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# The Indian Civil Liberties Bulletin

[ A MONTHLY REVIEW ]

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## PERSONAL LIBERTY

We regard the right of access to all His Majesty's judges in the Gold Coast as so fundamental to the liberty of the subject, that nothing short of an armed attempt in being to overthrow the Government can in our view support the assumption of a power which deprives the subject of this right.

We are fortified in this view when we reflect that in the midst of a life and death struggle no such power was assumed during the late war by His Majesty's Government in the United Kingdom.

Nevertheless such a power was assumed under regulation 29 by the Gold Coast Government during the recent emergency.

We are not concerned here to discuss what interpretation might be put upon regulation 29 by the courts. That its intention was to prevent access to His Majesty's judges admits of no doubt. Equally we are not unmindful of the fact that, in certain circumstances the right may prove illusory. Again we are not unaware that "producing the body" under a writ of habeas corpus may be made the occasion of public demonstration, fraught with grave danger to public order.

Bearing all these matters in mind, our considered opinion is that in so far as regulation 29 purports to deprive His Majesty's judges in the Gold Coast of jurisdiction to entertain an application by a subject detained otherwise than pursuant to a warrant issuing out of a Court of competent jurisdiction, the assumption of such a power was excessive to the occasion and we unhesitatingly condemn it.—*From the Report of the Commission of Enquiry into the disturbances in the Gold Coast, 1948.*

## ARTICLES

### INTERNATIONAL BILL OF HUMAN RIGHTS

The Charter of the United Nations in article 56 pledges all member States to respect and observe "human rights and fundamental freedoms" as necessary to the United Nations' objective of maintaining international peace. These rights and freedoms are defined in the Universal Declaration of Human Rights proclaimed by the General Assembly on 10th December, 1948. The Declaration embodies general principles of conduct which every State is expected and enjoined upon to observe in its internal dealings. It represents the aspirations of the entire family of nations in realising "the dignity and worth of the human person."

### FORMULATION OF A COVENANT

Elaboration of this instrument giving expression merely to the longings of mankind presented little difficulty; all nations heartily assented to it. But the next step in writing the International Bill of Human Rights which purports to convert these general principles of human conduct into definite obligations was not such an easy matter. And yet unless there is another instrument which ensures that the principles enunciated in the Declaration are effectuated in actual practice, the Declaration cannot be of any real value. It was therefore essential to formulate this instrument and U. N. bodies are now busy giving final shape to it. This is going to be called the International Covenant on Human Rights. It will be, unlike the Declaration, a binding legal instrument; it will give, for those States which ratify it, the force of law to the Declaration. With it human rights will pass from the realm of principle to that of international law. The Declaration will by its means come a stage nearer to realization in act and life.

The Covenant when completed and passed by the Assembly will cast upon the signatory States the duty of seeing to it that they carry out the obligations assumed by them under this instrument. It will be a convention or an international treaty which will be legally binding. The covenanting States will thereby be entering into a solemn compact to put into practice within their separate boundaries the rights and freedoms which will be incor-

porated into the Covenant. As Dr. Charles Malik, Rapporteur of the Human Rights Commission, says in the United Nations Bulletin for July, 1949: "These rights and freedoms have hitherto fallen exclusively within the domestic jurisdiction of the separate States, but the Covenant will have the effect of lifting them from being the independent and exclusive concern of the separate sovereign States to being the common concern, under international law, of all the covenanting States. But juridically the Covenant will have no greater force or validity than that enjoyed by any other international treaty, whether it be political, military, commercial, economic, cultural, or in any other field. The signatories will be legally bound by the terms of the Covenant, and any infraction of these terms will entail the same consequences as those entailed by the breaking of any international treaty." How to deal with cases of the breaking of this international treaty on human rights and fundamental freedoms is the subject of the third, and last, part of the Bill of Human Rights, viz., Measures for Implementation.

#### SCOPE OF LIMITATIONS

The Covenant, being a legally binding instrument, has necessarily to include, in regard to the enforcement of the rights enumerated therein, qualifications and limitations which need find no place in the Declaration consisting merely of a statement of general principles applicable in the field of human rights. And in defining such qualifications and limitations many differences of opinion arose. The procedure followed in the draft Covenant in this respect is first to include in it a general "derogation article," which is article 2, and then to specify, under the head of each right, the limitations to which any particular right will be subject. Article 2, after enumerating certain "inherent" and "inalienable" rights (like the right to life, freedom from torture, etc.) from which no derogation will be permitted under any circumstances whatever, is intended to make the following provision for a possible derogation of other rights:

In time of war or other public emergency threatening the interests of the people, a State may take measures derogating from its obligations under Part II (which is the main body) of the Covenant to the extent strictly limited by the exigencies of the situation.

It is recognised that "public emergency" is so vague an expression as to make it possible for a State to deprive people of rights in conditions which give no warrant for such deprivation, but no other method of making the provision absolutely water-tight could be agreed upon among the delegations of the member States.

The limitations to which the rights embodied in the Covenant are to be severally subject gave rise to a sharp conflict of opinion. There was always the danger, to quote Dr. Malik, that "the signatories who, for one reason or another, wish to evade their obligation under this instrument might, in the name of 'public order,' or 'public

emergency,' or 'the general welfare,' or 'the interests of the people,' introduce arbitrary limitations to these rights and liberties at will, which will make the Covenant eminently self-nullifying." And this danger, in spite of the efforts of nations like the United Kingdom has not been removed. Too much freedom of action for Governments has been allowed in several articles, in which the only restriction upon the action is that it should not be "arbitrary," the term "arbitrary," however, being left undefined in the text. This has made the Covenant in its present form exceedingly weak and almost unserviceable in actual practice.

#### FREEDOM OF PERSON

Take, for instance, article 9 relating to Freedom of Person, with which we in India are most deeply concerned in view of the provision for preventive detention in art. 22 of the constitution. It declares in para. 1 that "no one shall be subjected to arbitrary arrest or detention." So far, so good. But what connotation is to be attached to "arbitrary detention" is left in the air. The attempt made in para. 2 to define "arbitrary" makes it even worse. This paragraph says:

No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law.

This means that every State will be permitted by statute to restrict Personal Freedom at its sweet will, without article 9 coming to the aid of persons whom the State chooses to deprive unreasonably of their liberty. As Denmark's delegate, Mr. Soerensen, pointed out in the Human Rights Commission, "Nothing (in this article) would prevent a government from promulgating laws imposing certain penalties which could be called arbitrary, although they were apparently legal" (vide p. 30 of the BULLETIN). This para. 2 was modelled on art. 21 in our own constitution, at the instance of India's delegate, Mrs. Hansa Mehta. And as art. 21 affords us no protection from arbitrary detention, so would article 9 of the Covenant in its present form afford no protection to the peoples of other States. In fact this article of the Covenant goes no farther than article 9 of the Declaration which says that "no one shall be subjected to arbitrary arrest, detention or exile." That is to say, the right to Freedom of Person remains in the Covenant just as much a pious wish as it is in the Declaration. That the Covenant, unlike the Declaration, purports to be a binding legal instrument will do no good to anybody in regard to Personal Liberty. And yet, as Dr. Malik remarks, this is "the most important right in the whole Covenant," a right on the preservation of which the exercise of every other right depends.

It is no wonder, therefore, that the delegations of several nations (e. g., the United Kingdom, Australia, France, Belgium, Denmark, and Lebanon which last country Dr. Malik himself represented) raised the question, on the last day of the session of the Human Rights Commission, of the necessity of making article 5 (relating to the right

to live) and article 9 more precise, especially with respect to their limitations and to the meaning of the word "arbitrary." Indeed, the general feeling about the Covenant as it emerged from the Commission on Human Rights was that the Economic and Social Council to which the Commission's draft was submitted had better refer it back to the Commission with instructions to make it more satisfactory than it was. And the International League for the Rights of Man, which among unofficial organizations interested in human rights is the most weighty, actually opposed the draft as being totally inadequate. The Economic and Social Council, after long debate on the part of its Social Committee, finally recommended that the General Assembly should have a full discussion of all the problems and issues which had given rise to sharp differences of opinion, formulate general principles as to how these differences should be resolved and then remit the draft to the Human Rights Commission which would thereafter make changes in the draft on the lines of these principles.

#### SOCIAL AND ECONOMIC RIGHTS

Another bitter complaint against the Covenant in the form in which it has been passed by the Human Rights Commission is that it contains articles relating only to basic personal and civil rights (such as freedom of expression, assembly and association, freedom from arbitrary arrest or detention, equal protection of the law, etc.), the group of social, economic and cultural rights (such as the right to work, to an adequate income, to rest and leisure, to education, etc.) that are mentioned in the Declaration being excluded therefrom. While there are many nations which think that a Covenant which fails to guarantee this latter group of rights "would in the twentieth century be an anachronism," there are also many other nations which think that it would be expedient if the Covenant confined itself to the more fundamental rights common to the whole of humanity. While it would certainly be well if social and economic rights also could be protected everywhere, these nations feel that it would be difficult to formulate articles concerning such rights which would be universally applicable when living standards and economic development differ so widely in the different parts of the world. Although one may have a strong preference for including in the Covenant social and economic rights alongside of individual and civic rights, it would be wrong to dispose of the question by characterising as reactionary the attitude of those nations which are content with a Covenant having a more limited content. The United Kingdom has sponsored the latter idea and this fact alone, viz., that a country which has provided the best social security in the world for its people would rather like to go slow in the matter at present, should prevent anyone from jumping to any such superficial conclusion as the above on this point. The fear of nations like the United Kingdom evidently was lest social and economic rights, if included in the Covenant, should for many of the member States remain merely

good intentions, as they are in the Declaration, without any binding force and lest the whole of the Covenant should be brought down to the level of the Declaration.

We in India know the distinction between the Covenant and the Declaration. The former is like Fundamental Rights included in Part III of our constitution, while the latter is like the Directive Principles of State Policy included in Part IV. These Principles look very grand, but may amount to nothing so far as achievement goes. In art. 39, for instance, the State is directed to secure that the citizens have "the right to an adequate means of livelihood," but not one citizen may in practice be able to realise the right because of this article. Fundamental Rights proper, however, are enforceable. The right to freedom of expression, for example, is a right which any citizen can claim and assert against the State. We do not think that anyone in India is under a delusion that anything is gained by the inclusion of Part IV in the constitution, much less that anything would have been gained if Part IV were merged with Part III. On the contrary, if this were done the binding nature of the Fundamental Rights might have been compromised by a loose construction being put on them. The same kind of fear was manifestly entertained by the representatives of the United Kingdom and some other nations. The distinction between the Declaration and the Covenant is substantial: the former embodies what must after all be regarded as mere aspirations, while the latter creates juridical obligations. The distinction cannot be wiped out without danger of detriment to the binding character of these obligations. Instead of the whole of the Declaration being elevated to the position of the Covenant, the risk is real that the whole of the Covenant will be reduced to the position of the Declaration. Such was the line taken by the United Kingdom delegation at the Human Rights Commission.

#### First COVENANT

But the general feeling in the Commission was that social and economic rights should find mention in the Covenant, and in view of this feeling the Commission adopted a middle course. In the draft submitted by it to the Economic and Social Council for passing on it and thereafter placing it before the General Assembly it dropped out these rights but expressed its willingness to provide for them at a later stage by calling this Covenant the "First" Covenant, though in doing so it had to displease a number of nations which pressed for the inclusion of these rights even in the first Covenant. The draft is now before the Social Committee of the Council, and this Committee on 14th November decided to include economic, social and cultural rights in the Covenant.

#### APPLICATION IN FEDERAL STATES

One question of very great importance that has arisen in connection with the Covenant is that of its application to Federal States and to non-self-governing and Trust territories. Those nations that have constituent states, provinces or cantons are insistent that there shall be an

escape clause which will limit the Federal Government's obligation to those articles which are appropriate, under their constitutions, for federal action. The position of the United States in this matter is somewhat peculiar, for, though a Federal Union, article VI of its constitution provides that "all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land," and, furthermore, on the basis of the Supreme Court decision of 1920 in the *Missouri v. Holland* case, it has been asserted that the Federal Government's "treaty power may be extended beyond the limits of powers expressly delegated to the Congress, when those powers are too narrowly construed to permit effective action on matters of national interest and international concern" (McDougal and Leighton, "Law and Contemporary Problems," p. 517). Thus it would appear that the Covenant, once ratified by the Federal Government of the United States, might be binding upon the individual states. But other federal States which have no such provision as that of article VI of the United States constitution plead that their Federal Government would have no power to enforce the obligations cast by the Covenant in the constituent states. Colonial Powers have similarly insisted upon an escape clause. The United Kingdom delegate only pointed out on this aspect of the question that his Government has an agreement to consult the legislatures in the colonies before binding them to an international convention. Articles relating to these matters (articles 44 and 45) were not discussed at all by the Human Rights Commission, but were simply sent forward to the Economic and Social Council. It has now been decided to place these articles before the General Assembly so that it may take policy decisions thereon.

#### MEASURES FOR IMPLEMENTATION

Measures for implementation of the rights enumerated in the Covenant also evoked much discussion and gave rise to a wide divergence of opinion. The Soviet delegation conceived implementation as merely the realization of the rights by each State in its own way and thus virtually repudiated the very idea of setting up any international machinery for the purpose of making sure that the rights are in fact observed in the covenanting States. Other nations recognised the need of the international community having the power to oversee the condition of human rights and being in a position to intervene when and where they are violated. Opinion, however, differed widely as to the manner in which this could best be done.

The scheme of implementation that has been provisionally adopted is, however, far from satisfactory. It provides for a permanent Human Rights Committee composed of seven persons of high standing and recognised experience in the field to be elected by the covenanting States. In the case of an alleged violation the Committee is to determine the facts and make available its good offices to set matters right. If a solution is not reached at the end of eighteen months, it is to publish its findings.

The Committee is not endowed with power to adjudicate, nor will its conclusions be like judicial decisions taking effect automatically. As Dr. Malik observes: "The ultimate principle of this scheme is not to introduce a complicated coercive international machinery, but to leave it to the force of world public opinion, in the light of conclusions drawn by an impartial group, to effect itself the desired implementation." On this question again the General Assembly will be asked to form a policy decision. On 15th November the Social Committee decided, by 24 votes to 11 (with 11 abstentions), to refer the proposals on implementation to the Human Rights Commission.

#### RIGHT OF PETITION

One subsidiary question in connection with implementation is who should be entitled to lodge complaints with the Human Rights Committee: States, or individuals, or both. The present scheme provides that complaints can only be made by States Parties to the Covenant and not by individuals, and they will be complaints by one State against another. Not only will petitions from individuals be denied, but also those from recognised non-governmental organizations, whether national or international. This means, as has been well put, that "the State alone is to grant, guarantee and protect human rights, and no one cannot complain except through the State (in the scheme envisaged the State is always perforce another State than one's own)." The scheme in this particular is naturally regarded as a severe blow to proper effectuation of the Covenant. Ultimately it was decided that this question also should be one of those on which a policy decision of the General Assembly should be sought. In the meantime, it is gratifying to note a statement in the October Bulletin of the International League for the Rights of Man that "the right of petition for non-governmental organizations seems now to be accepted in principle by the majority of the Economic and Social Council members."

#### THE NEXT STEP

The Human Rights Commission, recognising the inadequacy of the Covenant that, at its spring session at Lake Success, it had approved, merely submitted the draft to the Economic and Social Council, and did not recommend, as it should normally have done, that the Council forward it to the next session of the General Assembly for the latter's consideration and adoption. This meant that the Commission itself desired that the Council should independently decide how it should dispose of the draft. The Council at its meeting in Geneva in July and August considered whether it should refer the draft back to the Commission for improvement or whether it should recommend its adoption by the General Assembly. The delegations of the United Kingdom, France and Belgium were the most outspoken critics of the draft and pressed strongly that the draft be referred back. Belgium's representative, Professor Dehousse, was very blunt in criticising the draft. He remarked, it was so inadequate and so unsatisfactory that, had it come from one of his students at the university

he would have told him to take it back and try again. It was finally decided by a narrow majority that the draft should be examined at once by the Social Committee with a view to sending it on to the General Assembly. Accordingly, the Social Committee examined the draft and decided to pass it on to the Assembly with the request that the Assembly should arrive at decisions of policy on certain questions which have been referred to above. It is also contemplated that the Assembly, after reaching decisions on these points, would refer the Covenant back to the Human Rights Commission, so that it may give effect to these decisions in the draft and submit the draft in a revised form to the Economic and Social Council. If the Assembly in its winter session sends the Covenant to the Commission according to the Council's suggestion, the Commission will consider it in its session of February, 1951. It is possible that, as desired by the Council, the Covenant will be thoroughly scrutinised, first by the Assembly and later by the Commission, on new lines if necessary and an attempt made to fashion an instrument which will be efficacious in protecting human rights and freedoms for all nations which will elect to subscribe to it. [It is learnt that when the Council turned over the draft to the Social Committee, the latter body decided on 17th November to "redraft the Covenant." ]

#### PROPOSED AMENDMENTS OF THE CONSTITUTION WILL ART. 22 BE REPEALED ?

The Tribune's New Delhi correspondent says, on the basis of lobby talks that are reported to be going on, that the Government of India have decided, within less than ten months of the proclamation of the constitution, to amend its provisions and have entrusted this task to Dr. Ambedkar, the Law Minister. The Government, it is said, are particularly perturbed at the decisions by the Supreme Court and the State High Courts about the scope of the rights of freedom enumerated in art. 19. If the report speaks true, it seems to be the Government's intention by constitutional amendment to restrict some of these rights.

Of all the articles in the constitution relating to fundamental rights by far the most important is art. 19. Much of the rest is sheer padding. If art. 19, however, comes to be circumscribed, it would be a great blow to India's constitutional liberties. One thing, however, we would like to say : if the Patna High Court's decision (particularly referred to in the news circulated by the Tribune) in a recent case concerning the freedom of the press is upheld by the Supreme Court where it has gone, making it impossible in effect to proceed against a person even if he indulges in instigation of violence, we for our part would certainly like art. 19 (1) (a) to be more precisely worded, allowing the Governments to penalise incitements to violence, subject to such a doctrine of interpretation as the "clear and present danger" rule which is being uniformly enforced in the United States. No sane man would like the use of violence to be preached as a practical proposition and such preachments be given the immunity which a

constitutional guarantee is intended to accord to more worthy and less blameable writings. But it is feared lest the Government should take the whole article into its stride and reduce the guarantees to nothing in practice.

If the Government is going to embark on the task of amending the Bill of Rights in the constitution, may we hope that it will also consider the desirability of repealing art. 22 which permits of preventive detention, an article the like of which is not to be found in any other constitution? When detention without trial is being so frequently resorted to, it would appear to be venturesome on our part to suggest that the power of suspending the writ of habeas corpus which every Government must have in reserve should be given up by our Government by deleting art. 22 from the constitution.

But our suggestion does not involve this result. For, it is not as if, when art. 22 is done away with, the Government will be left without power to suspend habeas corpus when it is necessary to do so. It will have the whole of Part XVIII of the constitution relating to Emergency Provisions at hand. This Part of the constitution enables the Government in need to put not only the right to a writ of habeas corpus but all other constitutional guarantees of civil liberty in abeyance. It gives far ampler power to the Government than art. 22. Only this reserve power can be brought into exercise in an emergency. But "emergency" is not so strictly defined as to cause any real hardship or to leave the Government powerless to face a situation of any degree of gravity. For art. 352 empowers the President on the advice of his Cabinet to declare an emergency whenever he is satisfied that a situation exists "whereby the security of India or any part thereof is threatened whether by war or external aggression or internal disturbance." The situation here contemplated is one of "grave emergency," but the President or the Ministry is sole judge of this, not even the legislature being competent to challenge the decision for at least two months (let alone the judiciary).

When an emergency is declared, provisions of art. 19 (which, as we have said embodies the most important of all fundamental rights) cease automatically to be in operation (art. 358), and, as regards other rights, they may remain nominally in operation, but by a Presidential order their enforcement through courts of law may come to be suspended, the President, i. e., his Cabinet, having full discretion in the matter (art. 359). These provisions, as we have frequently pointed out before, are much in excess of what any constitution provides, and in any case with such sweeping powers being available in times of difficulty there can be to be sure no need to have another article in the constitution, viz., art. 22, which expressly provides for preventive detention. The constitution of no other country in the world has an article corresponding to it. Art. 22 is a serious blot on the fair name of India, and the Government must take immediate steps to remove it. The existence of art. 22 in the constitution, in

addition to the Emergency Provisions, can mean only one thing: that power to detain without trial is required even when there is no real crisis. The situation may be somewhat difficult to handle, but admittedly it is not of such a character that even the President can call it an emergency. Surely everyone will agree that in situations of such minor difficulty it ought not to be possible for the Government to deprive individuals of their liberty in an arbitrary manner. The All-India Civil Liberties Conference, in its second session at Patna in April last, therefore, called urgently for an amendment of the constitution deleting provisions therein which permit of detention without trial in situations which do not partake of the character of a grave emergency.

Now that the Government is thinking of amending the constitution in other respects, it had better amend it in this respect if only to redeem India from what the civilised world regards as nothing but disgrace.

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## SPECIAL ARTICLE

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### ENFORCEMENT OF THE ANTI-RED ACT

#### Judicial Tests Have to be Faced

The implementation of the recently passed Internal Security Act is proving a very difficult process for the United States Government, which is being faced with many judicial tests. One of the first things it did was to refuse entry to aliens, which has raised a furor. Another thing that it felt it was required to do was to revoke bails given by aliens against whom deportation proceedings had already been started and to re-arrest them.

Sixteen such re-arrested persons filed petitions for the habeas corpus writ challenging the legality of their seizure under the Act and, pending a decision on this point, they asked to be let out on bail. Federal Judge Ryan sustained their writs of habeas corpus and ordered them to be released on bail on 17th November. The Judge found that the aliens, some of whom had been resident in the U. S. A. for well over thirty years, have

observed fastidiously all conditions of the bond under which they were released, they have at all times been available whenever required by the Government, and there is no indication that they will not continue to be so in the future.

Referring to the contention of the Government that the aliens who had been seized were members of or affiliated with an organization advocating the overthrow of the Government by force within the meaning of the Act, Judge Ryan asserted that "not a scintilla" of evidence relating to any recent activity on the part of the aliens had been adduced to substantiate a further Government charge that the aliens had in effect transferred their allegiance to a foreign power and he declared:

It is not inappropriate to refer here to the Eighth Amendment to the constitution of the United States,

one of the series of amendments collectively known as the Bill of Rights, which prohibits the imposition of excessive bail.

Certainly the principle inherent in that amendment applies to deportation proceedings, whether or not such proceedings technically fall within its scope. That principle cannot be reconciled with the Government's denial of bail to these relators under the circumstances here set forth.

It is the conclusion of this Court, that the denial of bail to relators herein was arbitrary and an abuse of discretion on the part of the Attorney General.

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#### FIRST MOVE IN THE ENFORCEMENT OF Compulsory Registration

The Communist Party of the United States, having refused voluntarily to register before 23rd October, the time-limit set by the Internal Security Act designed to control the Communists, the Government took the first move on 22nd November to force the Party to register by furnishing a list of all its members and disclosing its finances. The Attorney General filed a petition with the Subversive Activities Control Board praying that the Board declare the Party to be a subversive organization within the meaning of the Act. The petition is a portentous document embodying the Government's accusation against the Party.

The main charge is that the members of the Party give their first allegiance to a foreign Government. It says that "throughout its existence the Communist Party has operated and continues to operate primarily to advance the objectives of the World Communist movement"; that it has received and does receive financial aid from Russia; that it recognises "the disciplinary power of the Soviet Government... and other spokesmen of the World Communist movement" (the Comintern and the Cominform).

The charge is no less than that of treason. Two extracts from the indictment in this respect may be given here:

In the event of a war between the Soviet Union and the United States, the Communists in the United States have obligated themselves to act to defeat the military efforts of the United States and to aid and support the Soviet Union. The Communist Party teaches its members that in such event they must act to foment a civil war in the United States as a means for impairing the nation's military effort and for establishing a Soviet America having a dictatorship of the proletariat such as exists in the Soviet Union.

To the leaders and members of the Communist Party, patriotism means solidarity with and support of the Soviet Union.

The indictment contains a record of the Communist Party's machinations for twenty years from 1919 up to date.

The Party intends to fight registration through the courts. Even if the Subversive Activities Control Board

pronounces the organization to be of a subversive character and thus liable to registration, the Party will start an action in the regular courts to have the new law declared unconstitutional. And the Board itself will hold public hearings when the Government will argue its case that the Party is dominated and controlled by a foreign power and that its members are acting as agents of that power.

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## FREEDOM OF EXPRESSION

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### Secs. 124-A and 153-A Void

Master Tara Singh, the Akali leader, who had filed petitions in the Punjab High Court for quashing the two cases of prosecution that were being conducted against him in a special magistrate's court at Karnal for objectionable speeches, was ordered (28th November) by the Chief Justice (Mr. Eric Weston) and Mr. Justice G. D. Khosla, who heard the petitions, to be set at liberty. Their Lordships declared that sec. 124-A, Indian Penal Code (relating to sedition), and sec. 153-A (relating to promotion of ill-will and hatred between different classes) and sec. 24-A of the East Punjab Public Safety Act, 1949 (relating to dissemination of rumours, etc.), under which Master Tara Singh was prosecuted, were void as they contravened the right of freedom of speech and expression guaranteed by art. 19 of the constitution.

The Chief Justice who delivered the judgment of the Court said that he agreed with the interpretation of the scope of sec. 124-A embodying the law of sedition in India in the Tilak case given by Strachey J., viz. :

The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles is absolutely immaterial. . . . Even if he (the accused) neither excited nor intended to excite any rebellion or outbreak of forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section. . . . (The section) as plainly as possible makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance, the test of guilt.

This interpretation was approved by the Privy Council in this case and again affirmed by it in Sadashiv Narayan's case (1947), rejecting the restriction sought to be imposed by the Federal Court on the scope of the section in Niharendra's case (1942). And although the courts in India were not now bound by the Federal Court's decisions, he saw no escape (the Chief Justice said) from the logic of Strachey J. in the passage above set out.

The scope of sec. 124-A was as wide as all that, but the section must now be interpreted in the light of the new constitution, and (the Chief Justice said) there can be no dispute it is a restriction on the freedom of speech and expression guaranteed by clause (1) of art. 19 of the constitution and is not saved by clause (2). He said about the two sections of the Indian Penal Code and a section of the East Punjab Public Safety Act, under which Master Tara Singh was prosecuted, as follows :

Sec. 124-A.—India is now a sovereign democratic State. Governments may go and be caused to go, without the foundations of the State being impaired. A law of sedition, though necessary during a period of foreign rule, has become inappropriate by the very nature of the change, which has come about. . . . The unsuccessful attempt to excite bad feelings is an offence within the ambit of section 124-A. In some instances at least the unsuccessful attempt will not undermine or tend to overthrow the State. It is enough if one instance appears of the possible application of the section to the curtailment of the freedom of speech and expression in a manner not permitted by the constitution. The section then must be held to be void. As was said by the Supreme Court (in the "Cross Roads" case): "Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the constitution cannot be ruled out, it must be held to be wholly unconstitutional and void."

Sec. 153-A.—The gist of the offence under section 153-A is promotion or attempt to promotion of feeling of enmity or hatred between different classes of citizens of India. As in the case of section 124-A no doubt many acts falling under section 153-A will be acts undermining or tending to overthrow the State. We think that there can equally be no doubt that many acts, made punishable by section 153-A will not in any way undermine the security of or tend to overthrow the State, and here, again, the unsuccessful attempt may well have no result whatever. It seems to us that section 153-A must follow section 124-A and we would hold, therefore, that this section also has become void as providing an unwarranted restriction on the freedom of speech and expression.

Sec. 24-A.—Section 24-A of the Punjab Public Safety Act makes punishable the making of any speech if such speech (1) causes or is likely to cause fear or alarm to the public or to any section of the public, (2) furthers, or is likely to further, any activity prejudicial to the public safety or maintenance of public order

As it is conceded by the learned Attorney-General that the invalidity of this provision is concluded by the decision of the Supreme Court (in the "Organizer" case) upon section 7 of the same Act, I do not think it is necessary to discuss the matter further.

The Attorney-General of India, Mr. Setalvad, had taken a very wide ground in countering the argument of Master Tara Singh's counsel, Mr. N. C. Chatterjee, to the effect that all the three sections on which the prosecutions were based were repugnant to the constitution and particularly that freedom of speech could be legally abridged "only when there was a danger to the security or the foundation of the State." In opposition to this argument, Mr. Setalvad had said :

A violent speech may not have the effect of overthrowing a State immediately, but a succession of such speeches may have a tendency to overthrow it. For instance, someone may advise the people not to pay taxes or not to join the army. It may not involve a violent step. Even then those steps would have in the long run a tendency to overthrow the State and undermine its security.

Every step which tends to excite or attempt to excite disaffection, creating enmity or hatred against the Government established by law, tends towards the overthrow of the State.

Sections 124-A and 153-A, I. P. C., are in consonance with the Indian constitution and have been adapted as such through the Gazette of India by the President of the Indian Union under article 372 of the Indian constitution, which empowers him to adapt existing laws to conform with the new constitution.

It is a mercy that this "bad tendency" argument was decisively and almost brusquely turned down by the High Court.

On the Attorney-General's latter contention about art. 372 (1) of the constitution and paragraph 28 of the Adaptation of Laws Order, the Chief Justice said : "As (in art. 372) the continuance of laws is made expressly subject to provisions of the constitution other than art. 395, art. 372 can be of no assistance to the continuing validity of sec. 124-A or any other section of the Code." As to para 28, he said :

I cannot agree that this paragraph gives to the courts authority to remodel the law so as to make good what otherwise would become void under the constitution. The purpose of the paragraph appears to be that the courts shall not refuse to apply a law after the coming into force of the constitution by reason only that by the schedules to the Order, expressions appearing in the statute have not been amended so as to be in conformity with the constitution. If in any statute for the word "province" the word "State" or some expression embodying the word "State" has not been substituted, the courts shall not refuse to administer that statute on that account. The paragraph

cannot empower the courts to give a construction which on the plain language of a particular statute is not justified.

#### Right of Access to Court Judgments

In a certain case one Sakharam D. Karanjkar was found guilty of murder and sentenced to death. On appeal to the Bombay High Court, a re-trial was ordered. In the re-trial the jury at first arrived at a divided verdict and on being asked to reconsider the decision, declared the accused, not guilty of the charge of murder but guilty of robbery. Sakharam was sentenced to eighteen months' imprisonment by Sessions Judge J. C. Bhatt.

Mr. D. Nadkarni felt that the Judge's charge to the jury was full of instances of misdirection and non-direction which ended in miscarriage of justice. He applied for a copy of the summing up for the purpose of criticism but the Principal Sessions Judge rejected the application.

Thereupon Mr. Nadkarni filed a petition in the High Court for a copy, and the Chief Justice and Mr. Justice Gajendragadkar allowed the petition (27th November). Their Lordships observed : It was the privilege of the press to see judgments and to make extracts from them. Mere showing of the copy of the judgment to pressmen would not serve any purpose if they were not allowed the right to take extracts from it. A High Court circular gave pressmen the privilege of access to copies of judgment for a bona fide purpose and since criticism is a public duty, they have a bona fide purpose in asking for judgments.

## HABEAS CORPUS PETITIONS

### An M. L. A.'s Detention

Mr. K. Ananda Nambiar, a Communist M. L. A. in Madras State, was detained on 14th May, 1949, and grounds of detention were supplied to him a fortnight thereafter. The grounds stated that he was a prominent member of the Communist Party of India and had been engaged in furthering its violent activities and that he was taking part in organizing disorders and strikes on railways. Particulars of his alleged subversive activities were also stated in the grounds. The detention order was challenged in the Supreme Court on the ground, among others, that the allegations made against him were untrue and insufficient to warrant his detention. On this point Mr. Justice Fazl Ali observed :

We cannot go into the truth or otherwise of the grounds of detention. We have such limited powers that even with the best of intentions we cannot go into the sufficiency of the grounds of detention.

Mr. Justice Mukherjee made the same remark. He said that the Court was absolutely helpless in the matter of going into the sufficiency of the grounds of detention and added :

We have only to see whether the grounds are relevant for the purpose of detention. Secondly, we have



to see whether they are of such vague character as to give you no opportunity of making any representation.

Mr. Nambiar, who argued his case himself, next contended that his detention was mala fide, because, he said, though the order for arresting him was issued on 1st April 1948, the grounds were served some time after the Ordinance under which the detention order was issued had been declared illegal, and in the order reference was made to certain actions which occurred after the date of the issue of the warrant. That indicated that there could not have been reasonable application of mind or real satisfaction on the part of the detaining authority, which would make the detention order illegal. The Court did not accept this contention of the petitioner.

Mr. Nambiar then pointed out that mala fides on the part of the detaining authority could be seen from the fact that while the grounds of detention supplied to him referred mainly to his activities among railway workers he was not detained under the relevant clause of the Preventive Detention Act [i. e., under sec. 3 (1) (a) (iii) or for reasons concerning "the maintenance of supplies and services essential to the community"—] which provided for the detention of persons whose activities were likely to endanger communications. This, he said, was purposefully done as under the said clause he was entitled to have his case examined by the Advisory Board after three months. The Government wanted to deprive him of this right, which showed that the Government's action was mala fide.

This was a very important point of law, but it only brought forth an obiter dictum on the part of Mr. Justice Fazl Ali that personally he thought that

EVERY DETENU SHOULD BE ABLE TO APPROACH  
THE ADVISORY BOARD.

Unfortunately, however, Mr. Fazl Ali's wish notwithstanding, the law is quite different: it subjects only a small fraction of the total cases of detention (and of lesser gravity for the matter of that) to the review of an Advisory Board under sec. 9, all other cases being relegated to a Government review under sec. 12 (1). The question, that was raised in the present case by Mr. Nambiar was that, apart from the serious defect in the law pointed out by Mr. Fazl Ali, sec. 9 was not made applicable to him as it should have been, and that he was thus deprived of a valuable right, which the existing law gave him, of his case being reviewed by a body endowed with compulsory jurisdiction. This point does not seem to have appealed to the Court.

Relying upon the judgment of Mr. Justice V. Bhargava of the Allahabad High Court in the M. M. Bashir case (vide p. 121 of the BULLETIN), Mr. Nambiar submitted that inasmuch as the detention order did not specify any period it was illegal. The Court did not concede the force of this argument (and it will be recalled that a division bench of the Allahabad High Court took a different line

from that of Mr. Justice Bhargava in a subsequent case, as reported at p. 165 of the BULLETIN). Mr. Justice Fazl Ali remarked in regard to this aspect of the question:

So long as the authorities do not detain you for more than one year, it seems all right. The Act does not say that the period should be specified in the order itself.

Mr. Nambiar further argued that in so far as the Preventive Detention Act interfered with his privileges as a legislator it transgressed art. 194 of the constitution. At the least he said he should have been allowed to attend meetings of the legislature under police escort, as he had been produced before the Court. On this point the Court remarked that the Supreme Court had restricted jurisdiction in regard to habeas corpus petitions under art. 32 and that it could deal only with matters involving infringement of fundamental rights, and that High Courts, which under art. 226 had wider powers, were the proper forum to deal with questions involving violation of the privileges of members of Parliament, etc. But when a Madras M. L. A. took this latter question to the Madras High Court some time ago, the High Court was unable to give him relief.

Eventually the petitioner withdrew his petition (13th November).

#### Mr. Kumaramangalam Sues for a Writ Again

It will be recalled that Mr. S. Mohan Kumaramangalam's petition for a writ of habeas corpus against an order for detention by the Madras Government was sustained by the Madras High Court (vide p. 165 of the BULLETIN), but the release thus ordered did not avail him because the Madras Government served a fresh order of detention on him.

The facts of this somewhat strange case are, we are sure, in the memory of the reader: Mr. Kumaramangalam was residing in Bombay; he was arrested and detained by the Bombay police at the Madras Government's instance in order that he should be detained in Madras; accordingly he was transferred from Bombay to Madras under the Transfer of Detained Persons Act; and when his habeas corpus petition against the Bombay Government's detention order came up in the Bombay High Court, the Court was informed that the detention order had already been cancelled; thereupon the Bombay High Court ruled that "no order was necessary on the petition;" after transfer to the State of Madras the Madras Government served him with its own detention order, and this detention order the Madras High Court held illegal, saying:

The reason underlying the arrest and detention (in Bombay) was the fact that the petitioner was required by the Madras police for being detained. For such a purpose, in our opinion, the Bombay police or the Bombay Government cannot arrest the petitioner. . . . The Bombay police cannot arrest for being detained in the Madras State. It was on that

basis that, after the petitioner was transferred to the Madras State, the order of detention passed by the Commissioner of Police, Bombay, was cancelled. And, therefore, when once this order of detention has been nullified by the cancellation of the same, it cannot be validated by the Madras Government by serving a fresh order of detention.

In the result, however, though the detention orders of both the Bombay and Madras Governments were nullified by the courts, the detenu still finds himself in detention, the courts' orders being of no practical help to him!

Mr. Kumaramangalam, who had latterly taken up his abode in Bombay, apparently caused no trouble to the Bombay Government and they never thought of detaining him for anything he did in the State of Bombay. He was obviously a thorn in the flesh of the Madras Government, but as he had removed himself from the State of Madras they might have regarded this as a good riddance and might at least have waited till he had made his appearance in Madras State once again. But they were not content with leaving him alone in this way: they were bent upon having him brought over by hook or by crook within their jurisdiction and then locking him up in gaol. In this they have succeeded in their objective via the Bombay Government who detained him for no reason whatever.

Now Mr. Kumaramangalam came once again to the Bombay High Court with a habeas corpus petition, making a plea that he was got at by the Madras Government by using a strategem and that if the Court were in possession of all those facts which had been suppressed from the Court when the first habeas corpus application was made, Their Lordships would not have made the order they had made but would have issued a writ. It was further argued that as Government had illegally and wrongfully lost control over the detenu (Mrs. Kumaramangalam on coming to know of the proposed transfer of her husband, had written to the Commissioner of Police on 8th July requesting him not to send Mr. Kumaramangalam to Madras, adding that she had filed a habeas corpus petition), it was competent for the Court to direct the Government to produce Mr. Kumaramangalam, and failing to do so the Court could proceed against the Government for contempt of Court.

The Chief Justice and Mr. Justice Gajendragadkar, who constituted the bench to hear this case, dismissed the petition (27th November), adding, however, that if a petition charging the Government with contempt of court was made it would be considered on merits.

Their Lordships observed that the main purpose for a writ of habeas corpus was of a remedial character, so that the detention of a person should be investigated by the Court. The Court had power for the purpose only of investigation to compel the detaining authority to produce the person of the detenu.

A writ of habeas corpus should not ordinarily be made use of for the purpose of punishing and a prerogative writ should not be made use of for a purpose other than its normal and only purpose.

In this case, the main difficulty of the petitioner was that his original petition had been disposed of. It might be a matter of argument whether the petition was still pending (as stated by counsel for the petitioner) after, in fact, Government had lost control, both legally and de facto, of the detenu, and whether it was open to the Court to issue a writ of habeas corpus.

Even assuming the Court had power to issue a writ, Their Lordships continued, a writ could only have been ordered on the first petition. But that petition having been disposed of, the present petition could only be considered as an application for review, which this Court had no power to do. The application was, therefore, not maintainable.

The final upshot up to date is that though both the Bombay and Madras Governments' detention orders were cancelled, the Madras Government has still succeeded by what looks very much like a subterfuge in having Mr. Kumaramangalam brought over to Madras State and in locking him up in gaol.

### "Not Sitting in Judgment Over The State"

A detenu from Bihar, Mr. Chandrasekhar Prasad Singh, made a habeas corpus petition to the Patna High Court against the order for detention, and the petition was dismissed by Das and Narayan JJ. on 27th November.

The grounds against him were: he was a Communist and the Communist Party of India was engaged in overthrowing the existing Government by violent means and for that purpose had issued directives for a collection of large stocks of firearms, ammunition, etc. and the State Government had reliable information that the petitioner was in possession of firearms. His house having been searched on March 4, certain documents and leaflets advocating the policy of the Communist Party of India were recovered. He also possessed two typewriters and a cyclostyle machine from which leaflets in pursuance of the policy of the Communist Party were printed.

The petitioner who argued his case himself did not deny that he was a member of the Communist Party, but he contended that the Party was not engaged in violent activities and that he had not shared in such activities. He did not specifically deny that he possessed two typewriters and a cyclostyle machine but stated that no such machines were recovered from his house and denied that he was ever found in possession of firearms.

Their Lordships, after stating that "the grounds are sufficiently precise and clear," said:

It is not open to this Court to sit in judgment over the State Government. The facts alleged by the petitioner in his petition do not, in our opinion, disclose that the order of detention was not passed bona fide by the State Government. After all it is for the State Government to decide whether it is necessary or not to pass an order of detention against the petitioner. In our opinion there has been no failure to comply with clause 5 of article 22 of the constitution of India, though the grounds in this case were served 17 days after the order of detention.

What Their Lordships meant by saying that there was compliance on the part of the Bihar Government with art. 22 (5) is that grounds were supplied to the detenu which were sufficiently clear to enable him to make a representation against the detention order. Their Lordships concluded:

Section 12 (2) of the Preventive Detention Act gives the petitioner a right to make a representation and such a representation, if made, will no doubt be considered by the State Government as required by that section. The grievances which the petitioner has mentioned to us are really matters which should be represented to the State Government. In our opinion there are no good grounds for holding that the

detention of the petitioner is illegal. We accordingly dismiss the petition.

It may be noted that this detention case was not referable to an Advisory Board. We have not yet noticed a single case which was referred to such a Board.

#### " No Power to Inquire into Facts "

Mr. Tej Narain Jha, a Communist detenu from Bihar, who had in May challenged the validity of the Preventive Detention Act itself (of course unsuccessfully), now challenged in the Supreme Court the validity of the detention order passed against him under that Act. He argued his case in person and pleaded that the grounds supplied to him showed mala fides on the part of the detaining authority. The grounds, he said, were "sheer concoctions." On this point Mr. Justice Fazl Ali, who presided over the bench, observed :

Can you satisfy us that the grounds are not relevant or are so vague and indefinite that you cannot make any representation upon them? We have no power to examine witnesses and find out whether the allegations made against you are correct. That is a matter between you and the Government to whom you can make a representation against your detention. We can go into your case if there is some point of law involved. We have no jurisdiction to inquire into the facts. That is the trouble.

From a reading of the grounds supplied to you it cannot be stated that they are not relevant for the purpose of passing an order of detention. We cannot go into the truth or otherwise of these grounds.

Mr. Jha raised another point, viz., that the grounds of detention were supplied to him 22 days after his detention, and that the delay was particularly unjustifiable as the grounds served on him on this occasion (28th February) were the same as those which had been served on him in connection with previous detention orders passed against him. The delay appeared unreasonable to the Court. Mr. Justice Mookharji observed : " He ( the petitioner ) has been detained for more than two years. There should have been no difficulty in serving the grounds." Mr. Fazl Ali said : " We do not approve of the long delay in the supply of grounds to a detenu under the Preventive Detention Act. It should be impressed upon the detaining authorities that grounds should be served as soon as possible."

But the petitioner further contended that the detention order was passed for a collateral purpose, viz., to deny him facilities to prepare his defence in the criminal cases filed against him. He read out a letter purporting to have been written by a police official to the jail authorities at Gaya advising them to detain the petitioner if the appeal filed by him against his detention was allowed by the High Court. That, he contended, showed that the detaining authority wanted to hold him in gaol somehow or other and it did not apply its mind at all to the question. Upon this Mr. Justice Chandrasekhara Aiyer observed to counsel for the Bihar State :

How do you explain this letter? That does show that the idea is to catch hold of him and trump up a case against him as a safeguard against his release by a court on the old charges. It seemed that the authorities feared that otherwise he might abscond and it would be difficult to trace him.

The Court rejected the petition (14th November).

Naseer Afsar, a member of the Progressive Writers' Association, who was under detention for alleged Communist activities, was set at liberty under Government orders (24th November). When a habeas corpus application filed on his behalf came up before a division bench of the Hyderabad High Court, the Government Advocate informed the judges of the decision of Government to cancel his detention.

## A QUO WARRANTO APPLICATION

### Advocate-General's Appointment

Mr. G. D. Karkare filed a quo warranto application with the Nagpur High Court challenging the validity of the appointment of Mr. T. L. Shevde as Advocate-General of the Madhya Pradesh on the ground that he had attained the age of 60, which was illegal under art. 165 (1) read with art. 217 (1). Art. 165 (1) requires the Governor to appoint as Advocate-General a person "who is qualified to be appointed a judge of a High Court." A qualification of a High Court Judge is, according to art. 217 (1), that he "shall hold office until he attains the age of sixty years." Therefore, it was contended, Mr. Shevde, being past 60 years, is not eligible for appointment as Advocate-General.

A division bench of the High Court consisting of Kaushalendra Rao and Deo JJ. dismissed the application on 27th November. Pointing out that art. 165 (3) provides that "the Advocate-General shall hold office during the pleasure of the Governor," Their Lordships said :

If the provision in art. 217(1) viewed as a guarantee of tenure of office until the age of 60 is not applicable to the Advocate-General because he holds office during the pleasure of the Governor, we see no compelling reason why the same provision construed as a disability should be made applicable to him. We are, therefore, of the view that article 217 (1) cannot be read with article 165 (1) so as to disqualify a person from being appointed Advocate-General after the age of 60. We have no doubt on the point.

Perhaps of greater interest than the decision in this case is the fact that the preliminary objection raised on behalf of the Government against the application was dismissed by the Court. The objection was : (1) that the office of the Advocate-General is a very high office and the validity of an appointment to such a high office was not a justiciable question ; (2) As the Governor is not amenable to the process of the Court, the appointment cannot be declared invalid in the absence of the Governor who is the authority making the appointment ; (3) any grant of the writ in the absence of the Governor would be futile in its result as the Governor, not being a party to these proceedings, would not be bound by the decision of this Court and he would ignore it ; (4) the applicant had no locus standi merely as a private individual to move for a writ of quo warranto against the Crown which is here symbolised by the Governor under the constitution as the applicant is not seeking enforcement of the fundamental rights or any of his legal rights or performance of any legal duty towards him.

As to (1) Their Lordships observed : "Whenever the constitution desires the exclusion of certain matters from the jurisdiction of the courts, it has taken care to say so in express terms as in articles 122, 212, 262 (2), 329 and 361

(1). But there is no provision in the constitution prohibiting this Court from inquiring into the legality of the appointment of the Advocate-General." On (2) and (3) Their Lordships said:

The immunity afforded by article 361 is personal to the Governor. That article does not place the actions of the Governor purporting to be done in pursuance of the constitution beyond the scrutiny of the courts. What the constitution establishes is supremacy of law and not of men, however high-placed they might be. Unless there be a provision excluding a particular matter from the purview of the courts, it is for the courts to examine how far any act done in pursuance of the constitution is in conformity with it. Thus in *Re Banwarilal Roy* (48 C. W. N. 766 at pp. 805 and 809) in spite of section 306 of the Government of India Act, 1935, corresponding to article 361 (1), it was held that the Court was not precluded from setting aside an illegal appointment made by the Governor.

It is not the rule that relief cannot be granted in proceedings for a writ of quo warranto in the absence of the authority making the appointment. *Rex v. Speyer* leaves no room for doubt on that point. Whatever order the Court makes would be an order binding on the incumbent of the office in question. The judgment of the Court would be a judgment of ouster affecting the person holding the office. If the non-applicant disobeys any order made by this Court, this Court is not powerless to enforce it against him. The argument of the learned Advocate-General that His Excellency the Governor might ignore the declaration of law by a competent judicial authority is in our opinion much too conjectural in view of the oath or affirmation which is imposed upon the Governor by the constitution to "preserve, protect and defend the constitution and the law" (article 159).

s regards (4) Their Lordships said:

Though the power of this Court under article 226 is ordinarily exercisable for enforcement of rights or performance of duty, it cannot necessarily be limited to only such cases. Such a limitation cannot be reconciled with the power to issue a writ in the nature of quo warranto, which power has been expressly conferred on the Court. In proceedings for a writ of quo warranto the applicant does not seek to enforce any right of his as such nor does he complain of any non-performance of duty towards him. What is in question is the right of the non-applicant to hold the office and an order that is passed is an order ousting him from that office. *Shri Karkare* is only invoking what, in the words of *Lush J.* (*Rex v. Speyer*), is "the process by which persons who claim to exercise public functions of an important and substantive character, by whomsoever appointed, can be called to account if they are not legally authorised to exercise them.

Every subject has an interest in securing that public duties shall be exercised only by those competent to exercise them. So from every point of view it is a matter of grave public concern that the legality of the appointment to a high office under the constitution is not left in doubt.

## REQUISITIONING ORDER QUASHED

### Delegation of Powers Unjustified

Mr. Justice R. Kaushalendra Rao and Mr. Justice P. P. Deo of the Madhya Pradesh High Court in mid-November quashed the order of the Additional Deputy Commissioner, Narsimhapur, requisitioning a building in Kareli in Narsimhapur tahsil of the Hoshangabad district for housing refugees and directed the tenants of the building, who had filed an application against the order, to be put in possession of their property. Their Lordships admitted that the purpose of the order was covered by sec. 14 (1) of the Public Safety Act under which the order purported to have been made, but they found that the Additional Deputy Commissioner had no jurisdiction to make the order.

Sec. 14 (1) (a) empowers the Provincial Government to requisition any property if, in its opinion, "it is necessary or expedient so to do for securing the public safety or the maintenance of public order or services essential to the life of the community," and sec. 29 empowers the Government to delegate this power, like every other power under the Act, to "any officer or authority subordinate to it." In virtue of the power conferred by sec. 29, the Government delegated its power of requisitioning to all the Deputy Commissioners, and the Deputy Commissioner of Hoshangabad district in his turn delegated it, by an order made on 6th July last, to the Additional Deputy Commissioners under him, the delegation to come into effect from 1st July. This delegation at second hand was made on the strength of a notification under sec. 9-A of the Land Revenue Act, which enables an Additional Deputy Commissioner to exercise the powers of a Deputy Commissioner under any enactment for the time being in force. Thus the Additional Deputy Commissioner of Narsimhapur tahsil came to exercise the power of requisitioning in the case before the Court.

In ruling the Deputy Commissioner's order of 6th July void, Their Lordships said in their judgment:

The Deputy Commissioner exercises the power of requisition by virtue of the delegation made by the Provincial Government under section 29. Such a delegation of power cannot by any means be regarded as a power conferred by the Act itself. The legislature has conferred upon the Government a very wide power affecting the right of property of a citizen and the legislature permits the Government to delegate it to certain authorities. It is not contemplated that because the power can be exercised by the authorities to whom it is delegated, it can also be exercised by other authorities to whom no express delegation has been made. In our view, section 9-A of the Land Revenue Act cannot be of any avail to the Additional Deputy Commissioner in exercising a power conferred upon the Deputy Commissioner not by any enactment but by virtue of a notification under an Act. Construing section 9-A as we do, it is not necessary for us to express any opinion on the order of delegation made by the Deputy Commissioner on 6-7-1950.

By one stroke of the pen, on 6-7-1950, the Deputy Commissioner delegated all his powers under the Central Provinces Land Revenue Act, 1917, and every other enactment for the time being in force to the Additional Deputy Commissioner retrospectively with

effect from the 1st July 1950. This is delegation *in excelsis*. Whether such a delegation can be made retrospectively is open to serious question. But it is not necessary to decide the point in the instant case.

Their Lordships gave another reason for holding the order illegal. It was as follows :

Under sec. 14 (1) the authority requisitioning the property has to form an opinion that it is necessary or expedient so to do for securing the public safety or the maintenance of public order or for maintaining supplies or services essential to the life of the community. Then only it may by order in writing requisition the property.

If the order is *ex facie* in conformity with the provisions of the statute, in the absence of proof of misuse or mala fides, this Court cannot question the order. The applicants specifically raised the question of expediency for requisitioning the property. In the present case there is no recital in the order that it is necessary or expedient to requisition the property in question. Nor is there any affidavit filed to establish that the authority requisitioning the property has in fact applied its mind to the question and formed an opinion as required by the statute. So no presumption can be made in favour of the order. In the absence of proof that the order has been passed in conformity with the requirements of the statute, the order is liable to be quashed.

Finally, Their Lordships deemed fit to point out how the delegation of requisitioning power made by the Government itself was unreasonably wide, though of course valid in law. Their Lordships said :

Before we part with this case we deem it proper that we should invite the attention of the State Government that the apparently wide powers conferred on the Government under section 14 (1) of the Public Safety Act have been delegated in equally wide terms to all the Deputy Commissioners in the State. The power of requisition under similar provisions in the Supplies and Services (Transitional Powers) Act, 1945, in England when delegated to subordinate authorities was made subject to the condition that the powers could be exercised only in cases of unoccupied property : see *Blackpool Corporation v. Locker* [1948] (1 K. B. 349-354-355). The limitation, in our view, is very salutary. Otherwise, as has happened in this case, even property in the occupation of a citizen for his bona fide business can be taken over and given to any other person. Surely such a result could not have been in the contemplation of the State Government. The unlimited power of requisition of private property is a legacy left by the exigencies of war or a grave national emergency of that magnitude need not be made a matter of common occurrence. In any case such a power when delegated to subordinate authorities without any limitation may lead to the indiscriminate exercise of it resulting in much avoidable hardship to the citizen.

It will be noted that while the High Court issued a warning to the Government that the power of delegation conferred by the Public Safety Act was excessively wide and must be used with circumspection, it did not hold that the section giving such wide power was invalid in law, as did the Calcutta High Court in regard to the corresponding section in West Bengal's Public Safety Act (vide p. 169 of the BULLETIN). The words used in both the Acts are the same: the Government can delegate its power to "any officer or authority subordinate to it." On account of the Calcutta High Court's ruling, the section

relating to delegation was amended and the power to delegate was restricted to certain specified officers (vide p. 161), while in the Amendment Act of the Madhya Pradesh which was passed about the same time the section remained unaltered.

#### Extermment Order Set Aside

A division bench of the Hyderabad High Court on 24th November held the Public Safety and Public Interest Regulation of 1948 of the Hyderabad Government as a dead Act and set aside the externment orders passed against Mr. Azam Ali Khan, an advocate of Parbhani.

The externment orders were served on the petitioner by the Collector of Parbhani to prevent him from acting in a manner prejudicial to public order. In setting aside the order, Their Lordships observed that the petitioner "as a citizen of the Indian Union has the right to go anywhere he likes."

#### Ban on Communists Lifted

##### AS A CONSEQUENCE OF JUDICIAL DECISION

As a result of the High Court decision nullifying the Criminal Law Amendment (Madras) Act (vide p. 154 of the BULLETIN), the Madras Government on 16th November lifted the ban it has imposed in September last year on the Communist Party of India and its branches and other allied organizations in the State numbering 35 by cancelling all notifications against them. It has also ordered all proceedings pending in various courts under the Act to be withdrawn. The Government has already filed an appeal against the judgment of the High Court to the Supreme Court, in which the scope of the constitutional limitations in the matter of the right to freedom of association will be finally decided. But in the meantime the Government has taken the action which was clearly required of it by the obligation resting on it to respect judicial decisions. The cancellation of the ban does not affect persons who were detained or convicted under the voided Act before 26th January, the day on which the new constitution came into force.

Madras is not the only State in which the power of arbitrarily outlawing political parties which the central Act confers upon the executive was used. This power has been and is being exercised against the Communists in the States of West Bengal, Assam, Travancore-Cochin and Hyderabad, and these States are not going to give up the power because of the Madras High Court's decision, which is not binding upon them. Till the Supreme Court rules that the Act is unconstitutional, these States will retain the ban they have imposed.

## PUNJAB CIVIL LIBERTIES CONFERENCE

### Mr. Joshi's Speech

The Punjab Civil Liberties Conference was held at Ambala on 2nd and 3rd December under the presidentship of Mr. N. M. Joshi, Vice-President of the All-India Civil Liberties Council.

Lala Duni Chand, an old and respected leader of the Congress, was Chairman of the Reception Committee who in his opening speech welcomed the delegates:

Mr. Jai Prakash Narain, leader of the Socialist Party, inaugurated the Conference. He stressed the need for educating the masses on the importance of civil liberties. If the importance of civil liberties was not understood in their true perspective, the future of the nation would be en-

dangered. He asserted that the Congress was heading towards dictatorship and that some of its top leaders were actually maintaining dictatorship. Their attitude was responsible for the desertion of Congress by its tried and seasoned workers. Discussing the Preventive Detention Act, Mr. Narain said that it had been passed to deal with unruly elements, but the Congress Government had applied it to Trade Union movements. The High Courts and the Supreme Court had come to the rescue of the people and deserved the well-merited gratitude of the people.

Mr. N. M. Joshi said in his presidential address that the present High Courts in the country had proved themselves a bulwark of freedom.

He said that the supremacy of fundamental freedoms and human rights must be maintained at even great risk in order to promote democracy. As believers in democracy, they must do everything possible to protect individual freedom and even extreme opinions and ideas must be tolerated.

Mr. Joshi pointed out that all the repressive legislation passed by the present Government was in addition to the ordinary legislation, and special legislation was really against the letter and spirit of the constitution. He suggested the appointment of an expert commission to go into the matter. Repressive powers of the Government had been very freely used. So many successful applications for habeas corpus clearly proved that enforcement of detention legislation was not even fair, grounds given being vague and sometimes supplemented when courts found them unsatisfactory.

Referring to the control over the press, Mr. Joshi said there were numerous cases of Government demanding securities from the press, forfeiture of securities, pre-censorship of certain newspapers and ban on the entry of some papers in certain areas. Unfortunately, he added, in many such cases the press advisory committee did more harm than good and ought to be abolished. Mr. Joshi pleaded for undiluted freedom of association and said that in spite of the Criminal Law Amendment Act having been declared void by the Madras High Court, the Communist Party continues to be banned in Bengal, Hyderabad, Travancore and Cochin and Bhopal.

Referring to incidents of firing by police on crowds, Mr. Joshi said that this practice continued as before, perhaps more frequently than before, as public protests in such cases were not as vigorous as under the Britons. Even Home Guards, who were not free from political bias, were allowed to fire during kisan and labour agitations. Government must learn to maintain law and order without resorting to firing. In any case, the rule suggested by Mahatma Gandhi, that Government should hold a public judicial inquiry in every case of firing, must be insisted upon.

"Repression is no remedy against Communism since Communism has gone underground. Ideas cannot be repressed. Economic improvement and securing the co-operation of the people by establishing democracy are the only remedies against Communism," Mr. Joshi declared.

He claimed that the civil liberties unions were not Communist as Mr. Nehru alleged. Their object was democracy and individual freedom.

The Preventive Detention Act, Mr. Joshi observed, had been passed without proper Parliamentary discussion and consultation with those interested in the civil liberties movement. Mr. Joshi described the provincial Public Safety Acts as supplementary penal codes giving wide spe-

cial powers to the executive, providing for externment and internment, control over the press, control over labour and providing for special courts and special summary procedure.

The Conference set up a Punjab Civil Liberties Council with the object of safeguarding the civil liberties of the citizens of the State.

Mr. Bhim Sen Sachar, former Chief Minister of the Punjab, was elected President of the Council, and Pandit Haradatta Sharma, its Secretary.

The Conference demanded separation of the judiciary from the executive in the State and expressed its alarm at the continuance of the ban on public meetings and processions in Ambala and other districts of the Punjab.

The Conference also demanded the appointment of a commission to examine the present system of police administration in the State.

A resolution urged the Central Government to appoint a commission to examine and report on the existing legislation repugnant to the fundamental rights guaranteed by the constitution and also to examine and recommend legislation necessary to secure enforcement of the fundamental rights.

It asked for repeal of the Preventive Detention Act "in the interest of developing democratic institutions in India."

Among other demands made by the Conference were: No detention without trial, no arrest without warrant, immediate chargesheet, facilities for legal defence of the detenus, human treatment to all the detenus irrespective of status and education, family allowance to the dependants of the detenus during the period of detention, immediate withdrawal of all cases pending against the detenus for alleged breach of jail discipline and release of all those who have already been convicted on the same charges.

Mr. John Pearmain, Executive Secretary,

International League for the Rights of Man,

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

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

*Congratulations on the standards you have set for yourselves.*

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