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# The Indian Civil Liberties Bulletin

[ A MONTHLY REVIEW ]

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Power is an incomparable intoxicant; and the tendency exists in all Governments all the world over to encroach upon the Fundamental Rights, sometimes consciously and sometimes unconsciously. It is the duty of every citizen to resist such encroachment with all his might. Thus alone shall we prove ourselves worthy citizens of an independent sovereign democratic Republic.—Mr. Justice S. R. Tendolkar at the Progressive Group of Bombay.

## ARTICLES

### RENEWAL OF DETENTION LAW

The existing Preventive Detention Act passed by Parliament last year will expire at the end of March next, and Parliament will re-enact the law some time between 5th February when its session commences and 31st March. The duration of the law was limited to one year in the first instance because the statute had to be passed in a great hurry in order to avoid a large gaol delivery on account of some High Courts' decisions, which had either been delivered or were about to be delivered, to the effect that detention without trial was contrary to the constitution. There was no time then to give adequate consideration to the statute, and the Home Minister gave an assurance when the law was passed and repeated it later that when time would come again within a year to renew it, a well thought-out measure would be placed before Parliament and an opportunity given to the country to make its views heard so that the new law would be such as would be acceptable to responsible opinion in the country.

But it now appears that this pledge is not going to be respected and that the new law would more or less merely re-enact the old law and extend its life. This change in the Government's plan, it should be noted, has nothing to do with the sudden demise, deeply to be regretted, of the Home Minister, Sardar Vallabhbhai Patel. The change of plan, which was made earlier, is very deplorable, for detention without charge or trial is the most important civil liberty issue before the country at present. The deprivation of Freedom of Person which has been going on on an extensive scale for several years past in peace time is the largest single contributory factor to the unsettlement of the country and is verily bringing the fair name of India

into the mire in all democratic nations of the world. It was the bounden duty of the Home Ministry at such a time to sit down with the thinking elements in the country for the purpose of devising means whereby the Government would be enabled to cope effectively with disorder and disruption without at the same time altogether subverting the essential principles of justice which no democracy can disregard except at peril to its own continued existence. It is still to be hoped that the Government will not back out from its earlier promise but will itself propose a fully thought-out comprehensive measure and will neglect no opportunity to consult public opinion thereon.

Doubtless the new bill cannot just re-enact the old provisions. It will necessarily contain some amendments, but news has been spread in a semi-official way that the amendments would be of a minor character. If this happens to be true, nothing could be more unfortunate. The amendments have to be very sweeping in their scope if the law is at all to approximate to the kind of law which it is permissible for any democratic country to adopt. On one thing the reports that are current appear to be unanimous: the law will not be limited in duration but will be permanent. This will mean that India will provide itself by means of this statute with machinery to bring into use extraordinary power of arrest and detention whenever conditions are acutely, or perhaps even slightly, abnormal. To take such power for use in a possible contingency in the future is to depart from the procedure of countries like Britain and the United States whose constitutions we generally take for our model, and to follow the procedure of countries like France where a ready-made law of the state of siege is always available for employment in an emergency. If we are going deliberately to follow the example of the latter countries, let us at least take care that our law conforms strictly to the well-established prescriptions of a state of siege law.

Among the forecasts put out by the news agencies about the amendments to be made in the present law of detention, the most optimistic is that of the P. T. I., viz., that the view of the Advisory Board on detentions will be made mandatory "in all cases." Under the existing Act also the Advisory Board makes binding decisions in cases that may be referred to it. But the trouble at present is that very few cases are in fact referred to that body. Indeed, the competence of the Advisory Board is, in existing

conditions, purely nominal, only those cases in which detention was ordered for reasons connected with the maintenance of essential supplies and services—cases, as the succeeding article shows, which could not be dealt with at all by detention previously—being referable to it. If the Advisory Board, which cannot now consider any genuine cases of detention, comes, under the new law, to be invested with power to consider all cases of detention, it would, we are free to admit, be a great step forward. Though certainly an improvement of the highest value, it would be no more than what was invariably the practice in Britain under Regulation 18B in the last war and what is the practice in Ireland under the Offences against the State Act of 1939, as we have shown in the preceding numbers of the BULLETIN. The verdict of the Advisory Committee in Britain was binding in fact and that of the Inquiry Commission in Eire is binding in law also, and every case of detention was or is referred to the appeal tribunal in both countries. If in India also every case would in future be referred to the tribunal, our law would in that respect be on all fours with the British and Irish law, and this change would certainly make for a liberalising of the existing measure.

What is said above is, however, subject to one reservation. At present all detention orders which in duration are limited to three months or less fall outside the scope of the Advisory Board's jurisdiction altogether. This restriction must be removed, and all cases of detention, whatever be the period for which the detention is to remain in force, must be referred to the Advisory Board. Detention for three months is not a small matter which could be left to the executive's uncontrolled discretion, and the matter becomes all the more serious when it is remembered that detention, limited to three months by a first order, can be extended to another three months by a second order, and to still another three months by a third order, and so on, without the executive being required at any time to place the matter before the Advisory Board. It ought not to be possible for the Government to by-pass the Advisory Board by such fraudulent means. And the best way to do so is to make it incumbent upon the Government to refer every case of detention to the Advisory Board, irrespective of the duration of the detention order as well as the class of cases in which the order was made. Only then would Indian law be on the same level as Regulation 18B of Britain or the 1939 law of Eire.

But one more thing is required to put our law on a footing of equality with these laws—and that is of even greater importance. Extension of the appeal tribunal's scope is certainly desirable, but such extension will be of no practical advantage unless the tribunal is put in a position to give a searching examination to the cases which may come before it. We have pointed out in the earlier issues (and particularly in the November 1950 issue at pp. 176 and 177) how at every step our tribunal is bound hand and foot. All these fetters must be removed, and, like the Advisory Committee in England, our Advi-

sory Board must be made master of its own procedure so that it could (i) require all relevant information bearing on the charges made against a detenu to be made available without reserve, (ii) enable the detenu to appear either in person or by a legal representative to answer the charges, and (iii) permit the detenu to call evidence and cross-examine witnesses in suitable cases. The Advisory Board will be of real service only if, by giving it these facilities, it is enabled to probe thoroughly into the causes of detention; only then will it be in a position to give a finding on the question referred to it, viz., whether there was or was not sufficient cause for detention. We are not suggesting anything extraordinary here; we are merely asking the Government to do what the British Government did in war time.

Even this, however, is not all that is to be said on the subject. If all this is done, our practice will be in conformity with the British practice. But Britain temporarily permitted detention of suspects without trial in war emergency, when she had to fight for her survival as an independent nation. We are, however, adopting the short-cut of detention when there is no emergency either of invasion or rebellion. It is not therefore enough to surround our law of detention with adequate safeguards such as that of the Advisory Board. We must further limit the application of the law to grave emergencies. And this is what so influential and responsible a journal as the "Times of India" has in its issue of 21st December editorially suggested. The "Times" says:

The Act should be invoked only when a state of emergency is declared by the President. The ordinary law of the land is adequate enough to enable authority to deal with ordinary situations. Consistent with democratic precept and practice, the exercise of extraordinary powers should be limited to extraordinary conditions. It is logical in these circumstances to expect that a state of emergency will not be proclaimed unless conditions provoke this extreme safeguard. For this reason, State Governments, prone to exercise their powers arbitrarily, are likely to oppose any move to relate the Preventive Detention Act to the existence of an emergency. But regard for democratic principles with the accent on individual liberty should have precedence over the clamour of those pinchbeck Napoleons who strut the States' stage and exult in flourishing the big stick of arbitrary power.

Suspension of habeas corpus can only be an emergency measure; it should be called into action only when Emergency Provisions of the constitution can be legitimately invoked. We have often pointed out before how these Provisions give far more arbitrary power to the executive than is permissible in any democratic constitution in an emergency. In the U. S. A., for example, habeas corpus can be suspended only by Congress; a presidentially-declared emergency will not bring it about. Even when the legislature itself suspends habeas corpus, the facts justifying suspension will still be subject to judicial review. Our constitution does not provide for any of these checks. But

the least that we can and ought to do is not to suspend habeas corpus till the President declares an emergency under the Emergency Provisions. If this restriction is imposed and if further an Advisory Board endowed with sufficient power to make it a real appeal tribunal considers every case of detention without exception, then we shall have gone a long way towards preservation of Personal Liberty. Until we have done this, we shall not have done enough. And all this can be done within the bounds of the constitution as it stands at present.

### PREVENTIVE DETENTION

#### In Connection with Essential Supplies

The power which art. 22(7)(a) of the constitution confers on Parliament to except from the authority of the Advisory Board in the matter of reporting on and deciding cases of detention, if of longer duration than three months, has been so employed by Parliament as to limit the competence of the Advisory Board only to detentions ordered for reasons in connection with "the maintenance of supplies and services essential to the community" under sec. 9 of the Preventive Detention Act. Such detentions, as we have pointed out before, could not be ordered at all under the Public Safety Acts before the detention provisions therein were replaced by the comprehensive provisions of the central Act. The new law created this new ground of detention and further restricted the jurisdiction of the Advisory Board to detentions ordered on this ground alone!

It may first be useful to note that our Republican constitution has extended the field of detention without trial beyond what was permissible under the old bureaucratic constitution. The Government of India Act, 1935, gave power to the Union legislature to legislate on subjects relating to "preventive detention in British India for reasons of State connected with defence, external affairs or the discharge of the functions of the Crown in its relations with Indian States" (entry no. 1 in the Federal Legislative List) and to the provincial legislatures to legislate on subjects relating to "preventive detention for reasons connected with the maintenance of public order" (entry no. 1 in the Provincial Legislative List). It will be observed that the Constitution Act of 1935 did *not* give authority either to the central or local legislatures to enact laws permitting preventive detention for reasons connected with the maintenance of essential supplies or services. If any legislature had passed such legislation, it would have been promptly declared invalid by the Federal Court.

But the new constitution of Independent India has newly conferred this power on both the central Parliament and the local legislatures in the States! Entry no. 9 in the Union List gives power to Parliament to make laws relating to "preventive detention for reasons connected with defence, foreign affairs, or the security of India," and entry no. 3 in the Concurrent List gives similar power to the States

legislatures and the central legislature, i. e., to Parliament to make laws relating to "preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community." It will be noted that under the Republican constitution the central legislature has obtained all the power that the 1935 Act gave to the central legislature and also all the power which this Act gave to the provincial legislatures. But neither the provincial legislatures nor the central legislature under the previous constitution had any power to adopt laws of preventive detention for reasons connected with the maintenance of essential supplies and services. This is a new power given by the constitution of Free India both to the States legislatures and to Parliament.

The Preventive Detention Act covers the whole field of detention that could be ordered for six different reasons, including detention for reasons connected with the maintenance of essential supplies and services, and, what is more, the Act in sec. 9 confines the jurisdiction of the Advisory Board to this item newly added to the total ambit of legislative power. Thus the investigating body is free to consider only those cases of detention which could not arise at all under the old constitution or even under the Public Safety Acts passed after the new constitution came into force. This, one would think, was clearly contrary to the intentions of the constitution-makers in providing the safeguard of the Advisory Board. As Mr. Justice Mahajan says in the Gopalan case:

By this section (sec. 12) Act IV of 1950 has dispensed with the Advisory Board in five out of the six subjects above-mentioned, and the compulsory procedure of an Advisory Board laid down in cl. 4 of art. 22 has been relegated to one out of these subjects. This has been achieved by giving a construction to the phrase (in cl. 7) "the circumstances under which and the classes of cases in which (a person may be detained... without obtaining the opinion of an Advisory Board)" so as to make it co-extensive and co-terminous with the subjects of legislation. In my opinion, this construction of cl. 7 is in contravention of the clear provisions of art. 22 and makes cl. 4 of art. 22 to all intents and purposes nugatory. Such a construction of the clause would amount to the constitution saying in one breath that a law of preventive detention cannot provide for detention for a longer period than three months without reference to an Advisory Board and at the same breath and moment saying that Parliament, if it so chooses, can do so in respect of all or any of the subjects mentioned in the legislative field. If that was so, it would have been wholly unnecessary to provide such a safeguard in the constitution on a matter which very seriously affects personal liberty.

The wide construction of cl. 7 of art. 22 brings within the ambit of the clause all the subjects in the legislative list and very seriously abridges the personal

liberty of a citizen. This could never have been the intention of the framers of the constitution. . . . I cannot see that the compulsory requirement of an Advisory Board is likely to lead to such disastrous and calamitous results that in all cases or at least in five out of the six subjects of legislation it becomes necessary to dispense with this requirement. The requirement of an Advisory Board is in accordance with the preamble of the constitution and is the barest minimum that can make a law of preventive detention to some little degree tolerable to a democratic constitution. . . . The constitution must be taken to have furnished an adequate safeguard to its citizens when it laid down certain conditions in cl. 7, and it could not be considered that it provided no safeguard to them at all and that the words used in cl. 7 were merely illusory and had no real meaning.

The judge accordingly ruled in his dissenting judgment that sec. 12 of the Act which places most of the cases of detention outside the Advisory Board's jurisdiction was void.

#### BANNING OF ASSOCIATIONS

##### Law Declared Void

Following upon the decision of the Madras High Court in the case of the Madras People's Education Society (vide p. 154 of the BULLETIN), the Calcutta High Court on 5th January declared sec. 16 of the Criminal Law Amendment Act void. The Calcutta High Court's decision was not pronounced directly on the issue of the Act's validity. The question arose indirectly on the habeas corpus petitions of a number of persons detained under the Preventive Detention Act. Most of these persons had been detained because they belonged to the Communist Party which had been declared in March 1948 to be an unlawful association under the Criminal Law Amendment Act. In disposing of these petitions, therefore, the constitutionality of the Act became a major factor. And, on this point, Mr. Justice Sen and Mr. Justice Chunder decided (following the full bench decision of the Madras High Court) that

Sec. 16 of the Indian Criminal Law Amendment Act was ultra vires of the Indian constitution and that the declaring of the Communist Party of India as an unlawful association was, therefore, void and illegal. Their Lordships were in full agreement with the opinion of the full bench of the Madras High Court (September) that sec. 16 being ultra vires, the following secs. 17 and 17 (a) to (f) were also void to the extent to which they were inconsistent with the provisions of Part III of the constitution of India.

The Court considered the cases of 88 detenus and ordered 83 of them to be set at liberty, the cases of the remaining five having been heard and decided by other benches and there being no fresh material to justify review of the orders already passed thereon. Reviewing individual cases, the Court said that from a review of all

the facts of the different cases it would be seen that except the case of one detenu (Saktipada Hazra) all other cases were hit by reliance on sec. 16 of the Indian Criminal Law Amendment Act, 1908, which was ultra vires and on that ground alone the detenus in all these cases would have been entitled to an order of release. Over and above this in many of the cases the detenus would be entitled to an order of release on the ground of malafides because of the "midnight orders." [364 persons were served with an order for detention in one night within 24 hours of the passing of the Preventive Detention Act. It was impossible, the Court observed, for any authority to come to the conclusion that the activities of the detenus were against the maintenance of law and order within so short a period.] In some of the cases when "midnight orders" were passed, the petitioners were actually before the Special Bench. Further, as in many of the cases grounds which were illegal or outside the scope and ambit of the Act were considered along with other grounds, the whole order was vitiated. For, as decided in several cases before, where illegal grounds or grounds outside the scope and ambit of the Act had been mixed up with what might be good grounds, even then the whole order must be held to be vitiated. In several of the cases, including that of Saktipada Hazra, all the grounds given were vague. Therefore in all these cases the detenus on one or more grounds had made out a case for ordering their release from detention.

Some general observations that were made by Mr. Justice Sen, speaking for the Court, may be quoted here. He said :

As Judges of the Republic, we are to prevent its citizens being subject to any unlawful act, whether it is the act of a private individual or of the executive authority or of the legislature. In the case of private individuals we would ordinarily rely on the protection granted by the ordinary criminal or civil law. In the case of illegal executive action we would rely on the issue of special writs, i. e., habeas corpus, mandamus, etc., which the constitution empowers us to issue. If the legislature passes Acts beyond the powers granted to it by the constitution, we have the power to declare such Acts void on the ground that they are ultra vires of the legislature.

In our opinion, there is some confusion of thought regarding the supremacy of the legislature and the supremacy of the judiciary. We wish to express our views on this point. The confusion, we think, arises out of applying the principles of the English constitution in interpreting the Indian constitution. Ours is a written constitution which grants certain powers of legislation to the legislature which it creates. In England Parliament or the legislature is not a creature of statute and is supreme. In this Republic the legislature has only such powers of legislation as the written constitution grants it. If laws are

made in excess of such powers they are void and invalid.

Who is to decide whether an enactment by the legislature is valid or not? Obviously, the courts and the courts alone are competent to do this, and their decision is binding on all. If the law is within the powers of the legislature to enact, the courts are bound to apply and follow that law irrespective of the fact whether the courts approve of the policy of the law or not. There is no question of rival supremacy. Each body is supreme in its own sphere.

We should interpret an Act of the legislature, specially one dealing with the freedom and liberty of action of all citizens, in consonance with the principles laid down by the constitution as an impregnable fortress designed to withstand and repel any attack, from whatsoever quarter, upon the freedom and liberty of action granted to its citizens and not as a mere ornamental facade designed attractively in order to distract scrutiny and conceal from the people acts of oppression done in the name of law.

The "Statesman", in commenting on this case, particularly notes the fact that the Bengal Government deliberately omitted to pay heed to the warning which it should have taken to heart from the Madras High Court's judgment about the unconstitutionality of the Criminal Law Amendment Act. Observing that such headlessness has become common in Governments, the paper says:

In the present instance, for example, it appears that a State Government has been acting illegally for nearly a year—not to speak of other strictures passed by the Bench on vagueness of grounds and the mala fides of "midnight orders". That may be partly explicable by genuine ignorance or doubt about the state of the law (though the Government seems to have shown no disposition to act on the previous Madras judgment, but simply to have waited to be called to account).

The paper further remarks:

Since independence, India has seen a spate of emergency legislation, Central and local. Its necessity, cogently argued in representative bodies, the public was perhaps reluctantly prepared to concede; certainly the framers of the constitution did so, and the tenor of the times makes this, however regrettable in strict democratic principle, unsurprising. Nevertheless the public was entitled to expect that such measures should at least be carefully drafted, legally watertight and humanely administered. How far they have been deficient in all three respects is now notorious. In particular, hardly a single measure has survived, without partial or total invalidation, the probing scrutiny of the courts, though Ordinances have been hastily issued to plug the holes in Acts and Acts to

put right the powers assumed by Ordinance. It is scarcely too much to call the result legal and administrative chaos.

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## TOPICS FROM OTHER LANDS

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### Freedom from Self-Incrimination

#### "THE PRIVILEGE OF REMAINING SILENT"

Enforcement of the provisions in the United States McCarran Anti-Subversive Act for the compulsory registration of the Communists, which the Communist Party is going to challenge in the law courts, is likely to receive a severe set-back from the unanimous decision of the Supreme Court, delivered on 11th December, to the effect that witnesses before Federal grand juries might refuse to answer questions concerning their alleged Communist affiliations if they pleaded possible self-incrimination.

In an investigation by the Federal grand jury in Denver concerning Government employees who were accused of making false statements in connection with loyalty oaths the grand jury tried to obtain from Mrs. Patricia Blau the names of officers of the Communist Party in Colorado as well as books and data revealing the membership of the Party. Similarly it wanted to find out whether Mrs. Blau was in the employ of the Communist Party. Mrs. Blau refused to answer these questions on the grounds that the answers might tend to incriminate her and that she was entitled to immunity from compulsory self-incrimination by virtue of the provision in the Fifth Amendment: "nor shall any person be compelled, in any criminal case, to be a witness against himself."

Mrs. Blau was then taken before the district court, where the questions were again propounded and where she again claimed her constitutional privilege against self-incrimination and refused to testify. The district judge found her guilty of contempt of court and sentenced her to imprisonment for one year. The Court of Appeals affirmed. On further appeal the Supreme Court reversed the decision of the two lower courts. Because the clause in the Fifth Amendment relating to incrimination can be invoked only when the witness can reasonably fear an actual criminal prosecution, Mrs. Blau, to win her appeal, had to show that a person who admitted to a connection with the Communist Party might reasonably fear subsequent criminal prosecution. The Court held that Mrs. Blau had proved that point by citing the Smith Act under which the Politbureau of the Communist Party in the U. S. A. were convicted. In its opinion, which was written by Justice Black, the Court said:

At the time petitioner was called before the grand jury, the Smith Act was on the statute books, making it a crime among other things to advocate knowingly the desirability of overthrow of the Government by force or violence; to organize or to help to organize any society or group which teaches, advocates or encourages such overthrow of the Government; or to

become a member of such a group with knowledge of its purposes.

These provisions made future prosecution of petitioner far more than "a mere imaginary possibility." She reasonably could fear that criminal charges might be brought against her if she admitted employment by the Communist Party or intimate knowledge of its workings.

Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act.

Prior decisions of this Court have clearly established that, under such circumstances, the Constitution gives a witness the privilege of remaining silent. The attempt by the courts below to compel petitioner to testify runs counter to the Fifth Amendment as it has been interpreted from the beginning.

The self-incrimination clause was interpreted for the first time in U. S. history by Chief Justice Marshall 143 years ago in the historic case of Aaron Burr who was tried for treason. The prosecution in this trial sought to link Burr directly with an alleged plot to separate some of the Western States from the Union. On the question whether Burr was privileged not to testify against himself, the Chief Justice said:

If in such a case he say upon his oath that his answer would incriminate himself, the Court can demand no other testimony of the fact.

The Black opinion in the Blau case may possibly result in a complete stalemate on the proposed compulsory registration of the Communist Party. Because the forced disclosure of Communist affiliations which it involves may also be considered self-incrimination by the Supreme Court and held unenforceable. Such a decision would have the effect of voiding the entire registration section of the McCarran Act.

A campaign for the total repeal of the Internal Security Act is already on foot in the United States. An ad hoc committee has been formed under influential auspices for the purpose. Among those who have initiated this movement are two Noble Prize winners (Emily Green Balch and Thomas Mann), six bishops and numerous leading educators and scientists, and more than 1,000 cultural leaders from every state have joined the committee as members. The committee is hopeful that its repeal campaign will succeed particularly on account of two factors: 1. both the biggest labour organizations in the country, viz., C. I. O. and A. F. L. (no organization could be more anti-Communist than the latter) are in favour of repeal, and 2. the Act in the Committee's opinion

is bound to be declared void. On this second factor the memorandum of the committee says: "Our faith in the unconstitutionality of the Act (is confirmed by the recent Supreme Court decision in the case of *Blau v. the United States*) which proves that the registration provisions of the McCarran law cannot be enforced."

### Illegal Searches and Seizures

The guarantee in the U. S. constitution's Fourth Amendment relating to inviolability of domicile (our constitution contains no such guarantee) is usually given effect to by the courts by refusing to receive at trial evidence that has been acquired by the government as the result of an "unreasonable" search and seizure.

How meticulously this principle is observed in that country was forcibly illustrated in a highly sensational case last month. Miss Judith Coplon, a former Justice Department employee, and a Russian were convicted in New York last March on an espionage charge—conspiring to transmit U. S. Government papers to Russia—and were sentenced to fifteen years' imprisonment.

Miss Coplon made an appeal against the conviction, and it was heard by the Court of Appeals, the panel consisting of Chief Judge Hand and Judges Swan and Frank. The Court was unanimous on the main point: "The guilt is plain." And yet it ruled that the conviction was illegal because the evidence against the accused was illegally gathered.

Her arrest was illegal because the Federal Bureau of Investigation's agents who made it had no warrant, and Government papers found in her handbag at the time should not have been admitted as evidence. Federal law permits F. B. I. agents to arrest and search a suspect without warrant only if "there is a likelihood of his escaping before a warrant can be obtained." But the Court found that the Government had not shown that likelihood. And it recommended a new trial in which the Government might offer proof obtained by means which the law allows.

As the "New York Times" observes, "given the climate of the times, this is a courageous decision and it reiterates the determination of the courts to preserve this as a government of laws, not of men." "Independence of the courts," it says, "is a cornerstone of the democratic system; so long as the courts remain independent, freedom of the individual is safe."

### Postal Censorship

If justice requires the setting aside of a conviction on such a grave charge as espionage, even when "the guilt is plain," merely because the evidence on which the conviction was based was found on a person who was improperly arrested, how much more objectionable it would be for the State to procure evidence against a person from private correspondence while it is in transit in the mails.

The current Bulletin of the Irish Association of Civil Liberty states:

The allegation which has been made—and not officially denied—is that a small staff of Post Office workers has been regularly employed upon what is neither more nor less than systematic eavesdropping at the behest of the State. When the authorities have reason to suspect that some citizen is engaged in activities which meet with their disapproval, they are permitted, under a law originally passed for the benefit of Lords-Lieutenant and Chief Secretaries at the Castle, to abstract letters addressed to him, to steam them open, and—if they are incriminating—to use their contents as evidence against him. To what extent this old British law is utilised to-day remains uncertain; but the Minister for Posts and Telegraphs has freely admitted that it still is being invoked.

Some criminals have already been detected in this way. . . . It is true that States can justify the use of almost any expedient by the old argument that the swift detection of crime is in the public interest. On the same principle we ought all to submit to the taking of our finger-prints; everybody should report at intervals to the nearest police-station; and a microphone connected to the station should be fitted in every house so that our private conversations could be overheard. The present system whereby only our telephones can be tapped is hardly sufficient. The authorities should take their cue from the late George Orwell's last book—now banned—with its suggestion that they might instal a two-way television screen in every room, so that citizens might watch for orders and be watched for subversive activities at the same time.

The idea of some official who delves into our private concerns is repugnant to any democratic constitution; the case for State expediency breaks down before the more urgent claims of the individual citizen. The Council of the Irish Association of Civil Liberty is agitating for repeal of the law which permits of postal censorship of private letters.

We have heard complaints of long delays usually occurring in the transmission of letters addressed to Mr. M. N. Roy, and the suspicion is strong that the delays are due to official eavesdropping of the kind described above. Authorities should issue a strict warning that such tampering with private correspondence will meet with condign punishment.

**Poor Man's Lawyer**

Recently the Legal Aid Society of New York, which gives free advice aid in legal matters and representation in court to those New York citizens who cannot afford the services of an attorney, celebrated its seventy-fifth anni-

versary under the auspices of the Mayor. In his appeal for support for the Society, the Mayor said: "By assisting the worthy poor of this city the Society fulfils the great American tradition of equality under the law for rich and poor alike." The extent and quality of the aid which the institution gives can be gauged from the following remarks of the "New York Times":

Although it has become known in the city's courts and among the bench and bar as "the poor man's lawyer," the quality of legal assistance offered has been of the finest. Founded on the democratic and unassailable principle that help in legal matters should be generally available to all who need it, regardless of their ability to pay, the Society in the past year has handled more than 44,000 cases.

In India there are not many organizations which make it their aim to render this essential help to the poor. The best known of such organizations is the Legal Aid Society of Bombay, whose moving spirit is Mr. N. H. Pandia, one of the members of the All-India Civil Liberties Council. This Society has been ministering to the legal needs of the poor people in Bombay in a remarkably efficient manner for well-nigh fifteen years. Its example indeed deserves to be widely followed in other cities.

**COMMENTS**

**Number of Detenus**

According to the information supplied by the Government of India to the All-India Civil Liberties Council, the number of persons under detention in the several States was, on 30th November 1950, as follows:

West Bengal	...	...	547
Madras	...	...	399
Assam	...	...	218
Bombay	...	...	110
Punjab	...	...	107
Bihar	...	...	93
Orissa	...	...	84
Madhya Pradesh	...	...	45
Uttar Pradesh	...	...	42
Delhi	...	...	4

1,649

The number of persons detained in States under the jurisdiction of the Ministry of States is not included in the above figures.

**A. I. C. L. C.'s Suggestion  
CONCERNING DETENTION BILL**

The All-India Civil Liberties Council in its letter to the Home Minister of 5th October (printed at pp. 171-2 of the BULLETIN) made certain suggestions intended to insure full consideration of the detention bill not only in Parliament but in the country at large. One of these

suggestions, viz., that the bill should be circulated for eliciting public opinion, cannot now be carried out as the bill has to be finally disposed of before the expiry of the present Act, i. e., 31st March. All that it is now possible to do is to refer the bill, after its first reading, to a select committee which should have power to hear evidence from civil liberty organizations and from the interested public in general, so that, as we said at p. 179, "the bill as finally passed will be more in keeping with enlightened opinion in the country than it otherwise would be."

There will be time enough to do this, and we again urge upon the new Home Minister the desirability and indeed the necessity of following such procedure. We further repeat the suggestion made in the A. I. C. L. C.'s letter that the Home Ministry should make available to the public a detailed memorandum giving reasons for the amendments in the existing provisions that the bill may contain and also giving "the number of persons ordered to be detained by the Central Government and the States' Governments under sub-clauses (i), (ii) and (iii) of sec. 3 (i) (a) separately, (stating) how many of the orders for detention were placed before an Advisory Board under sec. 9 and how many were reviewed by the Government concerned under sec. 12, and with what results."

### Personal Liberty

#### "TRAVESTY" OF A FUNDAMENTAL RIGHT

In an extract from a speech by Mr. Justice Tendolkar quoted on a later page in this issue, the judge gives voice to the opinion universally held that art. 21 "enacts no right, fundamental or otherwise," and suggests that this article and art. 31 (which authorizes compulsory acquisition of property without just compensation) "require revision at an early date" by means of an amendment of the constitution.

About art. 21 a writer in the "Statesman" described by that paper as "a legal and constitutional expert" makes almost the same observation. He notes that the right to personal liberty guaranteed by that article is but a limited right "with the ambit circumscribed by its being taken away by enacted law." That it can thus be taken away is made clear by the immediately following article, viz., art. 22, "which (in the text) is described to be a guarantee of protection against arrest and detention in certain cases, but actually deals in five out of its seven clauses with preventive detention in its many processes." The writer adds: "It would be a travesty of truth to say that this article embodies or guarantees any fundamental right of the individual." Naturally, in the Bill of Rights of no country's constitution is there to be found any provision for preventive detention like what we have in our Bill of Rights.

#### Right to carry on Business

We have in our review not yet touched upon the right to property which the constitution has guaranteed. We have concentrated our attention so far upon such rights as

a right to freedom of person, and freedom of speech, press and assembly. It would therefore be well if we quoted here a reference, made by a constitutional expert in the "Statesman," of two cases relating to art. 19(1)(g). The writer says:

"The right to carry on one's business or profession without let or hindrance has come up for scrutiny in two cases; and in both the (Supreme) Court has upheld the freedom of the individual. In Rashid Ahmad versus The Municipal Board, Kairana, the respondent Municipal Board imposed a prohibition by a by-law against persons carrying on a particular trade without licence and at the same time put it out of its own power to issue licences to intending traders. A monopoly was created in favour of one individual and the occupation of others was put an end to. The Court considered that it was much more than a reasonable restriction which the municipality was seeking to impose and held the prohibiting by-law to be void. Similarly, in Chintamanrao versus The State of Madhya Pradesh, the Central Provinces and Berar Regulation of Manufacture of Bidis (Agricultural Purposes) Act of 1948 was held to be void on the ground of repugnancy to the fundamental right of freedom of trade. The Act sought to authorize the Deputy Commissioner to prohibit the manufacture of bidis during the agricultural season. The prohibitory power conferred by the Act was held by the Court to be unreasonable."

#### Mahasabha's Protest

The All-India Hindu Mahasabha at its annual session in the Christmas week passed a resolution strongly protesting against the repressive policy that is being followed by the Governments in India. The resolution said that the freedom of the individual was menaced and the citizens left to the tender mercies of the police and the executive owing to the operation of "repressive laws" and the application of the Preventive Detention Act and section 144 of the Criminal Procedure Code.

Mr. Asutosh Lahiri in moving the resolution said that the attitude of the Nehru Government towards Opposition political parties was "undemocratic and hostile." The Preventive Detention Act, he said, was being freely used to suppress the Mahasabha. He himself had been its victim and had been detained for some time on grounds which he thought were perverse and untrue. Thousands of Mahasabha workers had met with the same fate. Mr. Om Prakash said that Mr. Nehru once believed that the British Government had no justification to exist because they relied on the Criminal Law Amendment Act, suppressed and gagged the people and banned organisations.

#### Civil Liberties in Pakistan

The general feeling among the politically-minded people of India is that in Pakistan there is severer repression than in this country. We have no knowledge of the real state of things in this respect. But the comforting factor is that, whatever be the extent of repression in Pakistan, Pakistanis are not sitting under it, as also was the belief here.

On 9th and 10th December a Pakistan Civil Liberties Conference was held at Lahore. This was the third session of the Conference, and it was attended by 250 delegates from all over Pakistan. Mr. Mahmood Ali Kasuri, as chairman, described the condition of civil liberty as follows in his speech:



The advent of Pakistan had caused a vigorous tightening up of various restrictions upon the freedom of speech and expression.

The provisions of the Press Emergency Act and the Frontier Crimes Regulation, leaving out for the moment various safety legislations, were so extensive as to vest in the executive unrestricted arbitrary powers of control over the citizens.

Immediately after the creation of Pakistan a time had arrived when certain elements succeeded in completely confusing the people, and to talk of protection of civil liberties at that time was almost considered as bordering on treason. Numerous people, some with the highest record of national service, were arrested and detained without trial. The number of detenus had continued to swell and members of no party, not even the Muslim League, had escaped such detentions.

Pakistan was regaining its political consciousness, and the desire and demand for a democratic way of life was reasserting itself. Opposition parties, some in the very initial stages of their life, had made their appearance in the political arena, and if the common citizen maintained his balance of mind and continued to exert himself consciously for the protection of his fundamental rights and liberties, the case of democracy might yet be saved in this country.

A number of resolutions were passed demanding repeal of coercive legislation and restoration of civil liberties. The Pir of Manki Sherif was elected President of the All-Pakistan Civil Liberties Union, whose aim is to agitate against repression throughout the year. The resolutions passed at the Conference and the objects of the Union were explained by leaders of public opinion at a meeting attended by about 100,000 people.

#### " Things in Common "

At a State banquet given in honour of Mr. Menzies, the Prime Minister of Australia, on 27th December, Mr. Nehru, the Prime Minister of India, noted that there were many things in common between India and Australia. Some of these were specified; others were not. Among the latter, we suppose, a prominent place will have to be given to the fact that while India is banning the Communist Party under an age-old law of the British regime, Australia has forged a brand-new law to do the same. The laws of the two countries show some differences; but they are of a minor nature, not certainly to be taken into account while reckoning the common points. If the Indian law bars all access to law courts, the Australian law leaves the door ajar a bit. The main thing is that both countries have subverted the ordinary process of taking action against subversive elements. This similarity surely outweighs some small dissimilarities in other respects.

## PRESS ACT

### Forfeiture of Security Cancelled

An echo of the remarks made by the Punjab High Court in the case of Master Tara Singh was heard in the Madras High Court's decision (9th December) in a Press Act case. In declaring that the sedition law contained in sec. 124-A, I. P. C., was repugnant to the constitution, the Punjab High Court had said: "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 (viz. the attainment of freedom)" (vide p. 191 of the BULLETIN). Sec. 4(1) (d) of the Press Emergency Powers Act, 1931, is a counterpart of sec. 124-A, I. P. C., and in considering the effect of the attainment by India of political freedom on the scope of this section, the Madras High Court was also impelled to make similar observations. It said:

Words which might have been held by courts to tend to bring into hatred or contempt the Government when such Government happened to be a foreign and alien Government may not necessarily bring into hatred or contempt a popular representative Government. In our opinion this factor must not be overlooked in considering the effect of criticisms of the action and policy of the Government after August 15, 1947 (the day of independence).

The Madras Government by an order forfeited the security of Rs. 2,000 furnished by the printer and publisher of "Deshabhimani," a Malayalam daily published from Kozhikode, reciting in the order certain articles which appeared in the paper and which, in the opinion of the Government, fell within the mischief of sec. 4(1)(d) of the Press Act. This section authorizes the Government to declare forfeited a security deposited by any newspaper if the latter contains words which "tend, directly or indirectly, to bring into hatred or contempt the Government established by law." The order was challenged before the Chief Justice and Satyanarayana Rao and Viswanath Sastri JJ., who quashed the order.

The Court analysed the articles alleged by the Government to contain prejudicial matter and ruled: "There are no words in the passages appended to the order of forfeiture which fall within sec. 4(1)(d)." In one of the articles the subject matter was alleged atrocities of the Malabar special police in North Malabar. Their Lordships said about it:

The entire article was, in essence, a plea for an open inquiry into the allegation. It was impossible to contend that the writer was exceeding the limit of legitimate criticism. It must be admitted that the criticism of the officials was violent and couched in a provocative language. But a differentiation was clearly made by the writer between the officials and the popular Ministry. The very fact that the final appeal of the writer was to the Congress Ministry to conduct an open inquiry into the alleged atrocities of the Malabar special police was conclusive proof that there was no attempt to bring the Government as such into hatred or contempt.

Thus the Court went through all the impugned articles and found that none of them hit the Press Act's provisions.

It will be noticed that this decision of the Madras High Court is on narrow grounds. Without holding sec. 4(1)(d) to be unconstitutional, it merely ruled that the articles objected to were not covered by the section, whereas a different panel of the same High Court on a former occasion held the section itself to be void (see p. 181 of the BULLETIN).

## GLEANINGS

### PERSONAL LIBERTY

#### Which Art. 21 Does Not Guarantee

The story is often told of how the framers of the constitution, by taking out from art. 21 relating to personal

liberty the words "due process of law" which they had originally introduced into it have reduced the article to a futility. Mr. P. R. Das first pointed out in the "Indian Law Journal" what the consequence of this deletion would be. Mr. Vaze then, in a paper submitted to the first Indian Civil Liberties Conference, showed that the article as adopted was "absolutely valueless" in so far as constitutional protection of Freedom of Person was concerned. He said: "(The article) does nothing to assure personal liberty. For all the good it is capable of doing, it might as well not be in the constitution at all, it only means that no one shall do anything contrary to law. Surely no constitutional provision is required to enjoin observance of legal requirements, either in regard to personal liberty or anything else". The Conference itself passed the following resolution on the article in July 1949:

Personal Freedom, which is basic to all other forms of civil liberty, has no existence as a constitutional right in the constitution which the Constituent Assembly has adopted, inasmuch as art. 15 in the constitution (this has now become art. 21) gives plenary power to the legislatures of the Centre and the States to pass any laws they may consider necessary or expedient to restrict the Freedom of Person. The words "due process of law," which originally figured in the article, were eventually removed for the express purpose, as Dr. B. R. Ambedkar made clear, of making it incompetent for the courts to declare invalid any such legislation as in their opinion was unnecessary, arbitrary or unreasonable. The change effected renders Personal Freedom only a statutory instead of a constitutional right, placing it entirely at the mercy of the legislative bodies in the country.

#### Justice Tendolkar's Analysis

*The view thus expressed receives weighty confirmation from the observations made recently by the Hon'ble Mr. S. R. Tendolkar, a judge of the Bombay High Court, in a speech before the Progressive Group of Bombay. Following are some excerpts from the speech relating to this subject:*

The draftsmen of our constitution did not desire the courts in India to have the power to consider whether the law itself was just and that is why they deliberately changed the phraseology "without due process of law" into "except according to procedure established by law." An attempt to reinstate the former phraseology was made in the Constituent Assembly by Shri K. M. Munshi, the only dissenting member of the Drafting Committee, but it was strongly resisted and ultimately defeated.

Another great lawyer Shri Alladi Krishnaswami Ayyar twitted Mr. Munshi by saying: "Some ardent democrat may have a greater faith in the judiciary than in the conscious will expressed through the enactment of a popular legislature." The politician in him made him forget that if the conscious will of the legislature was always to prevail, there was no occasion to enact any fundamental rights.

By their very nature, they are intended to act as a restraint on the power of the legislature. Moreover, in practice the so-called "conscious will of the legislature" means the decision of a majority of the legislature, and if there is a party in power, the decision of the majority of that party, which may well be a small minority in the legislature. The will of the legislature need not, therefore, be sacrosanct in matters affecting personal liberty.

But did the draftsmen of the constitution succeed in their object by enacting the article as they did? [Yes!] The matter came up for interpretation before the Supreme Court in Gopalan's case and the Supreme Court, by a majority of 4 to 2, held that "law" in this article meant any law, howsoever capricious or unjust, and that the courts had no power to determine whether the law itself was just.

The result inevitably is that every person is at the mercy of the legislature; and if it chooses to behave in a party spirit or capriciously in matters affecting life or personal liberty, there is no remedy. The seriousness of the situation can only be realised by taking a very extreme case.

Supposing for example that a party in power decided to have a political purge and got the legislature to pass a law that its political opponents should be hanged, the law would be good.

I do not suggest that such a thing is likely to happen; but political purges have not been unknown at least in some countries. This provision in the constitution drew the caustic comment from a member of the Constituent Assembly that the Fundamental Rights were drafted from a police constable's point of view.

The article as interpreted, in my opinion, enacts no right, fundamental or otherwise. Even without it, if a person was deprived of life or personal liberty except according to procedure established by law, a remedy would lie in a court of law.

## C. L. U. NEWS

### Bombay Civil Liberties Conference

This Conference which was convened for 16th and 17th December had to be postponed on account of the sudden death in Bombay of Sardar Vallabhbhai Patel on the eve of the Conference. It has now been decided that the Conference would be held on 3rd and 4th February.

### Unions in the Punjab

Pandit Haradatta Sharma and Sardar Jaswant Singh, secretaries of the Punjab Civil Liberties Council, intend shortly to go on tour for the purpose of organizing branches and enlisting individual members of the Council. Already civil liberty organizations have been formed at Amritsar, Jullundur, Ferozepore, Ambala and Rupar. An attempt will be made to strengthen them and get them affiliated with the Punjab Civil Liberties Council.

### Mr. Joshi's Lecture

Mr. N. M. Joshi, Vice-President of the All-India Civil Liberties Council, during his visit to Akola (Berar) to preside over the Textile Workers' Conference, addressed a public meeting on 7th January on the civil liberties movement. He pointed out how great was the importance to workers as a class of the maintenance of such fundamental rights as freedom of speech, assembly and association. In most of the States the Governments were prohibiting public meetings whenever a strike took place and detaining trade union leaders without trial. The civil liberty movement, he said, does not support violence but only insists that those who commit acts of violence should be punished after being convicted of the offence in regular courts of law.