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# The Indian Civil Liberties Bulletin

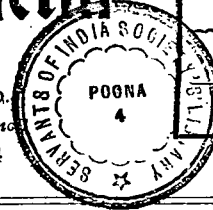
[ A MONTHLY REVIEW ]

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The personal liberty of every Indian to-day (1922) depends to a great extent on the exercise by persons in authority of wide, arbitrary or discretionary powers. Where such powers are allowed, the rule of law is denied. . . . Is there one argument advanced to-day by the bureaucracy and its friends which was not advanced with equal clearness by the Stuarts? When the Stuarts arrogated to themselves a discretionary power of committing to prison all persons who were on any account obnoxious to the court, they made the excuse that the power was necessary for the safety of the nation. And the power was resisted in England, not because it was never exercised for the safety of the nation, but because the existence of the power was inconsistent with the existence at the same time of individual liberty. . . . For myself I oppose the pretensions of law and order not on historical precedent but on the ground that it is the inalienable right of every individual and every nation to stand on truth and to offer a stubborn resistance to the promulgation of "lawless laws."—From C. R. Das's presidential speech at Gaya Congress.

## DETENTION WITHOUT TRIAL

In answer to a letter by Mr. S. G. Vaze (Secretary, All-India Civil Liberties Council) enclosing a copy of his presidential speech at the Bombay Civil Liberties Conference, Mr. Roger N. Baldwin as Chairman of the Board of Directors of the International League for the Rights of Man wrote as follows under date February 23 :

Dear Mr. Vaze,

Our Board has considered your letter on the speech concerning detention without trial which you made before the Bombay Civil Liberties Conference.

We cannot address the Government of India directly but assure you we desire to express our unanimous support of the position taken by your Council and our decided opposition to any system anywhere holding prisoners on political charges indefinitely without trial.

We trust that when the emergency act expires, no such system will be established in Indian law and that the normal processes of arrest and prosecution and trial will be afforded in political cases as in all others,

We are, with best wishes,

Sincerely yours,  
ROGER BALDWIN,  
*Chairman.*

## ARTICLES

### Amendment of Bill of Rights

An amendment of some provisions in Part III of the constitution, which constitutes our Bill of Rights, clearly seems to be contemplated by the Government of India. Which of the fundamental rights included in that Part are proposed to be amended and whether the guarantee in respect of them will be tightened further or loosened is not known. But indications are that art. 31 relating to compulsory acquisition of property will be amended in the direction of diminishing the protection which the article affords to one whose property is to be compulsorily acquired. The Zamindari Abolition Acts of the various States, the validity of which is being already challenged in the High Courts, are likely, it is feared, to be declared void under the article (and the Patna High Court has already invalidated Bihar Act), and although the decision of the courts will have to be respected for the time being, the Government of India feels that, the State Governments being pledged to the abolition of zamindari, the only way out of the difficulty is so to amend the article in question as to make the Acts passed constitutionally valid. The Government of India has perhaps some other amendments in mind also. One High Court has come to the conclusion that even direct incitements to violence cannot be penalised under art. 19(2) and has referred the matter to the Supreme Court for an authoritative opinion. It may be that the Government wishes this article also to be put in such form as to enable State Governments to punish such incitements. Possibly there are still some more articles in Part III which the Government would like to see amended.

The first question that arises in regard to any amendment is whether it would be right to undertake such an adventure before, as appears to be contemplated, the first general election takes place at the end of this year and Parliament is reconstituted as a result of the election. There are two objections to this course. One is that the next Parliament, which will be elected on the basis of adult suffrage, will be more representative than the present Parliament, which has been indirectly elected by members of the State legislatures, these members themselves being elected on an extremely restricted franchise.

and which therefore is admittedly provisional. The second objection is that the provisions of art. 368 which relates to the amendment of the constitution will not be fully operative if the present Parliament proceeds to amend any article. It should be noted that, where amendments to Part III are concerned, such amendments can be effected by Parliament alone, ratification of them by at least half a number of the States not being required under the proviso to art. 368. The only safeguard against hasty amendment provided in the article is that each house of Parliament should pass the bill embodying the amendment by an absolute majority which is not less than two-thirds of the members present and voting. But even this safeguard will not be available in full if an amending bill is passed by the present Parliament, because the present Parliament consists of only one house. However, the Prime Minister seems to have persuaded himself that it would not be wrong to seek amendments in the constitution in the existing Parliament on the ground that the existing uni-cameral Parliament is in fact the Constituent Assembly which adopted the constitution that is in force to-day.

But whatever the rights or wrongs of proceeding with amendment of the Bill of Rights in the present Parliament, we would like to make some suggestions as to the procedure that should be adopted if amendment is decided upon. The Government of India should publish at an early date the alterations it proposes to make in the provisions of the Bill of Rights and also invite suggestions about similar alterations from the public. These alterations should be considered by a Commission of experts (not necessarily drawn from members of Parliament) to be appointed for the special purpose and the Commission should be empowered to call evidence. In this connection we would suggest that at least one of the members of the Commission should be some one who has had practical experience of interpreting the Bill of Rights in the United States constitution. We specify the U. S. A. constitution, because it is the Bill of Rights in that constitution which is an example to the world in the constitutional limitations that should be imposed upon the executive and legislative branches of government in order that basic human rights be preserved against any undue encroachment. A Judge of the United States Supreme Court or any of the distinguished staff counsel of the American Civil Liberties Union which, as an organization, has no politics and which is free from any party affiliation might be invited to serve on the Commission with the greatest profit. They will render help which, by virtue of the special experience they have obtained in defining the precise scope of terms which have to be used, will be more valuable than that which almost anyone in India can give. Indians, we are sure, are not such narrow-minded nationalists as to look upon any help that can be derived from outside as anything like interference in domestic affairs. Civil liberty organizations in this country should be given the fullest opportunity of putting

forward their views before the Commission. We would ourselves like to include among the proposed amendments one to delete art. 22 which permits of detention without trial in situations which do not amount to an emergency within the meaning of art. 352 (1).

#### SUSPENSION OF HABEAS CORPUS

Mr. C. Rajagopalachari, the Government of India's Home Minister, is not one of those who have an abiding faith in the doctrine laid down by eminent political scientists, that "liberty represents a prime value of life which must be preserved at all costs." On the contrary, his thesis is, as he enunciated it in his speech on the Detention Bill, that whenever subversive elements in society produce or are likely to produce disturbed conditions, the State is justified in arresting people without warrant and detaining them in custody without trial. That is his confession of faith. But it is not merely that he believes in and acts on this principle. What is worse is that in his belief every country in the world, however democratic it may be, acts on the same principle. He said in Parliament:

The liberty of the individual is always conditioned by the security and the interests of the State. So it is that when the security of the State is affected or when public order is endangered, *it is now an established principle of government everywhere that we should tackle crime even in the stage of plots and plans.* [Emphasis supplied.]

We cannot of course prevent Mr. Rajagopalachari from throwing behind bars all persons who he suspects (or some 400 district magistrates in the country suspect) might indulge in acts which possibly imperil the State, but we can do something when he proceeds to make a statement that this principle of "guilt by anticipation" is followed in all other countries also. We can put him wise on this subject by informing him that that is just the principle which is never followed in democratic countries like the United Kingdom or the United States of America. Only the other day in a broadcast talk Justice Denning of the Court of Appeal in England remarked that under English law no man could be imprisoned except by the judgment of the King's Courts. Laying this down as a normal rule to be undeviatingly followed in peace-time, he referred to Regulation 18 B which was adopted during the last war as an exception to this rule. He said:

In time of peace, of course, a man can be sent to prison only for crimes which he has committed in the past. He cannot be detained by the executive simply because they think he may commit crimes. But in time of war this rule has to be abrogated. (Under Regulation 18 B) power to imprison a man without trial, not for what he had already done but for what he might hereafter do was entrusted by Parliament to the executive. This was a war-time measure.

He then contrasted this procedure with that which is followed in Soviet Russia and which is embodied in art. 7 of its Criminal Code. He said:

The safety of the community demands that a suspect shall be detained before he commits sabotage. That is the principle on which the Soviet jurists justify their procedure. The exception which we introduced in war-time has become in Russia a peace-time principle.

Mr. Rajagopalachari will thus see that the principle he enunciates is rejected by democratic countries and is followed only in totalitarian countries. It is in the latter countries alone that his principle is followed, the principle, viz., that, in the words of Justice Denning, "the freedom of the individual must always give way to the interests of the State." And Justice Denning went on to say:

It would be quite easy here, would it not, to find reasons for interning all Communists and fellow-travellers. It could be said with force that they are such an insidious danger to our way of life that we cannot risk leaving them at large. We have not, however, deprived them of their liberty but only of access to military secrets.

This is also true of the U. S. A., about which Mr. Rajagopalachari seems to be particularly misinformed. His observations about the Communist leaders' trial in the United States tend to show that he is not at all conversant with either the law or the practice in regard to detention in that country. It may perhaps be useful therefore for him and for others if we set out here in some detail what the U. S. constitutional law is in this respect and, even more than that, what that country's actual practice is.

The U. S. constitution provides that the writ of habeas corpus shall not be suspended except "in cases of rebellion or invasion" and except when in such conditions "the public safety may require it." The power of suspending the writ belongs to Congress and to Congress alone; the President does not share it with Congress. Abraham Lincoln in the Civil War assumed this power on the advice of his Attorney General, but this assumption is recognised as unconstitutional. Chief Justice Taney protested against it in the case of *ex-parte Merryman* (1861). He wrote: "I can see no ground whatever for supposing that the President, in any emergency or in any state of things, can authorize the suspension of habeas corpus or arrest a citizen except in aid of the judicial power." And "commentators now agree that the power to suspend or authorize suspension lies entirely in Congress" (W. W. Willoughby). But even more important than the location of the power are the safeguards attaching to its use. "In order to meet the constitutional requirement . . . actual and not simply constructive necessity by a declaration of the legislature is necessary; and the courts

will be the judge" (Willoughby and Rogers). The prohibition of suspension except in the above mentioned conditions is directed in the constitution only to the Federal Government, the States being free from this prohibition unless their own constitutions impose it. "But in case they do so (i. e., suspend the writ) without sufficient excuse, the person detained may, of course, obtain the writ from a Federal court under the claim that he is deprived of liberty without due process of law or in derogation of some other Federal right, privilege or immunity" (Willoughby). Thus the privilege of the writ of habeas corpus is enforceable no less against the States' Governments than against the Federal Government.

But, it may be asked, Are these provisions, which appear to be absolutely watertight, put into force with the rigidity which the constitution contemplates, or is suspension resorted to in actual practice on the slightest pretext that abnormal conditions have arisen which justify it? We shall see. On the outbreak of the Civil War on April 12, 1861, Lincoln by Presidential order clamped suspension of habeas corpus on areas in which armed rebellion was in being, and revoked this suspension by an order of February 14, 1862, when the insurrection had not yet been fully controlled. During those ten months about 25,000 arrests were made, and "there were doubtless unwarranted abuses of this power by subordinate officials." It has, however, to be remembered that this War of 1861-1865 was "certainly one of the most bitter and bloody civil struggles in all recorded history," and "it is certain that no government in mortal struggle ever dealt less severely with traitors, or went so far as to proclaim a general and almost unconditional release of political prisoners in the very middle of the conflict, . . . The moderation which Lincoln exhibited in the use of this power (of imprisonment) and his clemency towards Northern advocates of rebellion are a matter of historical record" (C. L. Rossiter).

World War I came fifty years after the Civil War, and during the interval there was no occasion in the United States to have recourse to suspension of habeas corpus. Nor was there such occasion during the pendency of the World War, as there was in England, doubtless because the United States was far removed from the actual operations of the war. The same was the case in World War II and in inter-war years, except that during this second World War the military authorities, to whom the Governor turned over the administration, suspended the writ of habeas corpus in Hawaii immediately after Pearl Harbour, and this suspension continued even after the initial Japanese threat had passed. "On application by interned persons Federal Judge Mertzger issued writs and ordered their release. The commanding general ignored the writs and was adjudicated in contempt. The impasse was solved by the removal of the internees to the mainland and their release there, by the withdrawal of the ban on the issuance of writs of habeas corpus and by the Presi-

dent's pardoning the general on the contempt conviction" (O. K. Fraenkel). Thus for the last 90 years since the Civil War the United States has not suffered from suspension of habeas corpus except in one little corner, and the country as a whole suffered from it only during a part of the time when a terrible war was waging there. Detention without trial was not resorted to at any time in the course of its history in order to cope with what Mr. Rajagopalachari would call forces of internal disruption.

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British law and practice are of course more widely known in this country. There are in the United Kingdom no constitutional limitations on deprivation of personal liberty as on deprivation of any other civil right. Parliament is supreme in everything. But, in spite of this absence of any constitutional guarantee, freedom of person is as closely protected there as in U. S. A. Because of its nearness to actual fighting, Great Britain had to suspend habeas corpus in the two World Wars in order to protect itself from the activities of fifth-column saboteurs. In the first war power to detain persons of "hostile origin or associations" was taken under Regulation 14 B, but the power could not be exercised except on the recommendation of a competent naval or military authority. After detention persons against whom action was taken were entitled to appear before an Advisory Committee which was master of its own procedure. There was never any question about any information being withheld from the Committee or any facilities required for getting at the truth being denied to the detainees. In the second war Regulation 18 B permitted detention without trial of persons who were (i) of hostile origin or associations, (ii) had recently been concerned in acts prejudicial to the public safety, (iii) were members of organizations subject to foreign influence or control, or (iv) had done things expressing sympathy with the enemy in any area specified by the Home Secretary. If a larger number of categories of persons were subject to detention on this occasion, that was because of the greater danger than of the Fifth Column. "The country was full of aliens and refugees whose bona fides could not possibly be checked in every case; and, in the years of political unrest and decline, there had been bred organizations which openly advocated the doctrines and the methods of totalitarianism, whether of the Right or the Left, and which had, to say the least, many affinities with foreign Powers." Thus writes C. K. Allen, probably the sharpest critic of British policy in this regard. A round table discussion of the situation and of the measures to be adopted was held, at which Regulation 18 B was evolved. The procedure of the Advisory Committee was elaborated still further than under 14 B and it was insured that the investigation of the detainees would be complete so as to minimise the risk of injustice being done. At one time the number of detainees was as much as 1428, "surely a trifling number

considering the state of England's defences at the time," according to an American critic. The Advisory Committee's recommendation for release was generally accepted, though the Home Secretary reserved to himself the power of setting it aside where necessary. "In over a hundred cases, representing about 5 per cent. of the total number of cases heard by the Committee, the Home Secretary has not adopted the Committee's recommendation of release; in fourteen cases he has suspended the order though the Committee has advised its continuance" (C. K. Allen). Whether the power of detention was employed more widely than it was necessary or otherwise, the fact at least stands out that the power was used only at a time of great national peril arising from a foreign war and not to curb internal subversion.

In order to round off this discussion it is necessary to state that martial law can be proclaimed both in Great Britain and the United States under common law, and such proclamation involves the possibility of not only the writ of habeas corpus but all other civil rights being suspended. But this is an event of very rare occurrence. Although Coercion Acts were applied in Ireland and other countries subject to British control, it has not been applied within the boundaries of England for generations. Martial law has not been instituted in England itself for over 150 years. "The last instances of martial law in England, none of them particularly serious, were in 1715, 1740 and 1780" (C. L. Rossiter). The same is the case in U. S. A. "Martial law is for the Federal Government a phenomenon only attending actual war, civil or foreign" and in any case, as in England, it is "a matter of necessity and fact to be ultimately determined by the regular courts" (ibid.).

#### "TRUST THE EXECUTIVE!"

In rejecting out of hand the amendment moved by Pandit Kunzru and even by a member of the Congress party, Mr. Sarvate, to the effect that the Advisory Board to be constituted to investigate detention cases be given the power, like the Advisory Committee under Regulation 18 B in England, to decide its own procedure, so that the Board can procure all relevant information and go thoroughly into it, the Home Minister's one argument was that in a matter involving exercise of "subjective" discretion like this Parliament must trust the executive; that the integrity and self-restraint of those who hold authority could be the only safeguard against unjust and arbitrary use of such authority. Mr. Rajagopalachari went so far as to say that so long as the reins of power were held by men like Pandit Nehru as Prime Minister and by himself as Home Minister, the country had really no cause to worry and that their presence in the Government would itself be a guarantee against the possibility of any injustice being done.

That Messrs. Nehru and Rajagopalachari and several other members of the Cabinet are persons of unquestionable reputation will be wholeheartedly agreed to by everyone.

that their good intentions are above suspicion no one can possibly deny. And if this factor alone were to decide the issue, nothing need be said about it. However, laws are not made and ought not be made on this basis anywhere. Power must be accompanied by proper restraints, and to propose such restraints is not to cast any reflection on those who ask for laws conferring extraordinary power. Restraints are proposed because even men of the highest character and of the noblest of impulses have to be under a restraint because power cannot be otherwise insured against abuse. That is the first principle of all law-making. It was surprising that Mr. Rajagopalachari ignored it.

What is said above should be self-evident. But we would still like to fortify ourselves by a telling quotation from "Law and Orders" by C. K. Allen. This well-known author says at p. 194 under the caption which we have given to this editorial :

Nobody on earth can be trusted with power without restraint. It is "of an encroaching nature," and its encroachments, more often than not, are for the sake of what are sincerely believed to be good, and indeed necessary, objects. Few despots, unless egoism has already demented them, begin their careers with a motive of oppression merely for its own sake. Throughout history the most terrible form of tyranny has been forcing on one's fellow-creatures what one believes to be good for them. The imposition of restraint on power therefore does not necessarily imply a deep suspicion of malevolent intentions. However implicitly a merchant may trust his cashier, he does not "risk the chance of abuse" by dispensing with the auditor. Human nature, at its best as well as its worst, has to be protected against itself, and where power is concerned the very existence of the possibility of restraint is a safeguard against that gradual degeneration—so easy, so insidious, often so imperceptible—by which the end justifies the means and the good in intent becomes the evil in effect. That, at all events, is the whole core of the theory of the balance of powers in our constitution.

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## COMMENTS

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### Protest Against Detention

In response to requests made to it, the headquarters of the All-India Civil Liberties Council is recommending the following standard form of resolution of protest against the Preventive Detention Act for adoption by conferences proposed to be held by civil liberty organizations affiliated with the Council :

The amended Preventive Detention Act is, in so far as form goes, an improvement on the old Act inasmuch as all detenus, whatever may be the duration of their detention or to whatever category they may belong, will now have their cases reviewed by an

Advisory Board, while under the Act of 1950 an infinitesimally small number of detenus, if indeed any, could go before an Advisory Board.

But this extension of the Advisory Board's jurisdiction and even the mandatory character of its verdict are rendered almost wholly nugatory by reason of the fact that the Advisory Board has not the power to decide its own procedure after the manner of the Advisory Committee under Defence Regulation 18 B in England but suffers from several serious handicaps which would make it impossible for it to give a searching examination to the detention cases that may be placed before it and thus to get at the truth. The amendment moved in Parliament by even a Congress member to approximate the procedure of the Advisory Board to that of the Advisory Committee was unceremoniously turned down by the Home Minister, with the result that the new Act will in reality constitute no improvement on the old Act.

A similar amendment designed to restrict the application of the Act to cases where a threat to the security of the State was apprehended and to limit the power of detention to the Home Ministers of the States instead of giving it to all district magistrates was rejected by the Home Minister of the Government of India, which shows the dangerous possibilities of abuse to which the extraordinarily wide powers conferred by the Act are liable.

There was large scope for amending the Act in such a way as to preserve the power of detention to the executive and yet to minimise the risk inherent in such a measure to the liberty of the citizen, but the Act as passed did not even make an attempt to utilise this scope. However, even if it had fully done so, the objection would still remain that detention without trial is permitted in circumstances which admittedly do not constitute an emergency either of invasion or rebellion, in which event alone arbitrary deprivation of personal freedom is everywhere thought to be justifiable.

This Conference therefore enters its most emphatic protest against the provisions of an Act which, apart from its being basically inapplicable in present conditions, omits to surround the power of preventive detention even in peace-time with safeguards which were available in England in war-time.

### Detentions—in Pakistan: Nehru's Grief!

Recently Mr. Nehru referred in a public speech to the continued detention without trial of Khan Abdul Gaffar Khan, known as Frontier Gandhi, and his brother, Dr. Khan, by the Government of Pakistan. It was a very touching reference as was natural, because the Khan brothers belonged to the Congress party and played an important part in the political movement before partition. They are supposed by the Pakistan Government to be in

league with the Indian Congress and perhaps to be engaged in plotting against the regime established in Pakistan. Mr. Nehru believes that these suspicions are entirely unfounded and that the only fault of the distinguished detained brothers is that, while completely loyal to Pakistan, they demand a certain amount of autonomy for the Pathans.

Mr. Nehru must be right in this, but where a system prevails of imprisoning persons on mere suspicion and not for proved guilt, what chance is there for him to show that the incarceration of the Khan brothers lacks justification? In fact, they fully satisfy the conditions which our Home Minister says lend justification to detention in any country: Crimes are not committed yet, but danger exists of crimes being committed. Mr. Nehru grieves that the Khan brothers have been rotting in gaol and that he can do nothing effective in securing their release from preventive detention, as they happen to be under a foreign government. But surely he can do something about preventive detention in India itself, over whose destiny he himself presides. It may be that the thousands of men who are languishing in Indian gaols have not anything like the stature of Khan brothers, but in the matter of justice stature should make no difference. Indeed, the very eminence of the Khan brothers and their immense popularity in India would work against them as giving a sharp edge to the suspicions which the Pakistan Government entertains about them. If such injustice as Mr. Nehru believes is being done to the Khan brothers is to be removed, it can only be done by doing away with preventive detention altogether, a weapon which is being freely used in India under Mr. Nehru's nose and presumably with his sanction. There is hardly any hope of the Pakistani Government releasing its nationals while the Indian Government is administering quite a large dose of preventive detention treatment to its own nationals.

It may be mentioned that, while winding up the debate on the budget, the Premier of the N. W. Frontier Province, promised to release in the near future, in view of the general elections to be held in November this year, most of the workers belonging to the Frontier Gandhi's Red Shirt Party who are undergoing detention. Such detenus number 89 at present; they were as many as 356 in 1948 when Khan Abdul Gaffar Khan was arrested on grounds of national security and his party outlawed. It may be that the Khan brothers will also be released along with their followers. In any case, the Frontier Premier must be congratulated upon deciding to free the Red Shirts from detention in order that they may have a fair chance in the ensuing elections. This is certainly more than the Prime Minister of India is willing to do, for he declared recently that if in any State which has outlawed the Communist Party (in spite of the fact, it must be added, that the High Courts of two States have declared the outlawing Act unconstitutional) the Communists are unable to take part in the impending general

elections, he cannot help it, and that he will not withdraw any existing restrictive orders in order that the persons suffering from them may be enabled to participate in the elections. Thus a Pakistani Premier appears to show a greater awareness of the necessity of preserving civil liberties than the Indian Prime Minister, who in the British regime founded the Civil Liberties Union, shows.

#### Telangana Red Cases

A full bench of the Supreme Court by a unanimous decision dismissed on 16th March the petitions of 12 Telangana peasants described as Communists praying that the sentences of death passed on them be quashed. The petitions were rejected on the ground of jurisdiction. The prisoners were originally convicted of murder by a special tribunal set up under the military regime following police action in Hyderabad State in 1948, and their conviction and sentences were confirmed by the Hyderabad High Court. The Supreme Court ruled that the High Court's decision had acquired finality so that it could not either sit in judgment over the decision or reinvestigate the cases because of any flaws in the procedure adopted by the trial court or court of appeal. The main substantial weakness in connection with these cases is that because the Judicial Committee whose intervention as court of last resort the prisoners had sought ceased to function at the time the constitution of India came into force in Hyderabad State while their application for special leave for appeal to the Judicial Committee was still pending in the Hyderabad High Court, and the Supreme Court now disclaims any power to take the cases into consideration as the Judicial Committee would have done. The result therefore is that the prisoners by the sheerest accident have come to be denied access to the highest court of appeal to which they were entitled. The only way to obviate this injustice now seems to be that the Nizam should grant the prayer for mercy which the prisoners have made to His Exalted Highness.

#### Public Safety Act of Bihar

A bill to amend the Maintenance of Public Order Act, 1950, was passed by the Bihar Legislative Assembly on 22nd February. The declared purpose of the amendments now introduced is to ensure that the restrictions which the Act permits the executive to impose on the movements and actions of persons in the interest of maintaining the public safety or public order, or on the holding of meetings or the taking out of processions, etc., will be "reasonable," as contemplated by art. 19 (5) of the constitution, so that the sections in the Act dealing with them may not be declared void by the courts. It appears from the scanty reports of the debates which have so far been available to us that the Bihar Government intends to provide, in respect of restrictions on movements (even if these restrictions are not of the nature of detention in custody) the safeguard of an Advisory Board like the safeguard that is provided under the Preventive

Detention Act in respect of detention. It is said that "an Advisory Board consisting of High Court Judges or persons qualified to be High Court Judges will examine the grounds of the (restrictive) order and the order shall cease to be in force after a certain period unless the Advisory Board is of opinion that there is sufficient cause for this order." It has also been stated that "the Government will be bound to produce all papers for the Board to judge."

It must be stated that if, as in Uttar Pradesh, Bihar is not to discard its special legislation altogether, the safeguard of the Advisory Board, now provided, will effect a change in the desired direction, and the change will be considerable if the Advisory Board is vested with power that is necessary to enable it to go into all the facts. A section in the Bihar Public Safety Act, as in every other Act, provides for the requisitioning of property. An amendment now introduced in the section sets up a machinery, we are told, for awarding fair compensation for property requisitioned. The present Act contains sections empowering the Government to impose censorship on newspapers or control circulation of documents printed outside the State "for the purpose of securing the public safety or the maintenance of public order." This is in contravention of art. 19 (2) as interpreted by the Supreme Court, and in order to bring the sections into conformity with this article, the amended Act provides that the power conferred by the sections can only be exercised "in the interest of the security of the State."

#### Firing "Unjustified"

The report of Mr. Justice P. V. Dixit who was appointed by the Madhya Bharat Government to inquire into the incidents culminating in the firing that took place at Gwalior on 9th August last year has been published. The finding of Mr. Dixit is that the firing was unjustified.

In considering the question of justifiability Mr. Justice Dixit has relied on the observations of Lord Justice Bowen in his report on the disturbances at Featherstone in 1893 to the effect that firing to be lawful must be necessary to stop or prevent serious and violent crimes such as arson, murder and grievous hurt. In this particular case Mr. Dixit has not found any evidence to show that such crimes were committed or intended to be committed. The apprehension of the police officers that if firing was not resorted to they would be overpowered springs, in Mr. Dixit's view, from a "fear psychosis." Their opinion, though entitled to full credit, cannot be regarded as final and conclusive. It is true that the police party involved was small in number and was mostly armed with rifles but in the view of the enquiring authority they should have endeavoured to call in the assistance of the force present in other parts of the Secretariat and

attempted to disperse the rioters by a lathi charge in the first instance.

Again, it may be that the crowd was stoning the police party from within a distance of about forty yards, a distance very much less than that ordinarily considered safe to obviate the risk of an armed party being rushed by a riotous mob, but distance alone, it has been held, does not determine the intentions of the crowd. The necessity and reasonableness of force and the requirements of the situation must be proved by evidence. Judged by the test of the necessity of the occasion, the police action has been held to be in excess of the requirements of the situation and consequently unjustified.

That a judicial inquiry was ordered in this case was in itself a great event; and it shows at any rate that firing is apt sometimes to be excessive. This should convince Authority everywhere, at a time when firing is being more and more frequently resorted to, that such inquiries ought to be permitted so that police officials would be under proper check. It is very creditable to the Madhya Bharat Government that they have accepted the findings of the inquiry with good grace and are proceeding to make an inquiry about the conduct of each individual officer concerned in the incident with a view to taking suitable action in each case. "But as against this," as the "Times of India" remarks, "how many cases are there of firing in similar or more distressing circumstances under Congress Governments where even the demand for a judicial inquiry has not been accepted!"

#### Australia's Anti-Red Act Invalid

On 9th March the High Court of Australia by a 6 to 1 majority declared invalid the Communist Party Dissolution Act passed by the Commonwealth Parliament on 20th October last, holding that the Act was an illegal exercise of the Commonwealth's "defence" powers. Justice Sir Edward McTiernan observed:

In a period of a grave emergency the opinion of Parliament that any persons or body of persons were a danger to the safety of the Commonwealth would be sufficient to bring their civil liberties under control but in time of peace, when there was no immediate or present danger of war, the position was different, because the constitution had not specifically empowered the Government to make laws for general control of civil liberties, and it could not be regarded as incidental to the purpose of defence to impose such control in peace-time. To decide that the Act was good under the defence power would radically disturb the grant of legislative powers made to Parliament by the constitution. The Court could not allow the opinion of Parliament to be a decisive factor without deserting its duty under the constitution. The mere aims of the Communists, apart from their actions,

were not sufficiently substantial to give Commonwealth Parliament a foothold on which to enact laws depriving them of civil liberties which in peace-time were immune from Commonwealth control.

Justice Sir Owen Dixon, who recently acted as a mediator in the Kashmir trouble, said :

That matters of which the Governor-General had to be satisfied under the Act were described most indefinitely, and in authorizing the executive Government to say whether the continued existence of a body or the activities of persons were prejudicial to the security and defence of the Commonwealth the Act provided a most uncertain criterion, depending on matters of degree. However carefully power might be used, there was a very great likelihood of matters being considered prejudicial to security and defence which could not possibly be made the subject of legislation. He could not see any reason for sustaining the grant of power to the executive to make declarations which the Act purported to authorize, and to dissolve bodies as unlawful associations, forfeit their property, restrict the actions of their officers and others, and disqualify individuals from certain offices and employment.

Mr. Justice Webb said :

Mere suspects could not lawfully have their property confiscated. The preamble did not establish a real connexion with the constitutional power; the burden of proof could not be shifted by putting evidence and argument in the preamble instead of submitting them to the Courts.

The dissenting Judge was Chief Justice Sir John Latham, who said :

He believed that the Government was entitled under the defence power to make preparations against the risk of war and to prepare the community for war by suppressing bodies believed to exist for the purpose of prejudicing the defence of the community and imperilling its safety.

Very likely the Government would now dissolve Parliament, the dissolution being followed by a general election and then by a referendum of the electors. The referendum would seek constitutional authority to pass legislation for suppressing communists, whether of the straightforward or fellow-travelling variety, and, along with it, other legislation dealing with industrial unrest that is not based on defence power. But this cannot be done speedily, as an election cannot be held until two months after Parliament has passed a bill embodying constitutional amendments. [ It has since been announced that the Government dissolved both houses of Parliament, the first "double dissolution" since World War I, and has ordered general elections on 28th April. ]

### " Liberation of Man and Nation "

Several hundred exiles from ten East European countries under Soviet domination met on 11th February in Independence Hall in Philadelphia, at the very site where 175 years ago the United States Declaration of Independence was signed, to issue a declaration of their own independence. This declaration calls for the formation of a European federation modelled after the United States. In proclaiming the aims and principles of liberation, the declaration stresses the need for securing " the liberation of man as well as nations " and proceeds to say :

The liberation of man must restore his natural rights—fundamental, inalienable, not to be proscribed in their very finality against the abuses of power and the interference of public authority.

This liberation, consecrated by legal guarantees of a national and international order, must deliver man from the fear that has permeated his being and give back his indispensable sense of physical and spiritual security; the freedom thus assured must be the essential in the formation of states and of those ties which are destined to draw more and more closely together the commonwealth of man.

The peoples of Central and Eastern Europe are firmly resolved, upon their liberation, to join the community of free nations and to establish government of the people, by the people and for the people. The right of habeas corpus, as well as freedom of religion, freedom of research and artistic creation, freedom of opinion and of information, freedom of assembly, among other essential freedoms and fundamental political and social rights, shall be assured.

### Guilt by Anticipation

According to the concept of " Guilt by Anticipation," preparation for the commission of a crime is made equally punishable with the crime itself. This is one of the principles on which Soviet Russia's criminal code is based, and the Yugoslavs adopted this feature of Soviet justice in their own code after World War II. But Yugoslavia is amending its code in order to give certain rights to its citizens so that they may be enabled to defend themselves against arbitrary action by the State. The principle of guilt by anticipation will no longer be applicable except to activities calculated to overthrow the State. The new code provides that no citizen can be punished for any offence unless that offence is defined specifically as a crime by it. It also does away with what corresponds to the pre-French Revolution practice of *lettre de cachet* under which the pre-trial detention of a prisoner could be indefinitely prolonged by the prosecutor beyond the constitutional limit of three months. The new code particularly protects the citizen against unlawful entry into his home and unlawful search without warrant



and purports generally to protect citizens against Government officials who would seek to deprive them of their freedom unlawfully.

## ABOLITION OF ZAMINDARI SYSTEM

### Bihar Act Held Unconstitutional

A special bench of the Patna High Court, consisting of Mr. Justice Shearer, Mr. Justice Ruben and Mr. Justice Das, on 12th March allowed a suit of the Maharajadhiraj of Darbhanga and a large number of petitions by other zamindars challenging the validity of the Bihar Land Reforms Act which the Bihar legislature enacted last year. Under this legislation the State Government has assumed powers to abolish zamindars' estates on payment of varying rates of compensation to outgoing zamindars.

Their Lordships, in separate but concurrent judgments, have held that the Act is unconstitutional and ultra vires under article 14 of the constitution which guarantees the right of equality to every citizen. Article 14 lays down that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Mr. Justice Shearer said:

The constitution of India, recognises the inviolability of private property except in so far as the property of an individual may be acquired for the purpose of the Union or the State or for some other public purpose, in which case compensation must be paid, in order that the individual expropriated may not be compelled to contribute to expenditure incurred by the State more than any other citizen does. Otherwise, private property is sacrosanct. The impugned Act confers on the executive the power to take over estates and tenures as and when it chooses.

The Bihar Zamindari Abolition Act, 1948, which the impugned Act repealed, contained a provision that when any estate or tenure belonging to a particular category was taken over, all other estates and tenures belonging to that category should be taken over also. I can well understand that such a provision may have led to administrative difficulties. Nevertheless, the provision in the impugned Act, which confers the wide power it does on the executive, is clearly discriminatory in character.

The impugned Act, moreover, discriminates between individuals falling in the class which it affects. In fact, it divides the class into a larger number of sub-classes and to these sub-classes differential treatment is meted out. It is quite impossible to say that the sub-division is based on any rational grounds. On what principle, for instance, ought a proprietor or tenure-holder, whose net income is Rs. 20,000, to be given eight years' purchase while a proprietor or

tenure-holder whose net income is Rs. 200,001 is given only six years' purchase? At the other end of the scales are the great zamindars who are to be allowed three years' purchase.

The conclusion to my mind is irresistible that the intention is to take over the great estates in the State paying no compensation or most inadequate compensation and, out of the considerable profits which are likely to be derived from them, to take over, in course of time, the remaining estates and tenures. In other words, a comparatively small minority belonging to this particular class are to be expropriated without compensation or with the most inadequate compensation in order that when the great majority are expropriated, they may receive compensation which will not be inadequate and may, quite possibly, in many cases, be more than adequate. The learned Attorney-General was unable to deny that this amounted to discrimination of a very flagrant kind.

His Lordship held that clause 4 of article 31 of the constitution did not debar the Court from entering into the question of compensation in order to decide whether or not the impugned Act offended against article 14.

Clause 4 of article 31 reads: "If any Bill pending at the commencement of this constitution in the legislature of a State has, after it has been passed by such legislature, been reserved for consideration of the President and has received his assent, then notwithstanding anything in this constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause 2" (which deals with compulsory acquisition of property).

Thus art. 31 (4) has not proved effective, as was its purpose, in saving zamindari abolition legislation which was pending before the legislatures at the time of passing the constitution. The Prime Minister of India has already declared that (if the constitutionality of such legislation is not upheld by the Supreme Court) an amendment of the constitution would be sought which would place the validity of the affected legislation beyond doubt. It may be noted that art. 14, which has led the Patna High Court to invalidate Bihar's zamindari Act, was also the article which led the Bombay High Court to invalidate important sections of Bombay's Prohibition Act.

## PRESS ACT

### Forfeiture of a Book Cancelled

Copies of a booklet "Bapu ke Saputon ka Raj" (which means the regime of the good sons of the Mahatma) were forfeited to His Majesty by an order of the Bihar Government in July 1949. The booklet is a kind of satire written in the form of a drama. "Read as a whole, it advocates the path of truth and selfless service chalked out by the great leader Mahatma Gandhi. It

also depicts at places subsequent deviation from that path by some of his distinguished followers." The Bihar Government thought that it offended against sec. 4 (1) (d) of the Press Act, 1931, the motive of the writer being to bring the Government into contempt, and took action against which a petition was filed in the Bihar High Court by Mr. Chandra Deo Sharma. A special bench of the Court consisting of Sinha, Sarjoo Prasad and Rai JJ. allowed the petition (16th February) and ordered the forfeiture order to be set aside. The main part of the judgment was as follows :

The hatred or contempt preached must be of such a nature as to excite feelings tending towards overthrow of the existing system of government. In the present booklet no hatred or contempt has been preached against the Government itself. The booklet read as a whole leaves only one and one impression, namely, the lapses of the followers of Mahatma Gandhi since they actually came into power. It depicts how they have neglected the great ideal of selfless service and how they have indulged in self-seeking and self-profiteering. I do not consider that the book read as a whole or any portion of it brings it within the mischief of section 4 (1) (d) of the Indian Press (Emergency Powers) Act.

The order in question which was passed in July 1949, if valid in accordance with the law then in existence, can now be questioned because of some higher right having been granted by the constitution which came into force on the 26th January 1950. In my opinion the booklet in question does not contain any words, signs or visible representations of the nature described in section 4 (1) of the Indian Press (Emergency Powers) Act, 1931. Hence the order of forfeiture referred to in the notification of the 14th July 1949 as quoted above must be set aside.

## HABEAS CORPUS PETITIONS

### Additional Grounds

Of the many points which were raised on behalf of two Punjab detenus, Mr. Ujagar Singh and Mr. Jagjit Singh Anand, in support of their habeas corpus applications before the Supreme Court, one was absence of the period of detention in the detention orders passed against them. On this point the Supreme Court on 22nd February rejected the contention that non-specification of the duration of detention rendered the detention order invalid. Mr. Justice Chandrasekhara Aiyar, delivering the judgment of the Court, observed :

Section 12 of the Preventive Detention Act did not require that the period of detention should be specified in the order itself where the detention was with a view to preventing any person from acting in any manner prejudicial to the maintenance of public order.

The section itself provided that he could be detained without obtaining the opinion of the Advisory Board for a period longer than three months but not exceeding one year from the date of detention. In view of the specific provisions in the constitution and in the Preventive Detention Act, non-specification of any definite period in the detention order was not a material omission rendering the order itself invalid. Another point urged on behalf of the petitioners was "the extreme vagueness of the grounds" originally supplied and inadmissibility of the supplementary grounds. On this point the Court ruled as follows :

There could be little doubt that in both cases the grounds furnished in the first instance were highly vague. Overlooking the facts that the grounds mentioned now were the same as those given earlier and condoning the vagueness in the original ground furnished in both cases to support the making of the order, it was impossible to justify the delay of nearly four months in the furnishing of what had been called additional or supplementary grounds. In the first petition there were several grounds which did not apparently relate to the original grounds. They were new grounds and had to be eliminated from consideration. In the second petition there were ten supplementary grounds and were served upon the detenu two days before he had prepared his petition to the Supreme Court. The time factor to enable him to make a representation at the earliest opportunity was not borne in mind or adhered to. This delay was very unfortunate indeed.

It had been held in *Atmaram Shridhar Vaidya's* case, by a majority of the Judges of this Court,

(a) That mere vagueness of grounds standing by itself and without leading to an inference of *mala fides* or lack of good faith was not a justiciable issue in a court of law for the necessity of making the order, inasmuch as the ground or grounds on which the order of detention was made was a matter for the subjective satisfaction of the Government ;

(b) That there was nothing in the Act to prevent particulars of the grounds being furnished to the detenu within a reasonable time so that he might have the earliest opportunity of making a representation against the detention order—what was reasonable time being dependent on the facts of each case ;

(c) That failure to furnish grounds with the speedy addition of such particulars as would enable the detenu to make a representation at the earliest opportunity against the detention order could be considered, by a court of law as an invasion of a fundamental right or safeguard guaranteed by the constitution ; and

(d) That no new grounds could be supplied to strengthen or fortify the original order of detention.

As the petitioners were given only vague grounds which were not particularised or made specific so as to

afford them the earliest opportunity of making a representation against their detention order and there having been an inexplicable delay in acquainting them with particulars of what was alleged, the petitioners had to be released.

In the case of three other Communist detenus from the Punjab ( Mr. Kartar Singh, Mr. Hazara Singh and Mr. Tehal Singh) the Supreme Court ruled ( 23rd February ) that their habeas corpus petitions fell within the ambit of their judgment on similar petitions of Mr. Ujagar Singh and Mr. Jagjit Singh and ordered their release. It was contended on behalf of the petitioners that the grounds served upon them in the beginning were either vague or unconnected with the maintenance of public order or with the security of the State for which reason they were detained and that the additional grounds which purported to give particulars of their alleged subversive activities could not be looked at by the Court as they were supplied after the lapse of a period of nearly four months. In addition to this delay, the Court found that most of the particulars given in the additional grounds had no bearing on the original grounds supplied and, applying the principles of the decision in the Vaidya case, ruled that these additional grounds could not be considered.

#### Detention for Black Marketing

The Detention Act is now being enforced against those who break control orders in respect of grain and cloth. Mr. Srilal Khowla, one of the proprietors of the firm of Dattulal Pannalal at Deoghar, was arrested and detained for failing to produce his stock register of cloth and concealing some cloth with motor parts. He filed a habeas corpus petition with the Bihar High Court for having the detention order cancelled. Mr. Justice Das and Mr. Justice Narayan dismissed the application ( 13th February ), after holding that the grounds communicated to the applicant were sufficiently precise and definite to enable him to make a representation against the order. For the rest, Their Lordships observed :

It is impossible for us to examine the grounds in the way desired by the learned counsel for the petitioner. We cannot treat these detention cases as though they were cases under trial before us, so that on a consideration of the evidence we shall be entitled to substitute our judgment for that of the State Government. Indeed, it would be wrong on principle to do so. It was for the State Government to examine the materials and come to a judgment on the question. Perhaps, if and when the matter goes to the Advisory Board, that body may examine the materials afresh. I do not think that it is within the scope of our jurisdiction to examine the materials in the way desired on behalf of the petitioner.

#### Three Other Merchants' Detention Upheld

The Allahabad High Court similarly upheld ( 1st March ) the orders for detention passed against the proprietors of three firms in Budaun (Uttar Pradesh) who held a license for importing yarn under the U. P. controlled Cloth and Yarn Dealers License Order, 1948. These importers had to supply yarn to various retailers according to a distribution scheme, but on 22nd December the scheme was suspended, leaving the importers free to sell yarn as they pleased. Within a few days after removal of restrictions on sale, it was found that the merchants had disposed of all their stock, and some of it at a rate higher than the controlled rate when the distribution scheme was in force. Accordingly, on 22nd January the planned scheme of distribution was again put into operation. But not content with this, the district magistrate passed on 27th January orders of detention against all the three merchants under sec. 3 (1) (a) (iii) of the Preventive Detention Act. Habeas corpus petitions on behalf of the merchants were presented to the Allahabad High Court on 2nd February, and on the same day the district magistrate cancelled the licenses of the importing firms.

In the orders for detention the period for which the merchants were to be held in detention was not mentioned by the district magistrate ; it was left to be determined by the U. P. Government in accordance with the provisions contained in secs. 10 and 11 of the Act. This was pointed out by the petitioners' counsel as a defect invalidating the detention order, but this contention was not accepted by Dayal and Bhargava JJ., who heard the petitions. They held that non-mention of the period of detention in the detention order did not render the order void. [ It will be recalled that in the case of M. M. Bashir Harish Chandra and Sankar Saran JJ. gave the same decision on 14th September, 1950, vide p. 166 of the BULLETIN ]. It was stated in the order for detention that " the district magistrate was satisfied that the importers concerned had been lately committing acts of black-marketing by selling yarn at prices higher than the controlled rates and thus grossly prejudicing the maintenance of supplies and yarn essential to the community. " Dealing with this, Their Lordships observed :

It was not possible to say that the district magistrate could not have bona fide come to the conclusion that, even during the distribution of yarn according to the allotment made by the supply officer, it was possible for the applicant to sell yarn at a rate higher than the controlled rate and that it was, therefore, necessary to detain the persons who, according to his opinion, had acted in that manner, i. e., had sold yarn at a rate higher than the rate in the past. In this view of the matter it could not be said that the order passed by the district magistrate was for purposes other than those contemplated by the Detention Act.

But the real question was: if the license held by the importers was cancelled, where was the need for detaining them in custody? Cancellation put it beyond their power to indulge in any black-market practices in future. In this connection the district magistrate had said in the statement of grounds communicated to the detenus that he considered it necessary to detain them in order to prevent them from acting any further in a prejudicial manner. On this point, viz., that it would be impossible for the applicants to have any dealings in yarn after suspension of the license, Their Lordships said:

It was true, but his inability to deal in yarn on account of cancellation of the license subsequent to that detention order did not invalidate the detention order which was valid on the date it was passed. It might be that in view of the cancellation of this license it might not be necessary to continue him in detention any further. But this would be a matter for the consideration of the State Government and not for Their Lordships when considering the validity of the original detention order. They were of opinion that it was not shown that the detention was invalid.

#### Membership of the Communist Party

A division bench of the Pepsu High Court consisting of the Chief Justice, Sardar Teja Singh, and Mr. Justice Gurnam Singh allowed the habeas corpus petitions (23rd February) of two Communist detenus, viz., Mr. Gurbaksh Singh and Mr. Santa Singh, and ordered their release. These detenus had been ordered to be detained for a period of six months. (This is the first time one hears of any person being detained for a specified period.) Their Lordships in their judgment said:

It is now well recognised that since the Communist Party has not so far been declared illegal, if a person belongs to that party it cannot be said that he commits an offence, nor can one be detained merely because of his being a member of that party.

Their Lordships further observed:

That the detenus were believers in the cult of violence could certainly afford a ground for thinking that they would act in a manner prejudicial to public order or safety, but the difficulty was that no facts were quoted in support of this allegation and it must be held that this part of the ground was vague.

In the second ground the allegation was that the detenus attended a meeting of the Communist Party held at Mansa on a certain date and that at the meeting it was decided to collect funds for helping the wife of a person who had been detained by the authorities and some amount was actually collected. On this point Their Lordships said:

For the reasons already mentioned attending a meeting of the Communist Party could not be regarded an illegal act nor could it afford any ground for

the belief that the detenus were likely to commit prejudicial acts. As regards the decision to collect funds for the support of the wife of a person who was in detention, there was nothing illegal or objectionable in that either.

#### Grounds Vague

Messrs. Ramjibhai Rupabhai Choudhari and Gopalrao alias Lalbhai Surve of Vankal in Surat district made habeas corpus petitions against their detention to the Bombay High Court, and on 14th March Rajadhayaksha and Dixit JJ., allowing the petitions, set aside the detention orders. The charge against the detenus was that between May and October of last year they incited agriculturists of Mangrol not to sell grain to Government in connection with the latter's procurement scheme and obstructed and drove away Government officers. The contention of the detenus on the other hand was that they had held responsible positions in the Congress, but because they disagreed with the present Congress policy they resigned their positions, and they were really detained for a collateral purpose, viz., in order to curb opposition of trade union and kisan workers. Their Lordships allowed the petitions on the ground that the details of the charge against the detenus were insufficient. They observed:

There was considerable justification in the contention raised on behalf of the detenus that the grounds furnished to them were vague inasmuch as they did not indicate the time, manner and the places in which the detenus indulged in their activities. In not giving sufficient details of the allegations against the detenus, the detaining authority had not exercised its discretion properly. The detention orders were therefore not valid.

#### Petition Unheard

When a habeas corpus petition for the production of P. Rangachari, a Communist detenu of Hyderabad, came up on 2nd March before the Supreme Court, the Advocate-General of Hyderabad disclosed for the first time that the detenu was dead. He was shot down in October, 1949, while attempting to escape from military custody. His brother who presented the petition stated that on 27th September, 1949, the deputy superintendent of the Hyderabad Central Jail had told him that his brother had been transferred from that jail "probably to Parbhani or Jalna." Thereupon he made repeated inquiries from various officials including the commissioner of police and the director-general of police, but in vain. On the contrary, he alleged, "he was harassed by the police people for his persistence in getting the whereabouts of his brother." The explanation given by the Hyderabad Government is that the detenu had been handed over to the custody of the adjutant of the 1st Mewar Regiment which was in charge of the anti-Communist operations in Warangal district, that he was shot dead when trying to escape from

military custody, and that as the military authorities did not intimate this fact to the police authorities, they were not able to intimate the petitioner about it. The Court dismissed the petition as infructuous.

## A. K. GOPALAN'S CASE

### Court Releases—Government Detains

Mr. A. K. Gopalan, a Communist detenu from Madras, became famous on account of the fact that he was the instrument through which the validity of the Preventive Detention Act (no. IV of 1950), challenged by him, was upheld by the Supreme Court on 19th May 1950. Circumstances that happened since have conspired to keep him in the limelight. He was ordered to be released by the Madras High Court on 22nd February last on the ground that his detention was illegal, and almost immediately thereafter re-arrested under the amended Act!

In his habeas corpus petition filed with the Madras High Court, some new grounds were adduced which were not before the Supreme Court when, after his ill-success in having the 1950 Act invalidated, he challenged the validity of the order of detention with equal ill-success. And the Madras High Court considered the petition on the basis of these new grounds, holding (in answer to the Advocate-General's objection) that "if fresh facts and fresh matter or even a new situation have arisen, it will be open to us as a court of concurrent jurisdiction to exercise powers conferred upon us under art. 226 of the constitution of India and sec. 491, Cr. P. C." One of the new grounds constituting "a new matter or a new situation" and thus justifying the High Court's interference after the supreme Court's decision was that the Madras Government's order of 5th July, 1950, confirming the original detention order of 27th February, 1950, after review under sec. 12 of the Act, did not, like the original order itself, specify the period for which detention was to remain in force.

### NON-SPECIFICATION OF DURATION OF DETENTION

Following the judgment of the Pepsu High Court in *Dr. Teja Singh v. the State* (All-India Reporter for January 1951), which was referred to in the BULLETIN at p. 147, a division bench of the Madras High Court consisting of Satyanarayana Rao and Ch. Raghava Rao JJ. ruled that non-specification of the period of detention in the detention order rendered the order illegal. Mr. Justice Satyanarayana Rao, rejecting the Advocate-General's contention that since the maximum period for which a person could be detained was one year it was unnecessary for the Government to state, even after review of the original order of detention under sec. 12 (2), what the duration of detention was to be, said:

The Act concerns the liberty of the subject and curtails it without observing the ordinary mode of

trial and the object is to prevent a person from acting in a manner prejudicial to the security of the State or the maintenance of public order. It would defeat the very object of preventive detention if the contention so ably advanced by the Advocate-General that, if the legislature had fixed once and for all the maximum period of detention without the necessity of the Government fixing a period in each individual case on a consideration of the materials before it, was accepted. When liberty is sought to be curtailed in a summary manner provided by the Act every step taken must be precise and definite and no room should be left for ambiguity or indefiniteness or vagueness. The fact that there is power to revoke or modify the period of detention would not absolve the Government from the duty of stating in the review order the period of detention. The grounds of detention in each case cannot be uniform. And the reason for detention in all cases cannot be the same and the previous conduct of the person concerned may, in certain circumstances, justify a lesser period of detention. And all these matters must receive due consideration by the Government, when it reviews the order and finally makes up its mind to continue the detention by deciding also the period or the time during which the person should continue in detention. The very fact that the Act fixes a maximum; in our opinion, is sufficient indication that the period must be fixed and should not be left to inference because the maximum is fixed by the statute. There is no object in fixing the maximum if the order is to continue for a definite period under the provisions of the Act. The conclusion we reach, therefore, is that the order is illegal as it did not specify the period of detention and is vague and indefinite.

Mr. Justice Raghava Rao, in his concurring judgment, declared that he had made up his mind in favour of the detenu on the ground that if specification of the period of detention was necessary (as held in the case before the Pepsu High Court) in the original order of detention, it would be more consonant with justice that in the case of the confirmatory order of detention, when one was made and communicated to the detenu, such a specification of the period of detention was equally necessary. He remarked:

I need only add in conclusion that, in answering the question which is by no means an easy one, I have guided myself by the well-settled rule of construction of penal enactments that when the question of their construction was left in a state of doubt by omissions or otherwise, the benefit of doubt must be given to the person charged so as to ensure just the minimum of encroachment on natural rights and liberties which is an inevitable requirement for the advancement of the purposes of the statute in accordance and only in accordance with its clear and unambiguous language.

As this particular point about the omission of the duration of detention in the detention order is likely to arise even under the amended Act, it would be useful to give extracts here from the judgment of Mr. Justice Passey of the Pepsu High Court in the case of Dr. Teja Singh. The Judge said on that occasion :

It is open under the law [sec. 12] to the detaining authority to direct detention for more than three months but for less than a year straightaway in appropriate cases, but to my mind that would be in view of the particular circumstances of the case and not as a general rule. At any rate, it cannot be doubted that the intention of the legislature is that the period of detention should be proportionate to the extent of the apprehension that the activities of the detenu warrant and that it should be as short as necessary or as short as possible, and if this intention is to be given effect to it would follow as a corollary that the period of detention must essentially be prescribed in the detention order itself. . . . The absence of specification of the period would render the order of detention vague as not only would the officer commissioned to detain a particular person (not knowing how long he is to keep him in custody), but the person affected would also not know how long he is to abide by the preventive treatment administered to him.

When a maximum period of punishment is provided for an offence and the order of conviction does not specify the term within that maximum to which the offender has been sentenced, the order of conviction would be liable to be set aside on that score alone. It is conceded by the State counsel that in that case it would not be possible to urge that the maximum penalty should be presumed to have been awarded. The period for which a person is ordered to be detained is the measure of the scope and extent of his activities that are likely to be prejudicial to the safety of the State or the maintenance of public order, and when no period of detention is specified in the detention order it is impossible to know if the detaining authority had weighed the material before him concerning the detenu on which he founded the order of detention, and the inference would be permissible that the detention of the person concerned has been ordered capriciously and haphazardly.

The specification of the period of detention is one of the indispensable essentials that would go to make the order of detention legal and valid in the eye of the law. It is, therefore, imperative for the detaining authority to prescribe the term of detention, and the failure to do so and leaving it to the maximum period permissible under the law if intended would make the order of detention undoubtedly vague.

But the order for release which the High Court passed on 22nd February can hardly be said to have been given effect to in reality. For Mr. Gopalan had barely walked out of the court compound when he was re-arrested by a C. I. D. officer within three minutes after the Court's judgment was delivered, marched to the Police Commissioner's office and served there with a fresh detention order, which had been signed and got ready even before the order for release was made. In fact the C. I. D. officer who arrested him had the detention order in his pocket and had even shown it to Mr. Gopalan though it was actually served some time later by the Police Commissioner. This strange phenomenon was sufficiently explained in the counter-affidavit which was filed in the High Court in connection with Mr. Gopalan's fresh habeas corpus petition against this detention order of 22nd February. It stated that probably the (earlier habeas corpus) petition would be allowed on technical grounds and that the legal advisers had informed the Government to that effect. The Government feared that if Mr. Gopalan was released and no prompt action was taken he would go underground; so it had taken the precaution even in advance of the Court's judgment to keep him in confinement although this might virtually involve nullification of the judicial order for release.

The previous history of Mr. Gopalan's detention, which is quite a long one, is thus summarised in a "Times of India" editorial :

This former Malabar Congressman, who became a Communist after a brief stay with the Socialist Party, was arrested in December 1947 for three allegedly objectionable speeches. Prior to being granted bail by the High Court he was served with an order of detention and some may construe this procedure as a deliberate attempt to forestall the expected High Court order. In November 1948, the Madras High Court ordered Gopalan's release from detention on the ground that as he was in jail when the detention order was served on him, the detaining authority could not have satisfied itself about the legitimacy of the order. Instead of releasing him, Government served him with a second detention order. Gopalan was subsequently convicted for one of his speeches, and the High Court in appeal reduced his sentence from five years to six months. In January 1950, the same judicial authority held that conviction in a case warranted detention and dismissed Gopalan's habeas corpus petition. Last September he approached the Supreme Court and argued that his detention was mala fide as the Act was used simultaneously and collaterally with a criminal prosecution. The Court rejected the petition but one of the judges posed three pointed questions. Could Government, asked Mr. Justice Mahajan, legitimately consider for detention purposes a person's actions during the fight for freedom? Secondly, could a detenu's past speeches be taken into consideration after the commencement of

the constitution which had granted freedom of speech? And could such past speeches be held as honest grounds for detention three years later?

In the grounds of detention it was stated, according to Mr. Gopalan, that in 1936 (1) he acted in a manner prejudicial to the safety of the State. And he pleaded:

At that time he was a Congressman, occupying an important position in the Congress organization, and he was bound over for his activities. Congressmen in charge of the present Government had also indulged in such activities as he did in 1936. This had been shown as a ground for his detention. Could there be, he asked, greater malice than this to show that his present detention was mala fide. While some Congressmen who did the same acts as he did in 1936 were awarded four acres of land, he had been given four years of detention in jail. So long as the present Government existed, he had no hopes of being released. For a thing which he did *16 years ago*, he was now being detained in 1951.

The Court asked him what his present political affiliations were, and for so long a time has he been in custody that he answered: "At present I am only a member of the Cuddalore Central Jail." The Advocate General argued that the Government was satisfied that Mr. Gopalan must still be in custody and that that should finally decide the issue. He cited a judgment of the Supreme Court in which detention practically on the same grounds had been held legal. Mr. Justice Satyanarayana Rao asked:

Has the Supreme Court held that a detenu could be detained for four or five years on the same ground? Here is a man who has been in jail for four years in succession. How can it be concluded that if this man was released, there would be danger to peace and public order?

Mr. Justice Raghava Rao said:

His sole activity was inactivity when he was in gaol for four years.

This was the aspect of the question which decided the High Court in allowing the new habeas corpus petition and ordering the release of the petitioner on 19th March. Mr. Justice Satyanarayana Rao said in his judgment:

The point for consideration in the present proceedings is whether the order of detention made by the Government on February 22 last was a bona fide one and whether the order of release passed by this Court on that date does not affect the legality of the fresh order of detention made on the same day before our judgment was pronounced and whether our judgment does not automatically terminate the fresh order of detention as a whole.

The essence of the matter is that if an order came into existence before the judgment is pronounced it is the duty of the Government to bring it to the notice of the Court. If the Government do not produce it and do not seek to justify the detention on that ground the fault is that of the Government and they must thank themselves for their default. It is not open to the Government thereafter to put forward the fresh order of detention for arrest and to detain the person after the judgment is pronounced. Of course, these observations are confined to antecedent orders of detention passed before an order of discharge made by the Court, but not to orders of detention passed on a later date.

And His Lordship observed that, apart from the question of the mala fide nature of the detention order, the order of Their Lordships on February 22 last directing the release of the petitioner automatically discharged the fresh order of detention passed earlier on that day. Mr. Justice Raghava Rao observed:

It was difficult to resist the conclusion in the circumstances that the intention of the Government in promulgating the order was not so much to devise legitimate means for surmounting the difficulty created by the judgment as to somehow evade its operation. That was in his opinion sufficient proof of the lack of bona fides, vitiating the order.

A further incident arose out of these proceedings. In the course of the arguments on Mr. Gopalan's second habeas corpus petition, Mr. Justice Satyanarayana Rao had said that to sign a fresh order of detention while the validity of the earlier order was being considered by the Court and particularly to suppress the knowledge of this fresh order from the Court amounted to a flouting of the Court's decision. On the basis of this Mr. Gopalan filed an application for taking contempt of court proceedings against the Chief Minister who was responsible for the fresh order of detention and against the officers who had issued and executed the order. But the Court dismissed the application with the remark: "In view of the observations already made in the course of the judgment, we do not propose to take any further action in the matter."

## DISTRICT CIVIL LIBERTY CONFERENCES IN MADRAS STATE

### Tirunelveli District Conference

The first of a series of district civil liberty conferences planned and organized in Madras State by the Organizing Secretary of the All-India Civil Liberties Council was held at Tuticorin on 11th March. The conference was a notable success.

Mr. M. M. Subrahmanyam welcomed the delegates; Professor A. Ranjitham, retired Principal of the American College at Madurai, opened the session; and Mr. A. S. Kuppuswami, retired Government Pleader, presided over it. While the opener of the Conference is a severe critic of the Congress party, the president is among its loyal adherents, which fact alone emphasizes the non-party character of the civil liberty movement. Mr. Kuppuswami in his speech dwelt on some of the important rights incorporated in the constitution and showed how they could be utilised in the context of the social and economic problems which were before the Madras State at present.

### "A COMPLETE DENIAL OF DEMOCRACY"

Among the messages of good wishes received by the organizers of the conference was one from Mr. P. R. Das, President of the All-India Civil Liberties Council. In this message Mr. Das said: "The latest (Preventive Detention) Act constitutes a complete denial of the first principles of democracy."

The resolution which the conference passed protesting against the Preventive Detention Act was largely modelled on that supplied from the headquarters of the All-India Civil Liberties Council and published under "Comments" on an earlier page in this issue. It, however, took care to add specifically two safeguards which such a law must contain, viz.,

**MR. SIVASWAMY'S ARREST**

Mr. K. G. Sivaswamy, Organising Secretary of the All-India Civil Liberties Council (and convener of the Madras State Coordination Committee of Provincial Socialist Parties) was arrested along with a Socialist co-worker on 19th March for holding a meeting at Koilpatti in contravention of the order banning meetings and processions in the town. Both were later released on bail.

Rivalries among the local INTUC and SRV trade unions, in regard to their representative character, had led to some acts of violence at public meetings held in the town about 18 months ago. This is alleged to be the cause for the ban imposed by the Assistant Superintendent of Police under section 30 of the Indian Police Act, 1861, on meetings and processions by other unions also. The order further makes it necessary for those intending to hold meetings and organise processions to apply for a licence to the Assistant Superintendent of Police, Sankarankoil (a place about 25 miles away from Koilpatti) for the purpose, and the Assistant Superintendent is given five days' time to consider the application. The order is to remain in force for one year from 5th March 1951.

The power of detention should be exercisable only by the Home Ministers of the States and the Union; and

The Act should be capable of being applied only in areas in which the President has proclaimed a state of emergency under Part XVIII of the constitution. This last safeguard is very important as showing that detention without trial cannot be resorted to except in grave national emergencies. It is a safeguard which was editorially suggested by the "Times of India." Another resolution asked for the cancellation of all detention orders and other orders restrictive of movement in order that that the general elections to be held before the end of the year would really be "free and fair."

**CRIMINAL PROCEDURE CODE**

A comprehensive resolution on this subject was adopted by the conference. It was as follows:

A revision of the Criminal Procedure Code is necessary to bring it into line with the fundamental rights guaranteed in the constitution. Whichever official deprives a citizen of these rights under colour of any law should get severe punishment.

This conference condemns the indiscriminate use of sec. 151, Cr. P. C., as practically a negation of the civil liberties of citizens and is opposed to the spirit of articles 21 and 22 of the constitution. This conference views with grave concern the fact that the arrests of workers under sec. 151, Cr. P. C., is being used for effecting retrenchment of labour.

This conference condemns the indiscriminate resort to sec. 144, Cr. P. C., for banning public meetings and thus rendering nugatory the rights of freedom of speech and freedom of assembly and involving open and flagrant violations of the basic rights of citizens under article 19 of the constitution.

This conference condemns the police excesses in cases of enforcement of orders under sec. 144, Cr. P. C., in a number of recent instances in the district.

This conference is of opinion that sec. 197, Cr. P. C., requiring the sanction of the Union or the State

Governments for the prosecution of higher grade public servants for illegal excesses purporting to be acts in discharge of their public duties is unjustifiable and discriminatory in character and urges its immediate repeal.

Mr. K. G. Sivaswamy, Organising Secretary of the All-India Civil Liberties Council, while speaking on the above resolution, gave instances of misuse of sec. 144, Cr. P. C., resulting in police excesses and gave an outline of the reforms required in the Code as follows:

A revision of the Criminal Procedure Code is necessary to bring it into line with the fundamental rights guaranteed in the constitution. Whichever official deprives a citizen of these rights under colour of any law should get some punishment (vide secs. 241-242 of Cr. P. C., U. S. A.). Under existing conditions citizen rights such as (1) the right to be free from personal injury inflicted by a public officer, (2) the right not to be kept in illegal custody and in wrongful detention, (3) the right to engage in a lawful activity without interference by a public officer, (4) the right to be free from discriminatory law enforcement by either the active or passive conduct of a public officer, and (5) the right for damages, civil and criminal, in cases against a citizen which have been declared false by a magistrate—these rights should be spelled out definitely in law so that safety and security of person may be strengthened. Thus alone will judicial magistrates be able to take cognisance of violations of law by public officers.

**MR. BALDWIN'S LETTER****Rajaji's Statement Contradicted**

To the Editor

Sir,

The statement made in the Indian Parliament by the Home Minister in discussing the Detention Act, concerning American practices, deserves comment. He is quoted on page 213 of the *INDIAN CIVIL LIBERTIES BULLETIN* of February, 1951, as saying that "the procedure of the U.S.A. in dealing with Communists was much worse than it would be under the law that 'we have or will have.' He thought the Communists themselves would prefer to be under the Indian law than undergo the trials to which they were subjected in the U. S. A."

I would say, as an American and also as an officer of an international organization, that there is no procedure in the United States which denies the Writ of Habeas Corpus. The only detention provision in American law, where persons may be held without trial, applies in war-time under war conditions, namely, to aliens and persons dangerous to national security who may be held.

I am quite certain that the Communists would prefer to be subject to ordinary judicial procedures in any country rather than to be subjected to arbitrary orders by the executive. In that respect they are no different from others.

Sincerely,

ROGER BALDWIN,

Chairman,

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the Rights of Man.

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