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The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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The "Police Power" Doctrine

Mr. Osmond K. Fraenkel, author of "Our Civil Liberties" and counsel who has fought many a civil liberty case in the U. S. Supreme Court and Courts of Appeal both on his own account and on behalf of the American Civil Liberties Union, amicus curiae, writes to us under date 10th August about the above-captioned article in the BULLETIN on pp. 280-285 :

I THINK YOU HAVE MADE A VERY GOOD JOB IN EXPOUNDING THE DOCTRINE OF THE POLICE POWER.

We are naturally delighted to receive support from such a high quarter.

FREE SPEECH

Justice Douglas in the Communist Case

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." The Constitution provides no exception. This does not mean, however, that the Nation must hold its hand until it is in such weakened condition that there is no time to protect itself from incitement to revolution. Seditious conduct can always be punished. But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech except in the extreme case of peril from the speech itself. The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy. Its philosophy is that violence is rarely, if ever, stopped by denying civil liberties to those advocating resort to force. The First Amendment reflects the philosophy of Jefferson "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." The political censor has no place in our public debates. Unless and until extreme and necessitous circumstances are shown our aim should be to keep speech unfettered and to allow the processes of law to be invoked only when the provocateurs among us move from speech to action. . . . Our faith should be that our people will never give support to those advocates of revolution, so long as we remain loyal to the purposes for which our Nation was founded.

BOUNDARY LINE OF FREE SPEECH

ACLU's Statement

In a statement on the eleven Communist leaders' conviction, the American Civil Liberties Union says :

Freedom of speech can never be absolute, but the basis for any limitation in the criminal law should be simply and strictly this : there is clear and present danger of damage arising from it because of its nature and its circumstances. This means immediate incitement to riot, or to treasonable or revolutionary espionage, sabotage or violence, etc. In a democracy, advocacy of the violation of any law is "reprehensible morally" (Whitney v. California [1927] 274 U. S. 357), but, legally, the First Amendment should—judicially and legislatively—be interpreted as requiring what it was declared by Chief Justice Vinson as recently as May 1950 to require : "that one may be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom" (American Communications Association, CIO v. Douds [1950] 339 U. S. 382).

Treasonable or revolutionary acts — large or small, open or secret, of whatever sort, and with whatever prospect of success or failure — can and should be legally prevented or punished at any time under any circumstances. Speech advocating treasonable or revolutionary acts should be opposed by speech, until the time and the circumstances join with the nature of the speech to create a clear and present danger that such acts will actually be attempted.

It is not just the individual citizens seeking to exercise free speech who need it. The nation needs the free speech of all its individual citizens—to remain a strong nation in a time of international struggle, to remain a free society and to remain a country in which faults are corrected and new virtues developed. There are always risks in free speech, but all life—being an experiment, as Justice Holmes told us long ago—involves risks. In our effort to maintain a reasonable balance, we must stand ready to take most of our risks on the side of free speech.

PRESS RESTRICTIONS BY CENTRAL GOVERNMENT

In reply to an interpellation it was stated in Parliament by the Home Minister that securities had been demanded from 44 newspapers in the centrally administered areas since 15th August 1948. The demand was, however, withdrawn in the case of 7 of these.

COUNCIL OF EUROPE'S BILL OF RIGHTS

COMPARISON WITH THE INTERNATIONAL COVENANT

In course of the prolonged debates that have taken place on the U. N. draft Covenant on Human Rights it was stated by some delegates that this Covenant, though world-wide in the range of its application, was not quite so well conceived and did not give as much protection as the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4th November 1950, confined in its application as it is to the countries of Western Europe, gives. This remark is very true. The Convention states the exceptions to the generality of the civil rights in far more precise terms than the Covenant does and the exceptions too are fewer. Likewise, the obligations which the Convention imposes on acceding States are also capable of being more rigidly enforced than in the case of the Covenant.

As to the content of the civil rights enumerated in the Convention, we shall select only two, Freedom of Person and Freedom of Expression, for the purpose of showing how much better they are dealt with in the Convention than in the Covenant.

Freedom of Person

This is the subject of art. 5 of the Convention. The first paragraph thereof begins with the broad statement that "everyone has the right to liberty and security of person," and then proceeds to set forth possible exceptions to the operation of this general principle. It will be remembered that the Covenant too had originally proposed to deal with this most basic right in a similar way. After stating the principle of personal liberty in the beginning it had gone on to say in what conditions alone deprivation of the personal liberty could justifiably take place. But this method of treatment was later changed, mostly at the instance of India. Now, instead of mentioning definitely the kind of cases in which detention in custody will not be regarded as "arbitrary," the Covenant merely lays down that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law" (as in art. 21 of the Indian Constitution), thus leaving the legislature of each country free to curtail the personal liberty of its citizens.

It is not so with the Convention framed for the European countries. It states the exceptions in clear terms. It says that "no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law," and the exceptions mentioned are all such that no one can take objection to any one of them. For instance, one such exception is "the lawful detention of a person after conviction by a competent court." Another exception that has been specified in para. 1 (c) may be particularly referred to here. It is :

The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

This exception has been further clarified in a subsequent paragraph in order to ensure that such detention does not become for all practical purposes preventive detention or detention without trial as in India. This paragraph states :

Everyone arrested or detained in accordance with the provisions of para. 1 (c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Thus it will be seen that the Convention does not at all contemplate detention without trial except in periods of grave national emergency, and the position which comes into effect in such a crisis is dealt with in a later section of this article.

Provision is made in the Convention for remedies of the nature of habeas corpus :

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

These remedies have to be made available in all normal times : there can be no suspension of habeas corpus. It is also provided that "everyone who has been the victim of arrest or detention in contravention of this article shall have an enforceable right to compensation" — a provision the like of which finds no place in the Indian Constitution.

Thus it will be observed that in the Convention of the European Council Freedom of Person is very clearly defined and the lawful exceptions are precisely stated without making it possible for the national legislatures to make their own additions to the exceptions. The right also becomes more easily capable of enforcement on account of the provision relating to compensation for wrongful confinement.

Freedom of Expression

This right is guaranteed in art. 10 of the Convention, and the guarantee is fuller than that in the Covenant. It reads as follows :

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . .

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of—

So far it is very much on the lines of art. 14 of the Covenant relating to this right, but a contrast is to be observed in the matter of the exceptions allowed. While the Covenant permits of restrictions being imposed in the interests of "public order" (on which India so much insists), the Convention forbids such restrictions. Both the Covenant and the Convention agree that no restrictions can be imposed on the right of free expression for the sake of maintaining "friendly relations with foreign States," as art. 19(2) of the Indian Constitution allows. Anyway, it is clear that the right to freedom of expression is wider in the Convention than in the Covenant.

Enforcement of Obligations

It will be seen from the definition given above of the two most essential of "human rights and fundamental freedoms" enumerated in the Convention that the content of these rights and freedoms is greater than that of the rights and freedoms proposed to be provided for by the Covenant. And what is equally satisfactory is that measures for implementation which the Convention provides for are more effective than those proposed in the Covenant.

Under the former, two bodies are set up "to ensure the observance of the engagements" undertaken by the Member States: (i) a Commission of Human Rights and (ii) a Court of Human Rights.

COMMISSION OF HUMAN RIGHTS

As regards (i), it is provided that "the Commission may receive petitions . . . from any person, non-governmental organization or group of individuals claiming to be the victim of a violation" of the rights set forth in the Convention. Such petitions can be dealt with only after all domestic remedies have been exhausted. The Commission, after an investigation of the facts involved in the case, tries to secure, through a sub-commission, "a friendly settlement of the matter on the basis of respect for human rights." If such a settlement is effected, then of course there is nothing further to be done about it. But it is provided that "if a solution is not reached, the Commission shall draw up a report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention." Unless in the meantime the question is referred either by the Commission itself or by the States concerned to the Court of Human Rights, the Committee of Ministers which is the executive body of the Council of Europe will decide by a two-thirds majority "whether there has been a violation of the Convention." If the decision is that there is a violation, the State which is guilty thereof "must take the measures required by the decision" within a prescribed period; and if the State has not done so, the Committee is to decide, again by a two-thirds

majority, "what effect shall be given to the original decision." And it is further provided that the Member States "undertake to regard as binding on them any decision which the Committee of Ministers may take in the application" of these provisions.

COURT OF HUMAN RIGHTS

But if the Commission has acknowledged failure of its efforts for a friendly settlement, the case may be referred on the motion of the Commission itself or the Member States to the Court of Human Rights. If the Court finds that any measure taken by a State is in conflict with the obligations arising from the Convention, it will decide what is required in order to "afford just satisfaction to the injured party." "The judgment of the Court shall be final," and it is transmitted to the Committee of Ministers, "which shall supervise its execution."

It will thus be seen how the measures for implementation provided for by the Convention are far more effective than those proposed in the Covenant, the point which affords the most striking contrast being that in the Convention the private right of petition either by an aggrieved individual or by any non-governmental public body on his behalf, whereas in the Covenant as it stands at present it is specifically denied. However, it must be stated that access to the Commission will be available only against a State which "has declared that it recognises the competence of the Commission," and similarly, access to the Court will be available only against a State which has declared "that it recognizes as compulsory *ipso facto* and without special agreement the jurisdiction of the Court." It must be admitted that these conditions limit the operation of the implementation provisions of the Convention very severely. They amount in fact to letting those States escape altogether from their obligations which do not voluntarily subject themselves to the authority of the bodies created for the purpose of enforcing the provisions. It is not different in the case of the Covenant either, because the latter too will be enforceable only in the States which recognise its authority. The voluntary nature of the obligations is common to both. Even so, the Convention is better than the Covenant. Because if under the former instrument a State does not accept the jurisdiction of the Commission or the Court, it at any rate incurs the opprobrium of the other States for the indifference it shows to fundamental freedoms, whereas under the latter instrument a State, however indifferent it may in fact be to these freedoms, it may still pose as a loyal member of the United Nations and go on violating human rights, without its being exposed to criticism at all.

A Crisis Clause

The Convention, like the Covenant, has also a crisis clause permitting derogations from its obligations. It runs as follows:

In time of war or other public emergency threatening the life of the nation any High Contracting Party

(i. e., Member State) may take measures derogating from the obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. And every State compelled so to derogate from its obligations on account of the crisis is required to inform the Council of Europe of the extent of the derogations and of the reasons therefor, so that the Council could keep a watch on the extraordinary measures taken.

It may be noted that the original draft of the Covenant also had provided for this: it had stipulated that a State availing itself of the right of derogation should inform the United Nations "fully of the measures which it has thus enacted (in derogation of the guaranteed freedoms) and the reasons therefor." But the present draft does not contain such provisions, thus reducing the authority of the United Nations. It is otherwise with the Council of Europe's Convention: the Council retains its supervisory function in the matter of implementation of the Convention.

COMMUNISTS AND CIVIL LIBERTY

The danger of admitting Communists in the determination of policies on questions concerning civil liberty showed itself in a striking manner at the All-India Civil Liberties Conference held recently in Nagpur. Experience has proved that the Communists do not really believe in civil liberty. At the Bombay Provincial Conference of two years ago they opposed a resolution condemning the application of the Criminal Law Amendment Act for the purpose of banning political parties. At that time the Communist Party had already been outlawed in Bengal, though the ban had not yet fallen on that party in Bombay. Yet at that Conference the Communists opposed the resolution. Why? Because they were anxious that the R. S. S. on which a ban had been imposed by that time should not be free from the ban. Such is their vindictiveness against all other parties and such is their callousness to civil liberty as such. But the danger becomes the greater because Indian Communists act in the sphere of civil liberty as in that of every other question as vassals of Soviet Russia who has no faith in civil liberty: witness Vishinsky's statement in "The Law of the Soviet State" (1948), "In our State naturally there can be no place for freedom of speech, press, and so on for the foes of socialism." The Indian Communists who have vowed fealty to the U. S. S. R. and regard themselves bound to carry out the dictates of that country follow that line in India on civil liberty questions: they would deny civil liberty to all except the Communists. Those who believe in civil liberty for all irrespective of their political opinions have always to encounter opposition from Communists on such questions, especially where Soviet Russia in on record as being opposed to a particular point of view. This danger forced itself on the attention of non-Communist delegates to the Nagpur Conference.

At this Conference the Communist delegates joined with others in condemning the severe restrictions that the Constitution of India has imposed on personal liberty and liberty of speech. They joined in this condemnation not so much from love of human freedom as from hatred of the Nehru Government. But other delegates were not called upon to look into their motives; they naturally wel-

comed the support they received in this quarter for a cause which in itself was just. When, however, the Conference turned from a consideration of the Indian Constitution to a consideration of the International Covenant on Human Rights, the Communist delegates executed a complete somersault! The main point of attack on the articles relating to liberty of the person and liberty of speech in the Indian Constitution was that these articles placed these basic freedoms entirely at the mercy of the legislatures and therefore provided no guarantee against any possible legislative infringement of the rights. The same criticism can well be levelled against arts. 6 and 14 in the Covenant relating to these rights, and this criticism was voiced in a resolution (vide no. 6 *infra*) that was proposed at the Nagpur Conference. Another resolution proposed at the Conference (resolution no. 5) condemned the part which India played in the United Nations bodies. This resolution said that India "helped in whittling away the two most precious civil rights, viz., rights to Freedom of Person and Freedom of Expression." After condemning art. 21 and art. 19 (2) of the Indian Constitution, the Conference was bound in duty to condemn the corresponding articles in the Covenant and the evil influence India exerted in the shaping of these latter articles in the United Nations.

But, strange as it may appear, the Communist delegates opposed these condemnatory resolutions at the Conference! These they would have supported if they had not found out from the memorandum which the Secretariat of the All-India Civil Liberties Council had circulated for the purpose of substantiating the criticism made in the resolutions, that to condemn India in this matter was also to condemn by implication the Soviet State to which their homage was due. For the U. S. S. R. and its satellite states had also voted with India in some of the proposals which the latter country had brought forward in the United Nations bodies. Their loyalty to civil liberty, whether genuine or assumed, must yield to the loyalty which they owe to their overlord—Soviet Russia. The result was that the Communist delegates who were not behind anyone else in condemning the formula contained in the Indian Constitution about Freedom of Person ("no

person shall be deprived of his . . . personal liberty except according to procedure established by law") saw nothing objectionable in the provision of art. 6 of the Covenant ("no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law")—a form of words which was adopted in the Covenant on the proposal made by India's own delegate. One of the Communist delegates to the Nagpur Conference, while indulging in a tornado of recrimination against the Nehru Government on matters not even remotely connected with civil liberty, said in speaking on this sinister contribution of India to the formulation of the right to Personal Freedom in the Covenant: "While the Nehru Government's general policy was reprehensible, that Government had for once strayed into the right path" by proposing that Personal Freedom should be left at the complete disposition of the legislatures of the countries that would accede to the Covenant! Similarly, the Communist delegates found great merit in the limitations on account of "public order" and "friendly relations with foreign States" which were newly introduced into art. 19 (2) of the Indian Constitution, because Soviet Russia had supported proposals to this effect that India had made in the United Nations! Thus, what was bad for India domestically became good in the international sphere for no other reason than that Russia had ranged herself on India's side on that question!

This palpably inconsistent attitude was sought to be covered up by the Communist delegates by railing at the United Nations for its political "sins." They tried to make the hair of the audience stand on end by referring to the inhuman atrocities that the U. N. forces were committing in Korea, the shameful manner in which the Security Council was dealing with the Kashmir problem, and, of course, the imperialism which the capitalist Anglo-American bloc was consolidating through the U. N. The simple answer which Mr. K. G. Sivaswamy, Organising Secretary of the All-India Civil Liberties Council, gave to this indictment of the U. N. was that all of it was irrelevant on a civil liberty platform, where the transactions of the U. N. concerning fundamental human freedoms could alone be considered. To the Communist argument that the U. N. was a body which every nation ought to shun, Mr. Ruikar, the leftist leader of Nagpur, gave a fitting reply. "If the U. N. was so execrable," he asked, "why was Soviet Russia, the source of inspiration for Communists all the world over, herself staying in the U. N. and why was she pressing for the admission of Red China into that body?"—a retort which had a telling effect on the Conference. It is no use, Mr. Ruikar pointed out, measuring everything under the sun by the yardstick of the U. S. S. R. The Covenant contains many weaknesses and imperfections, and they must not be lauded up by anyone who has an independent power of thinking merely because Russia would rather have these weaknesses and imperfections in order to be able to deride the whole Covenant.

The strongest argument in the armoury of the Communist delegates against the resolutions proposed at the Conference was that the resolutions complained that the measures for implementation that the draft Covenant had provided for were such as to leave the rights enumerated therein without any guarantee for their realisation. These delegates were opposed to any provision being made in the Covenant for implementation at all. In this respect, they were faithfully following the cue of Soviet Russia. The Soviets would keep these rights and freedoms exclusively within the domestic jurisdiction of the separate States, while the very purpose of the Covenant is to lift these rights and freedoms from being the independent and exclusive concern of the separate sovereign States to being the common concern, under international law, of the international community as a whole. And therefore the conception of the Soviets in regard to implementation is that each State should in its own way realise the rights and freedoms of the Covenant, thus repudiating the possibility of setting up any international machinery for the purpose of making sure that these rights and freedoms are in fact observed and respected. "Why should we allow ourselves to be dictated to by the U. N.? We shall protect our rights by the strength of our own arms," the Communist delegates declared, though many persons would have no little difficulty in recognising Communists as defenders of civil liberty. The general feeling in India for national sovereignty and self-sufficiency has such a keen edge at present that these delegates could easily work up this feeling by appealing to the audience that they must not let the U. N. meddle in their domestic affairs. Mr. Sivaswamy neatly pricked this bubble of foreign interference by stating that if the U. N. was enabled to exercise some oversight over the condition of human rights as it must, such oversight would be possible only in covenanting States, and if India acceded to the Covenant, which was very desirable but which was a matter of her own choice, the oversight to which she would be subject would not be imposed from outside; it would be oversight which for the sake of the whole international community she thinks essential. In any case, India would much sooner accept subordination to the international watch-dog of civil liberty created by the U. N. than the subordination to Soviet Russia which the Communists would force on her.

The opposition of the Communists did not count for much; they were outvoted and the resolutions were passed by an overwhelming majority. But the opposition pointed up the danger which lurks in our movement. It is experience of this kind which we suppose has led the American Civil Liberties Union to make a rule laying down that no Communist or Fascist (who are equally contemptuous of civil liberty) shall be eligible for becoming its director or staff member. The Union fights the battles of the Communists; it appears as friend of the court in all important cases against them. It does so because it holds that civil rights must be made available in their fulness to all. But it has been compelled to exclude

these anti-civil liberty groups from responsible positions in its own organization. Our movement in this country is also intended to secure the benefit of civil liberty for all; indeed it happens at present to benefit the Communists more than anyone else. It asks for the repeal of detention laws: this would benefit the Communists most, for most of those held in detention are Communists. It asks for revocation of the ban on political parties: this would benefit them alone, for it is only the Communist Party which is under a ban at present, the one against the R. S. S. having been lifted. If even in such a condition the Communists as bondmen of Soviet Russia go on opposing the vital planks of the civil liberty movement, the movement would be forced, as in the U. S. A., to shut its doors on them, though it would continue to contend for the application of civil liberty to them too. The time for taking this drastic step has not arrived yet; it will arrive only if and when the Communists become too obstructive in our movement's attempt to protect the civil rights of all. We hope such time will never arrive.

SPECIAL ARTICLE

Freedom of Speech in Emergencies

We have pointed out before the great contrast in the constitutional law of India and the United States in the matter of dealing with fundamental rights in times of emergency. Our Constitution provides in art. 358 that the "right to freedom" embodied in art. 19, which includes the right to "freedom of speech and expression," shall automatically remain suspended as long as an emergency proclaimed by the President under art. 352 (1) lasts, the result of which provision is that all the states will then have the power to enact and enforce any laws restrictive of the right. There is no such provision in the U. S. Constitution. The Bill of Rights of that country remains operative as well in emergencies (even war emergencies) as in normal times of peace. In that country, of all the fundamental rights only the writ of habeas corpus is liable to be suspended in certain narrowly defined circumstances, the actual existence of such circumstances being again a matter of adjudication by the courts.

That freedom of speech, like every other civil right, has in the United States to be made available to all even in the most difficult of times is a fact that one cannot emphasize too strongly or too often. We would therefore cite here some remarks made by Justice Frankfurter of the Supreme Court in his concurring judgment in the case of the eleven Communist leaders. Premising that the United States Government possesses all the powers inseparable from a sovereign nation and can use them for the purpose of protecting the nation from threats of either external aggression or internal subversion, he proceeds to set forth the limitations to which exercise of these powers is subject. He says:

But even the all-embracing power and duty of self-preservation is not absolute. Like the war-power,

which indeed is an aspect of the power of self-preservation, it is subject to applicable constitutional limitations. (See *Hamilton v. Kentucky Distilleries and W. Co.* [1919] 251 U. S. 146.) Our Constitution has no provision lifting restrictions upon governmental authority during periods of emergency, although the scope of a restriction may depend upon the circumstances in which it is invoked.

The First Amendment is such a restriction. IT EXACTS OBEDIENCE EVEN DURING PERIODS OF WAR; it is applicable when war clouds are not figments of the imagination no less than when they are. The First Amendment categorically demands that "Congress shall make no law abridging the freedom of speech or of the press." The right of a man to think what he pleases, to write what he thinks, and to have his thoughts made available for others to hear or read has an engaging ring of universality. (Emphasis supplied.)

It is true that it was far more pertinent to point to the entirely unsuspendable nature of the right to freedom of expression in the U.S. when that right in our Constitution also was fairly water-tight in normal times and could only be suspended in periods of grave external or internal danger. The U.S. example has almost ceased to have any applicability now, when the legislatures have been given power to enact restrictive laws in the interest of "public order," "incitement to an offence" or "friendly relations with foreign States" even in times of no such danger. The right remains suspended all the time; it just ceases to exist. There is therefore no question now of putting it in abeyance for a short period when national security is endangered. The quotation made above has thus lost all relevance at present. Still it is just as well that those who are interested in the fundamentals of the problem should know that in the United States free speech and a free press have to be allowed, under the Constitution, even when war is raging.

"Official 'Doxy' is Orthodoxy"

RAJAJI'S RULE OPPOSED

In our last issue we stated that the Rajaji philosophy of Freedom of the Press amounts to this: that official opinion must be respected, and that when a legislature forbids a certain thing everyone must pay implicit deference to such legislative judgment. And we attempted to show how this rule was opposed to the cardinal tenets of a free press, citing in our support the opinions of three eminent judges in the U. S. A. Now we take occasion to cite one more such opinion, again the opinion of Justice Frankfurter in the same case. This opinion also refers to an opinion delivered in another case by the Court of Appeals which is equally important. The courts in all such cases have to strike a balance between Authority and Liberty and to resolve conflicts between speech and other competing interests, and in doing so they have to use their own independent judgment which may override

legislative judgment. With this background in mind Justice Frankfurter explains how very important the interest of free speech is when a conflict of interests arises and what self-restraint its protection requires on the part of executive officials and the legislatures. He says :

Freedom of expression is the well-spring of our civilization. . . . For social development of trial and error, the fullest possible opportunity for the free play of the human mind is an indispensable pre-requisite. The history of civilization is in considerable measure the displacement of error which once held sway as OFFICIAL TRUTH by beliefs which in turn have yielded to other truths. Therefore the liberty of man to search for truth ought not to be fettered, NO MATTER WHAT ORTHODOXIES HE MAY CHALLENGE. Liberty of thought soon shrivels without freedom of expression. Nor can truth be pursued in an atmosphere hostile to the endeavour or under dangers which are hazarded only by heroes.

"The interest which [the First Amendment] guards and which gives it its importance, presupposes that THERE ARE NO ORTHODOXIES — religious, political, economic, or scientific — which are immune from debate and dispute. Back of that is the assumption — itself an orthodoxy, and the one permissible exception — that truth will be most likely to emerge, if no limitations are imposed upon utterances that can with any plausibility be regarded as efforts to present grounds for accepting or rejecting propositions whose truth the utterer asserts, or denies. (International Brotherhood of Electrical Workers v. Labour Board, 781 F. 2d 34.)"

In the last analysis it is on the validity of this faith that our national security [which was involved in the Communist leaders' case] is staked.

This shows that though freedom of speech is not an absolute right (indeed, in *Robertson v. Baldwin* [1897] 165 U. S. 275, the Supreme Court asserted that the First Amendment "cannot have been, and obviously was not, intended to give immunity for every possible use of language") and though some restraints can justifiably be laid on free speech, only such restraints would be permissible as are indispensably required by the need for reconciling competing social interests such as the interest of security and the interest of freedom. And though the initial responsibility for adjusting this clash of interests is that of the legislatures, the ultimate responsibility is that of the courts. In India, of course, under the amended article relating to free speech, viz., art. 19 (2), this question of adjustment by the courts does not arise, for here the restrictions permitted by the Constitution are wider than those which a legislature may impose and is intended to impose! The legislative judgment is thus supreme! There cannot possibly be a legislative infringement of the right!

COMMENTS

Human Rights and Their Protection

INDIA'S ATTITUDE AT THE U. N.

India's representative, Mr. T. T. Krishnamachari, claimed at a Unesco meeting in Geneva on 28th August that the Indian Constitution provided for greater safeguards of the rights of the individual than those embodied in the draft Human Rights Covenant. This claim is demonstrably unfounded. The right to Personal Freedom is in the Indian Constitution as unguarded as in the Covenant, but the major responsibility for weakening the Covenant in this respect is, as we have repeatedly stated, India's. The right to Freedom of Expression is clearly far more precarious in the Indian Constitution than in the Covenant.

As if to compensate for the reactionary attitude India has taken in so far as the content of the human rights is concerned, she has ranged herself on the side of progressive nations in the matter of implementation of the rights. The Communists of India seem to believe that, like Soviet Russia, India too stands on her right of national sovereignty and rejects implementation of the human rights through an international machinery. This is a wholly wrong notion. As an illustration of what the Communists think of international protection of the International Covenant, we may cite here a statement issued by four Communist delegates to the Nagpur Civil Liberties Conference on that subject. They say :

We Asiatics have learnt at the cost of unparalleled sufferings that Americans and British imperialists intervene, not in the interest of the people, but in their own selfish interests. Their intervention in Kashmir has not benefited the people in any way; on the contrary they are provoking the Indo-Pak tension and are plotting to introduce direct imperialist regime in Kashmir. In Korea, they are raining death and destruction under the name of the U. N. The U. N. Court at Hague vetoed the natural right of the Iranian people to nationalise their own oil.

Therefore, we are definitely opposed to the demand of an effective machinery from the U. N. General Assembly which is conducted by the Anglo-Americans irrespective of the basic principles of the U. N. Charter. If India has opposed such intervention, she has done nothing wrong. Our understanding of the Nehru Government as a government which pursues a persistent policy of destroying the civil liberties and of imposing a police state all over the country should not bar us from appreciating its stand in this instance. Not to do so will be falling a prey to American machinations.

These people think that whatever may be the sins of the Nehru Government, it is at least to be congratulated upon not falling a prey to the blandishments of the Anglo-

American bloc by accepting the jurisdiction of the international tribunal to be set up for implementing the Covenant as the tribunal will itself be dominated by that bloc. But unfortunately for them it is not so. Not only is India quite willing to subject herself to international supervision in regard to the observance of the human rights, whatever they are, but also insists that complaints of violations of the rights be allowed to be made before an international tribunal by aggrieved individuals. Mr. Krishnamachari at the above meeting of the Unesco rejected the Human Rights Commission's recommendation which, by confining complaints of violations to signatory States and refusing the right of private petition, would practically deny access to the tribunal for relief.

India has made two proposals in regard to implementation of the Covenant :

- (1) to permit the Human Rights Committee (which is the tribunal to be set up) to initiate inquiries into violations upon receipt of complaints by individuals or non-governmental organizations when a majority of the Committee is convinced that an inquiry is merited ; and, further,
- (2) to permit the Human Rights Committee to go beyond inquiry by processing a case which a majority finds deserving of it, from whatever source the information as to violation comes (on the analogy of the Permanent Mandates Commission set up after World War I to inquire into the administration of the mandated territories).

We heartily congratulate India upon the breadth of vision it has shown in this respect, though we cannot help saying that our feeling of satisfaction on this point is very much qualified by the manner in which she helped in watering down the two basic elements of human freedom.

Compensation for Wrongful Detention

A case that has occurred in Burma brings into relief the fact that not only India like Burma permits of detention without trial in time of peace, but does not provide for compensation to those who may be proved to have been detained without cause.

One Mr. E. C. Moment, an Anglo-Burman planter at Tavoy, was detained by the Burmese Government in jail for over a year under the Public Order Preservation Act but was later released by the Supreme Court because of lack of evidence to justify his detention. Now it is understood that the British Government through its embassy in Rangoon has demanded a formal apology from the Burmese Government, as well as payment of Rs. 30,000 as compensation on the ground that the arrest and detention of Mr. Moment not only adversely affected him personally but also proved injurious to the standing of the British community in Burma.

The Constitution of Burma, like that of India, does not provide for compensation to those who have been un-

justifiably deprived of personal liberty. In this respect, the U. N.'s draft Covenant, though otherwise as unsatisfactory in regard to Freedom of Person as the Constitutions of India and Burma, is superior in this particular respect. For para. 6 of art. 6 of the Covenant provides that " anyone who has been the victim of unlawful arrest or deprivation of liberty shall have an enforceable right to compensation." A provision such as this will serve two purposes : first, it will help in restraining the Governments' power of detention, and second it will restore to the person who has been wrongfully detained his self-respect of which he has been deprived along with his personal freedom.

FREEDOM OF THE PRESS

Prevention of Publication under Cr. P. C.

HIGH COURT SETS ASIDE THE ORDER

The editor of a Telugu weekly of Vijayawada, " Mutukola," was served with an order under sec. 144, Criminal Procedure Code, by the local sub-divisional magistrate prohibiting him from publishing statements containing allegations of corruption against police officers and other officials of the district. Against the order the editor preferred a revision petition in the Madras High Court, and Mr. Justice Panchapakesa Aiyar allowed the petition and set aside the order (17th August).

In his judgment His Lordship observed :

The order was illegal and section 144 Cr. P. C. could be applied only when there was danger to public safety, or a likelihood of the breach of peace or public tranquillity, etc. The order passed by the magistrate was an extraordinary one. The Advocate-General frankly conceded that there was no prior instance of such an order being passed in any State on the editor of a newspaper preventing him from publishing comments. The Advocate-General's contention that these comments were annoying to officers and that they would become apathetic in the discharge of their duties, could not be accepted to support an order passed under section 144 Cr. P. C. In this case, His Lordship was not concerned with the merits of the comments. It might be that this paper was not a first-class newspaper. But, even obscure papers like the " Mutukola " were entitled to the enjoyment of the rights, privileges and powers conferred on them. The magistrate's order was clearly wrong. Elections were approaching, and such comments were likely to become more and more numerous, and it might be advisable for the magistrate to know what section to apply against newspapers and what not to apply to prevent irresponsible, malicious and false criticism. Any comment must be held false and irresponsible only after enquiry of the person making the comments and not prevent him from doing so by passing an ex-parte order.

His Lordship also suggested that to check the publication of defamatory comments and articles in newspapers. It was advisable for the legislature to amend section 500 Cr. P. C. (offence of defamation) with a view to punish offenders who had made defamatory attacks on Government officials awarding rigorous imprisonment instead of simple imprisonment.

HABEAS CORPUS PETITIONS

Detention for Black-Marketing

The Madras High Court disposed on 27th August of a petition by Mr. Kodidasu Appalaswami for a writ to quash the order of detention passed against him for the alleged offence of black-marketing. It appears from the grounds of detention supplied by the Madras Government that the detenu used to smuggle large quantities of rice into his mill at Payakaraopeta in Vishakhapatnam district from the neighbouring district of East Godavari and transport all this rice (at the rate of 1,000 bags a day) to feed the black market in various towns in his own district. It would also appear from the statement made by the Government that such operations had been going on for quite a long time.

Justices Mack and Somasundaram, who heard the case, dismissed the petition. They took care, however, to say :

We are precluded from going into the truth or adequacy of the grounds. It is sufficient to say that they constitute a grave indictment of the petitioner.

The judgment makes it clear that the Court, whose business is to hear evidence and find a person guilty if the evidence is sufficient to establish his guilt, would prefer that Government dealt with offenders by prosecuting them instead of detaining them in custody for offences which need not be proved. In any case, if detention is held to be necessary there is no reason why prosecution should not be started against such persons while they are in detention. Their Lordships said :

Counsel (for the petitioner) has also urged that the correct course for the Government is to prosecute the petitioner directly under the criminal law for the many alleged offences he has committed. We are in complete agreement (with this view) and consider that there should be such a prosecution. Preventive detention being quite inadequate punishment for so shocking an indictment of black-marketing activity as that disclosed in the ground, we are of the opinion that, not only in fairness to the petitioner but in the wider public interests, the petitioner should be prosecuted criminally and as expeditiously as possible on the grave charges in this comprehensive indictment within the ambit of criminal law.

It is true that detention under the Preventive Detention Act is essentially preventive and not punitive but we have no reason to infer that the object of this detention is not essentially preventive, viz., to put a summary stop to black-marketing activities,

such as those disclosed in the grounds. We can see no legal impediment to a person being detained under the Preventive Detention Act and while under such detention his being prosecuted for certain serious criminal offences he is alleged to have committed, in a criminal court of law. We would rather strongly deprecate any line of least resistance being taken in such cases if the Preventive Detention Act is used if not abused, merely to detain persons on grounds such as those alleged against the petitioner and not to prosecute them through the ordinary courts so that they may be acquitted if innocent and drastically punished if guilty of black-marketing offences such as those disclosed in the indictment. According to the ground, the black-marketing activities of the petitioner have gone on for some considerable time. With the expression of our pained astonishment that he has been allowed to continue them for so long without being stopped by punitive proceedings, we dismiss this petition summarily.

Another Such Case

A division bench of the Punjab High Court consisting of Mr. Justice Bhandari and Mr. Justice Soni similarly dismissed in the third week of August the habeas corpus petitions challenging the detention of Malik Mathradas, managing director of the Wholesale Cloth Corporation of Jullundur and three members of the Corporation. These persons were detained under orders of the district magistrate, Jullundur, for alleged black-marketing in cloth for three months. Their Lordships dismissed the petitions and in course of the judgment observed :

The district magistrate had in his affidavits gone into the facts relating to this case prior to his passing orders of detention. With these facts they were not going to deal. In their view the Court could not go into the facts of the case. The jurisdiction of the Court was limited merely to finding out whether detention could have been made under the provisions of the Preventive Detention Act and not to go into the facts of a case in order to find out whether the facts to which the District Magistrate gave his attention were facts on which this Court would say that the district magistrate was wrong and should not have passed detention orders. Reading various orders passed in this case on various dates, they could not come to any other conclusion but that the district magistrate had jurisdiction to pass detention orders against the detenu.

A Communist Detenu Released

"ACTING PREJUDICIALLY UNDER COVER OF ELECTIONS"

At the Patna High Court on 14th August Mr. Justice Shearer and Mr. Justice Ahmad set aside the order of detention of Pandit Karyanand Sharma, president of the Bihar State Kisan Sabha and a Communist leader of Bihar, and directed that he be released forthwith.

Pandit Karyanand Sharma was said to be a leading member of the Communist Party of India, the object of which was to destroy capitalist system in the country by overthrowing the Government of India. He was working underground and when he came into the open, he wrote a letter to the Chief Minister of Bihar that he had ceased to work as he had been working hitherto and that he would participate in the coming general election.

The Government of Bihar detained Pandit Karyanand Sharma because it was thought that he would work prejudicially and violently under the cover of elections. It was said against the petitioner that all along in the past he had been working in a violent manner against the Government.

Mr. Justice Shearer, with whom Mr. Justice Ahmad concurred, said :

I do not say that when a Communist who has been working under cover comes into the open and asserts that he intends to take part in the election, the making of an order against him cannot, under any circumstances, be justified. All that I say is that the reasons for making the order ought to appear from the grounds which are served on him. In the present case, this does not appear either from the grounds or from the affidavit which has been put in by Mr. Barun Chandra Sinha.

ALL-INDIA CIVIL LIBERTIES CONFERENCE

THIRD SESSION AT NAGPUR

The third session of the All-India Civil Liberties Conference was held at Nagpur on 25th and 26th August under the presidentship of Dr. Syama Prasad Mookerjee, M. P., former member of the Central Cabinet. The Chairman of the Reception Committee, Dr. N. B. Khare, opened the Conference in a welcome speech in which he pointed out how under the newly established Republic civil liberties were being crushed far more ruthlessly than under the former British regime they were ever crushed or even attempted to be crushed.

Presidential Speech

The President then delivered his inaugural address. He said : "Sharp tendencies towards dictatorship and intolerance of criticism or honest differences of opinion, which are sometimes in evidence in the administration of India today, were dangerous symptoms and they must be boldly resisted and checked by the united efforts of all freedom-loving citizens of India irrespective of party affiliations." The existence of "one party rule" in India was mainly responsible for the "suppression of civil rights by the party in power." Government had failed to serve the interests of the people. This led to "widespread discontent" and Government, instead of trying to understand the causes of the discontent, tried to "gag the people and the press, thereby hoping to crush the Opposition."

The recent amendment of the Constitution "curbed the fundamental rights which were guaranteed under it. When the Constitution had provision for meeting emergencies and when ordinary laws were capable of meeting the situation, "boogies of upheaval and perilous consequen-

ences are raised to justify the arbitrary exercise of power by Government." "If democracy is to function in India, freedom of thought and expression, whether exercised by the public or by the press, and the right to assemble and hold meetings must be preserved with as little interference from Government as possible."

Dr. Mookerjee condemned "detention without trial" as one of the most "obnoxious provisions" known to any civilized country. Such detentions might be justifiable during a period of grave emergency but not in normal times. It was necessary to exercise vigilant care to ensure "that civil liberties are not interfered with so as to disturb the holding of free and fair elections." In many ways, directly or indirectly, the party in power could manipulate matters in its favour. "We must therefore demand that the official machinery must not be made to move in any way whatsoever to discriminate in its favour." This was essential not only in the interest of the contesting parties in the forthcoming elections but for the ultimate peace and safety of the country as a whole.

Civil rights, Dr. Mookerjee said, included not only political but also economic rights of the citizens of free India. "No Government can function in India with the willing consent of her people unless the inherent right of the Indian citizen to leave a decent economic and social life is amply protected and implemented."

In his concluding address Dr. Mookerjee said that the discussions had brought out "the sad state of affairs" in the country. The main problem before them, Dr. Mookerjee said, was how to rouse public opinion effectively so that civil rights could be fully protected. He hoped that the Civil Liberties Unions would be able to mobilise opinion throughout the country in the coming year in order to bring about "a radical change" in the present state of affairs.

Resolutions

Among the resolutions passed by the Conference were the following :

1. FREEDOM OF EXPRESSION

In the view of this Conference, the amendment to art. 19 (2) introduced by the Constitution (First Amendment) Act was as uncalled for as it is destructive of the freedom of speech and of the press.

Taking advantage of certain stray decisions of High Courts to the effect that incitement to violent crime was protected by art. 19 (2) as it then stood, the Government of India proposed, and secured the assent of a one-party Parliament for, changes which in effect reduce the right to freedom of expression to a nullity.

The Government should have first caused an appeal to be made to the Supreme Court for an authoritative interpretation of art. 19 (2), and if as a result of this the Supreme Court had upheld the interpretation of the High Courts, the Government might have limited the amendment of the article to making it clear that incitement to violence did not fall within lawful speech.

Instead, the Government has managed to lay on freedom of expression restraints so wide-sweeping in their range and so drastic in their nature as not to be found in the constitution or legislation of any democratic country in the world.

"Friendly relations with foreign States," "public order," and "incitement to an offence," which are made

in the Act new grounds for imposing restrictions on speech and publications, were opposed by all democratic countries in the United Nations bodies while considering the formulation of guarantees for freedom of expression, for the reason that they are too broad and vague to afford any protection to this essential right against any possible vagaries on the part of the national legislatures.

The Government of India too unreservedly admits that these new grounds in the form in which they find expression in the Amendment Act are too broad and vague, but holds out the hope that their scope would be reduced in the legislation which is to be passed to give effect to the Amendment. Even if this hope were to be realised, the fact would still remain that the right to freedom of expression would lose all constitutional protection and would be placed at the mercy of Parliament and the State legislatures.

For this very reason, viz., that the restrictions permitted by the Constitution as amended will be broader than those which legislation passed thereunder (including administrative orders) may permit, the requirement that the restrictions will be subject to court review on the ground of their reasonableness will give little practical relief as in no case will the courts be competent to treat a restrictive law as repugnant to the Constitution, and the value of any constitutional guarantee of fundamental rights consists in the courts being able to hold that any particular restrictions constitute a legislative infringement of the rights.

Of what little practical use the introduction of the word "reasonable" before "restrictions" in the amended article will be may be illustrated by the change made in the limitation on account of the security of the State. Whereas formerly only matter "which undermines the security of, or tends to overthrow, the State" fell outside the scope of the protected freedom, now under the proviso of the amended article all "reasonable restrictions" are allowed to be imposed "in the interests of the security of the State." It is obvious that because the phrase now substituted is very indefinite it will permit of severer restrictions, though operating under judicial review, than the phrase in the original article permitted because it was far more precise.

The almost total extinction of the right to free expression which the Amendment Act involves cuts at the very root of democracy. In the absence of this right effectively guaranteed, India will to all intents and purposes cease to be a democratically governed country and will have to be ranked with frankly totalitarian countries. The damage done to India by this amendment in the Constitution, both in itself and in the estimation of freedom-loving nations is so grave that the Conference implores in all earnestness all the political parties in the country to exert themselves to the utmost for undoing the mischief that has been done and for restoring the Constitution to a form in which freedom of speech and the press will be fully protected and placed beyond the reach of fleeting majorities in the legislatures.

2. PREVENTIVE DETENTION

This Conference reiterates the demand made in the previous Conferences for the repeal of all detention laws.

The main change introduced into the Preventive Detention Act, 1950, by the amending Act passed in 1951 consists in requiring all cases of detention, instead of only a specified class of cases, to be referred to an Advisory Board whose opinion if favourable to the detenu must be respected by the Government concerned. This change

could have been regarded as a real improvement, if the Advisory Board had been given power so to sift the cases coming before it as to enable it to arrive at a just conclusion in regard thereto. But the Advisory Board lacks this power.

(i) While it can call for full information from the Government, no provision is made in the Act (as it was in Eire's Offences against the State Act under which also the investigating body's opinion was mandatory), that the Government shall furnish it, provision being made on the other hand in art. 22 (6) of the Constitution to reserve power to the Government not to disclose facts which it considers "to be against the public interest to disclose." In contrast to this, Regulation 18 B, 1939, of England made it the duty of the Advisory Committee to furnish the detenu "with such particulars as are in the opinion of the Chairman sufficient to enable him (the detenu) to present his case," which indirectly placed on the Government the obligation to supply full particulars to the Committee, and it is on record that "the Advisory Committee have before them all the evidence which is in the possession of the Secretary of State."

(ii) The Act forbids a detenu "to appear by any legal representative" before the Advisory Board. In England the Advisory Committee had the power to let a legal representative appear before it.

(iii) No provision is made in the Act for calling in witnesses. In England they could be called and were in fact called in many cases.

(iv) No provision is also made for a compulsory periodical review of detention cases by the Advisory Board.

In the absence of provisions for making full information available, for giving necessary legal assistance to the detenu and for enabling him to call evidence, not to speak of cross-examining witnesses, the Advisory Board will, in the opinion of this Conference, be unable in cases regarded by the Government as specially dangerous to come to a right conclusion.

Although the renewed Act is to expire by the end of March next year, there is no guarantee that its operation will not be extended further, as indeed the Home Minister warned that it might be. And since "relations of India with foreign powers" is one of the grounds on which the Act permits detentions without trial, there is no reason to suppose that the Act would not be indefinitely extended.

The Conference, however, takes its stand against the Act on the broad principle that habeas corpus ought not to be suspended, as it is not suspended in any democratic country, except in periods of grave national emergency such as one contemplated by art. 352 (1) of our Constitution. This Conference therefore reiterates the demand made by the previous Conference that, in order to secure Freedom of Person, art. 22 which permits suspension of habeas corpus be repealed in toto.

3. CRIMINAL LAW AMENDMENT ACT

Although the Criminal Law Amendment Act, 1908, empowering Governments to ban organizations has been declared unconstitutional by the High Courts of two States, viz., Madras and West Bengal, in which the Act was applied, some other States are still enforcing it and keeping some political organizations under a ban. This is highly immoral if not technically illegal. This Conference urges the Government of India to issue a directive to all State Governments to withdraw any orders which they