

Editorial Committee :

N. M. JOSHI,
S. G. VAZE,

*Vice-President and
Secretary respectively of
the All-India Civil
Liberties Council*

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*Edited by R. G. KAKADE, M. A., LL. B., PH. D.,
Assistant Secretary, All-India Civil Liberties Council
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INDEPENDENT EXAMINATION AND APPRAISAL OF FACTS WHERE VIOLATION OF CONSTITUTIONAL RIGHTS IS CLAIMED

In our last issue we adverted to what we regard as a faulty method followed by our Supreme Court in cases like that of Dr. Khare's externment from Delhi—the method, viz., of concentrating on legal issues and passing by factual matters where the deciding factor was the latter—and pointed to the great contrast which this method presents with the method which is adopted by the Supreme Court of the United States in cases where denial of the fundamental rights guaranteed by the federal Constitution is in question. In the present article we propose to set forth in detail the American method, giving instances to illustrate the point.

In the United States such questions do not come before the highest court of the nation before they are canvassed in the state courts. In India they may be referred to the Supreme Court in the first instance, without being pre-

viously considered by the courts in the states. This cannot happen in the United States. There the Supreme Court is the court of final resort which reviews cases on a writ of certiorari. Some of the cases may be concerned with mere legal issues, the interpretation of federal rights enumerated in the Constitution. It is the function of the Supreme Court to determine the meaning and application of the provisions of the Constitution concerning these rights. That Court is the final authority to resolve such issues concerning interpretation of the scope of the rights. There may also be cases, and naturally they are far more numerous, in which questions of law are commingled with questions of fact. Where facts are disputed, it becomes the duty of the Supreme Court to determine, on the basis of the evidence on record, what the facts actually were. It may be thought that the state courts' findings of fact would have to be accepted by the Supreme Court and that such questions it would not be competent for that Court to reopen. That is of course the rule in all other matters, but where violation of constitutional rights is claimed that rule is departed from. The Supreme Court has the authority, and in the case of disputed facts it becomes its duty, to re-examine the evidence and make its own findings of fact. And even where the facts are undisputed, it is the function of the Supreme Court to appraise them and to determine finally whether in applying the principles governing the constitutional rights that are in question to the factual situation the rights have in effect been denied. It is only by following this method of reviewing cases which involve fundamental liberties that these liberties can really be secured, and the method is invariably followed in the United States.

FREEDOM OF ASSEMBLY

We have given in this issue the judgment of the Punjab High Court upholding the validity of sec. 144 of the Criminal Procedure Code in so far as it authorizes magistrates to ban meetings if danger to the public peace can be averted thereby. We consulted a constitutional lawyer of high eminence who deals with civil liberty cases in the United States courts as to the rule to be deduced from the decisions of the Supreme Court of that country on this subject and particularly on the question as to whether local officials can, as in India, interfere with meetings in order to prevent purely speculative harm. In the course of the opinion with which he has favoured us he says that while the legal position in respect of restrictions because of anticipated disorder has not perhaps been completely cleared up,

"I am convinced that our Supreme Court would not uphold any statute which permitted the banning of meetings in advance merely because disorders were anticipated."

In numerous cases has the Supreme Court asserted its right of an independent review of conflicting evidence and of an independent appraisal of it, and in numerous cases has it refused to accept state court's findings of fact and the conclusions to be drawn therefrom. We give below relevant extracts from its judgments in some of them. Probably the case most frequently cited in this connection is *Norris v. Alabama* (1935) 294 U. S. 587. In this case

the petitioner, Clarence Norris, a negro who had been convicted of rape and sentenced to death by a state court, claimed that he had been denied due process by the systematic and intentional exclusion of negroes from the jury lists. The state court had held that the evidence did not establish such exclusion. The Supreme Court examined the evidence, reached a conclusion contrary to that of the state court, and reversed its judgment. Delivering the opinion of the Court, Chief Justice Hughes said:

The question is of the application of this established principle (that there must be no exclusion of negroes from service on grand or petit juries solely because of their race or colour) to the facts disclosed by the record. That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.

Two more cases involving racial discrimination in the selection of juries shall now be given. In *Smith v. Texas* (1940) 311 U. S. 128, it was found that the statutory provision of Texas in regard to the empanelment of a grand jury "is not in itself unfair," and that "it is capable of being carried out with no racial discrimination whatsoever." But it was found that such discrimination was in fact practised for years together. Because both the trial court and the court of appeals denied that in this case exclusion of negroes from the jury which indicted and convicted a negro of rape was intentional or arbitrary, the U. S. Supreme Court examined the record for itself and, having come to the conclusion that racial discrimination had resulted, "whether accomplished ingeniously or ingenuously," ruled that "the conviction cannot stand." The Court, in asserting its right to enter upon an independent examination of the evidence, said:

But the question decided (by the state courts) rested upon a charge of denial of equal protection, a basic right protected by the federal Constitution. And it is therefore our responsibility to appraise the evidence as it relates to this constitutional right.

The case of *Putton v. Mississippi* (1947) 332 U. S. 463 was very similar. A negro from a county the adult population of which is more than 35 per cent. negro had been convicted by an all-white jury. He complained that

he was deprived of constitutional rights by systematic exclusion of negroes from jury service. The supreme court of the state did not sustain this objection, but the U. S. Supreme Court sustained it on the ground that no negro had served on a criminal court jury for thirty years and that the inference of systematic exclusion is not sufficiently repelled by showing that a relatively small number of negroes meet a requirement that a juror must be a qualified elector. Mr. Justice Black, delivering the Court's judgment, said:

Whether there has been systematic racial discrimination by administrative officials in selection of jurors is a question to be determined from the facts in each particular case. In this case the Mississippi supreme court concluded that petitioner had failed to prove systematic racial discrimination in the selection of jurors, but in so concluding it erroneously considered only the fact that no negroes were on the particular venire lists from which the juries were drawn that indicted and convicted petitioner. It regarded as irrelevant the key fact that for thirty years or more no negro had served on the grand or petit juries. This omission seriously detracts from the weight and respect that we would otherwise give to its conclusion in reviewing the facts, as we must in a constitutional question like this.

The judgment was reversed.

Equal protection of the laws was the subject of *Oyama v. California* (1948) 332 U. S. 633, in which the transfer of landed property of an American of Japanese descent was involved. The Alien Land Law of California as applied in this case was declared by the U. S. Supreme Court to violate the equal protection clause against the findings of the state courts, saying:

In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled.

The same principle was asserted in *Fuy v. New York* (1947) 332 U. S. 261. Two persons were convicted of extortion by what is called a special or "blue ribbon" jury, and the question was whether the special jury statute of the state was so administered on the present occasion as to deny due process to the defendants. The state courts made no findings of fact at all on the subject and when the case went up in appeal to the Supreme Court of the U. S., the Court regretted the fact that the lower courts had omitted to consider the question, and stated that even if they had done their job they would still have to enter upon an independent examination of the evidence. The Court said:

We would, in any case, be obliged on a constitutional question to reach our own conclusions, after full

allowance of weight to findings of the state courts, and in this case must examine the evidence.

In *Chambers v. Florida* (1940) 309 U. S. 227 the question at issue was whether the confessions on the basis of which four young negroes accused of murder were sentenced to death were coerced, depriving the accused of due process of law guaranteed by the Fourteenth Amendment. The supreme court of Florida had affirmed the judgment of the trial court. When the case came on a writ of certiorari to the U. S. Supreme Court, the Court went into all the facts of the case itself and came to the conclusion that the confessions obtained after continuous interrogations for five days in conditions which were such as to fill the accused with terror were not voluntary. The Court's finding was that "the supreme court (of Florida) was in error and its judgment is reversed." The Court asserted its right of an independent review of facts thus :

The state of Florida challenges our jurisdiction to look behind the judgments below claiming that the issues of fact upon which petitioners base their claim that due process was denied them have been finally determined because passed upon by a jury. However, use by a state of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment. Since petitioners have seasonably asserted the right under the federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns.

The validity of a statute of Florida which is like an act sanctioning peonage (which is compulsory service in payment of a debt) was in question in *Pollock v. Williams* (1944) 322 U. S. 4. The circuit court of the state had held that the law under which the case was prosecuted was unconstitutional. The supreme court of the state reversed. The matter then went in appeal to the U. S. Supreme Court. This Court said :

(Where the question is whether a federal right has been denied, we are not concluded by that holding (i. e., the holding of the supreme court of Florida) upon an underlying question of fact, however, but under the circumstances are authorized to make an independent determination,

and set aside the judgment of the supreme court of the state, holding that the Florida statute was null and void by virtue of the Thirteenth Amendment (prohibiting slavery and involuntary servitude) and the Anti-Peonage Act of the United States.

There are of course instances in which the U. S. Supreme Court, undertaking an independent examination of evidence, came to the conclusion that the judgment of

the lower courts was correct and that there was no violation of constitutional rights. One such instance is afforded by *Akins v. Texas* (1945) 325 U. S. 398. In this case the petitioner, a negro, who was convicted of murder and sentenced to execution, had claimed that the jury which tried him and the juries which tried other negroes were so composed as to limit the number of negroes on the jury panel in a way amounting to discrimination on account of race. The Court held that deliberate and intentional discrimination was not proved and affirmed the judgment of the state court. But the important point is that the Supreme Court independently reviewed the evidence in the case, saying :

While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a federal constitutional right has been denied, expressly or in substance and effect, we accord in that examination great respect to the conclusions of the state judiciary.

From the Court's opinion three justices dissented (as in some other cases of affirmation of the state court's judgments), Mr. Justice Murphy declaring that "clearer proof of intentional and deliberate limitation on the basis of colour would be difficult to produce."

The same question of systematic exclusion of negroes from jury service arose in *Pierre v. Louisiana* (1939) 306 U. S. 354, but with a better result for the petitioner, who, a negro, had been convicted of murder and sentenced to death in a court of Louisiana and whose conviction had been affirmed by the supreme court of the state. The U. S. Supreme Court stated in its judgment that the conclusions of the state courts upon the questions of fact involved were not controlling and that it must itself inquire into the facts. It said :

In our consideration of the facts the conclusions reached by the supreme court of Louisiana are entitled to great respect. Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts. For equal protection to all is the basic principle upon which justice under law rests.

As in *Chambers v. Florida*, the question at issue in *Ashcraft v. Tennessee* (1944) 322 U. S. 143 was whether the confession of Ashcraft charged with having hired a negro to murder his wife was voluntary or compelled. Both Ashcraft and the negro were convicted and sentenced. Neither the court which tried the case nor the supreme court of the state which affirmed the conviction actually held that the confessions were freely and voluntarily made and the question was left to the jury to decide, without

any evidence being recorded. The U. S. Supreme Court, which on a writ of certiorari reviewed the case, went into the evidence and, holding that the confession was not voluntary, reversed the conviction. It said:

The treatment of the confessions by the two state courts, the manner of the confessions' submission to the jury, and the emphasis upon the great weight to be given confessions make all the more important the kind of "independent examination" of petitioners' claims which, in any event, we are bound to make. *Lisenba v. California* 314 U. S. 219. Our duty to make that examination could not have been "foreclosed by the finding of a court, or the verdict of the jury, or both." *Id.* We proceed therefore to consider the evidence relating to the circumstances out of which the alleged confessions came.

The result of this examination was, as stated above, reversal of Ashcraft's conviction.

This rule, that the Supreme Court undertakes an independent examination of facts where a federal right is involved was stated by the Court in *Hooven & Allison Co. v. Evatt* (1945) 324 U. S. 652 thus:

In all cases coming to us from a state court, we pay great deference to its determinations of fact. But when the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts on record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity as applied, we are free to re-examine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained.

The Supreme Court had occasion to apply the rule of independent investigation and independent assessment of facts involving freedom of the press in *Pennekamp v. Florida* (1946) 328 U. S. 321. The publisher and one of the editors of the "Miami Herald" were convicted by a state court of contempt of the court by publication of criticism of judges in pending litigation, and the supreme court of the state affirmed the conviction. Three years prior to this matter coming up before the U. S. Supreme Court on a writ of certiorari, *Bridges v. California* had fixed the limits of permissible comment on pending cases by laying down the formula that only such comments could be punished as created a clear and present danger to the fair administration of justice. In the present case also the Court employed this formula and after considering the comments made in the newspaper and the likely effect they would produce on the judges concluded that "the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible comment." The judgment of the state courts was reversed.

In arriving at this conclusion, the Court first asserted its right of independent review. It said:

The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the due process clause of the Fourteenth Amendment, protect. When the highest court of a state has reached a determination upon such an issue, we give most respectful attention to its reasoning and conclusion, but its authority is not final. Were it otherwise the constitutional limitations of free expression in the Nation would vary with state lines.

On the facts themselves there was not much difference of opinion (except that of emphasis) between the Florida court and the U. S. Supreme Court. On this point the latter Court said:

While the ultimate power is here to ransack the record for facts in constitutional controversies, we are accustomed to adopt the result of the state court's examination. It is the findings of the state courts on undisputed facts or the undisputed facts themselves which ordinarily furnish the basis for our appraisal of claimed violations of federal constitutional rights.

But the conclusion to be drawn from accepted facts might be different. Said the Court:

The acceptance of the conclusion of a state as to the facts of a situation leaves open to this Court the determination of federal constitutional rights in the setting of those facts. . . . We must, therefore, weigh the right of free speech which is claimed by the petitioners against the danger of corruption and intimidation of courts in the practical situation presented by this record.

And, applying the principle of *Bridges v. California*, the Court said:

We think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.

On this basis the Court reversed the judgment of the lower courts.

Craig v. Harney (1947) 331 U. S. 367 was also a case concerning contempt of court. Here, too, the Supreme Court reversed the judgment of the state court in convicting the accused. It is enough to note the following observation of the Supreme Court:

In a case where it is asserted that a person has been deprived by a state court of a fundamental right

secured by the Constitution, an independent examination of the facts by this Court is often required to be made.

The Court's conclusion was that "the danger (to the administration of justice) must not be remote or even probable; it must immediately imperil."

Cases involving the question of due process in the matter of property or taxation have also given occasion to the assertion of this principle by the Supreme Court. In *Beidler v. South Carolina Tax Commission*, 282 U. S. 1, the Court said:

But a conclusion that debts have thus acquired a business situs must have evidence to support it, and it is our province to inquire whether there is such evidence when the inquiry is essential to the enforcement of a right suitably asserted under the federal Constitution.

The Court re-examined the point at issue in the light of the evidence and overruled the state court's decision.

In *Johnson Oil Refinery Co. v. Oklahoma*, 290 U. S. 158, the Court said:

As the asserted federal right turns upon the determination of the question of situs (of cars upon which ad valorem taxes were levied), it is our province to analyze the facts in order to apply the law, and thus to ascertain whether the conclusion of the state court (in favour of the validity of the taxes) has adequate support in the evidence.

The Court examined the evidence, reached a contrary conclusion, and reversed the judgment.

Similarly was the judgment of the supreme court of Washington reversed by the U. S. Supreme Court in *Great*

Northern R. Co. v. Washington (1937) 300 U. S. 154, saying:

We come to the question whether, when the asserted right has been denied, this Court is concluded by a finding of fact or a mixed finding of law and fact made by the state court. We have repeatedly held that in such cases we must examine the evidence to ascertain whether it supports the decision against the claim of a federal right.

In *Broad River Power Co. v. South Carolina*, 281 U. S. 537, the Supreme Court said: "Even though the constitutional protection invoked be denied on non-federal grounds it is the province of this Court to inquire whether the decision of the state courts rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded."

The rule to be deduced from the decisions cited here may be stated, in the words employed by the Supreme Court on numerous occasions, as follows:

In cases in which federal constitutional rights are alleged to have been infringed by state action it is incumbent on the Supreme Court of the United States to inquire not merely whether those rights have been denied in express terms but also whether they have been denied in substance and effect, and to review independently both legal issues and those factual matters with which they are commingled.

It is essential that this rule is consistently followed in India by our judiciary if our fundamental rights guaranteed by the Constitution are to be effective.

THE RIGHT OF ASSEMBLY

AN IMPORTANT JUDGMENT OF A U. S. A. COURT

In view of the constitutionality of sec. 144 of the Criminal Procedure Code in so far as banning of public meetings is concerned being upheld by the Punjab High Court (the case is reported elsewhere), the scope of the guarantee in art. 19(1)(b) of the Constitution of the right to peaceable assembly has attained great importance. This section empowers any magistrate to "direct any person to abstain from a certain act... if such magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury... or a disturbance of the public tranquillity, or a riot, or an affray." The only safeguard provided by the section is that any person who is served with an order thereunder may apply to the very magistrate who made the order to rescind it, "showing cause against the order;" but the magistrate may reject the application and his decision is final, subject to review by the High Court, which does not mean anything in

view of the wide terms of the section (e. g., "tends to prevent" a riot).

The section is occasionally used to stop publication of specific matter in a newspaper or even to stop a newspaper, and in spite of the Press Laws Enquiry Committee's recommendation to the contrary, the Government insists upon applying the section to the press (vide p. ii:4). But the section is more frequently used for prohibiting public meetings. The Government often goes so far in the matter of controlling the right of assembly as to direct that no meetings of even small committees in private buildings be held without its prior permission.

The Punjab High Court, in deciding that the provision of sec. 144 authorizing a magistrate to prohibit a meeting if in his opinion it is necessary or desirable to do so for the purpose of preventing a possible disturbance of the public peace, has taken good care to state the "the issuing of such an order (banning a meeting) in a particular set

of circumstances may be ultra vires of the Constitution," unlike, e. g., the Supreme Court in the Khare case, where the Court considered merely the law and ignored the factual situation in which the order for externment was served on Mr. Khare. Whether the order for prohibition of meetings passed by the district magistrate of Jullundur was actually justified in the circumstances was not a matter before the Punjab High Court, and naturally it did not pronounce its opinion on that aspect of the question. But the emphasis it has laid on the fact that although sec. 144 was legal in its view, an order made under it might as well be illegal in certain circumstances gives the public an opportunity of testing the legality of such orders in courts of law, which we believe is a great advantage. And in order that such tests may be effectively made, we propose to cite in later issues a few leading cases in other countries in order to show how the right of public assembly is handled by the courts there, so that the people in this country may be able to assert this right. And, to begin with, we give below a most recent case that was decided in a U. S. A. court, which will throw very useful light on the subject.

As regards the decision of the Punjab High Court on the validity of sec. 144, we shall only say that while exercise of the right of peaceable assembly is made in art. 19 (3) subject to "public order" as it must be, the Court's opinion that "any law in the interest of public order is a good law" appears to us to be too broad a generalization, which it is hard to sustain. It may well be that the matter will be taken up some day to the Supreme Court in order that a final decision may be obtained as to whether a law giving uncontrolled discretion to a magistrate to ban meetings where he anticipates that disorder may possibly take place is valid. But for the present we must take the Punjab High Court's interpretation of the law to be correct. Even within these limits it would be possible to protect to a certain extent the right of assembly, which before the present Constitution came into force was wholly unprotected. And it is with that object in view that we give below the opinion handed down by Mr. Justice Doscher of the supreme court of Westchester County in *American Civil Liberties Union, Inc. v. Town of Cortlandt*, which is of great moral value to all of us who are engaged in preserving the basic right to freedom of assembly from attack by the executive. The opinion is quoted from the "New York Law Journal" of 23rd November 1951.

In this case the validity of two municipal ordinances was the subject of adjudication by the court. One of them requires a permit for the use of public streets and public places for the purpose of holding parades, demonstrations or assemblages. This the Judge calls the "Permit Ordinance." The other prohibits certain acts like holding public meetings in order to prevent disorderly conduct. This the Judge calls the "Prohibitory Ordinance." And the question was whether these ordinances, which were obviously within the power granted to the municipalities by the

Town Law and therefore presumptively constitutional, were in fact constitutional, or whether the presumption of constitutionality was overcome inasmuch as they invaded constitutional rights and were therefore unconstitutional.

In regard to the first ordinance of 29th September 1949, i.e., the so-called "Permit Ordinance," the Judge said :

The power granted to a town to regulate the use of its highways and to regulate the parades and public assemblages therein, carries with it the power to license or grant permits. The "Permit Ordinance" here under attack not only regulates the use of highways but also deals with public assemblages in any public place. Even this regulation is not illegal per se (*Kunz v. New York*, 340 U. S. 290; *Cox v. New Hampshire*¹, 312 U. S. 559.) An attack, however, is made on the constitutionality of the enactment on the ground that no standards are set for the issuance or denial of a permit.

The "Permit Ordinance" requires an application for a permit to be made to the town board at least seven days before a parade, demonstration or gathering is contemplated. The assemblage cannot be held unless written approval of the town board is obtained. The ordinance is entirely devoid of any mention of a basis upon which the town board may, or must, grant or withhold its approval. The discretion entrusted to the town board in the manner in which it will "assure the safety of the travelling public and properly regulate the use of public properties for public assemblage" is unlimited. The grant of such uncontrolled discretion invades constitutional rights (*Kunz v. New York*, 340 U. S. 290).

The mere fact that the preamble to the "Permit Ordinance" states a legal purpose does not save the enactment. Dressing an ordinance in the garb of legality does not make it constitutional (*Saia v. New York*,² 334 U. S. 558).

1. In *Cox v. New Hampshire*, the validity of a state statute prohibiting a parade or procession upon a public street without a special license was challenged. The Supreme Court held that such a statute was not necessarily illegal and that "the question in a particular case is whether that control is exerted so as not to deny or unwarrantably abridge the right of assembly." It said further that the statute as construed by the supreme court of the state had a limited objective and in that sense was not unconstitutional. The state court had said that the statute prescribed "no measures for controlling or suppressing the publication on the highways of facts and opinions, either by speech or writing;" that the licensing board was strictly limited, in the issuance of licenses, to "considerations of time and place and manner so as to conserve the public convenience" and of "affording an opportunity for proper policing;" that the board was not vested with an arbitrary power or an unfettered discretion to issue or refuse licenses and that its discretion must be exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination."

2. In *Saia v. New York*, the Supreme Court held unconstitutional an ordinance forbidding the use of a loud speaker or an amplifier except with permission of the chief of police, although the ordinance "was dressed in the garb of the control of a 'nuisance'."

Although in most cases where legislative acts have been struck down, the discretion in administering the licensing power has been placed in administrative officials, the rule is no different where the legislative body reserves for itself the administration of the licensing power. In the case of *Niemotko v. Maryland* (340 U. S. 268), applications for a license were customarily made first to the police commissioner, and, if refused by him, application was then made to the city council. Even that body was not permitted to have unlimited and uncircumscribed discretion. It is that type of discretion that has been here vested and, of necessity, this court must declare the "Permit Ordinance" unconstitutional.

In regard to the second ordinance of 18th October 1949, i. e., the so-called "Prohibitory Ordinance," the Judge said:

Certain portions of the "Prohibitory Ordinance" are attacked as being too vague and as a threat to the freedom of assembly. Not all assembly is under the constitutional cloak, just as not all speech is immune from prosecution. It is necessary for the statute, however, to give fair notice of the proscribed action (*Winters v. New York*,¹ 333 U. S. 507).

Each of the subdivisions under attack must be separately considered. In this discussion, it must be remembered that each subdivision contemplates an *intent to provoke a breach of the peace*.

Subdivision 3 of sec. 2 of the ordinance prohibiting acts which disturb the public peace by causing "consternation" and "alarm" was allowed by the Judge as being within the ambit of constitutionality. In reply to the contention of the American Civil Liberties Union

1. In this case the Supreme Court said: "A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press."

that the words were so vague as to make this subdivision illegal, the Judge said: "Standing alone, they may create some uncertainty; however, taken in context they do furnish adequate notice." But he struck down subdivisions 5 and 6 prohibiting assemblies and prohibiting schemes or plans for assemblies respectively for the purpose of "breaking down law enforcement." The Judge said:

The crux of each subdivision (and the basis for plaintiff's attack) are the words "breaking down law enforcement." Even in the light of the required intent to provoke a breach of the peace, the court finds these words too vague. The enforcement of what law, or laws, must the assembly seek to "break down"? Could it be a tax law, or, perhaps, a zoning ordinance? What is meant by the words "break down"? The portion of the ordinance that states it shall not be so construed as to prevent lawful freedom of speech or lawful assembly does not save its constitutionality. Even a plan or scheme by two or more persons formulated in the sanctuary of a home to hold a public meeting against some innocuous ordinance might well come within the dragnet of these subdivisions. It is almost impossible to envisage where the heritage of protest ends and the violation of this ordinance begins. It might be that a group of citizens standing on a street corner and deciding to breach the provisions of a burdensome tax ordinance might find that an "intent to breach the peace" is spelled out and hence a violation of subdivision 5 charged against them. Though far-fetched, the examples point up the vagueness of the statutory language and the threats to freedom inherent in the ordinance. Such dragnets must be declared void (*Herndon v. Lowry*, 301 U. S. 242; *De Jonge v. Oregon*, 299 U. S. 353).

The result was that the whole of the "Permit Ordinance" and subdivisions 5 and 6 of the "Prohibitory Ordinance" were held to be unconstitutional.

RESTRICTIONS IN THE CONSTITUTION WIDER THAN IN THE STATUTE!

GOVERNMENT'S REPLY TO AICLC'S REPRESENTATION

A queer situation has arisen because of the fact that in the amended article 19 (2) of the Constitution enumerating the restrictions which legislatures of the states are permitted to embody in laws concerning freedom of expression are wider than what the Government of India contemplates would actually be embodied in legislation that may be passed in the states in pursuance of the article. Such a situation does not arise in other countries where fundamental rights are guaranteed in the Constitution. There the restrictions, if any, which the Constitution permits the legislatures to impose on the exercise of any

particular right are very closely drawn and the legislatures are warned to keep within those limits if the laws they may adopt are not to be declared unconstitutional by the courts. In India, on the other hand, the condition is just the reverse. Here, "public order," "friendly relations with foreign States," and "incitement to an offence," which represent the three additional restrictions permitted by the amendment of art. 19 (2), are admitted by Prime Minister Nehru to be far too wide and comprehensive; but he stated that the actual restraints that would be laid on speech and press would be narrower, meaning thereby that the

Governments would not avail themselves in practice of their power of restriction to the fullest extent permitted by the Constitution.

A test of this arose immediately after the adoption of the Press Act by the Government of India for application in all the states. The West Bengal Government, seeing that its Security Act does not make full use of the power which the amended article 19(2) confers upon it for controlling the press, proceeded to amend the Act by including in it all the three new restrictions which the article, as it now stands, permits every state to impose upon the liberty of the press within its jurisdiction. The most surprising part of this proceeding is that that Government felt that the passing of the Constitution Amendment Act by Parliament was a signal to all the states to tighten up their legislation to the "required extent." The local conditions in West Bengal, even according to the Government, did not require any such widening of press restrictions, but the Government had a feeling that the Constitution Amendment Act set a certain standard of strait-jacketing of the press to which all local Governments must rise if they are not to be thought disloyal to the metropolitan Government which caused the three new restrictions to be introduced.

The All-India Civil Liberties Council brought this West Bengal Security (Amendment) Act, 1951, to the attention of the Home Ministry of the Central Government in a representation on 21st October last, which was reproduced at pp. ii:11 and 12 of the BULLETIN, and inquired as to what had happened to the promise implicit in the pronouncement of Mr. Nehru that, however vague and indefinite the additional restrictions incorporated in art. 19 (2) might be, their scope would be narrowly limited in statutes. To this representation the Home Ministry sent a reply on 26th November, which, however, did not go to the root of the matter. It pointed out that, by reason of sec. 27 (2) of the Press Act, all provisions contained in the West Bengal Security Act which impose restrictions in excess of those allowed by the former Act would cease to be valid after 1st February 1952 when the Press Act is to come into force, and as for the intervening period of some three months after the passing of this Act on 23rd October 1951, the Home Ministry's reply said: "It is correct that the definition of a 'prejudicial report' embodied in that Act (i. e., the West Bengal Security Amendment Act) uses expressions that are embodied in the amended article 19 (2) of the Constitution, and theoretically, it may provide legal justification for judicial proceedings against any published matter that falls within the expressions used. There is no reason, however, to assume that these powers will be utilised to the maximum permissible limits by the West Bengal Government."

But the question is not merely what the West Bengal Government would do before 1st February 1952, but what any local Government could do even after that date. Supposing any such Government adopts a local law for the control of the press (which, being in the concurrent

field of legislation, it can obviously do), a law which in view of local conditions imposes more stringent and far-reaching restrictions than those contained in the Press Act, what in such circumstances would be the status of such a law from the legal point of view? Would the law be valid? Would it be competent to a local Government to exercise the powers conferred by the central Press Act and in addition the powers which it takes to itself by its own local enactment? Or suppose it chooses by its law to cover the whole area of restrictions permitted by the amended article 19 (2), which Mr. Nehru admits includes an area that should not be fully occupied, would it be within its competence to do so? AICLC, on receiving the Government's reply, addressed on 29th November an inquiry on this point.

To this inquiry the Assistant Secretary to the Home Ministry sent a reply on 22nd December, which is quoted below:

In reply to your letter of the 29th November 1951 on the subject of legislation relating to the press, I am desired to say that although by virtue of item 39 of the Concurrent List in the Seventh Schedule to the Constitution, any state Government would be competent to enact such legislation within the limitations imposed by article 19 (2) of the Constitution, they would not normally proceed with such legislation without consulting the central Government. In any case, if any Bill passed in a state legislature contains provisions repugnant to the provisions of the Press (Objectionable Matter) Act, 1951, it will have to be reserved for the consideration of the President under article 254 of the Constitution, and in considering the question of giving his assent to the Bill the President will naturally be guided by the policy of the Central Government.

We must admit that this reply of the Home Ministry is satisfactory in so far as its own intentions are concerned. It shows that it does not desire any state to go beyond the bounds of the Press Act which it has persuaded Parliament to adopt for use by all the states, and that if it did go beyond these bounds the Ministry would use all the resources within its power to prevent any wider restrictions coming into force. But the legal position of a law passed by a state, which imposes restrictions in excess of the central Act, is not, we are afraid, quite as clear as the Home Ministry has assumed it to be in its reply. Our Constitution no doubt lays down the rule current in all federally-governed countries that where there is a conflict between central laws and local laws on the same subject, the former shall prevail. Art. 254 (1) provides for that: "If any provision of a law made by the legislature of a state is repugnant to any provision of a law made by Parliament, ... the law made by Parliament ... shall prevail and the law made by the legislature of the state shall, to the extent of the repugnancy, be void." But here the question would naturally be whether a state law

which confers larger powers of regulating the press than the central law does is necessarily repugnant to, or inconsistent with, the enactment of the central government. The state would claim that while the provisions of the central Act would satisfy the requirements of the country in general, the peculiar conditions obtaining in its territory necessitate some additional provisions which it has made by its own law. These provisions are not by any means in conflict with those of the central law but are in the same direction and have the same object in view. Only in detail they have to be slightly different in order to achieve the end. They are merely supplementary provisions, and it is the very purpose of constituting a concurrent field of legislation that states should be enabled to pass supplementary legislation that, in the opinion of those who are most competent to judge, local conditions may require. Whether such legislation can be regarded as repugnant to the central law is a moot point, and although the Government of India looks upon it in this light, it would be matter for adjudication by the courts.

Nor is it an invariable rule in our Constitution that where a state statute and a federal statute operate upon the same subject matter, prescribing different rules concerning it, the state statute must give way. In all other federal constitutions federal legislation supersedes state legislation. Art. 254 (2) provides (and it is this article to which the Home Ministry refers) that in certain circumstances a state law acknowledged to be inconsistent with a federal law will prevail over the latter. In such cases what enables the central Government to have a whiphand over a state is the provision that, in order that a state law, although inconsistent with a central law, may remain in force, it must have received the assent of the President who will be guided by the central Ministry. But it is quite possible that when the law is being enacted it may not be reserved at all, under art. 201, for the consideration of the President, for the Governor of the state, guided by the state Ministry, might well decide that the law contains no provision "repugnant to the provisions of an earlier law made by Parliament," which is a necessary condition of reservation, and that he need not reserve the law but might give his assent to it straightway. These are possibilities which cannot be lightly set aside. But even in such cases the proviso to art. 254 (2) gives the central Government the last word, because it provides that Parliament may repeal a state law which it thinks is repugnant to its own law. The Government of India can in this way ultimately assert itself, and it is because of this that we are satisfied that no state will be permitted to restrain the press to a greater extent than the central Press Act does if the Government of India so wishes it, as we see that it does.

This assurance of the Home Ministry is satisfactory in so far as it goes, but the assurance only means that a state press law cannot be worse than the Press (Objec-

tionable Matter) Act, which is bad enough. Still the method followed by the Government of India in framing constitutional provisions in so loose a fashion as to permit unreasonably wide restrictions on the basic right to freedom of expression and then persuading local Governments voluntarily to keep well behind the utmost limits of those restrictions will be recognized as a novel procedure which will be fatal to the preservation of free speech and free press. It was obviously such recognition that induced the General Assembly of the United Nations to turn over the International Covenant of Human Rights to the Human Rights Commission with a mandate so to improve the wording of the first eighteen articles of the Covenant relating to civil and political rights as to protect these rights in an effective manner. It has told the Commission to see that the rights set forth in the Covenant and the limitations thereto are defined "with the greatest possible precision." And in particular it has given a direction to the Commission to remove from art. 14 relating to freedom of opinion and information the vagueness of very general terms like "public order" used in the draft of the article. The General Assembly has done this because indefiniteness and imprecision in the definition of rights and their limitations is a sure method of emasculating the rights. And yet it is this method which the Nehru Government has followed in India.

PROHIBITION OF PUBLIC MEETINGS

Relevant Part of sec. 144, Cr. P. C., Held Valid

On 20th December section 144 Cr. P. C. was held to be good law, to the extent it dealt with issuing orders in order to prevent a disturbance of public tranquillity, by the division bench of the Punjab High Court consisting of Mr. Justice Bhandari and Mr. Justice Khosla. Petitions challenging the validity of the section filed on behalf of Master Tara Singh, the Akali leader, Sardar Dasaundha Singh, former Minister of United Punjab, Mr. Mohan Singh of the INA and 50 other Akali and INA leaders were dismissed by Their Lordships.

The petitions were filed under articles 228 and 226 of the Constitution praying that the cases pending against the petitioners in the court of the additional district magistrate of Jullundur under section 188 I. P. C. for infringement of the order of the district magistrate under section 144 Cr. P. C. be transferred to the High Court. The main ground on which the transfer was sought was that section 144 Cr. P. C. was ultra vires of the Constitution.

The facts giving rise to the cases were that on 10th March 1951 the district magistrate of Jullundur issued an order under section 144 Cr. P. C. prohibiting the holding of public meetings, processions and demonstrations in any public place throughout the district in order to prevent disturbances of public tranquillity. On 13th April last,

public meetings were held in three villages of Jullundur district and the petitioners attended them. They were subsequently charged under section 188 I. P. C.

Their Lordships observed that the only point requiring their decision at this stage was whether section 144 was or was not ultra vires of the Constitution.

The contention of Mr. H. S. Gujral, petitioners' counsel, was that the section was couched in such wide terms that it was repugnant to the provisions of articles 19, 25 and 31 of the Constitution. He also argued that the section contemplated unreasonable restrictions on the liberty of the subject and was not therefore saved by exceptions to articles 19 or 25.

On the other hand the Advocate-General, Mr. S. M. Sikri, contended that a part at least of section 144 was good in law because it did not in any way infringe any article of the Constitution. He maintained that the particular order under section 144 could be passed to prevent a disturbance of the public peace because such orders were saved by sub-section 2 of section 3 of the Constitution (First Amendment) Act, 1951, whereby any law imposing reasonable restrictions on exercise of the right conferred by article 19 in the interests of public order would be good in law. Mr. Sikri drew Their Lordships' attention to the provisions of article 13 and maintained that only that part of section 144 which was inconsistent with the provisions of the Constitution could be said to be void and not the whole of the section.

[Sec. 3, sub-sec. 2, of the Constitution Amendment Act is as follows: "No law in force in the territory of India immediately before the commencement of the Constitution which is consistent with the provision of article 19 of the Constitution as amended by sub-section 1 of this section shall be deemed to be void, or ever to have become void, on the ground only that, being a law which takes away or abridges the right conferred by sub-clause (a) of clause (1) of the said article (relating to the right to freedom of speech and expression), its operation was not saved by clause (2) of that article as originally enacted."

Their Lordships said:

It is clear that this section (sec. 144, Cr. P. C.) is saved by article 19 of the Constitution as it reads now, for, any law in the interests of public order is good law. Mr. Gujral contends that it is not open to us to break up section 144 in this manner as this amounts to redrafting the section and making it totally different to what its framers intended it to be. Omission of certain phrases which stand independently of other phrases does not, however, amount to redrafting. If an entire section in a certain statute is found to be ultra vires, that section may be omitted and the rest of the statute treated as good law. In the same manner if of several sub-sections one or two are bad while the others are good, the good ones will stand.

Section 144 (1) provides that a magistrate may issue certain orders in certain circumstances. Issuing

of such an order in a particular set of circumstances may be ultra vires of the Constitution but this does not mean that the entire section must go, for a magistrate may legitimately issue an order in another set of circumstances, namely, when there is danger of public disorder resulting, for the Constitution provides that a law which authorizes issuing of such an order is good law.

We are clearly of the view that in so far as section 144 empowers a district magistrate to issue orders in the interests of public order the section is good and intra vires of the Constitution. Therefore it must be held that the section does not contravene the provisions of article 19.

With regard to article 25, the contention of the petitioners' counsel is that the meetings called were religious meetings [three hours' previous notice to the police was required before holding a religious meeting], and that they could not be banned; but freedom of religion given by article 25 is subject to public order and whether the object of these meetings was to propagate religion or not, a ban under section 144 could have been imposed by the district magistrate in the interests of public order. There is a similar saving to freedom given under article 31 (which relates to "Right to Property"). In any case article 31 could apply because in the present case we are considering the validity of section 144 by omitting the phrase relating to "property." [Sec. 144 empowers a magistrate to direct a person "to take certain order with certain property in his possession or under his management," thus requiring an individual to surrender his property or management thereof.]

For reasons given above Their Lordships held that section 144, to the extent that it dealt with issuing orders in order to prevent a disturbance of public tranquillity, was good in law and therefore the order issued by the district magistrate, Jullundur, under that section in this case was a valid order. Their Lordships rejected the petitions and ordered that the records be sent back to the trial court for disposal of cases according to law.

HABEAS CORPUS PETITIONS

Reasons for Release of Tarsikka

In the sensational case of Makhan Singh Tarsikka, a Communist detenu from the Punjab, the point of law was whether in a detention order made under the 1951 Detention Act a government could specify the period of detention even before referring the case of the detenu to an Advisory Board. It will be recalled that the Constitution Bench of the Supreme Court, after hearing Mr. Tarsikka's habeas corpus petition, directed (5th December) the petitioner to be released, stating that the reasons for the order would be given later (vide p. ii.42). The

reasons were given on 10th December in a judgment written by the Chief Justice, Mr. Patanjali Sastri, and concurred in by the other four Justices. His Lordship said :

Whatever might be the position under the Act before its amendment in February, 1951, it is clear that the Act as amended requires that every case of detention should be placed before an Advisory Board constituted under the Act (sec. 9) and provides that if the Board reports that there is sufficient cause for the detention "the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit (sec. 11)." It is, therefore, plain that it is only after the Advisory Board, to which the case has been referred, reports that the detention is justified, that the Government should determine what the period of detention should be and not before. The fixing of the period of detention in the initial order itself in the present case was, therefore, contrary to the scheme of the Act and cannot be supported.

It cannot be too often emphasized that before a person is deprived of his personal liberty, the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person affected.

Following their decision in this Tarasikka case, Their Lordships ordered the release of Mr. Hazara Singh Thakar detained under an order of the Punjab Government.

The Madras High Court held in February 1951 in the case of Mr. A. K. Gopalan (vide p. ii:239) that the order of detention passed against him was illegal inasmuch as it did not mention the duration of his detention. (The order had been made under the 1950 Act.) Against this judgment of the High Court the Madras Government appealed to the Supreme Court, and the Constitution Bench of the Supreme Court dismissed the appeal on 10th December.

Grounds Not Supplied

Mr. Karamchand, a Communist detenu of Moga, in Ferozepore district, was ordered to be released on 21st December by a division bench of the Punjab High Court, consisting of the Chief Justice and Mr. Justice Harnam Singh. In the habeas corpus petition it was alleged that the detenu had been arrested on October 16, 1949, under the Public Safety Act and was under detention since. The new order of detention, under sections 3 and 4 of the Preventive Detention Act, was served on him on June 5, 1951. No grounds of detention were supplied to him. It was contended on behalf of the Government that this was not a new order, but it was served on the detenu to specify the period of his detention and, therefore, it was not considered necessary to serve him with the grounds of detention.

Their Lordships held the detention illegal and observed that this was a new order of detention under section 3 of the Preventive Detention Act and grounds of detention had to be supplied under the Act.

Detention "Mechanically" Ordered

On 26th December Mr. Justice Jia Lal Kilam of the Jammu and Kashmir High Court ordered the release of a detenu, L. Mohan Lal, holding that the order for detention was passed in a routine and mechanical manner. That the order was so passed was clear from the fact that while the detention purported to have been ordered under sec. 3 clause (a) of the State's Public Security Act, there is no such clause in the section in fact, the real clause being clause (i) of sec. 3. Similarly, it was stated in the detention order that L. Mohan Lal was being detained "with a view to prevent him from 'facing' in a manner prejudicial to public security" instead of "acting in a manner. . . ." His Lordship said :

Detaining authorities should know that by passing an order under section 3 of the Public Security Act or rule 24 of the Defence Rules they are depriving a subject of his liberty without affording him an opportunity to produce defence and without taking any evidence against him in his presence. When an action is taken under these provisions of law, what is expected is that utmost care and caution is taken by the detaining authority while making the detention order, and that the provisions of law are followed in meticulous details. But in this case we find that the order has been made under a provision of law which does not exist.

I think the mere fact that the order has been signed without correcting these errors shows the mechanical frame of mind of the detaining authority which negatives a cool and calm appreciation of facts, which is essential for an intelligent mental satisfaction. The superintendent of police (who is the detaining authority in this case) in his affidavit says that the word "facing" in the order of detention is a mere clerical error and in fact means "acting." I wish he knew this elementary principle of law that the benefit of mistakes, whether clerical or otherwise, must after all go to the subject whose liberty has been snatched away from him under an order which contains clerical errors and wrong recitals about law.

The detenu had also demanded a copy of the detaining order in order that he might make a revision application, but the copy was refused by the detaining authority, stating that "the offence is non-appealable," and that "a copy of the detention order cannot be supplied." On this point His Lordship said :

According to law a detenu has a right to get such an order reviewed by the Government. I think the detenu was entitled to a copy of the order, because without such a copy it was not possible for him to put in his

revision petition before the Government. The copy having been denied to him, he has been deprived of a proper remedy guaranteed to him by law.

I am of the opinion that the detention order is not properly made and that Mohan Lal is detained improperly in custody.

Grounds Untenable

Sitaramappa C. Anne, who had been in detention for his alleged complicity in the planning of illegal activities among the Warlis in Thana district, was ordered on 21st December to be released by Mr. Justice Bavdekar and Mr. Justice Dixit at the Bombay High Court.

The grounds for Sitaramappa's detention, among others, were that he was present at a meeting held at Mahim in Bombay, in October last, where it was planned to start a campaign in Thana instigating the agriculturists of the district not to pay the grain levy and to use violence against landlords and Government officers.

Their Lordships accepted the detenu's contention that as the levy was not compulsory in Thana district there was no need to ask the agriculturists not to pay the grain levy. There was also no possibility of any violence being used against Government officers, it was stated.

Their Lordships also held that the commissioner of police had no jurisdiction to pass the detention order against the petitioner as the alleged no-rent agitation was restricted to Thana district and did not in any way affect the maintenance of public order in Greater Bombay.

Detained for Having "a Liking for Communism"

Mr. K. Venkata Reddy, a detenu, was on 2nd January ordered to be released by a division bench of the Hyderabad High Court on a writ of habeas corpus filed on his behalf.

Mr. Reddy had been detained for having developed a liking for Communism, which, Their Lordships felt, was not a sufficient ground for detention.

BANNING OF ORGANIZATIONS

Cochin Act Held Invalid

A full bench of the Travancore-Cochin High Court on 10th December held that section 3 of the Cochin Criminal Laws Amendment Act 27 of 1124 M.E. was ultra vires of the Constitution and all restrictions imposed under the section were unreasonable and were opposed to the fundamental rights guaranteed under articles 14 and 19 of the Constitution in regard to formation of associations, etc.

The High Court was pronouncing judgment in the case in which George Chadayanmuri, a leading Communist who had been prosecuted for prejudicial acts and charged for holding study classes with a view to subverting established Government, had appealed before the High

Court for quashing the conviction against him and had prayed for the issue of a writ questioning the validity of the ban on the Communist Party imposed under the Cochin enactment.

The case was first heard by a division bench and was referred to a full bench. The judgment, however, made it clear that it had no reference to the existing Public Safety Measures Act which had been recently amended by an ordinance by the Rajpramukh.

In a concurring judgment Their Lordships declared that section 2 of the Cochin Criminal Law Amendment Act of 1124 M. E. became void on 26th January 1950, the day on which the Constitution of India came into force. The notification issued by the Government thereunder on January 2, 1950, therefore, ceased to be valid on January 26, 1950, and the prosecution for transgression thereof in respect of acts after that date was clearly unsustainable.

In passing the order quashing the charge framed in the case as a whole, Their Lordships observed, "We do not, however, know whether the detention in jail of the petitioner and the several other accused who have been apprehended is on account of this case alone. As such we do not pass any order for their immediate release."

The High Court granted the State Government leave to appeal to the Supreme Court.

DISCRIMINATION ON THE GROUND OF SEX

Madras High Court's Ruling

A girl student, Miss S. Santha Bai by name, who had passed her school leaving examination, applied to the Principal of the Mahatma Gandhi Memorial College, Udipi, for admission to the Intermediate Class of the College. The Principal refused admission on the ground that the authorities of the Madras University, on the recommendation of an inspection commission, had issued a rule not to admit women students for the Intermediate course in the College.

Miss Santha Bai filed a petition before the Madras High Court for the issue of a writ of mandamus to direct that she be given admission. Mr. Justice Subba Rao, who heard the petition, held (14th December) that the University, by directing the Principal not to admit girls in the College, had violated the fundamental right of the petitioner and therefore the petitioner was entitled to relief by way of a writ of mandamus. His Lordship said:

If article 15 (1) of the Constitution (prohibiting discrimination on grounds of sex, etc.) stood alone, every college would become a co-educational institution; for if a woman cannot be discriminated against on the ground of sex, a man also cannot be discriminated against on the ground of sex. The result would be that not only a woman would be entitled to apply for a seat in a college reserved for men, but a man would also be entitled to apply for a seat in

a college reserved for women. To meet this situation and to protect the interests of women, article 15 (3) of the Constitution was enacted. Under article 15 (3) the State can make special provision for women and children. It can provide a separate college for women. It can direct that a minimum number of seats in a college should be allotted to women. It can make other similar provisions to safeguard the interests of women. Article 29 of the Constitution is not in conflict with article 15, for it says that no citizen shall be denied admission in any educational institution on grounds only of religion, race, caste, language or any of them; it does not say that the State can make discrimination on the ground of sex. If permission to make discrimination on the ground of sex is necessarily implied from this clause, it will certainly be in conflict with article 15 (1); for under article 15 (1), no discrimination shall be made against any citizen on the ground of sex. If a provision is made in article 15 (3) safeguarding women's rights by reservation of seats or separate colleges, for women, article 29 (2) would be in conflict with that provision, if the word "sex" is also found in article 29 (2). To avoid that conflict and to safeguard the interests of women the word "sex" is omitted in article 29 (2). I would, therefore, hold that article 29 (2) will not limit the scope of article 15. To illustrate the combined scope of the two articles, if a boy or a girl applies for admission to a college, he or she cannot be refused admission on the ground of sex only. But the State can make a provision for a separate college for women or allot separate seats for them in a college by reason of article 15 (3). If a boy applies for admission to a women's college, his application can be rejected, as article 29 does not prohibit discrimination on grounds of sex. So construed, the provision of both the articles can be reconciled and full effect can be given to the intention of the framers of the Constitution. I, therefore, hold that the University by directing the Principal not to admit girls in the College have violated the fundamental right of the petitioner and she is entitled to relief under article 226 of the Constitution.

In the end, His Lordship allowed the petition, directing the Principal to consider the petitioner's application for admission without any discrimination being made on the ground of sex.

PUBLIC SAFETY ACT OF MADHYA PRADESH

Special Court Notifications

Mr. Justice C. R. Hemeon and Mr. Justice V. R. Sen of the Nagpur High Court have held invalid (the "Hitavada" of 20th December reports) the notifications of the Madhya Pradesh Government constituting a Special Court of criminal jurisdiction for Akola district and appointing Mr. G. R. Kale as a Special Judge to preside over the Special Court.

The notifications were issued in exercise of the powers conferred by the Madhya Pradesh Public Security Measures Act, 1950.

Jagjiwanram, Pyarelal, Dunia Singh alias Mahabir Singh and 37 others were prosecuted on the allegation that they belonged to a gang of persons associated for the purpose of habitually committing thefts and house breakings and they had been operating in the district of Akola. The case was directed to be tried by the Special Judge,

under the orders of the Madhya Pradesh Government, acting under the Public Security Measures Act, 1950. Jagjiwanram and two others came in revision to the High Court questioning the validity of Government's action in applying the Act to their case.

Among the grounds urged, and the one on which the High Court gave its decision, was that another gang case was pending at Akola, in which the trial was being held by the normal Court and the accused in that case had all the facilities of a full trial under the Criminal Procedure Code, while the applicants' rights were curtailed by virtue of their case being directed to be tried by a Special Judge. It was urged that this resulted in discrimination and offended article 14 of the Constitution (guaranteeing equal protection of the laws).

On behalf of the State it was contended that section 14 of the Act laid down that a Special Judge appointed under the Public Security Measures Act "shall try such offences or class of offences or such cases or class of cases as the State Government may direct," and, therefore, even one individual could be treated as a class if such individual was unique or as it was sometimes called a class by himself.

After examining the provisions of the Act their Lordships said:

We are now in a position to see the difference between the trial of offences by a Special Judge and the trial of offences under the Code. There is no commitment under the Act. This is distinctly disadvantageous to the accused. He is deprived of the benefit of an inquiry. He has only one opportunity of cross-examining the prosecution witnesses and has no chance of being discharged. The Special Judge is not required to frame a charge and the procedure is not that of a warrant case. The Special Judge is not required to record evidence in accordance with section 356 except in cases of trial of offences punishable with death or transportation for life. He is only required to record a memorandum of substance of what each witness deposes. This mode of recording evidence is prejudicial to the interests of the accused. The impugned section 14 empowers the State Government to deprive an accused of his right to be tried by a jury by directing his trial before a Special Court. The right to be tried by a jury has always been regarded as one of the most valuable rights of the citizens in this country and in England.

Their Lordships then observed:

The real question was whether the power conferred on the State Government under section 14 of the Act involved discrimination in a manner contrary to article 14 of the Constitution. In their opinion, there was no discrimination if certain offences or classes of offences were directed to be tried by a Special Judge. Persons accused of such offences would be treated alike. They would all be subject to the procedure governing the trial of cases under the Act by a Special Judge. The power to direct certain classes of cases to be tried by a Special Judge might not also be regarded as discriminatory if there were good reasons for classification of such cases and treating the cases and persons charged in such cases differently from other cases and persons charged therein.

The power given to the State Government to direct that any particular case be tried under the Act in a different way from that in which it would ordinarily have been tried, involved discrimination and infringement of article 14 of the Constitution. It

enabled the State Government to discriminate between man and man in the same locality—it might even be in respect of the same or a similar crime—and to send one of them for trial by a Special Court, with all the risks and disadvantages which special procedure involved, while leaving the other to be tried in the normal course by the regular courts. It was an uncontrolled and unguided power left in the hands of the Government.

It did not appear that in enacting section 14 of the Act, the legislature had in view the provisions of article 14 of the Constitution. The Special Judge did not appear to have examined the validity of section 14 of the Act in the light of article 14 of the Constitution.

Agreeing with the unanimous decisions of the Calcutta High Court, Their Lordships held that Government notifications constituting the Special Court and appointing the Special Judge were invalid. The Special Court, Their Lordships said, had no jurisdiction to try the applicants. They therefore quashed the proceedings.

COMMENTS

India is Not "Adult"

Sir Robert Watson Watt, F. R. S., says in the Human Rights issue of December 1951 of the Unesco's "Courier" that the right to freedom of expression includes "that highest of human rights—the right to be 'wrong' and the right to preach 'false' and 'subversive' doctrines." And he goes on to say: "There are sadly few communities sufficiently adult fully to cede these rights within their own frontiers—regardless of the frontiers of others." Evidently, in the scientist's opinion, India, being a country in which political organizations can be and are being banned for the opinions they hold, is not an adult country.

Release on Parole

The Orissa Government too, following the example of the Governments of some other states, released all the 15 Communists who were held in detention in order to enable them to participate in elections. Only they were released on 26th December, just on the eve of the polling day! But the Bombay Government, whose Home Minister (Mr. Morarji Desai) is a convinced disciple of the late Mr. Patel, the "iron man" of the Government of India, refuses to do even this. Mr. N. M. Joshi, President of the Bombay Civil Liberties Union, brought the example of Madras and other states to the notice of Mr. Desai and requested him to release Communist detenus on parole, but to no purpose.

Civil Liberty and Elections

Deprivation of civil liberties by the Congress Governments in all the states figured prominently in the election campaigns of all non-Congress parties. For an illustration we may point to the criticism levelled by Mrs. Sucheta Kripalani, wife of Acharya Kripalani, a former President and for many years General Secretary of the Congress, who has now seceded from the Congress and founded a party of his own. Mrs. Kripalani referred at a Bombay meeting on 23rd December to the "bitter experience" of four years of Congress rule during which things had gone "from bad to worse." She said:

Civil liberties were not respected and preventive detention was the order of the day, climaxed by "changes for the worse in the Constitution," suppressing freedom of speech and expression. The number of police firings had increased unprecedentedly during Congress rule; firing on innocent people, particularly on hunger-marchers (as in Cooch-Bihar), was thoroughly inconsistent with the principle of non-violence to which the Congress was pledged.

Another instance of civil liberties being kept in the foreground of the election campaign is found in the remarks made by Mr. S. S. More, General Secretary of another non-Congress party, at Poona on 3rd December. He referred to the threats which Mr. Nehru was constantly giving to crush the Hindu Mahasabha and the R. S. S. for their political opinions. These remarks were particularly notable because Mr. More's party is opposed to both the Hindu Mahasabha and the R. S. S. "We have our differences with these bodies," he said, "but we shall not allow the Government for that reason to use coercion against our opponents. The Government went even so far as to detain the aged leader of the Hindu Mahasabha, Mr. L. B. Bhopatkar, under the Public Safety Act on mere suspicion. Such flagrant violations of civil liberties cannot be tolerated." This reference to Mr. Bhopatkar's detention was particularly graceful, because Mr. More's party is supposed to be virulently anti-Brahmin and Mr. Bhopatkar's party is supposed to be violently pro-Brahmin.

Infringement of fundamental liberties was a heavy count against the Congress in the platform of all the other political parties.

Truman's Civil Rights Programme

Mr. Truman is making another effort to carry out, though on a more modest scale than formerly, his civil rights programme which was in abeyance on account of the revolt of the Southern Democrats. On 3rd December he issued an executive order setting up a committee to recommend measures for the enforcement of the clause in federal contracts (which cover one-fifth of the total national economy) forbidding discrimination on the ground of "race, creed, colour or national origin." Such a clause exists in all contracts for Government work for the last ten years, and negro employees are the principal beneficiaries thereof, but complaints are widespread that the clause is not strictly enforced. Mr. Truman had at first tried to make permanent Mr. Roosevelt's Fair Employment Practices Commission that operated during World War II, but the Commission was starved to death by lack of funds when Congress refused further appropriations in 1946. The Committee now to be appointed will have far less powers than this Commission. In the first place, it will not be within the competence of the Committee, as it was within that of the Commission, to prevent discrimination in the matter of wages, hours, etc.; it is concerned only with employment. And, in the second place, the Committee will only be able to set up an inspection agency and recommend action against those found guilty of discriminatory practices; it will have no power to enforce its own sanctions. Even so, the present executive order is to be welcomed as signalling renewal of challenge on Mr. Truman's part to his Southern opponents.