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THE INEXORABLE SAFEGUARD OF DUE PROCESS OF LAW

In this article we have taken the procedural due process of the United States constitutional law as the subject of our discussion. The occasion for doing so is the decision of the Madras High Court affirmed by the Supreme Court, in V. G. Row's case under the Criminal Law Amendment Act, 1908, as amended by the Madras Act, Section 1 of the article gives a resume of the tests applied by the Madras High Court in holding the restrictions imposed by the Act on the Right of Association as "unreasonable." As these tests conform to the principles of due process, we have set forth in Section 2 the requirements of these principles (particularly the right to counsel) at some length and shown how these principles are similar to the principles of natural justice as understood in British law. And in Section 3 we state how due process was invoked in a very important recent case in the United States Supreme Court. It is our hope that this discussion will help in understanding the underlying principles of due process in relation to the requirement in our Constitution that any restrictions to be validly laid on some of the fundamental rights must be "reasonable."

1.—RULE OF THE OUTLAWING ACT CASE

Although, in declaring in V. G. Row's case (vide p. ii:101 of the BULLETIN) that the restrictions imposed by the Criminal Law Amendment Act, even as amended by the Madras Act, on the right to freedom of association were "unreasonable," the Supreme Court claims to have rested its decision "on a broader and more fundamental ground" than that taken by the Madras High Court, it will be found on closer scrutiny that the Supreme Court's objections too, like those of the Madras High Court, are really founded on the same consideration, viz., that the Act, as Mr. Justice Satyanarayana Rao put it in the Madras High Court, "does not provide an adequate and just remedy for the person aggrieved to challenge the correctness of the declaration" of the Government purporting to outlaw an organization. The Madras High Court did not object to the provision made in the Act for referring cases of outlawry to an Advisory Board instead of to a court of law, though it does not think that there was any overriding necessity to oust the latter's jurisdiction.* Nor did it object to absence of a provision in the Act for an appeal

to any authority against the decision of the Advisory Board. What it objected to was that there was no "due observance of procedural requirements (that) is obligatory (not only in judicial trials but) even when a judicial power is exercised by the executive." As Mr. Justice Viswanatha Sastri said in the Madras High Court :

The substance of justice and fair play must be provided before a person is deprived of his freedom by action taken under a restrictive enactment, and this requisite is an integral part of the "due process" doctrine of the American Constitution. It is also the core of the principle of "natural justice," a term widely employed in the discussion of this subject. The idea is that the substantial requirements of justice should not be violated : notice of the charge and of the inquiry into it should be given ; adequate opportunity to rebut the charge and to be heard in defence should be given ; the tribunal must be impartial and disinterested ; and any condemnation, conviction, or deprivation of personal liberty or property must be imposed only as a result or by the force of the decision of the tribunal.

The Court found that all these requirements of justice except the one relating to the composition of the tribunal were violated by the provisions of the Madras Act. (1) "There is no provision in the Act for service of the notice of the declaration on the association through its office-bearers or members at its place of business," the declaration itself being made ex parte by the Government on its own information. "So soon as the declaration is published, the association becomes an unlawful association and its members are liable to be prosecuted and sentenced to imprisonment and fine under sec. 17. The moveable properties, moneys, securities, and credits of the association as well as effects not belonging to it (if intended, in the opinion of the Government, to be used for the purposes of the association) are liable to be forfeited by Government under secs. 17B and 17E." A subsequent

As in the past two years the Bulletin will not come out in June next. The present issue is to be considered as a joint issue for May and June. The Bulletin will make its next appearance in July.

* "If an offence under the ordinary law is committed or a new offence is created by the statute, there is no reason for not adopting the ordinary modes of procedure for trying such offences."—Satyanarayana Rao J., para. 24.

cancellation of the declaration on the report of the Advisory Board "is like a judgment of acquittal on an appeal from conviction." (2) "The person (concerned) has no right to lead any evidence (before the Advisory Board) and the matter has to be disposed of merely on the representation made by him and the information, if any, which the Advisory Board would be able to obtain under sub-cl. (3) (of sec. 16A)." "The persons affected are not entitled to be heard in person or by counsel before the (Advisory) Board." They "are not entitled to know on what evidence they are being declared to be members of an unlawful association. The Government is entitled to withhold communication of the evidence according to its discretion, even though it cannot claim privilege under the Evidence Act." "They (the persons affected) have no right to test the evidence relied upon by the Government or to lead evidence *contra*. The Government is the sole judge of what evidence it will produce and what it will withhold from the scrutiny of the Advisory Board. The Board cannot compel the Government to produce all the evidence in its possession." (3) "There is nothing (in the Act) making it incumbent on the Government to refer the notification to the Advisory Board within a definite time and there is nothing to compel the Advisory Board to make its report within a particular time." It may be mentioned that the Preventive Detention Act provides that cases of detention shall be referred to the Advisory Board within six weeks, and the Advisory Board shall submit its report, within ten weeks, from the date of detention, and it cannot be understood why these provisions were omitted from the Madras Criminal Law Amendment Act, which generally follows the Preventive Detention Act. But the Chief Justice of the Madras High Court does not consider that the defect arising from the absence of these provisions would in itself alone "render the Act repugnant to the Constitution". The main ground on which the High Court invalidated the Act was the prohibition imposed upon the aggrieved person "from taking any part in the proceedings of the Advisory Board" and the absence of any provision for such person to defend himself. In other words, the Act does not provide that the trial, even if before the special tribunal of the Advisory Board, shall be "a fair trial in the sense that the person accused has a reasonable opportunity of placing his case before the tribunal and a guarantee of a fair trial." In the absence of such a provision, "the imposing facade of an Advisory Board," in the words of Mr. Justice Viswanatha Sastri, "is not an effective protection."

2.—DUE PROCESS AND NATURAL JUSTICE

Principles of Due Process

Thus the vice of the Madras Amending Act and still more of the original 1908 Act is, if one were to use the phraseology of the U. S. constitutional law, that it violates the procedural due process of law. But to many of our Supreme Court judges that phrase is suspect. In the case of Gopalan, the first important constitutional case that

came before the Court, they were so intrigued by the "diverse meanings" which were given to that phrase by the United States Supreme Court, being "widened or abridged in certain decades," that they seemed to think that the doctrine of due process has no particular significance in the constitutional law of the United States itself and that at any rate no particular significance need be attached to it in interpreting our Constitution. It is no doubt true that in matters of social legislation and particularly of economic control the U. S. Supreme Court has progressed from an attitude of what is called "a judicial *laissez faire*" to that of almost complete legislative freedom. This was inevitable on account of the change in the current social and economic philosophy. But in the field of truly essential human rights the doctrine of due process has performed a mighty function. It is the greatest of all the instruments in the hands of the courts for the protection of the people inasmuch as it enables the courts to annul unreasonable, arbitrary, or capricious governmental action. It is a non-technical concept and has pliability enough for adaptation to the modes and needs of the changing times, but is always capable of being invoked in behalf of "checking attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution" (Justice Frankfurter). *

The procedural safeguard of due process requires reasonable notice and a fair hearing. Willoughby says that the procedural due process requires that a person who is to be deprived of his life, liberty or property "shall have had due notice, which may be actual or constructive, of the institution of proceedings by which his legal rights may be affected"; and "that he shall be given a reasonable opportunity to appear and defend his rights, including the right himself to testify, to produce witnesses, and to introduce relevant documents and other evidence" (p. 736). The requirement is of course imperative in criminal cases. "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defence—a right to his day in court—are basic in our system of jurisprudence." *Re Olivier* (1948) 333 U. S. 257. "The hearing, moreover, must be a real one, not a sham or a pretence." *Palko v. Connecticut* (1937) 302 U. S. 319. Similarly, notice and hearing are pre-requisite to due process in civil proceedings, e. g., *Coe v. Armour Fertilizer Works* (1915) 237 U. S. 413. Indeed, the doctrine is all-pervasive, requiring fair procedure in all matters in which men are denied or deprived of any kind of right. In all actions of adminis-

* Professor A. W. Macmahon of Columbia University shows in "Problems of Modern Government" how the due process clause, first used to impose substantive restraints on legislative control of economic matters, later (i. e., about 1937,) fell into desuetude. He says: "While the Fourteenth Amendment is being contracted as a substantive restraint in the economic field, it is being enlarged as a guarantee of personal rights. . . . While legislatures are being blocked in one direction, they are being given free passage through the Fourteenth Amendment in the other."

trative boards which are quasi-judicial in character, due process requires that notice and hearing be given to the party concerned. Thus, in levying ad valorem taxes it is held that assessment of the property to be taxed cannot be validly made without giving notice and opportunity for hearing to the taxpayer. To the extent that finality is accorded to the rate determination of an administrative agency, the Supreme Court exacts a high standard of procedural fairness. In *Morgan v. United States* (1938) 304 U.S. 1 the Court said about a rate determination proceeding: "In administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a fair and open hearing,—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'"

And, generally, no one can be deprived of property without a fair and full hearing. "An opportunity to be heard is constitutionally necessary to deport persons even though they make no claim of citizenship, and is accorded to aliens seeking entry in the absence of special directions to the contrary. *Yamataya v. Fisher* (1903) 109 U.S. 86. Even in the distribution by the Government of benefits that may be withheld, the opportunity of a hearing is deemed important" (Mr. Justice Frankfurter). In 1941 the Attorney General's Committee on Administrative Procedure reported that the requirement of "a fair hearing," always insisted upon in action by administrative agencies, was in most cases found to have been observed, the requirement being:

Before adverse action is taken by an agency, whether it be denying privileges to an applicant or bounties to a claimant, before a cease-and-desist order is issued or privileges or bounties are permanently withdrawn, before an individual is ordered directly to alter his method of business, or before discipline is imposed upon him, the individual immediately concerned should be apprised not only of the contemplated action with sufficient precision to permit his preparation to resist, but, before final action, he should be apprised of the evidence and contentions brought forward against him so that he may meet them. He must be afforded a forum which provides him with an opportunity to bring his own contentions home to those who will adjudicate the controversy in which he is concerned. The forum itself must be one which is prepared to receive and consider all that he offers which is relevant to the controversy.

The Concept of "Natural Justice"

In England this doctrine goes by the name of "natural justice," the main principles of which are "that no party ought to be condemned unheard or to have a decision

given against him unless he has been given a reasonable opportunity of putting forward his case" (Halsbury's "Laws of England," vol. 6, p. 392). And in the Report of the Committee on Ministers' Powers (1936) it is said that while in administrative determination a Minister may "depart from the usual forms of legal procedure or from the common law rules of evidence, he ought not to depart from or offend against 'natural justice'." The English courts always insist that an opportunity to be heard is given. In the leading case of the Board of Education v. Rice (1911) A. C. 179, Lord Loreburn said: "They (the Board of Education) can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view." Similarly, *General Medical Council v. Spackman* (1943) A. C. 627, and *Rex v. Westminster Assessment Committee* (1940) 1 K. B. 53. In Gopalan's case Mr. Justice Fazl Ali cited the statement of the Lord Chief Baron, in *Wood v. Woad* (1874) 9 Ex. 190 with reference to a committee performing quasi-judicial functions:

They (the committee) are bound in the exercise of their functions by the rule expressed in the maxim *audi alterum partem* (meaning: Hear the other side), that no man should be condemned to consequences without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.

DUE PROCESS WITH PARTICULAR REFERENCE TO

The Right of Counsel

We give below extracts from the often-quoted decision of the United States Supreme Court in *Powell v. Alabama* (1932) 287 U. S. 45, which stresses the necessity of giving notice and a fair hearing in criminal cases with particular reference to the right to counsel which must be conceded to the accused persons in order to ensure that they shall have a fair hearing. It is a cardinal principle of the jurisprudence of the United States that in all criminal prosecutions the accused shall not be denied the right of counsel with the accustomed incidents of consultation and opportunity for preparation for trial. The Sixth Amendment specifically provides for this in federal courts, and the right is embraced within the due process clause of the Fourteenth Amendment so far as the states are concerned. Moreover, the constitutions of all the states, save that of Virginia, contain provisions with respect to the assistance of counsel in criminal trials. This insistence on the right to counsel in the decision which is being quoted is specially apposite now in view of the fact that the Madras Amending Act in Row's case, in sec. 16A (5), negatives the right of the persons affected to appear either in person or by an advocate before the Advisory Board. In this respect the Act follows the provisions of the Preventive Detention

Act, 1950, though sec. 10(1) of the latter Act as amended in 1951, permits the Advisory Board to hear a detenu in person "if in any particular case it considers (such hearing) essential," the right to appear by counsel before the Advisory Board being still denied. In *Powell v. Alabama*, the U. S. Supreme Court said:

It never has been doubted by this Court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by "the law of the land" is intended "a law which hears before it condemns," have been repeated in varying forms of expression in a multitude of decisions. In *Holden v. Hardy* (1898) 169 U. S. 366, the necessity of due notice and an opportunity of being heard is described as among the "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." And Mr. Justice Field, in an earlier case, *Galpin v. Page* (1874) 18 Wall. 350, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. "Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered." Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so.

What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how

much more true is it of the ignorant and illiterate, or those of feeble intellect? If in any case, civil or criminal, a state or federal court were to refuse arbitrarily to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

The decisions all point to that conclusion. In *Cooke v. United States* (1925) 267 U. S. 517, it was held that where a contempt was not in open court, due process of law required charges and a reasonable opportunity to defend or explain. The Court added, "We think this includes assistance of counsel, if requested." In numerous other cases the Court, in determining that due process was accorded, has frequently stressed the fact that the defendant had the aid of counsel. See, for example, *Felts v. Murphy* (1906) 201 U. S. 123; *Frank v. Mangum* (1915) 237 U. S. 309; *Kelley v. Oregon* (1927) 273 U. S. 589. In *Ex parte Hidekuni Iwata* (D. C.) 219 Fed. 610, the federal district judge enumerated among the elements necessary to due process of law in a deportation case the opportunity at some stage of the hearing to secure and have the advice and assistance of counsel. In *Ex parte Chin Loy You* (D. C.) 223 Fed. 833, also a deportation case, the district judge held that under the particular circumstances of the case the prisoner, having seasonably made demand, was entitled to confer with and have the aid of counsel. Pointing to the fact that the right to counsel as secured by the Sixth Amendment relates only to criminal prosecutions, the judge said, "But it is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner." In *Ex parte Riggins* (C. C.) 134 Fed. 404, a case involving the due process clause of the Fourteenth Amendment, the court said, by way of illustration, that if the state should deprive a person of the benefit of counsel, it would not be due process of law. Judge Cooley refers to the right of a person accused of crime to have counsel as perhaps his most important privilege, and after discussing the development of the English law upon that subject, says: "With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defence by counsel." The same author, as appears from a chapter which he added to his edition of *Story on the Constitution*, regarded the right of the accused to the presence, advice and assistance of counsel as necessarily included in due process of law. The state decisions which refer to the matter invariably recognize the right to the aid of counsel as fundamental in character.

3.—JOINT ANTI-FASCIST REFUGEE
COM. v. McGRATH

The President's Loyalty Order

The external threat to the security of the United States which Communist infiltration into Government offices constituted was realized after the revelations in the Canadian spy case, followed in the U. S. A. itself by the disclosures of Whittaker Chambers and Elizabeth Bentley and by the discovery of the espionage activities of Judith Coplon and Klaus Fuchs and his conspirators. In order to meet this threat it was thought necessary to screen governmental employees by instituting investigations into their loyalty to the Government. Such check on loyalty was directed by the President's Loyalty Order of March 1947. It set up the standards to be adopted in investigations and prescribed the procedure to be followed in arriving at conclusions. The authorities concerned were told that refusal of employment or removal from employment could be justified only where "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." Among the activities and associations which were to be considered in connection with the determination of disloyalty of an employee or a would-be employee was included "membership in, affiliation with, or sympathetic association with, an organization" designated by the Attorney General as "totalitarian, fascist, communist, or subversive." The list of such associations prepared by the Attorney General is supplied to all government departments, and the Loyalty Review Board charged with carrying out the screening process uses the list as only one piece of evidence to be weighed along with everything else that is pertinent, but the determination of the tribunal is based on all the evidence available. The procedure followed in this respect "constitutes," in the opinion of a competent writer, "marked improvements over previous practices. It requires that an employee shall be informed of the charges against him. Hearings are made mandatory, not discretionary with the agency as in the past. At the hearing, the employee is given the right to be accompanied by counsel or other representative, to bring in witnesses, and to present other evidence on his own behalf" (Eleanor Bontecou in the "Annals of the American Academy of Political and Social Science" for May 1951, p. 120).

Although the interests of an aggrieved employee are thus duly protected, it was felt that the characterization by the Attorney General of any organization as "subversive" in itself inflicted an injustice on that organization inasmuch it harmed its reputation, and since the Attorney General prepares this list without giving notice and an opportunity to the organizations which he designates as "subversive" or "communist" to prove that the charge is false, the procedure involves denial of due process. This question arose prominently in *Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U. S. 123, and the opinions recorded by several Justices are most interesting

and instructive. The case was not decided on the basis of this issue at all, but arguments that the procedure violates the procedural due process and that it does not do so figured prominently in the judgments respectively of Mr. Justice Frankfurter and Mr. Justice Reed, which throw a great deal of light on what precisely the requirement of due process is, and we shall give the arguments advanced mostly in the words of these Justices.

Let us first see exactly in what manner the question of due process arises in connection with the Attorney General's "black list". He was ordered to prepare such a list "after appropriate investigation and determination," and it was not alleged in this case that the Attorney General put the characterization of "communist" on the three organizations involved therein without proper investigation. The contention rather was that the organizations concerned were not allowed to take any part in the investigation conducted by the Attorney General; that his designation was ex parte, and arrived at without that "fair and open hearing" which has been described as an "inexorable safeguard" of persons or bodies against whom a charge is made; and that no matter what remedies might in the end be available to a member of an organization who might be discharged from service, the stigma remained on the organization and the stigma was the result of a procedure which deprived the organization of due process. "Designation has been made without notice, without disclosure of any reasons justifying it, without opportunity to meet the undisclosed evidence or suspicion on which designation may have been based, and without opportunity to establish affirmatively that the aims and acts of the organizations are innocent. It is claimed that thus to maim or decapitate, on the mere say-so of the Attorney General, an organization to all outward seeming engaged in lawful objectives is so devoid of fundamental fairness as to offend the due process clause of the Fifth Amendment."

Arguments Pro and Con

This argument is met as follows: If there were any deprivation of property or liberty of any listed organization by the Attorney General's designation, there would indeed be force in the claim that "the listing resulted in a deprivation of liberty or property contrary to the procedure required by the Fifth Amendment." "This designation, however, does not prohibit any business of the organizations, subject them to any punishment or deprive them of liberty of speech or other freedom." Listing does not determine "any 'guilt' or 'punishment' for the organizations or has any finality in determining the loyalty of members." The Regulations say in this respect:

In connection with the designation of these (listed) organizations, the Attorney General has pointed out, as the President has done previously, that it is entirely possible that many persons belonging to such organizations may be loyal to the United States; that membership in, affiliation with, or sympathetic association with, any organization designated is simply

one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case. "Guilt by association" has never been one of the principles of our American jurisprudence. We must be satisfied that reasonable grounds exist for concluding that an individual is disloyal. That must be the guide.

The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty is that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

The list does not furnish a basis for any court action against the organizations designated as subversive. If any such action follows, "the accused organization would have the usual protections of any defendant." The list is evidence only of the character of the listed organizations in proceedings before loyalty boards to determine whether "reasonable" grounds exist for belief that the employee under consideration is disloyal. Listing of the organizations does not conclude the members' rights to hold government employment. It is only one piece of evidence for consideration. If members of listed organizations are removed from employment, then again the normal removal procedure will come into play. "Removal (in the case of permanent employees) requires notice and charges. Before the loyalty review boards similar procedure is followed. Where initial consideration indicates a removal of an incumbent for disloyalty may be warranted, notice is provided for." The notice given to the man against whom action is contemplated requires that he be told of "his right to appear before such a board personally, to be represented by counsel or representative of his own choosing and to present evidence on his behalf." The notice also requires stating of "the charges against him in factual detail, setting forth with particularity the facts and circumstances relating to the charges so far as security considerations will permit," and because of this proviso the board is warned that it "shall take into consideration the fact that the applicant or the employee may have been handicapped in his defence by the non-disclosure to him of confidential information or by the lack of opportunity to cross-examine persons constituting such sources of information." Because of these safeguards which the Regulations provide, most of the cases that go to hearing before the Loyalty Review Board end in acquittals. "Some 3,000,000 federal employees have been scrutinized. About 300 of this number were discharged on findings of potential disloyalty—approximately one ten-thousandth of those involved" (Professor Walter Gellhorn in "Civil Liberties under Attack"). "Thus there is scrupulous care taken to see that an employee who has fallen under suspicion has notice of the charges and an opportunity to explain his actions. The employee has an opportunity to

disprove the characterization placed upon the listed organization by the Attorney General."

To these contentions the reply made was as follows. It is true that the designation of the organizations concerned as communist "imposes no legal sanction on these organizations;" nor is it conclusive of the disloyalty of their members who in case they are declared ineligible for employment or dismissed from employment will have their usual remedies. Yet there is no reason why the designation itself should be made without giving due notice and an opportunity for hearing to the organizations so designated. The McCarran Act, which provides for compulsory registration of communist organizations, "grants organizations a full administrative hearing, subject to judicial review, before they are required to register as 'communist-action' or 'communist-front'" and such hearing could surely have been given to the organizations involved in the present case before they were dubbed "communist" by the Attorney General. The desirability of such a procedure was freely granted by Mr. Justice Reed who still maintained that no denial of due process was involved in this case. For "a statutory requirement for notice and administrative hearing (such as the McCarran Act contains) does not mean the existence of a constitutional requirement," as was contended by the organizations. "The executive has authority to gather information concerning the loyalty of its employees. A public statement of legislative conclusions on information that later may be found erroneous may damage those investigated, but it is not a civil judgment or a criminal conviction. Due process does not apply. Questions of propriety of political action are not for the courts. Information that an employee associates with or belongs to organizations considered communistic may be deemed by the executive a sound reason for making inquiries into the desirability of the employment of that employee. That is not 'guilt by association.' It is a warning to investigate the conduct of the employee and his opportunity for harm. . . . In investigations to determine the purposes of suspected organizations, the Government should be (constitutionally) free to proceed without notice or hearing. Petitioners will have protection when steps are taken to punish or enjoin their activities. Where notice and such administrative hearing as the Code of Federal Regulations prescribes precede punishment, injunction or discharge, petitioners' and their members' rights to due process are protected."

This discussion is most useful in understanding what importance is attached to procedural due process even by Justices who in this case held that the requirement of the Fifth Amendment was not violated by designation of certain organizations as communist when the organizations "are not ordered to do anything and are not punished for anything."

FREEDOM OF PERSON

IN INTERNATIONAL COVENANT AND INDIAN CONSTITUTION

The article on Personal Freedom in the draft Covenant on Human Rights being very similar to that in the Indian Constitution, it has provoked nearly the same kind of comments in the Human Rights Commission as the analogous article in our Constitution has provoked not only in unofficial circles in this country but in the Supreme Court itself.

Para. 2 of art. 6 of the Covenant says: "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." It is clear that this form of words, adopted on the suggestion of the Indian delegate to the Human Rights Commission, places personal freedom entirely at the mercy of the national legislatures. Few could be satisfied with a right of this nebulous kind, for a right, to be entitled to the characterization of a fundamental right, must be incapable of being interfered with by the legislative as well as the executive branch of government. The United Kingdom representative therefore raised the question in the seventh session of the Human Rights Commission whether individuals are to enjoy only such personal liberty as their national legislatures would allow them or whether the complete legislative authority which para. 2 seems to grant is qualified in any way by the prohibition of "arbitrary arrest or detention" in para. 1, which provides that "no one shall be subjected to arbitrary arrest or detention." In any case the prohibition, whatever it may mean, does not appear strong enough to make the right immune from legislative encroachment.

The United Kingdom's comment on para. 2 was:

The term "arbitrary arrest or detention" is too vague and uncertain in its content for use in defining the important right which is the subject of this article. The discussion in the Commission has shown that there is no agreement on the question whether this paragraph merely says in another form what is said in para. 2 or whether it adds to the conception in para. 2 that further conception that the law itself must be a just law.

In India too the question was raised in A. K. Gopalan's case whether "law" in art. 21 of our Constitution (which says: "no person shall be deprived of his life or personal liberty except according to procedure established by law") meant just any State-made law or something deeper—the immutable principles of natural justice or what goes by the term "due process of law" in the United States Constitution. Mr. Gopalan's counsel naturally contended that the word meant not merely *lex* but *jus naturale*. However, it was not difficult in the least for the Supreme Court to negative this contention, for art. 21 which purports to guarantee personal liberty is immediately followed by art. 22 which sanctions detention without trial! And such detention for an indefinite period—at a time too which need not be a time of emergency—is also made a fundamental right in the Constitution, a right obviously

not of an individual against the Government, but of the Government against the individual!

The Supreme Court in giving a wide interpretation to the content of art. 21 had also to face another difficulty. It was pointed out by the Attorney-General, quite rightly, that in the earlier draft the article relating to personal liberty had stood thus: "no person shall be deprived of his life or liberty without due process of law" and that the words "without due process of law" were later omitted and "except according to procedure established by law" substituted for them, thus definitely barring judicial review of the nature of the law and making the legislative will unchallengeable in this respect. He quoted from the speeches of several prominent members of the Constituent Assembly including that of the Law Minister (who had said on 14th December 1948 that "the question now raised by the introduction of the phrase 'due process' is whether the judiciary should be given the... power to question the laws made by the State on the ground that they violate certain fundamental principles") to show that the very purpose of dropping the "due process" phraseology from the article was to prevent the courts from invalidating a law which gave power to the executive to deprive an individual of his Freedom of the Person on the ground that it violated certain fundamental principles and was therefore unreasonable and arbitrary.

Some of the Justices refused to take notice of such "extrinsic evidence," Mr. Justice Patanjali Sastri, e. g., saying: "I attach no importance to the speeches." Still there were other documents which could not be so ignored and in any case such a radical change effected by the Constituent Assembly in the form of words adopted could not but produce an effect on the mind of the Court. Mr. Justice Mukherjee, e. g., felt constrained to declare:

I have no doubt in my mind that if the "due process" clause which appeared in the original draft was, finally retained by the Constituent Assembly, it could be safely presumed that the framers of the Indian Constitution wanted that expression to bear the same sense as it does in America. (But the word "due" meaning "just and proper" being deliberately omitted from the text, the omission) shows clearly that the Constitution-makers of India had no intention of introducing the American doctrine... It is all a question of policy as to whether the legislature or the judiciary would have the final say in such matters and the Constitution-makers of India deliberately decided to place these powers in the hands of the legislature.

Mr. Justice Das also agreed that, broadly speaking, our legislatures were supreme. He said:

Although our Constitution has imposed some limitations on the legislative authorities, yet subject to and outside such limitations our Constitution has left Parliament and the State legislatures supreme in

their respective legislative fields. In the main, subject to the limitations I have mentioned, our Constitution has preferred the supremacy of the legislature to that of the judiciary.

The consequence is that the American doctrine of procedural due process has and can have no place in our system of jurisprudence in respect of personal freedom.

That doctrine can only thrive and work where the legislature is subordinate to the judiciary in the sense that the latter can sit in judgment over and review all acts of the legislature. Such a doctrine can have no application to a field where the legislature is supreme.

If art. 21 does not restrain the legislature in any way but on the contrary makes the legislative judgment unchallengeable, of what use is this article? Mr. Justice Mukherjea explained :

The fundamental rights not merely impose limitations upon the legislature, but they serve as checks on exercise of executive powers as well, and in the matter of depriving a man of his personal liberty checks on the high-handedness of the executive in the shape of preventing them from taking any step which is not in accordance with law, could certainly rank as fundamental rights.

His Lordship did not explain whether, in the absence of this article, the executive would have been able to act contrary to law. Mr. Justice Patanjali Sastri does not believe so. For he said: the executive can "only act in pursuance of the powers given by law and no constitutional protection against such action is really needed." He further said: "It is of the essence of (the conception of a fundamental right) that it is protected by the fundamental law of the Constitution against infringement by ordinary legislation." If, then, a fundamental right, properly so-called, must be immune from legislative as well as executive interference, does personal liberty as guaranteed in art. 21 deserve to rank as a fundamental right? Mr. Justice Das would answer the question in the affirmative. For, as he pointed out, that article not only protects every person against the executive, but does something else. He said :

It appears to me that art. 21 of our Constitution read with art. 22 also gives us some protection even against the legislative authority in that a person may only be deprived of his life and personal liberty in accordance with procedure which, although enacted by it, must at least conform to the requirements of art. 22. Subject to this limitation, our Parliament or any State Legislature may enact any law and provide any procedure it pleases for depriving a person of his life and personal liberty under art. 21.

If then the legislative judgment is to prevail without question, do the constitutional limits contained in art. 21 (such as they are) merely mean: "You shall not take

away life or personal freedom unless you choose to take it away"? This question was probably asked by Mr A. K. Gopalan's counsel in his argument, basing it on the following observations of Justice Bronson in *Taylor v. Peter*, 4 Hill 140 :

The words "by the law of the land" as used in the Constitution do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two Houses: "You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it."

The Supreme Court did not agree that art. 21 was quite as unmeaning as this quotation would imply; yet the word "law" in that article was, according to it, equivalent to "a statute" and certainly did not mean only "a just law."

"A TEMPORARY MEASURE"

In considering whether the restrictions imposed by laws on rights guaranteed by art. 19 (1) are reasonable or otherwise, which decides whether the laws are constitutional or unconstitutional, the factor of the duration of the laws plays an important and sometimes almost a decisive role. Take for instance the case of Dr. Khare's externment from Delhi under the East Punjab Public Safety Act, 1949, where the question was whether the Act was within the limits of valid legislation permitted by the Constitution. In this case Chief Justice Kania said: "If the law prescribes five years' externment or ten years' externment, the question whether such period of externment is reasonable... is necessarily for the consideration of the Court." And, in regard to the argument that the order of externment passed under the Act may in certain circumstances remain in operation for an indefinite period, which should make the restriction unreasonable and thus the Act unconstitutional, he referred to "the fact that the whole Act is to remain in force only up to 14th August 1951," implying that there was no possibility of the externment order being kept in force indefinitely because the life of the Act itself had been limited. That the Court was largely influenced by this temporary character of the Act in holding the Act valid becomes clear from the references made to the case by the Judges of the Madras High Court in V. G. Row's case, in which the Madras Government relied strongly on the reasoning and decision of the Supreme Court in Dr. Khare's case.

Mr. Justice Mukherjea, who wrote a dissenting judgment in this case, with Mr. Justice Mahajan concurring, did not accept the Chief Justice's argument on the latter point. He said :

It will be seen from this sub-section (sub-sec. 3 of sec. 4) that there is absolutely no limit as to the period of time during which an externment order would remain in force if the order is made by the Provincial Government. The Provincial Government has been given unlimited authority in this respect and they can keep the order in force as long as they choose to do so. . . . The law does not fix any maximum period beyond which the order cannot continue; and the fact that the Act itself would expire in August 1951 is, in my opinion, not a relevant matter in this connection at all.

The 1949 Act was no doubt to expire in 1951, but after its expiry it was renewed by the President on account of the constitutional breakdown in the State, and this re-enacted measure provides for externment. If the original Public Safety Act was passed in 1947, and then extended in 1949, and thereafter still further extended in 1951, has the measure really the quality of "temporariness" which is worthy of being taken into consideration by the courts as a factor making for the protection, or rather for a mitigation of the deprivation, of individual freedom?

The same question of the duration of an Act arose incidentally in the case of an externment order passed against Mr. Jesingbhai Ishwarlal Modi under the Bombay Public Safety Measures Act, 1947. In this case (*Jesingbhai v. Emperor*, 37 AIR, Bombay 363) it was argued by the externee's counsel, in order to prove the Act's unconstitutionality, that no period for the duration of the externment order was laid down in the statute, and the Advocate-General on the other hand pointed out that the Act itself being for a temporary period, the duration of the externment order was limited by the duration of the statute. On this the Chief Justice said:

In a sense he (the Advocate General) is right, but it must also be pointed out that even a temporary statute can be renewed from time to time by the legislature and even a permanent statute may be repealed by the legislature. This very statute, which originally was for two years, was amended by the legislature to be for a duration of three years, and then subsequently for a period for six years. Therefore, there is no limit to the power of the legislature to continue the duration of the statute.

The High Court held the relevant section of the Act invalid, but not on the ground that the externment was capable of being maintained in operation for an indefinite period, but on the ground that the Act made no provision for the externee being heard. This became clear when the High Court dismissed an application from Mr. Abdul Rahiman Shamsoddin, who was served with an externment order (without the limit of the period of externment being mentioned) under the District Police Act which gives an externee the right to be heard, holding that the relevant section of the Act was valid. Mr. Justice Shah,

who wrote a dissenting judgment in *Jesingbhai's* case, also referred to the fact that the externment order was "in terms" of unlimited duration, adding however: "Nor can the order be said to be of unlimited duration in view of the fact that the parent Act under which orders are passed is necessarily of a temporary character (being) passed in order to meet an emergency, and the effectiveness of the order would remain so long as the statute under which the orders are passed would remain operative."

In *Gopalan's* case it was argued by the petitioner's counsel that sec. 11 of the Preventive Detention Act, 1950, was invalid as it permitted detention for an indefinite period. On this point Chief Justice Kania said: "In my opinion this argument has no substance because the Act has to be read as a whole. The whole life of the Act is for a year and therefore the argument that the detention may be for an indefinite period is unsound." Here also it must be noted that, like the Punjab and Bombay Safety Acts, the Preventive Detention Act, originally limited in duration to a year, was later extended for another year and still later for six months more, so that although the Acts themselves may be very temporary, the externment or detention orders made under them could nevertheless be in operation at the present time after the lapse of a number of years since their passage and for an indefinite time in future.

Restrictions on the movement of persons may be held to be quite reasonable in spite of the fact that the time during which they are to continue in force is not limited. But to infer from the fact that the statutes which permit imposition of such restrictions have a limited life that the restrictions themselves will be operative for a limited time and may therefore be regarded as reasonable appears to us to be not at all sound reasoning, because the statutes may be, and in several cases have been, given an extended life. In our view, what Mr. Justice Mukherjea said in this connection is true, viz., that the limited duration of the statute is a wholly irrelevant matter in this respect. What must be limited, if that is to influence one in judging the reasonableness of the restrictions, is not the duration of the statute itself but of the restrictions permitted to be imposed under the statute.

A limitation of the latter character is contemplated by our Constitution in respect of detention orders. Article 22 (7)(b) provides that "Parliament may by law prescribe the maximum period for which any person may . . . be detained under any law providing for preventive detention." If Parliament had utilised this power, as it has not done either in the Act of 1950 or 1951 or 1952, then indeed any individual detention would be of limited duration, but in the absence of a law being enacted to which art. 22 makes reference, every detention order must be supposed to be for an indefinite period even if the Act itself under which it may have been made is designated as

a temporary Act limited to a year or six months for the time being.

An instance in which in fact a limitation has been laid on the period during which restrictive orders can remain in operation is afforded by the President's Punjab Security of the State Act, 1951, which replaced the East Punjab Public Safety Act, 1949. Sec. 7 (3) of the Act provides (and the provision seems to be due to the remarks of Mr. Justice Mukherjea quoted above) that "no restriction order shall be operative for more than one month if made by a district magistrate and one year if made by the State Government." The Act itself, as originally passed on 12th September, was unlimited in duration as was the Act which it displaced, though later

it was limited in duration to one year. But even if it had remained of unlimited duration, it would have given because of sec. 7 (3) some protection to individuals subjected to restraints, thereunder but such protection was wholly lacking in the earlier enactment though it was to be in operation only for two years.

What we have said above proves we hope the truth of Mr. Justice Mukherjea's observation that the limitation of time for the operation of a statute has no relevance in considering the impact of the restrictive orders passed thereunder; what has real significance from the point of view of individual liberty is the limitation of time, if provided in the statute, for the operation of a restrictive order itself.

EQUALITY IN THE ENJOYMENT OF BASIC RIGHTS

RACIAL DISCRIMINATION IN LAND OWNERSHIP BARRED

The supreme court of California, U. S. A., in a 4 to 3 decision, invalidated on 17th April that state's Alien Land Law of 1920, which imposes a ban on the ownership or occupation of farm lands by aliens ineligible for United States citizenship, on the ground that the law contravened the equal protection of the laws clause of the Fourteenth Amendment. Because this decision (we believe) for the first time squarely faces the question of racial discrimination in the matter of real property on the ground of broad principle, we propose to deal with this case at some length, first giving an account of the supreme court's decision and then tracing briefly the history of this particular law.

Mr. Sei Fujii, an alien of Japanese origin in lawful residence in the state, purchased land in California notwithstanding the prohibitory provisions of the state law. His action was challenged in the Los Angeles superior court, which upheld the land law. The matter was then taken in appeal to the state's appellate court which, on 24th April, 1950, reversed the lower court's decision. It declared the law unconstitutional, but on a somewhat debatable ground (with which we deal below); and now the supreme court has affirmed the appellate court's decision on the ground that the law is in conflict with the U. S. Constitution.

Because the present decision is against the ruling of the United States Supreme Court in *Frick v. Webb* (1923) 263 U. S. 326, sustaining the state law (the theory being that, subject to the provisions of the organic law of the state and to the national Constitution, a state, as an attribute of its own sovereignty, has the inherent power to adopt land laws limiting ownership of the soil to persons morally bound by obligations of citizenship), Chief Justice Gibson of the state's supreme court, who wrote the court's judgment in the instant case, showed that later trends in the opinion of the U. S. Supreme Court, particularly evidenced by its condemna-

tion of restrictive covenants when enforced by state courts, called for a fresh consideration of the constitutional issues surrounding the Alien Land Law. And he concluded that the constitutional theories upon which that Court based its action in 1923 were "to-day without support and must be abandoned." He then said:

It is generally recognized that the real purpose of the legislation was the elimination of competition by alien Japanese in farming California land.

Although the prevention of agricultural competition between residents of the state might be a proper legislative objective under some circumstances, arbitrary or unreasonable means may not be used to accomplish that result, and discrimination on the basis of race, whether by the terms of a statute or the manner of its administration, is obviously contrary to the Fourteenth Amendment.

The California Alien Land Law is obviously designed and administered as an instrument for effectuating racial discrimination and the most searching examination discloses no circumstances to justify classification on that basis.

History of the Act

This legislation was due to the anti-oriental prejudice which infected a great many people in the state. It was about 1900 when Japanese began to arrive in California in large numbers, and at once demands began to be made that Japanese immigration be drastically limited or prohibited entirely. Numerous acts of violence were perpetrated against Japanese businessmen and private economic sanctions were used to drive them out of business. When the Japanese Government protested, President Theodore Roosevelt intervened, which had a temporary restraining effect. Still, land bills designed to eliminate Japanese competition in agriculture and thus to stop their influx were introduced in the California legislature.

in 1907, 1909 and 1911, which would have passed but for President Roosevelt's further intervention. At last in 1913 the first land law was passed, in spite of the attempt made by President Wilson not to proceed with the measure. This law was comparatively mild; it denied aliens ineligible to citizenship the privilege of buying land for agricultural purposes in California, but allowed them to lease land for three years for such purposes. The Japanese Government again protested, but the matter was allowed to lapse on the outbreak of World War I.

After the war ended, there was a recrudescence of anti-Japanese agitation which resulted in a severer land law being adopted by popular initiative in 1920. While the earlier law had allowed ineligible aliens to lease agricultural land, this law, which is the law now in force, prohibited even leasing of land to aliens. It is true that the law, whether of 1913 or of 1920, does not mention Japanese aliens by name, but there is no doubt that it was in fact aimed against them only, other aliens being numerically insignificant. But even the excuse that the measure was not discriminatory against Japanese but applied equally to all aliens who were ineligible for naturalization cannot now be put forward, since other nationals like Filipinos, Chinese and Indians ("Hindus") are now admitted into the U. S. A. under the quota system and can seek naturalization. Thus the Act, though outwardly directed against all aliens, in recent years at any rate, hits almost exclusively Japanese aliens. Thus it has in effect become what it was really intended to be—a frankly anti-Japanese measure, attracting the provisions of the equal protection clause of the Fourteenth Amendment.

Previous Decisions

The law narrowly escaped being voided by the U. S. Supreme Court in *Cyama v. California* (1948) 332 U. S. 633. The Court's decision in this case "protected the parties involved against the impact of the statute," but it was based upon a narrower ground than that of the law's constitutionality, because a decision on such a ground was sufficient to produce the effect that a direct decision on the basic constitutional problem would have produced. But in two concurring judgments four Justices expressed the opinion that the California statute was on its face inconsistent with the equal protection clause of the Fourteenth Amendment and that they would have preferred the Court to say so in forthright terms. The judgments further expressed the opinion that the earlier decisions of the Court which upheld the constitutionality of the law should be overruled. Mr. Justice Murphy pointed out that the equal protection clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws," and that the words "any person" were wide enough to include resident aliens, whether eligible for citizenship or not. As an additional argument the concurring judgments referred to the United Nations Charter which in art. 55 says that "the

United Nations shall promote . . . observance of human rights and fundamental freedoms for all without distinction as to race," and in art. 56 says that "all members pledge themselves to take joint and separate action for the achievement of the purposes set forth in art. 55." Since the United Nations Charter has been duly ratified and adopted by the United States, these Justices said that their country was morally bound to set aside the Californian Alien Land Law which "stands as a barrier to the fulfilment of that national pledge."

Curiously enough, what in this case was put forward as an argument of great moral weight was used in the instant case of *Sei Fujii* as an unbreakable legal argument by California's appellate court. "The theory of the court was that by ratification of the Charter by the United States in 1945, it became the supreme law of the land and, as a treaty, took precedence over any conflicting state statutes" (art. 6, sec. 2 of the U. S. Constitution). Justice Wilson said in his judgment: "A perusal of the Charter renders it manifest that restrictions contained in the Alien Land Law are in direct conflict with the plain terms of the Charter. . . . The Alien Land Law must therefore yield to the treaty as the superior authority." The supreme court of the state did not base its invalidation of the statute on this ground. Chief Justice Gibson agreed that the Charter was a treaty and thus part of the supreme law of the land, but he said, "a treaty does not automatically supersede local laws which are inconsistent with it unless the treaty provisions are self-executing," and the relevant provisions of the Charter here were not. Ordinarily state legislatures and courts were bound by treaties entered into by the United States but only where it appeared that the treaty provisions were intended to have that effect without further legislation. Thus he expressed himself as satisfied "that the Charter provisions relied on by the plaintiff were not intended to supersede existing domestic legislation" and said, "we cannot hold that they operate to invalidate the Alien Land Law." It was on the basis of the statute being violative of the Fourteenth Amendment that he declared it void.

Restrictive Covenants

Here we may notice another case concerning private agreements which have as their purpose the exclusion of persons of designated race or colour from the ownership or occupancy of real property because the decision in this case is regarded "as one of the milestones in the steady advance which is being made in the protection of human rights" (Reppy in "Civil Rights in the United States," p. 157), and because in the *Sei* case the supreme court of California derived great encouragement from it in declaring the Alien Land Law unconstitutional. This case is that of *Shelley v. Kraemer* (1948) 334 U. S. 1. Restrictive covenants, privately arrived at, have always been held to be not in conflict with the guarantees of the Fourteenth Amendment, since these guarantees can be invoked only when rights are infringed through state

action. But in the Shelley case agreements were not effectuated by voluntary adherence to their terms but by judicial enforcement, and the question was whether such court enforcement was state action bringing it within the protective wing of the Fourteenth Amendment.

The case arose in St. Louis and involved a restrictive covenant by owners of real property barring sale, lease or rent to Negroes. The covenant had been breached by sale to a Negro, and injunctive relief had been given to the respondents, which action had been affirmed by the supreme court of the state of Missouri. On certiorari, the United States Supreme Court reversed the decision, holding that enforcement of the covenant by the state court amounted to state action and came within the purview of the equal protection clause of the Fourteenth Amendment. One argument used in this case to prove that no discrimination was involved was that if state courts could be utilised to enforce agreements restricting the rights of Negroes, the courts could equally well be utilised to enforce similar agreements restricting the rights of whites. This argument has an air of plausibility about it, but it was unceremoniously turned down. The Court said on this point: "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to the petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or colour. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

Dr. Thurgood Marshall says in the "Annals of the American Academy of Political and Social Science" of May 1951, p. 107, that "the decision is unquestionably one of the most important in whole field of civil rights," and the Californian decision too must be regarded as equally important in the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the states based on considerations of race or colour.

NOTES

Ill-Will between Different Classes

The private member's bill (to which we referred at p. ii.89) seeking to relax the rigid provisions of the English libel law in accordance with the recommendations of Lord Porter's Committee of 1948 was moved in the House of Commons on 1st February by Mr. N. H. Lever, and has now gone to a small all-party Standing Committee to thrash out its provisions. In this Standing Committee a member proposed on 20th March that racial and religious libel and slander be punished by imprisonment.

The proposal amounts to the introduction into England's criminal law a section corresponding to sec.

153 A of our own Penal Code, which punishes all attempts "to promote feelings of enmity or hatred between different classes of subjects" with two years' imprisonment and with fine. The reader will remember that this section was declared void by the Punjab High Court (vide p. 191 of the BULLETIN) on the ground that it contravened the right to freedom of expression guaranteed by art. 19 (1) (a) of the Constitution. But subsequently the Constitution Amendment Act revived the section and Rajaji's Press Act included this offence among the special press offences to be punished with the penalties of taking a security from a newspaper and forfeiture of the security and of the printing press itself. The proposal made in England has thus a special interest for us.

In England itself what is now sought to be created as an offence in connection with Mr. Lever's Defamation (Amendment) Bill is already an offence as part of the offence of sedition. For "a seditious intention" is defined in English criminal law not only as an intention to raise disaffection amongst His Majesty's subjects but also as an intention "to promote feelings of ill-will and hostility between different classes" of such subjects (Halsbury's "Laws of England," vol. 9, p. 302). But this form of sedition has long become obsolete in that country, and the proposal now made amounts to a re-activation of this old principle.

In the Standing Committee on Mr. Lever's bill the Solicitor-General and the Attorney-General strongly opposed the proposal as involving a restriction of freedom of speech, the latter saying:

Freedom of speech should not be restricted beyond what was necessary for the safety of the State and for the preservation of the public peace.

In speaking on this subject in the House of Commons the Attorney-General said of group defamation that "matters of that kind are often best left to public opinion." We do not know whether the Standing Committee accepted or rejected the proposal, and in any case it would be surprising if Parliament would accept it.

This subject is dealt with by Mr. Chafee under the heading of Group Libel at pp. 116-131 in his book entitled "Government and Mass Communications" which was published as a report of the Commission on Freedom of the Press. We ourselves wrote on this subject in August of last year (see pp. 298-300) before the Press Act was passed, appealing to Rajaji that whatever else he might do, he should not include the offence of sec. 153 A, I. P. C., among the special press offences that the Act would create.

Easy Constitutional Amendment

If it is a merit of a constitution that it should be easy of amendment, the Indian Constitution has certainly that merit. The opinion of Wheare quoted by Dr. Alladi Krishnaswami Aiyar in his first lecture on behalf of the Rt. Hon'ble V. S. Srinivasa Sastri Memorial Foundation, viz., that the procedure provided for amendment of our

Constitution "is much more satisfactory (from the point of view of flexibility) than the procedure laid down in many of the federal constitutions," is fully borne out, for no constitution is as flexible as ours, being capable of amendment by a law passed in Parliament by a two-thirds majority of members of the Houses present and voting provided that this two-thirds majority constitutes also a simple majority of the total membership of the Houses.

In the United States a two-thirds majority of both Houses of Congress is required for proposing an amendment which must subsequently be ratified by the legislatures of three-fourths of the several States to be effective. This provision is found to be very stiff; it ensures that every amendment that is adopted has the support of an overwhelming volume of public opinion. In the Australian and in almost all the post-war constitutions a referendum is required for making any constitutional alterations, which has also the same result. It should be remembered that no more difficult procedure for constitutional amendment is prescribed in India for making any change in the Fundamental Rights part of the Constitution than in any other part, and we have had only a recent experience of this when the Provisional Parliament (which, incidentally, consisted of one chamber only) drastically cut down, almost to the point of extinction, the right to Freedom of Expression which is basic to democracy.

Compare this with the case of South Africa which is now being much talked about. In South Africa only two matters are regarded as really fundamental, which must not be changed unless a solid public opinion desired a change. And these matters were "entrenched;" a two-thirds majority was prescribed to make a change in this respect. But this two-thirds majority that is necessary to change the existing provisions in respect of these subjects is not two-thirds of those present in the Houses of Parliament, but two-thirds of their entire membership, which is quite a different thing. The Malan Government is being furiously attacked in this country for seeking to amend the organic law by taking away the right of the courts to test the constitutionality of laws so that he may successfully flout the Supreme Court and revalidate the Act isolating some 50,000 coloured voters who had consistently voted against his apartheid policy. But our Government did nothing else when it amended our Constitution: it got round the Supreme Court's and High Courts' decisions in that way, thus managing to validate a press law that had been declared invalid. The only difference between the two cases is that while the Nehru Government succeeded in its efforts, the Malan Government may fail.

Due Process Clause "Advisedly" Omitted

In a second Srinivasa Sastri lecture delivered by Dr. Alladi Krishnaswami Aiyar, this most eminent constitutional lawyer on the Constitution Committee of the Constituent Assembly, stated that the due process clause

of the American Constitution had been "advisedly" omitted from the Indian Constitution. The reason adduced by him was that the clause was given a fluctuating meaning by the U. S. Supreme Court which had for several decades used the clause to retard economic and social legislation. It is, however, too much to believe that if the clause had been introduced in the Indian Constitution at a time when in the United States it had entirely ceased to operate as a check on legislative control of economic policy it would have been interpreted as a clog on any legitimate measure of social or economic reform. But it would have given the courts a powerful instrument with which to strike down measures arbitrarily interfering with the exercise of individual freedom, as it is in the hands of the U. S. courts.

There is no doubt either that, in the opinion of Dr. Aiyar, the safeguard provided in art. 19 that the restrictions to be imposed on the exercise of the rights mentioned therein is slight, for he says that "normally speaking, courts would lean in favour of the legislation (in question) and proceed on the footing that restrictions imposed by a popularly elected legislature were reasonable, though, if ex facie the restrictions were arbitrary or alien and repugnant to the subject-matter of the legislation, the Court would not hesitate to pronounce the restrictions as unreasonable."

Civil Liberty in Soviet Russia

Referring to our editorial "Freedom of the Press in Russia" (vide p. ii:81), a correspondent bids us remember that the governmental control to which the Russian press is subjected belongs to the transitional period of dictatorship of the proletariat which, according to Marxist theory, is an essential condition of a successful revolution, at the end of which is to appear perfect freedom for all. We have heard of this theory that after proletarian dictatorship has liquidated the privileged classes, the dictatorial regime is to liquidate itself. But we referred to the Constitution enacted by M. Stalin twenty years after the Revolution when we thought the transitional period was over; apparently, however, it is not over yet.

Mr. M. N. Roy, who was at one time among the high-ups of the Communist Party, wrote in the "Statesman" of 31st March :-

The fact is the continuation of dictatorship even after classes are claimed to have been abolished. . . . Private property has been destroyed in all the branches of national economy. Consequently, according to Marxist theory, exploitation of man by man has ended; society is no longer divided into classes. All the means of production and distribution having been socialized, and the entire national wealth, actual as well as potential, being commonly owned, the class of the dispossessed and exploited has disappeared. . . . Yet, the dictatorship of the Communist Party is the most outstanding feature of the new order. As a

matter of fact, in Communist Russia, political dictatorship is no longer necessary for suppressing the enemies of the working class; it is now maintained to serve the purpose of exploitation of labour by the State, which is the sole employer, of enforcing intellectual subservience to the Communist Party and cultural regimentation.

The state of affairs, according to Mr. Roy, is the same in Communist China. He says:

Many intellectuals who in the beginning supported the Communists seem to be getting critical. They are subjected to "brain-washing." The term, also used in official publications, means surrender of the freedom of thought and conscience under coercion. . . The Russian experience having set the pattern of Communism in practice, civil liberty, freedom of thought and freedom of conscience will indefinitely remain illusive ideals also in China.

Sale of Offices

On the basis of a law barring solicitation of political gifts in "consideration of the promise of support or use of influence in obtaining any appointive office or place under the United States," two Democratic leaders of Mississippi, Brashier and Wilkinson, were charged in a federal district court with seeking funds for the State Democratic Committee in February of last year in return for pledges to use their influence in obtaining appointments as chairmen of county ration boards. The court dismissed the indictments on the ground that the law did not apply to the "sale of non-existent offices" or influence in regard to the appointments.

From this decision the Justice Department appealed to the Supreme Court, the Solicitor General arguing that a seller of patronage "should not be allowed to plead that he is innocent because he could not in fact deliver what he purported to sell," and that when promises were made "there was reason for the parties to believe" that the county ration board positions "might be available in the near future." The Supreme Court in a 5 to 4 decision upset on 31st March the district court's ruling, returning the cases to the lower court for "further proceedings," which implies a trial.

Justice Frankfurter, who wrote the Supreme Court's decision, held that the law was "plainly broad enough on its face to cover the sale of influence in connection with an office which has been authorized by law and which, at the time of the sale, might reasonably be expected to be established." He maintained that Congress outlawed "not the use of such influence, but the solicitation of its purchase, the peddling of forbidden wares," and then added

It is no less corrupt to sell an office one may never be able to deliver than to sell one he can. Dealing in futures also discredits the process of government. There is no indication that this statute punishes delivery of the fruit of the forbidden transaction—it forbids the sale. The sale is what is

here alleged. Whether the corrupt transaction would or could ever be performed is immaterial.

Even judges need not be blind to the fact of political life that it helps in influencing political appointments to be forehanded with a recommendation before an office is formally created.

HABEAS CORPUS PETITIONS

Re-Detention After Release

It will be remembered (vide p. ii:42) that Mr. Makhan Singh Tarsikka, a Communist detenu from the Punjab, was ordered by the Supreme Court to be released on a habeas corpus petition, but immediately after his release he was re-arrested and re-detained. So complained Mr. Tarsikka in the Court, saying that he intended to take contempt proceedings against the Advocate-General of the Punjab, the district magistrate of Amritsar and the two police officials who had effected his arrest.

The proceedings were eventually taken only against police officials, Inspector Chadda and Sub-Inspector Sher Singh, Mr. Tarsikka's allegation against them being that when he was proceeding in a friend's car to the Constitution House after his release, these two officials forced themselves into the car and handcuffed him on reaching the Constitution House. The officials first denied the charge in a counter-affidavit but tendered an apology when the case came up in the Supreme Court. Thereupon Mr. Justice Aiyar and Mr. Justice Mookherjee dropped the contempt proceedings.

The Attorney-General in tendering his clients' apology said: "Whatever we did, we did under orders from our superiors; and if we have done something which we should not have, we are sincerely sorry for it."

Detention without Jurisdiction

Six Communist detenues, including Mr. L. K. Oak, former Secretary of the Bombay Committee of the Communist Party, Mr. S. Y. Kolhatkar, former General Secretary of the Naval Dockyard Workers' Union, Mr. R. K. Bhogale, President of the Bombay Girni Kamgar Union (Red Flag), and Mr. P. B. Vaidya, General Secretary of the All-India Textile Workers' Federation, who were in detention under the Preventive Detention Act of 1950 were ordered to be released forthwith by Mr. Justice Rajadhyaksha and Mr. Justice Vyas at the Bombay High Court on 18th April.

The six detenues were arrested between January and June, 1951, and detained on orders passed by the Commissioner of Police. Detention orders had been passed against Mr. Oak and Mr. Kolhatkar in March, 1950, and proclamations had been issued for their surrender. Consequently, after their arrest in June 1951, both of them were charged with non-compliance with the proclamation. The Presidency Magistrate, before whom Mr. Oak and Mr. Kolhatkar were tried, held that the Commissioner had no jurisdiction to pass detention orders against them as it

was shown that both of them were not in Bombay since 1948.

Government appealed against this decision. The appeal and the habeas corpus petitions came up for hearing before Their Lordships, who upheld the decision of the Magistrate and dismissed the appeal.

In their petitions praying for release, both the detenus had taken the same plea as they had urged in the police court proceedings. Their Lordships having held in the Government appeal that the Commissioner had no jurisdiction to pass detention orders under the Act of 1950, they ordered the release of these two detenus.

As regards the other two detenus, Mr. Bhogale and Mr. Vaidya, it was alleged in the grounds of detention that they were holding secret meetings with Mr. Oak, Mr. Kolhatkar and others. In view of their finding that Mr. Oak and Mr. Kolhatkar were not in Bombay at the material time, Their Lordships thought that the Commissioner had not properly applied his mind in regard to the detention of these two detenus and ordered their release also.

For similar reasons, Their Lordships also ordered the release of Mr. P. B. Donda, former President of the Bombay Dockyard Workers' Union, and Mr. P. P. Singhvi, the two other detenus.

Detainer's "Satisfaction" Alone Required.

A division bench of the Hyderabad High Court on 15th April dismissed the habeas corpus application of Mr. S. B. Ramanathan, a top-ranking Communist detenu, rejecting all his contentions. One such contention was that among the grounds of his detention it was stated that he was charged with dacoity, but the detaining authority had obviously failed to take note of the fact that he was discharged in the case. On this point Their Lordships remarked:

The detention is after all preventive and, therefore, the fact that he is discharged of a charge of dacoity against him cannot materially affect the order of detention.

As for his contention that the grounds of detention were vague, the Court observed that the Supreme Court had laid down that the grounds would be considered vague only where on the grounds furnished it would not be possible for the detenu to make effective representation to the Advisory Board. In this case, the Court remarked, the detenu had made representations to the Advisory Board and, therefore, it could not be argued that the grounds were vague.

It was also contended by the petitioner that there were not adequate grounds for his detention. On this point the Court observed:

It was open to the detaining authority to detain a person, where it was satisfied that the security of the State was imperilled or the maintenance of public order was endangered otherwise. It was beyond the

Court's scope of inquiry to inquire as to whether the grounds were sufficient to enable the authority to pass an order of detention as the satisfaction in this regard was only of the detaining authority.

Grounds Vague

The Supreme Court on 18th April released a Communist detenu from Hyderabad—Syed Zafar Hasan, holding that the grounds of detention were vague.

It dismissed nine habeas corpus petitions from Hyderabad, one from Punjab, one from Assam and one from Bombay, on preliminary hearing.

The Court held the detention of Mrs. Godavari Parulekar as legal after hearing the arguments of the petitioner in person.

Grounds Must Particularize

At the Pepsu High Court, on 22nd April, the habeas corpus petitions of Jangir Singh and four other Communist tenants were dismissed. Among the charges against the detenus one was that they visited other villages and invited the tenants there not to give batai to the landlords. While the Chief Justice, Sardar Bahadur Teja Singh, held that these grounds were in order, he agreed with counsel for the petitioners that the first ground supplied to the petitioners was vague. His Lordship, in dismissing the applications, said:

I am inclined to think that though the Government is not bound to supply the facts and particulars of a detenu's acts on the basis of which it forms the satisfaction that it is necessary to make a detention order with a view to preventing the detenu from acting in any manner prejudicial to public peace, etc., merely saying that the detenu is constantly engaged in doing something without telling him anything further falls short of the requirements of law, because it does not give any information to the detenu which he can controvert and show that there existed no grounds for his detention.

Vagueness of Grounds

The Supreme Court on 22nd April ordered the release of a Communist detenu from Hyderabad, Mr. D. Raghavendra Rao, on the ground that the grounds of detention were vague.

The Court also held the order of detention defective, as the grounds of detention were served on the petitioner six months after his arrest. The petitioner was arrested on February 25, 1950 and grounds of detention were served on September 4, 1950.

ZAMINDARI ABOLITION ACTS

Held Intra Vires by Supreme Court

The Constitution Bench of the Supreme Court held on 2nd May that the Acts for the abolition of zamindari estates in Bihar, Uttar Pradesh and Madhya Pradesh were

good in law. The Chief Justice expressed this opinion in one composite judgment for zamindari cases from all the three States, the first case that came on for consideration being the one from Bihar.

The Bihar Land Reforms Act, which was adopted in 1950 after the earlier legislation on the subject had been twice declared unconstitutional by the Patna High Court, was itself held unconstitutional and void by the High Court in March 1951 on the ground that it contravened art. 14 of the Constitution (vide p. 235 of the BULLETIN). The present decision of the Supreme Court was on appeal by the State against the High Court's ruling.

In the High Court the Act was challenged on the ground that it constituted an infringement of the fundamental right to property. Subsequently, however, the Constitution (First Amendment) Act was passed, which, by insertion of arts. 31A and 31B providing that no law for the acquisition of property could be questioned on the ground of infringement of fundamental rights and that such laws shall be deemed never to have become void, took away the basis of such an attack in the Supreme Court, especially as the said amendment was unanimously held valid by the Court.

ARGUMENTS OF COUNSEL

But the Amendment Act provided no immunity from attacks based on lack of legislative competence under art. 245 of the Constitution read with the Union and the State Legislative Lists in the Seventh Schedule to the Constitution, and counsel for the Bihar zamindars attacked the Land Reforms Act mainly on the basis of entry 36 of List 2 and entry 42 of List 3. It was claimed that a two-fold restriction as to public purpose and payment of compensation was imposed on the exercise of the law-making power under entry 36, and the legislative power conferred under entry 42 was a power coupled with a duty to exercise it for the benefit of the owners whose properties were compulsorily acquired under a law made under entry 36. For these reasons it was claimed that the State legislatures had no power to make a law for acquisition of property without fulfilling the two conditions as to public purpose and payment of compensation. It was contended that the compensation which the Land Acts purported to provide was illusory as compared with the market value of the properties acquired, and that the statutes were not enacted for a public purpose, their only purpose being to destroy the class of zamindars and tenure-holders and to make the Government a super-landlord.

THE COURT'S JUDGMENT

After examining articles 31 (2), (3), (4), (5) and (6) and articles 31 A and B which were introduced into the Constitution by an amendment, His Lordship said that once the President's assent was given to a law under article 31 (4), it could not be challenged on the ground that it did not provide for compensation and that there was no public purpose to support it. Article 31A, His

Lordship said, operated as an exemption to article 31 (2) read with article 13 only in respect of laws authorizing acquisition of estates and rights therein and this exception was to be deemed to have been part of the Constitution from its commencement. But it had no application to laws authorizing acquisition of other kinds of property and as regards those, the requirements as to public purpose and payment of compensation were enforceable by express provisions of article 31 (2).

In the face of the limitations on the State's power of compulsory acquisition thus incorporated in the body of the Constitution from which estates were excluded, it would, His Lordship said, be contrary to elementary canons of statutory construction to read by implication those very limitations into entry 36 of List 2, alone or in conjunction with entry 42 of List 3 of the Seventh Schedule, or to deduce them from "the spirit of the Constitution" and that too in respect of the very properties excluded.

In the view he had expressed, the Chief Justice said that the objections based on lack of a public purpose and failure to provide for payment of a just compensation were barred under article 31 (4) and were also devoid of merits. It therefore became unnecessary to consider what was the public purpose and whether the acquisition authorized by the impugned statutes subserved any public purpose. Nor was it necessary to examine whether the scheme of compensation provided for by the statutes was so illusory as to leave the expropriated owners without any real compensation for loss of their property.

While holding the Bihar Act *intra vires*, the Court by a majority of 3 to 2 (the Chief Justice and Mr. Justice Das dissenting) declared two sections of it to be unconstitutional—sec. 4 (b) which provided that the arrears of rent due to the landlord could be acquired by the State who in turn would pay compensation in accordance with the provisions of the Act by adding 50 per cent. to the said arrears, and sec. 23 (f) which provided that 4 to 12½ per cent. of the gross assets of an estate could be deducted from the amount of compensation payable as "costs of works of benefit to the raiyats." Mr. Justice Mahajan said that the deduction allowed by the latter provision was a "deduction of an artificial character, the whole object being to inflate the deductions and thus bring about non-payment of compensation." The voided sections were held to be severable from the Act.

The Madhya Pradesh and Uttar Pradesh Acts were declared valid on 5th May.

DISCRIMINATION BASED ON SEX

Section of Court of Wards Act Held Void

Mrs. A. [Cracknell, a part proprietor of the Dasna estate in Meerut district, whose estate was taken over by the Court of Wards under sec. 8 (1) (b) of the U. P. Court

of Wards Act, 1912, made a writ application to the Allahabad High Court praying that her estate be restored to her management.

Sec. 8 (1) (b) provides that "proprietors shall be deemed to be disqualified to manage their own property when they are females declared by the Local Government to be incapable of managing their property." In the case of male proprietors the Act provides that no declaration of incapacity to manage their properties be made until such a proprietor "has had an opportunity to show cause why such declaration should not be made." And although under sec. 11 no declaration made by the Government can be challenged in a civil court, it has been decided by the High Court in the case of Avadesh Pratap Singh (see p. 256 of the BULLETIN) that the declaration of disqualification by the Government was a quasi-judicial act requiring the Government to give to the proprietor concerned "an opportunity of leading evidence in support of his allegations and in controverting such allegations as were made against him." But such a safeguard as the Act provides for male proprietors whose properties are taken over under sub. cl. (d) of sec. 8 (1) is not available for female proprietors who may be declared incapable of managing their property under sub. ci. (b).

The petitioner in this case complained that the Court of Wards had, at the instance of the collector of Meerut district, assumed superintendence of her estate "without any notice, warning or any opportunity to show cause," and contended that if the Act does not require that cause be shown in the case of female proprietors, "she had been deprived of the right to hold and enjoy her property only on the ground of sex and a law under which such a deprivation had been effected was no reasonable restriction."

Bind Basni Prasad and Gurtu JJ. allowed the writ application and quashed the assumption by the Court of Wards of the petitioner's estate to the extent of her share of the property. Their Lordships said:

There could be no doubt that a female proprietor had been placed in a more disadvantageous position under sec. 8 of the Court of Wards Act than a male proprietor. While the superintendence of her estate could be assumed by the Court of Wards at the sweet will of the Government, it was not possible to do the same in the case of a male proprietor. She had asserted in her affidavit that she had been managing her property efficiently and there was no occasion to declare her as incapable of managing her property. It had not been shown to them as to what acts or omissions on her part were responsible for her being declared under clause (b) of sub-section (1) of sec. 8 as incapable of managing her property. The suggestion on behalf of the applicant was that the act of Government was capricious.

In the present case the classification was based only on the ground of sex, a classification which was not permissible now in a matter like this, in view of the

provisions of article 15 of the Constitution. Classification on the ground of sex might be permissible in the case of labour laws. In the very nature of things it was necessary to grant female workers certain special privileges, e. g., maternity benefits. That would be reasonable classification. But it would be no reasonable classification to place a proprietor under a more disadvantageous position in respect of the assumption of the superintendence of the estate on the ground of sex alone.

Whatever might have been the position prior to the commencement of the Constitution, sec. 8 (1) (b) of the Court of Wards Act classified female proprietors in an arbitrary manner and placed them in a more disadvantageous position than the male proprietors, who could not be declared incapable of managing their property without their being given an opportunity of showing cause and whose incapacity to manage the property was confined to the five reasons specified in clause (b) of that sub-section. Article 15 of the Constitution provided that "the State shall not discriminate against any citizen on the ground of sex." As section 8 (1) (b) made a discrimination on the ground of sex, it was void under article 15 of the Constitution.

RULERS' PREROGATIVE RIGHTS

Nizam has no such Rights

A full bench of the Hyderabad High Court, consisting of Mr. Justice M. A. Ansari, Mr. Justice Sadat Ali Khan, Mr. Justice A. S. Srinivasachari, Mr. Justice Vithal Rao Deshpande and Mr. Justice Jaganmohan Reddi, held on 18th April that the Nizam had no prerogative right after the coming into force of the Indian Constitution.

The bench also held that the order of the Chief Minister of the State, when it was quasi-judicial, was amenable to the certiorari jurisdiction of the High Court.

These points arose out of a dispute over the right of succession to the estate of the late Nawab Kamal Yar Jung. Nawab Kamal Yar Jung was a jagirdar and nobleman of the State. He died in 1944, leaving behind him nine alleged heirs, three sons, one daughter, three wives and two concubines. The legitimacy of the issues and the marriage of the ladies were questioned. The Nizam appointed a commission in 1944 to inquire into his succession and report. The "police action" intervened in the meantime. Later, another commission was appointed which submitted its report in 1949.

The Chief Minister of the State accepted the majority opinion of the Commission and recognised the persons recommended by it as heirs and the quantum of shares also. The succession was challenged by applications for writs of certiorari, prohibition and mandamus.

The application was originally heard by a division bench, then by a full bench and later by another full

bench of five Judges to which was referred the question whether the order of the Government (Chief Minister) was administrative or quasi-judicial and whether the High Court had the jurisdiction under the Constitution of India to quash it and whether the Nizam had the prerogative to sanction the recommendations of the Commission which was hearing jagir succession cases after the coming into force of the Indian Constitution.

All the five judges held that the order of the Chief Minister was quasi-judicial and therefore amenable to the certiorari jurisdiction of the High Court.

Mr. Justice M. A. Ansari, Mr. Justice E. Sadat Ali Khan and Mr. Justice Jaganmohan Reddi held that the Nizam had no prerogative right to sanction the recommendations of the Commission after the coming into force of the Constitution.

Mr. Justice Srinivasachari and Mr. Justice Vithal Rao Deshpande held that the question whether the Nizam was exercising his prerogative right in sanctioning the recommendations of the Commission required no answer.

A. I. C. L. C.'S REPRESENTATION

Right of Private Petition

IN VIOLATIONS OF HUMAN RIGHTS

The All-India Civil Liberties Council addressed on 14th April the following representation to the Hon'ble Minister for External Affairs of the Government of India on the right of Private Petition.

In view of the ensuing session of the Human Rights Commission of the United Nations from 14th April to early June next, the All-India Civil Liberties Council, which is an affiliate of the International League for the Rights of Man (756, Seventh Avenue, New York 19), desires that the Government of India should urge in the Human Rights Commission the view of the Council and of the League, that it is essential, if the proposed International Covenant on Human Rights is to serve any useful purpose, that the right of private petition be conceded in case of alleged violations of any of the rights to be guaranteed by the Covenant.

2. The necessity of such a representation of the Council's view has arisen because the Human Rights Commission in its Geneva session last year rejected the right of private petition by a vote of 7 to 10 (with one abstention). The Council holds that the Covenant will not be an effective instrument unless armed with adequate means of enforcement, and that without the right of private petition the means of enforcement must remain wholly inadequate.

3. I need only add that the Indian Civil Liberties Conference (of which the All-India Civil Liberties Council is the executive) at its third session held at Nagpur in August 1951 adopted a resolution on the draft Covenant on Human Rights, of which the part relating to this subject was as follows :

Moreover, the implementation of the rights through a committee of experts to be appointed by the International Court of Justice and invested with the power of inquiring, conciliating and getting advisory opinions of the Court, will be almost ineffective inasmuch as the draft as approved by the Human Rights Commission in its Geneva session in May last limits the right of bringing complaints of violations of the rights only to the Governments of Member States, rejecting the right of private petition. As the aggrieved individual or any unofficial organization on his behalf cannot bring a complaint before the committee and as no government will be willing to haul up another government before it, the international tribunal provided in the draft would hardly be able to give relief even in cases of aggravated injustice and oppression, even assuming that the Covenant were perfect.

The last words in the above quotation, viz., "even assuming that the Covenant were perfect," refer to the fact that, in the opinion of the Council, the present draft is exceedingly defective in regard to several of the rights it deals with inasmuch as it leaves too many loopholes for infraction of those rights.

4. But for the present the Council requests the Government of India to use its best endeavours in removing the fatal defect in the Covenant in the matter of implementation of the rights, whatever in the end these may be.

C. L. U. NEWS

Bombay C. L. Union

An annual general meeting of the Bombay Civil Liberties Union was held in Bombay on 29th March under the chairmanship of Professor T. A. Kulkarni. After adoption of the report and accounts, election of the executive committee took place. Among the secretaries newly appointed is Mr. P. R. Lele, known to be a good student of constitutional law and author of several publications on the subject. His appointment is specially to be welcomed because till recently he occupied a high position in the executive of the Congress party in Bombay City.

Punjab C. L. Council

The Punjab Civil Liberties Council which met at Ambala on 7th April accepted the resignation from the presidentship of the Council of Mr. Bhim Sen Sachar, now appointed Chief Minister, appointing Mr. Jagan Nath Kaushal in his place till the president is properly elected at the next general meeting. The Council in a resolution urged the immediate withdrawal of the Preventive Detention Act and demanded release of newly elected members of the legislatures who were still under detention.

The Council also drew the attention of Mr. Sachar to the desirability of making a beginning in the direction of the "over-due reform of separating the executive from the judiciary" by placing selected judicial magistrates in the various districts under the control of the High Court, as envisaged in art. 235 of the Constitution.

COMMENTS

Release of Detenus

On account of the improvement that has taken place in the political conditions, detenus are being released in some States after a review of their cases by Governments. It appears that in West Bengal 34 detenus, including all the seven legislators under detention, were released on 9th April. All of these are Communists, except one who belongs to the Revolutionary Socialist Party of India. A week thereafter 60 detenus, all Communists, were released, 13 of them on parole. Similarly, on 20th April 52 Communists were released, 21 of them on parole. It would appear that there are now 19 Communist detenus in this State, besides 58 belonging to R. C. P. I. In Pepsu 13 detenus were released on 19th April, and though the orders for release were made by the "united front" government which has succeeded the Congress government, it is said that the orders were passed by the Congress government before it resigned the previous day. It was reported that in Hyderabad too detenus' cases were to be reviewed after the ban on the Communist Party was lifted. But no details about these releases are available at this writing.

Ban on Communists Lifted in Hyderabad

The ban imposed on 25th September 1948 on the Hyderabad State Communist Party and the Andhra Mahasabha Communist Party was lifted on 23rd April, after being in operation for three years and a half.

The ban would have had to be lifted in any case, irrespective of any improvement in the political conditions. The Supreme Court's judgment in V. G. Row's case (vide p. ii:101 of the BULLETIN), in which the Hyderabad Government was an intervener, made it necessary. The judgment in this case referred to the Criminal Law Amendment Act, 1908, as amended by the Madras Act, and this Act, by providing for an Advisory Board whose opinion was binding on the Government, had, it must be admitted, made substantial improvements in the original Act, though even under the amended Act constitutional rights and liberties of citizens were, according to Mr. Viswanatha Sastri of the Madras High Court, "considerably eclipsed." The Hyderabad Government had imposed the ban in virtue of the unamended Act, of which the Chief Justice of the Madras High Court said:

It follows that the original Act before its amendment (by the Madras Act) became void on the coming into force of the Constitution. ... One could not find a better illustration of the exercise of

naked arbitrary power than the original Criminal Law Amendment Act. The Government had only to issue a notification on a subjective satisfaction that an association was unlawful and it was infallible and conclusive.

The Madras High Court's decision was rendered on 14th September 1950, just about a year after the Hyderabad Government had imposed its ban. One would feel that the Government should have raised the ban immediately after the decision. That was a moral, if not a legal, obligation on it.

Pakistan's Security Act

The Pakistan Government has enacted a law for the purpose of controlling subversive activities, this law replacing the Public Safety Ordinance promulgated early in March after the Federal Court had held a former ordinance invalid (vide p. ii:88 of the BULLETIN). The law, limited in duration to three years, generally follows the lines of our own Public Safety Acts. These Acts, it will be remembered, had covered detention till a central Act was passed in 1950 to provide separately for that matter. Pakistan has no separate detention law, but the present Security Act contains provisions concerning it, and these provisions are similar to those of our 1950 Act before it was amended in 1951.

Advisory Boards are to be created, which are to be of a recommendatory character, as was the case under our Public Safety Acts and the earlier version of the Preventive Detention Act. All cases of detention are to be referred to such Boards, except cases of persons detained for a year. Under our Act of 1950 detention orders for three months were exempted from the Advisory Boards' jurisdiction, and although the 1951 Act removes this exemption our Constitution itself under art. 22 (4) still permits detention for three months without a reference to the Advisory Boards! Grounds of detention will be communicated to the detainees and the detainees will be allowed to make representations to the Boards but will not be permitted to appear before the Boards "in person or through legal representatives." These prohibitions still remain under our Act, though in 1951 that of personal appearance was somewhat relaxed.

Another safeguard that is available in the Pakistani Act but was lacking in our former Acts and is lacking in the current Act is that orders for detention will be made only after the Minister-in-Charge is fully satisfied about the need for such orders." In our country, it is well known that the subjective satisfaction of any district magistrate is enough for a suspected person being locked up in jail.

The Pakistani Act also provides for externment or internment of persons, control of associations and information and prevention of activities prejudicial to "defence and external affairs." But the great advantage which this Act has over our Public Safety Acts and Detention Act is that all orders passed under the Act of Pakistan "will be reviewed every six months." The

Pakistan Government has also amended its press law prohibiting ownership of newspapers by foreigners and providing in the case of newspapers not owned exclusively by an individual that 75 per cent. of capital of the concern must be held by the citizens of Pakistan.

The leader of the Congress party in Pakistan, Mr. Chakravarty, denounced the measure as the "blackest of black measures ever brought before any Parliament," though to that very party in India analogous measures enacted in this country are not even grey, but pure white. Naturally enough, the Home Minister of Pakistan made light of this condemnation, contenting himself with inviting Mr. Chakravarti to remember what was happening in "the land of his abode (India)." The reason for the measure that was advanced by the Pakistani Home Minister was that it was intended only for "the protection of freedom." The Pakistan Congress party asked the question, as non-Congress parties in India ask, "If the Bill was to guard freedom, who was to guard against the guardians?" The Home Minister of Pakistan said, as our former Home Ministers, Messrs. Vallabhbhai Patel and Rajagopalachari used to say, "All democratic countries in the world had given their Governments such powers in times of emergency." Yes, "emergency" is such a flexible word that it never fails to give an excuse for strong action to any one who is bent on such action. What was this emergency in Pakistan? "The continued influx of refugees from India," and "the international situation dividing the world into two opposing groups." Our own Governments advance other but equally insubstantial pleas to prove to their own satisfaction that we are sitting on the top of a volcano and badly require special measures to safeguard our freedom and security.

"Indian Press Quite Free!"

The press in India to-day lacks freedom in two senses. First, monied classes by virtue of their monopolistic position have such a tight grip over the press that few newspapers can hope to retain their independence and yet be commercially successful. Second, the press law, being about the most repressive in the world, keeps a Damocles' sword hanging over the heads of writers, printers and publishers separately, there being an ever-present danger of its descending on them at any time. The press, to be really free, must get past both these dangers.

The authorities would naturally like the pressman to concentrate his attention on the first danger, so that the second one which is of their own creation may not attract much notice. But, to be sensible, they should at any rate refrain from making out a palpably unfree press to be free from governmental fetters. However, they do not always show this much sense. The Governor of West

Bengal, for instance, Dr. H. C. Mookerjee, could not resist the temptation of saying, when inaugurating the annual conference of the Federation of Working Journalists in Calcutta on 12th April, that "the press in India was quite free." But, he added, "the individual journalist was not as free to-day as he was even a few years ago. Nothing could be more distressing to a conscientious journalist than to be compelled to write a piece of comment or an item of news in the form or in the script which his conscience would not approve. Yet not unoften a journalist nowadays found himself confronted with the choice between compliance with an instruction or rather a direction of that nature and unemployment."

This latter statement is very true. But a conscientious journalist does not quite appreciate the Nehru Government's machinery of securities and forfeitures either, the like of which is not known in any country of the world. That is why Mr. Chalapathi Rau, who presided over the conference, expressed the hope, vain though it must be, that the Government over which Mr. Nehru presides, would repeal the Press Act even before the two years of its initial term were over. And we may add, if the Act is not much in actual use it is mainly because the press is largely in the control of millionaires who are ever willing to bow the knee to the powers that be. But the rigorous policing of the press always goes on if often silently. Those who have to work for the freedom of the press must fight on two fronts; they must try to break the fetters imposed both by the Government and by the monopolists.

The president of the Southern India Journalists Federation, Mr. N. Raghunatha Aiyar, also made an appeal to the Government of India to repeal the Press Act at the annual conference of the Federation. While deploring "the depressing apathy in the country over the Press Bill" (when it was under consideration), Mr. Aiyar said that "the Act should be allowed to lapse at the end of the two-year period and that in the meanwhile the Governments, both central and provincial, should strongly resist the temptation to make use of it. The mere presence of such legislation on the statute book is pernicious; it will tend to overawe timorous newspapers and make them take flight from their duty to the public. Section 124 A. I. P. C., still remains unrepealed, and it should be scrapped without further delay."

Leftists' Programme of Civil Liberty

The Communist members of Parliament have drafted a programme for use by all leftist parties, in which amendment of the Constitution is given pride of place. The amendment would seek, among other things, withdrawal of the clauses in the Constitution "restricting freedom of speech, press and association and the right to strike, as well as the clauses on preventive detention."