

Regd. No. B. 5681

# The Indian Civil Liberties Bulletin

[ A MONTHLY REVIEW ]

Edited by R. G. KAKADE, M. A., LL. B., PH. D.,  
Assistant Secretary, All-India Civil Liberties Council  
Office : Servants of India Society, Poona

**Editorial Committee :**

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

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

Annual  
Subscription : Rs. 3.  
Per issue : annas 4  
including postage

Nos. 44 & 45

May-June 1953

## U. S. A.'s Refusal to sign the Covenants

We have had no news of what happened in the current ninth session of the Human Rights Commission, when it met at Geneva for a two-month sitting to finalise the draft of the two Covenants on Human Rights after the U. S. representative, Mrs. Oswald B. Lord, announced on the opening day that the United States would not ratify the Covenants (vide p. ii:256 of the BULLETIN). But we gain a somewhat clearer idea of the motive which lay behind this announcement from the information that has since come in.

It could not be that the United States, which has given itself the Bill of Rights of the ordinary citizens, has suddenly developed an indifference to human rights in other countries. This indeed is not so. In fact the decision not to ratify the Covenants in the form which they have now assumed was, it is clear, prompted by the desire just to promote the "universal respect for human rights and fundamental freedoms for all" which the United Nations Charter enjoins on all nations. This is apparent from the President's message to the Commission which Mrs. Lord read at the meeting.

What is the present position of the Covenants with which the Commission has been occupied exclusively since 1948? In spite of the long and arduous labours of the Commission, the Covenants are in a form which progressive countries cannot accept, inasmuch as the Articles relating to some of the most important rights to be guaranteed by the Covenants leave too many loopholes for Governments to take arbitrary action. It is because "the Covenants will not have the expected effectiveness in the field of human rights" that the United States sees little use in their being enforced, if they can be enforced with the proposed machinery for implementation.

It is also certain that the Covenants will have but a "limited applicability." As Secretary of State Dulles said in his letter, "Nor can we overlook the fact that the areas where human rights are being persistently and flagrantly violated are those where the Covenants would most likely be ignored."

*As in past three years, this number of the Bulletin published in May will serve as the joint May-June number, and there will be no separate issue of the Bulletin next month.*

The situation therefore is this. The Covenants are, and will probably remain at the end, wholly unsatisfactory. And, after all this pother, they will not be implemented with the devotion that is necessary. The Covenants, designed to be binding international law, have been practically reduced, by the number of wide qualifications introduced into the Articles, to the status of a mere statement of pious wishes and aspirations in regard to human rights. If this is to be the final result, why have Covenants at all, the United States argues, in addition to the Universal Declaration of Human Rights adopted by the General Assembly in 1948? Why not therefore alter the direction of the Commission's labours in recognition of the existing circumstances?

Let us rather, the United States says, concentrate our attention on creating a human rights conscience throughout the world as a means of furthering the objectives of the Universal Declaration, instead of engaging in a sort of debating society wrangle about the form which the draft of the Covenants should take. Let us rather make the Commission a working commission with positive action programmes before it. That would "perhaps be the strongest factor in the progress" to be achieved in developing a real respect for human rights.

While urging this new approach to the problem of the promotion of human rights, Mrs. Lord on behalf of the United States promised continued help in drafting the Covenants and in suggesting improvements in them that are so badly needed. The announcement that she made cannot therefore be interpreted by any means as aloofness on the part of the United States from the task of formulating a suitable international code in respect of human rights. It only means that the United States would like greater attention to be paid immediately to the creation, by means of world-wide education and publicity, that respect for fundamental human liberties without which no Covenant will be of any practical good.

Britain also seems to be of the same view, for Samuel Hoare expressed concern at the direction the proposed Covenants were taking and said he agreed with the United States that there was serious doubt that any large number of freedom-loving nations would be able to ratify the Covenants in their present extremely imperfect form.

The Covenants, as they have now emerged from the Commission's deliberations, are in several respects a definite step backward from the constitutional law and practice of countries like the United States and Britain, and the people of such countries would definitely stand to lose, say, in the matter of Freedom of Person and Freedom of Expression, if the Covenants were to be the law for these countries also.

In order to prevent such curtailment of the basic rights which citizens of progressive countries already enjoy, the Human Rights Commission is reduced to the necessity of urging such progressive countries not to lower for their citizens the standard of protection which their law gives them. It has therefore inserted in its draft an Article which says:

Nothing in this Covenant (i. e., the First Covenant) may be interpreted as limiting or derogating from any of the rights and freedoms which may be guaranteed under the laws of any Contracting State or any conventions to which it is a party.

The Commission says in effect to countries like U. S. A. and U. K.: "It is true that the Covenant we have drafted

is very much inferior to the law and usage which you have been following for ages, but we implore you for Heaven's sake not to bring down the level of your practice to that laid down in the Covenant. Pray, maintain your own standard." While there is a danger of the more progressive countries becoming less progressive, one cannot entertain much hope of backward countries levelling themselves up. The United States, in refusing to ratify the Covenant as it is at present, merely insists (so it appears to us) that the Commission adopt a less starry-eyed and more realistic attitude to the whole business than it is doing.

We set a very high value on the Covenants, and just because we do so, we cannot find fault with the United States in drawing pointed attention to the make-believe that is widely prevalent in this matter at present. We see no good in the attempts that are being made in the Human Rights Commission for turning the Covenants into a replica of the Universal Declaration of Human Rights, the Fundamental Rights into Directive Principles of State Policy (to use the words of our Constitution),

## PRINCIPLES OF EMERGENCY GOVERNMENT AS PRACTISED IN SOUTH AFRICA, BRITAIN AND INDIA

The Public Safety Act adopted as a permanent measure by the Parliament of the South African Union in February last, following upon the deplorable manifestations of race unrest that took place at New Brighton, East London and Kimberley, is like the decree of the Roman Senate authorizing the consuls "to see that the Republic took no harm." It practically empowers the executive to suspend the civil rights of citizens and to establish martial law in the country whenever in its opinion it is necessary or expedient to do so "for providing the safety of the public or the maintenance of public order." It was urged, very cogently, against the law that it was both unnecessary and likely to be infructuous. But we do not consider these arguments here. Our main purpose is to point out the striking differences that exist between the provisions of that law and those of Britain's Emergency Powers Act of 1920, on which the South African Minister of Justice claimed that the Public Safety Act was modelled.

### 1

#### PUBLIC SAFETY ACT OF SOUTH AFRICA

The British Act places a number of powerful limitations on the arbitrary or excessive use of the emergency powers which it confers, but such limitations are either lacking altogether or are largely emasculated in the Union's enactment.

*First*, the British Act is designed to meet a narrow type of emergency, viz., an emergency caused by

strikes threatening to interfere on an extensive scale with "the supply and distribution of food, water, fuel, or light," etc., "of any substantial part of the community." On the other hand, the Union Act contemplates an emergency of the most general nature. An emergency is supposed to be caused, sanctioning the use of exceptional measures, whenever circumstances have arisen which threaten the safety of the public or the maintenance of public order and when the ordinary law of the land is thought to be inadequate to ensure these. This is a fundamental difference between the two laws.

*Secondly*, the British Act provides that any proclamation of emergency that may be made declaring that a state of emergency exists shall not remain in force for more than one month, whereas in the Union Act the maximum duration of the proclamation has been laid down as twelve months. It is true that in Britain, as in the Union, the proclamation is capable of being renewed if the emergency outlasts the prescribed period, but it is obvious that the limitation of the duration of any particular proclamation to one month affords in Britain far greater opportunities for Parliamentary control of the discretionary power given to the Government than the corresponding provision in the Union does.

*Thirdly*, the South African statute lacks the stringent provisions inserted in the British statute for submitting the proclamation of emergency to the scrutiny of Parliament. If Parliament is sitting when an emergency is declared, the matter is of course placed immediately before

it. But the important question is what is to happen if Parliament is not in session at the time. In such circumstances the British statute requires the immediate summoning of Parliament. It provides for a meeting of Parliament within five days after the proclamation is issued. In the bill as it was first placed before the House of Commons the proposal was to bring the matter before Parliament within fourteen days of the issue of the proclamation, but that was thought too long a time and it was therefore reduced to five days. But in the Union statute there is no provision at all requiring the Government to convene Parliament within a specified period. In order to remedy this grave defect an amendment was moved by the United Party to prescribe that Parliament, if not then in session, be convoked to meet within thirty days after the issue of the proclamation, thirty days in contrast to five in Britain being allowed in view of the larger size of South Africa and the difficulty of bringing Parliament together. But the amendment was resisted by the Nationalist Government and failed to pass. Thus it may happen that as many as six to nine months may elapse before Parliament is at all seized of the emergency, the extraordinary powers to which it gives rise being invoked by the Government continuously in the meanwhile.

*Fourthly*, there is a difference in the two countries as to the manner in which an emergency is brought to the notice of Parliament. The British Act provides that "where a proclamation of emergency has been made, the occasion thereof shall forthwith be communicated to Parliament . . . and Parliament shall accordingly meet and sit . . . and continue to sit . . ." There is no such provision in the South African Act for the continued sitting of Parliament for the duration of the emergency until the matter has been disposed of. The Government itself may not raise the question of the proclamation and it is then left to private members to bring up the matter on a no-confidence motion or on a motion to vote the supply for a Minister or on similar other occasions. There is no imperative provision for Parliament dealing with the emergency, as there is in Britain.

*Fifthly*, the British law empowers the Government to issue by Order in Council regulations "for securing the essentials of life to the community," but these regulations remain in force for only one week (originally two weeks) by virtue of executive authority, and they can be continued only if Parliament approves. The law says:

Any regulations so made shall be laid before Parliament as soon as may be after they are made, and shall not continue in force after the expiration of seven days from the time when they are so laid unless a resolution is passed by both Houses of Parliament for the continuance thereof.

The necessity for positive Parliamentary approval within seven days for the continued validity of all regulations framed by the executive is the strongest safeguard in the British law. But the South African law adopts the converse course. It provides that the regulations shall be laid

on the Table of the Houses of Parliament within 14 days (and if Parliament is not in session, within 14 days of the next ensuing session, which may well be after some six months). They lie upon the Table for a period of 28 days, and if within this period no substantive motion approving the regulations is passed they lapse at the end of the session. Whereas in Britain a formal motion giving affirmative approval to the regulations is required to clothe them with validity, in South Africa a motion disapproving the regulations is necessary if the Government is to revoke them. The difference between the two positions is indeed very great.

*Sixthly*, the English statute itself lays down the maximum penalty—imprisonment for three months or a fine of £100—for the punishment of violations of regulations issued under it. But the Union statute has no such provision. The gravity of the situation which the absence of a provision of this nature is likely to create will be apparent when it is remembered that under the statute persons thought dangerous can be arrested and held in detention for an indefinite period. In order to provide some check on such a situation, an amendment was moved by Dr. Smit limiting the period of detention to thirty days, before the expiry of which "the executive should be required to bring such a person before a competent court so that a proper charge may be formulated" and in the absence of such a charge the person should be released.

## 2

### 1920 ACT CONTRARY TO BRITISH TRADITIONS

While we have instituted a comparison between South Africa's Public Safety Act and Britain's Emergency Powers Act and shown how the former is far more drastic than the latter, it must be remembered that the British Act itself constitutes a grave departure from the traditional common law practice followed in Britain. Of course emergencies arise in every country, but common law countries like Britain follow a different course in mastering them than civil law countries like France. In Britain as an emergency takes shape, a minimum of power is given by statute in order that the executive may be enabled to overcome it. And where legislative action becomes impossible on account of the sudden precipitation of a national danger, the executive takes independent action based on the doctrine of *salus populi suprema est lex*. The working of this doctrine was thus described by Mr. Fagan, who later became Judge of Appeal in South Africa, at the outbreak of World War I:

The legal position is such that the Government is not powerless when troubles arise in the country. Our ordinary law does not leave the Government in any way powerless. Our ordinary law gives the Government the right to take action when conditions in the country are such that action is required, and the Government has the same rights and powers for

the maintenance of peace and order in the country that I would have if a man broke into my house or threatened to break into my house. I can resist with as much force as would be necessary to see to it that he did not commit that offence. Our ordinary law (similarly) allows the Government, if there is any trouble or threatened trouble in the country, to take the necessary steps for the maintenance of public safety.

This action may even take the form of placing the country under martial law but all such action is subject to the jurisdiction of the courts as to whether the action taken was required in the prevailing circumstances or was excessive. For, as the South African Minister of Justice himself said :

According to the ordinary common law, the proclamation of martial law or a state of emergency as happened in 1939 under the previous (Smuts) Government, when they proclaimed a state of emergency without legislation, those people had to go to court, and the court had to rule whether or not a state of emergency existed, and the courts ruled that since there was a state of war the Government could act as it did.

Although the courts ruled on that occasion that there was an emergency and that the rule of martial law was justified, they could rule in any less pressing situation that there was no warrant for using martial law powers under the common law. When, however, specific emergency legislation is enacted, like the Public Safety Act of South Africa or the Emergency Powers Act of Britain, the courts have no longer the jurisdiction that they have under the common law to say that any action taken by Government to conquer a so-called emergency was wrongly taken. That is the reason why common law countries prefer to deal with emergencies under the common law allowing the courts to function. The Emergency Powers Act is thus a deviation from the normal British way of handling crises.

Britain generally tackles every emergency as it arises with a minimum of statutory powers or even by independent executive action, but always subject to the Rule of Law, to which it is tenaciously devoted. The Continental way of enacting a comprehensive code of regulations giving emergency powers, foreseen and preordained, to meet any kind of emergency that may arise is foreign to British traditions, just because no judicial check is placed either on the power to declare an emergency or to take any action to deal with it. The declaration of an emergency is a purely governmental act not subject to judicial review, and so is the action that is taken to cope with it. In the Continental countries there is the legally anticipated and codified state of siege, which regulates governmental action without the control of law courts, and the Emergency Powers Act which the Lloyd George Government adopted in view of the coal strike that then threatened was a kind of Britain's minor state of siege law. The Act

provides for checks, and some stringent checks, on the discretionary power which the Government can exercise when faced with strikes of the most serious nature and causing the most pressing hardship to the national community, but the Act also excludes the courts from a review of the exercise of the power, and for this reason it is considered to deal a death blow to the Rule of Law, which is the governing principle of Britain's normal policy.

Continental European countries, however, in which common law does not prevail, provide themselves with a state of siege regime. The state of siege law arms the executive with wide extraordinary authority, and the exercise of this authority is placed under the constant surveillance of Parliament from the inauguration of the state of siege to its termination. The best and most widely known instance of this is the French law of 1878. It first of all defines the circumstances in which alone the state of siege can be invoked. This emergency institution is reserved in France for crises of the most severe nature. "The state of siege can only be declared in the event of imminent danger resulting from a foreign war or an armed insurrection." It can ordinarily be declared by Parliament alone, the Government being authorized to declare it only in exceptional circumstances, and the exercise of the power conferred by it is thoroughly regulated by Parliament. Thus Parliamentary supremacy at every stage is the main characteristic of the stage of siege. "The right to suspend the rule of the laws can belong to no one but the power which makes them." By the grace of Parliament alone can the executive function even in a grave crisis. Thus the only defect of the state of siege regime, and it is a serious defect, is that the civil law courts provide absolutely no check upon the declaration of the state of siege, neither at the time of the proclamation nor after the disturbed conditions have been allayed; that is to say, the courts can offer no redress to the citizen "mistreated by the arbitrary procedures of government which the state of siege sets in motion." And it is because of this that in Britain, whose proud boast it is or has been to preserve the judicial process in all circumstances, not excluding martial law, the state of siege is never resorted to, though the Emergency Powers Act, designed to control strikes, is an exception to this general rule.

### 3

#### INDIA'S CRISIS WEAPON

The Constitution of India, following generally as it does the principles of the British Constitution, departs from the latter in this important respect, viz., that it gives the Government wide discretionary powers to be brought into use in time of crisis. Thus the Constitution contains a chapter on Emergency Provisions such as no constitution modelled on that of the British or the U. S. A. Constitution does. In this respect it follows the example of state of siege countries, though in these countries the

state of siege is governed by statutory and not constitutional provisions. This is very much to be deplored inasmuch as the state of siege regime keeps the courts at arm's length in regard to the operation of the state of siege and thus deprives injured persons of the relief which the judiciary could have given them. But even the legislative ascendancy which is the characteristic of the state of siege is not preserved in its integrity in the Indian Constitution. We shall now set out the principal points in which Parliamentary control is impaired in dealing with emergencies by comparing the provisions of our Constitution with those of the French state of siege law of 1878.

*First*, in France the state of siege can be established by Parliament alone if Parliament is then sitting. It is only when Parliament is not in session that the President is competent to declare the state of siege. In India, however, the Constitution authorizes the President (and the President alone) to declare an emergency and thus bring the emergency powers into use, which in the language of French jurisprudence means executing the state of siege, and this authority the President can use irrespective of whether Parliament is at the time actually in session or not.

*Secondly*, in France it is provided that if the President declares the state of siege because Parliament happens to have been prorogued at the time, "then the Chambers meet automatically two days later." The Indian Constitution contains no such provision; it does not require that Parliament be summoned within any specified time if at the time the President declares an emergency it has been prorogued.

*Thirdly*, still worse becomes the position if Parliament has been dissolved when an emergency is declared. In this event nothing happens till Parliament is reconstituted by means of fresh elections. This may mean quite a long wait of some six months or so and for some time thereafter. In France such a situation in which the state of siege is in operation without Parliament having a look-in can never arise, unless a war is on. The law of 1878 says:

In the event the Chamber of Deputies is dissolved, and until elections shall have been entirely completed, the state of siege cannot, even provisionally, be declared by the President of the Republic.

The only exception to this is:

Nevertheless, in the event of a foreign war, the President, on the advice of the Council of Ministers, can declare the state of siege in the territories menaced by the enemy, on the condition that he convoke the electoral colleges and reassemble the Chambers in the shortest possible delay.

*Fourthly*, in India Parliament is powerless to do anything about the proclamation of emergency for a period of two months even if it be in session at the time the President declares an emergency by means of this

proclamation. Parliament may be of the opinion that no emergency has arisen necessitating the use of any extraordinary powers, and yet the powers may go on being used for two months without Parliament being able to put a stop to their use. Thus, not only is it not left to Parliament to inaugurate the state of siege even when it happens to be sitting at the time, as is the case in France, but Parliament is deliberately thrust out of the picture for as long as two months, being reduced to the position of seeing the state of siege of which it perhaps thoroughly disapproves being executed under its very nose during this period. (And two months is a pretty long period as in France the total duration of the state of siege which is declared by Parliament is generally a matter of weeks.) In France, on the other hand, Parliament when it reassembles after prorogation or dissolution is given full power either to keep on or withdraw the state of siege established by the President while it was not in session. There is a section in the Act of 1878 which states that on these occasions "the Chambers, as soon as they shall have reassembled, shall maintain or lift the state of siege. In the event of a disagreement between them, the state of siege is lifted automatically."

*Fifthly*, in the French law the duration of the state of siege is to be determined in the declaratory statute, for it states that this law "will fix the period of its duration." Following this principle, the validity of the Emergency Powers Act of Britain is fixed at one month. This does not mean that the time limits here mentioned cannot be extended in any circumstances, but it means that they can be extended only by positive action of the national legislature. The Indian Constitution which provides for an Emergency Powers regime contrary to the British constitutional system provides nowhere for its termination, which is contrary to the state of siege concept of the Continental countries which it follows.

*Sixthly*, the French law gives the authorities in control the power to restrict only four fundamental rights of the citizens, which include the right to freedom of expression. But the Indian Constitution gives the President the power to suspend all fundamental rights whatsoever, and the right to freedom of expression comes to an end automatically. Whereas in France the section concerning the forbidding of publications and meetings judged "to be of a nature to incite or sustain disorder" is an enabling provision, in India the corresponding Article of the Constitution is an imperative provision: freedom of speech or press just comes to an end, whether the President, i. e., the national Ministry, thinks such abolition of a vital freedom is necessary or not. In this respect the Constitution puts not merely the legislature but even the executive itself out of the field. It says: **FREEDOM OF SPEECH SHALL CEASE.** (After the close of the first World War, Professor Chafee suggested the application of the following test: "In war-time, speech should be free unless it is clearly liable to cause direct and dangerous interference with the conduct of the war.")

We have attempted to show above that not only has India chosen to adopt a crisis weapon which, being contrary to the Rule of Law, she should not have adopted, but, having adopted it, she does not even follow the usual state

of siege procedure, which, even if it keeps out the judiciary from the operation of the state of siege, at least maintains Parliamentary supremacy in full.

## ADVERTISING AND FREEDOM OF THE PRESS

The Bombay Government's secret circular concerning the distribution of state advertisements to newspapers, against the policy disclosed in which the Bombay and Madhya Pradesh Civil Liberties Unions have entered a strong protest (vide pp. 255-6 of the BULLETIN), gives a more convincing answer to the following two questions included in the Press Commission's questionnaire than any witness appearing before it could possibly have given with concrete evidence to support it :

Is there any evidence of the Central or State Governments having discriminated in the distribution of advertisements? Is there any evidence of special patronage?

Are there any instances of the Central Government or any State Government . . . offering advertisements to, or holding out the threat of withdrawing advertisements from, a newspaper on the ground of its policy?

To the Bombay Government's circular is appended a list of newspapers arranged in the order of preference to be accorded to them in the matter of advertising. This list has seen the light of day only in so far as the newspapers which have been given the privilege of publishing State-wide advertisements are concerned. But the list apparently goes on to specify to which local newspapers advertisements should be given, and in which order. It is only after the full list is open for inspection that the Government's underlying policy can be understood in all its implications. We wonder whether, on a request being made by the Press Commission, the Chief Minister will condescend to place the list at its disposal. The Commission no doubt has power to call for and receive all relevant material from all quarters, but it is a matter of doubt whether the Bombay Government can be compelled to produce a list which it has designated as secret. If the Commission is not competent to have the list placed before it, it will obviously be unable to draw any definite conclusions as to the principles on which the list may have been framed, unless it instigates some venturesome newspaper to complete the job which the "Times of India" has done in so far as State-wide advertisements are concerned, in face of the risk of prosecution under the Official Secrets Act.

But whether the policy which the Bombay Government appears to have formulated for its guidance in this matter is fully known or not, some of the criteria by which it judges the fitness of a paper for receiving advertisements have been unreservedly acknowledged.

One of these criteria is whether the paper is a critic or a supporter of the Government's policies. This is not a matter of inference. The Government itself has said on the floor of the legislative chamber that the "Times of India," which among English papers admittedly commands the largest circulation, has been eliminated from the list, with the effect that it cannot have any Government advertisements whatever, because among other things it often expresses strong disapproval of some of the actions and policies of the Government. Not only was this reason adduced in defence of withholding advertisements from the paper, but a hope was held out to it that if its writing underwent a suitable change, it might again be considered worthy of receiving favours at the hands of Government. There can therefore be no question that in the matter of distributing advertisements at least one of the major factors that decided the Bombay Government was the policy which the newspaper concerned followed in the consideration of Government measures. The inclusion of any paper in its preferential list or exclusion of any paper therefrom was dictated in some measure at least by the desire either to bestow patronage or to impose financial sanctions instead of by the desire to get the best value for the money to be spent.

One of the questions on which the Press Commission wishes to have information is: What is the behaviour of the newspapers if the Government does try to influence their policy by means of the patronage it has in its hands in the form of advertising? Do they resist such pressure or succumb to it? The question is put in these words:

To what extent are newspapers . . . influenced by Government's displeasure? Can you suggest measures for safeguarding the Press from such influences?

We cannot persuade ourselves to believe, from what happened as a result of the Bombay Government's circular, that newspapers as a whole can resist the pressure. We are told that when recently some American film companies found that Danish newspapers criticized the films adversely, they tried in September last to apply sanctions against such newspapers by withdrawing their advertising from them. They cancelled their advertisements in two of the biggest newspapers, saying, like the Chief Minister of Bombay, "We will not take any more space in your newspapers until they say nicer things about American pictures." What was the reaction in the newspaper world of Denmark? A number of newspapers refused to take any advertisements from the American film companies, and the newspapers that were punished sternly

maintained the independence of their view-point, "continuing their comments on the films as forthrightly and frankly free from bias as before." But in the Bombay State the Government's scandalous circular created a visible rift in the ranks of newspapers. No paper declined to publish advertisements coming from the Government until the circular was withdrawn, and it appeared that some newspapers inwardly rejoiced that the "Times of India," which is pushing ahead rapidly in circulation, received a setback at the hands of the Government. The "Times of India" itself has maintained its independence; but who can say that the smaller and financially weaker papers in the districts, which have been simply excluded from or given a very low place on the Government's preferential list can do so? The Bombay Government has also announced that it will revise its list every year. That all newspapers would be willing or able to resist the temptation, held out by these annual revisions, of coming high on the list and thus securing Government advertisements by falling into line with the policy of the Government is something which is too much to hope for. The only remedy, it appears to us, lies in formulating certain principles governing the giving of Government advertisements and requiring the Governments to observe them in practice. And it is obvious that the Press Commission would be the most competent and acceptable body for formulating such principles, which would of course prohibit unjust discrimination. The Standing Committee of the All-India Newspapers Editors Conference adopted on 26th April the following resolution on the subject:

This Conference notes that certain State Governments continue to depart from the policy that Government advertisements should be placed with newspapers on a firm non-partisan, commercial basis. It, therefore, reiterates its stand that Government advertising should not be placed as patronage or withheld from a newspaper as a punitive measure by Government on the ground of publication of news and comments unpalatable to it. It further requests the States concerned to bring their policy in this respect in line with the declared policy of the Government of India.

This is about Government advertising. But the question of the Government itself practising discrimination when giving its own advertisements to newspapers hardly ever arises in countries steeped in democratic traditions. We do not believe that this question formed part of the work of the Royal Commission

on the Press in Great Britain (1947-1949). The question with which it was mainly concerned was whether any influence was exerted by private advertisers or outside financial interests on the way in which newspapers conducted themselves, and its general verdict is that the policy of the press is not dictated by such external influence; the policy is determined by those who own and conduct the press. The most recent instance of how British newspapers resist any attempt by advertisers to control their editorial policy is given in the "Times of India" of 26th April. It says:

The London offices of Hollywood film companies normally spend £3,000 a week to boost their products in the organs of the Beaverbrook Press. Six weeks ago they withdrew their advertisements, intending not to renew them until the critics writing in the Beaverbrook newspapers were either sacked or modified their criticisms of the Hollywood films which they were invited to see.

The Beaverbrook papers retorted with a statement that they were determined—even at the cost of £150,000 a year advertisement revenue—to resist any attempt to interfere with the independence of their editorial columns.

As the "Daily Express," one of the Beaverbrook papers, said, like freedom from Government restrictions, "freedom from advertisers' dictation is a solemn trust to the public which newspapers must discharge at whatever cost to themselves." This is the British tradition, and the "Times of India" concludes:

Well, Britain is a free country, and if advertisers want to withdraw from British magazines and newspapers, they are at liberty to do so. But neither by withdrawing advertisements nor by inserting them will they succeed in getting anyone sacked or in influencing what is said in the editorial columns. It is because most advertisers know the strength of the British Press in its tradition of independence—because they too remember the fight that has been waged and won for freedom of editorial comment—that they respect the journals in which they take space, and make no attempt to influence them.

Until the Indian newspapers develop such traditions, it will not be possible for us to have a really free press. Law will not help here; the newspapers must themselves learn to meet all efforts from private advertisers with unflinching opposition and an unyielding refusal to submit to dictation.

## SEARCHES AND SEIZURES

### SOME LEADING CASES

The manner in which the right to privacy is safeguarded in the United States by means of the Fourth Amendment coupled with the Fifth will be gathered from a study of important cases before the Supreme Court which are given below.

#### THE LOYD CASE

*Re Jackson*, 96 U. S. 727 (1878), established the principle that regulations of the postal department as to inspection of letters and sealed packages must be in subordination to the command of the Fourth

Amendment. The Supreme Court held that, consistently with this guarantee of the people to be secure in their papers against unreasonable searches and seizures, such mail matter could only be opened and examined upon warrants issued on oath or affirmation, particularly describing the thing to be seized; "as is required when papers are subjected to search in one's household."

In the case of *Boyd v. United States*, 116 U. S. 616 (1886), the constitutionality of a federal statute was involved, which required a party to produce his private books and papers, and if he refused to do so upon demand, permitted the Government to assume as true its allegations as to the contents of the said books and papers. The statute, it is true, did not authorize forcible entry into a man's house and searching among his papers, but, in the words of the Supreme Court, "it accomplishes the substantial object of these acts in forcing from a party evidence against himself," and thus the statute was "obnoxious to the prohibition of the Fourth Amendment of the Constitution as well as the Fifth."

This is the first leading case in the United States which clearly recognised the doctrine laid down by Lord Camden in *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765) (to which indeed the Fourth Amendment joined with the Fifth owes its ancestry), that search for evidence from papers illegally seized by a governmental agency violated the principle against self-incrimination and that such evidence must therefore be excluded in trial. Citing Lord Camden's judgment, which "is considered as one of the landmarks of English liberty" and "is regarded as one of the permanent monuments of the British Constitution," Mr. Justice Bradley, who spoke for the Supreme Court, said:

The principles laid down in this opinion affect the very essence of constitutional liberty and society. They reach farther than the concrete form of the case before the Court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

On the facts of the case Mr. Justice Bradley said:

It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object of search and seizure.

The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other, it is not.

(The question here is:) Is a search or seizure, or what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an "unreasonable search and seizure" within the meaning of the Fourth Amendment of the Constitution? (It is)

#### THE WEEKS CASE

The case of *Weeks v. United States*, 232 U. S. 383 (1914), involved a conviction for using the mails to transmit coupons or tickets in a lottery enterprise. The defendant was arrested by a police officer without a warrant. After his arrest other police officers and a federal marshal went to his house in his absence, got the key from a neighbour, entered the defendant's room and searched it, and took possession of various papers and articles. The defendant filed a petition in the district court asking the return of all his property. The court ordered the return of everything not pertinent to the charge, but refused to turn over the letters which were afterwards put in evidence on behalf of the government to secure conviction, acting on the proposition that the letters having come into the control of the court, it would not inquire into the manner in which they were obtained, but, if competent, would keep them and permit their use in evidence. The present case established the principle that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure.

The Supreme Court held that the official of the United States who took the letters from the house of the accused acted "in direct violation of the constitutional rights of the defendant," and similarly in the order of the trial court refusing his application for the return of the letters "there was involved a denial of the constitutional rights of the accused." The letters should have been restored to him. "In holding them and permitting their



use upon the trial, we think a prejudicial error was committed." Mr. Justice Day said :

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offence, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavour and suffering which have resulted in their embodiment in the fundamental law of the land.

The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information, and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the government, and under colour of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would have justified such procedure; much less was it within the authority of the United States marshal to thus invade the house and privacy of the accused.

#### THE SILVERTHORNE CASE

In the case of *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920), the Silverthornes, having been indicted, were arrested at their homes and detained in custody by the police. While so detained, Government officers without authority went to the office of the company and seized all the books, papers and documents found there. The district court ordered all books, etc., returned on a finding that the search and seizure violated the constitutional rights of the parties. Thereafter, photographs and copies of the papers were made and a new indictment was framed, based upon the knowledge thus obtained. Subpoenas were then issued calling for production of the original papers for use of the grand jury. Upon refusal to produce, one of the Silverthornes was imprisoned for contempt. His refusal to obey was upheld by the Supreme Court. In its view the whole performance of the unlawful search and seizure of books and papers was an "outrage" planned or at least ratified by the Government. Mr. Justice Holmes, speaking for the Court, said :

The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy

them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks v. United States*, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion, such is not the law. It reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

#### The Exclusionary Rule

The exclusionary rule first laid down by the *Boyd* decision and confirmed with greater emphasis by the *Weeks* decision, viz., the rule that evidence procured by means of an illegal search and seizure must not be admitted in criminal prosecutions is the force at the back of the Fourth and Fifth Amendments which makes these constitutional guarantees effective. But for this rule the victims of unreasonable searches and seizures would be left only with the remedy of civil suits for damages against the government for the injuries sustained by illegal police action, or of a prosecution of the offending police officer for his improper conduct. But such remedies are obviously ineffective and constitute little check upon unreasonable searches and seizures. It is thus this rule of suppressing evidence obtained by illegal means which helps in implementing the sacred right to immunity from police intrusions which the Constitution has guaranteed.

Formerly it was the unvarying law that upon the trial of a criminal case, the court would receive any competent evidence without inquiring into the means by which it had been procured. That is the common law rule, and although the *Boyd* case had laid down that an exception should be made to the common law rule by excluding all evidence in the procuring of which government officials took part by methods forbidden by the Fourth and Fifth Amendments, yet, after the *Boyd* case, the Supreme Court reverted to the old rule in *Adams v. New York*, 192 U. S. 585 (1904). In this case, the police had seized, while executing a search warrant for the discovery and seizure of gambling implements, some books and papers not mentioned in the warrant. These documents were used as evidence to prove the guilt. The Court

held in this case that the papers, having incidentally come into the possession of the police, did not cease to be competent evidence though the seizure was unlawful. Thus the Court reaffirmed the old rule that "a court will not, in trying a criminal cause, permit a collateral issue to be raised as to the source of competent testimony." But this decision has been overruled by subsequent decisions of the Supreme Court, as Mr. Justice Cardozo has stated in *People v. Defore*, 242 N. Y. 13, 150 N. E. 585, and the exclusionary rule has now been firmly established and consistently followed. On the authority of the *Boyd* case an order was made for returning the books and papers unlawfully seized in *United States v. Mills*, 185 Fed. 318 (1911). This was followed by the *Weeks* decision in which the Supreme Court, as said above, reversed the conviction based upon the use of illegally seized papers, for the return of which an application had been made to the trial court and rejected by it.

The rule of exclusion has since then been well settled. It was generally understood at the time that objection to the admission of evidence illegally obtained or an application for the compulsory return of documents constituting the evidence should be made before the trial commenced. But *Gouled v. United States*, 255 U. S. 298 (1921), and *Amos v. United States*, 255 U. S. 313 (1921), ruled that a motion before trial was unnecessary if the defendant had no knowledge until the trial that an illegal seizure had been made. Further, *Agnello v. United States*, 261 U. S. 20 (1925), held that the evidence must be excluded, though the things seized were contraband and though there had been no motion before trial if the facts were undisputed. Thus, in the words of Justice Cardozo, "the procedural condition of a preliminary motion has been substantially abandoned, or, if now enforced at all, is an exceptional requirement." The adoption by the courts of the rule of evidence barring the use of materials obtained through improper searches and seizures against defendants is the means by which they have been enabled to give effect to the protection afforded to people by the Fourth Amendment. As Mr. Justice Douglas said in *Wolf v. Colorado*, 334 U. S. 25 (1949), "in the absence of that rule the Amendment would have no effective sanction." In fact, in the words of Justice Rutledge employed in the same case, exclusion of evidence taken in violation of the Fourth Amendment's mandate is "the one sanction" which ensures the fulfillment of the mandate. It was said in *United States v. Wallace and Tiernan Co.*, 336 U. S. 793 (1949), that the rule that the knowledge gained by Government from illegally seized documents cannot be constitutionally utilized is "an extraordinary sanction, judicially imposed, to limit searches and seizures to those conducted in strict compliance with the commands of the Fourth Amendment." Similarly, the Supreme Court said in *McDonald v. United States*, 335 U. S. 451 (1948):

(The Fourth Amendment) marks the right of privacy as one of the unique values of our civili-

zation and, with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause supported by oath or affirmation. And the law provides as a sanction against the flouting of this constitutional safeguard the suppression of evidence secured as a result of the violation, when it is tendered in a federal court.

The exclusionary rule means, in the words of Justice Murphy in *Goldstein v. United States*, 316 U. S. 114 (1942), that the Court "has refused to make itself a participant in lawless conduct by sanctioning the use in open court of evidence illegally secured." But this rule of the suppression of such evidence applies only to evidence illegally obtained by the employees of the federal Government; such evidence if obtained by the employees of the states can be used in federal courts. In *Feldman v. United States*, 322 U. S. 487 (1944), the Supreme Court said (with three dissents): "While evidence secured through unreasonable search and seizure by federal officials is inadmissible in a federal prosecution, . . . incriminating documents so secured by state officials without participation by federal officials but turned over for their use are admissible in a federal prosecution." Similarly, evidence improperly obtained by private persons may be used, as was decided in *Burdeau v. McDowell*, 256 U. S. 465 (1921), but such evidence, if obtained by state officers who are co-operating with federal officials, cannot be so used, vide *Gambino v. United States*, 275 U. S. 310 (1927). This means that if federal officials play any part, direct or indirect, in collecting evidence by means of search and seizure prohibited by the Constitution, such evidence is vitiated and becomes inadmissible in federal courts.

The Federal rule of exclusion is now incorporated in the Federal Rules of Criminal Procedure, but *Wolf v. Colorado*, 338 U. S. 25 (1949), decided that although the security of one's privacy against arbitrary intrusion by the police, guaranteed by the Fourth Amendment, was enforceable against the states through the due process clause of the Fourteenth, the exclusionary rule need not be supposed to be applicable to a state conviction based on evidence obtained as the result of an illegal search. In this case the majority of the Court held that it was for the individual states to determine whether or not such evidence could be admitted at the trial. From this holding Justices Murphy, Douglas and Rutledge vigorously dissented.

---

## FREEDOM OF TRAVEL

---

### Visit to Russia Not Permitted

Mr. V. G. Row, a Communist member of the Madras Legislative Council, applied on 23rd October last for the issue of a passport for proceeding to several countries including the U. S. S. R. and East Asia, and endorsement was made by the Madras Government only in regard to

travel in countries other than U. S. S. R. and East Asia. He therefore applied to the Madras High Court for a writ of mandamus to direct the State Government to endorse passports to enable him to travel in U. S. S. R. and countries in East Asia. The petitioner contended that refusal of endorsement on the passport, in regard to travel to any country, was a violation of the fundamental right guaranteed under Art 19 (1) (d) of the Constitution (which confers the right "to move freely throughout out the territory of India") and any restriction of that right must be "reasonable" and "in the interest of the general public." He also contended that the refusal of endorsement for travel to the U. S. S. R. and the Far Eastern countries was mala fide and was a discrimination which was both arbitrary and unjust and in violation of Art. 14 of the Constitution. He alleged that the refusal was due to the fact that he was a member of the Communist party in the State legislature and that he had, as such, consistently opposed the party in power. He relied on the fact that passports endorsed to such countries had been issued to other persons.

It was contended on behalf of the Government that the petitioner had no legal claim to the issue of a passport which was in the nature of grant of a special facility and that it was in the discretion of the executive to give it or to refuse. It was denied that endorsement to U. S. S. R. and some other countries was refused to the petitioner because he was a member of the Communist party.

Rajamannar C. J. and Venkataraman J., who heard the petition, in the course of their judgment on 1st May, discussed the provisions of the Indian Passport Act and the rules framed thereunder and observed that these related to passports issued in connection with the entry of a person into India. The Act was quite clear on the point and it was manifestly designed to prevent persons entering India without a passport. Certainly, the rules could not enlarge the scope of the Act. There was no provision in the Act or in the rules for the grant or issue of passports to persons leaving India. "We have no doubt," Their Lordships stated, "that the Act was not intended to prevent British Indian subjects from entering India." So far as India was concerned, there was no statutory provision which prohibited a person from leaving India without a passport; nor was there any provision forbidding Indian citizens from entering India without a passport. Those facts had to be borne in mind in dealing with the petitioner's contention relying on Articles 14 and 19 of the Constitution.

Their Lordships further observed that Article 14 had no application to a matter like the issue of passports, which consisted of the exercise of a purely political function. Their Lordships expressed the view that the relief which the petitioner sought at their hands was not founded on any legal right. The passport gave the recipient the benefit of the protection of the Government issuing it. "But can it be said that anyone has got a right to obtain

a passport to any particular country? We think not." Even when a passport had been granted to an individual, the State could not be compelled to exercise its protection over that individual in a foreign country.

In the result, Their Lordships dismissed the petition.

A similar petition filed by Mr. S. B. Adityan, M.L.C., was also dismissed.

---

## HABEAS CORPUS PETITIONS

---

### Release of Two Detenus

#### DETAINED FOR SUPPORTING JAMMU AGITATION

The Supreme Court on 4th May ordered the release of Dr. Ram Lal Mahajan and Mr. Parkash Lal, who had been detained under the Preventive Detention Act for alleged participation in the movement started in support of the Praja Parishad agitation in Jammu. The former was detained by the Punjab State and the latter by the Delhi State about the middle of March.

One of the charges made against Dr. Mahajan in the grounds of detention supplied to him was that he had been addressing and attending Rashtriya Swayam Sevak Sangh and Jana Sangh meetings in the district of Gurdaspur with the intention of mobilising public opinion in favour of the Praja Parishad movement and for collecting arms and funds. Mr. Parkash Lal was charged, among other things, with enrolling volunteers for the Jana Sangh.

Following their decision in the case of Dr. Bharadwaj that if even one of the grounds of detention supplied to a person preventively detained was vague, the detention resulted in an infringement of his constitutional right to make a representation against his detention, Their Lordships ordered that these two detenus be released.

Similarly, on 8th May the Supreme Court ordered the release of three persons detained for alleged complicity in the agitation started by the Jammu Praja Parishad—Mr. V. G. Deshpande, M. P., Secretary of the Hindu Mahasabha, Mr. U. M. Trivedi, M. P., and Mr. Hardayal Devgun, Organizing Secretary of the Hindu Mahasabha. It was alleged against Mr. Deshpande that he was proceeding to Pathankot to start the agitation there. The Supreme Court held that some of the grounds of detention served on the detenus were vague and indefinite.

### Delay of Four Months in Furnishing Particulars

Following the decisions of the Supreme Court in *State of Bombay v. Atmaram Shridhar Vaidya and Tarapada De v. State of West Bengal*, the Calcutta High Court held on 18th June 1951 in the matter of the habeas corpus petitions of Anand Sankar and others (A. I. R. 40 Calcutta 129) that the detention of persons to whom particulars of grounds of detention were furnished some five months after they had been detained complied with the require-

ments laid down in Art. 22(5) of the Constitution that the detenus be supplied with grounds of detention "as soon as may be" and that they be afforded "the earliest opportunity of making a representation." In the case of Atmaram Vaidya the particulars were not delivered until nearly four months after the order of detention had been made and until after the detenu had filed a habeas corpus petition. The facts of some of the detenus in the case before the Calcutta High Court were "precisely similar" to those of the above-cited cases decided by the Supreme Court, and the High Court therefore held that the express decisions of the Supreme Court "cannot possibly be questioned and must be followed." Compare the decision of the Supreme Court in the cases of Ujagar Singh and Jagjit Singh given on p. ii:228 of the BULLETIN.

In the case of some of the detenus it was urged that the orders for their detention must be held mala fide "because they were only made after the detenus had either been discharged in criminal cases or had been released on bail." Chief Justice Harries said in regard to this contention: "Making orders for detention, where persons had been discharged by a criminal court or had been released on bail, does give rise to suspicion," but in the present case "there is nothing to suggest that these orders were not honestly made beyond the fact that they were made when it was clear that the detenus would be set at liberty. The fact that the prisoner would be at large might well compel the authorities to make an order if they honestly believed him to be dangerous. . . . To hold that the orders were mala fide, something more than these mere circumstances would have to be established."

#### SUCCESSIVE PETITIONS ON SAME GROUNDS

An important question was raised in this case as to whether detenus were entitled to make successive habeas corpus applications when their previous applications had been dismissed, but this question was not decided in the instant case. "A number of detenus had made previous applications to this Court for writs in the nature of habeas corpus and such applications had been dismissed by various benches of this Court. It was contended on behalf of the State that as previous applications had been dismissed, this bench had no jurisdiction to consider subsequent applications." And the Court said:

It might well be argued that there is nothing in law to prevent successive applications. In civil matters there is the rule of *res judicata* and in criminal matters the rules of *autre fois convict* and *autre fois acquit*. But these proceedings are neither civil nor criminal and it is contended that there is no express provision prohibiting successive applications even based on the same facts.

However, the Court found it unnecessary to give a ruling on this point as the applications in this case had been dismissed under the Preventive Detention Act of 1950 and fresh applications had been made after the Act had been

amended in 1951. And the Chief Justice held that "a decision under the Preventive Detention Act of 1950 could never prevent an application being made when that Act, had been amended in the manner in which it was amended by the 1951 Act. The fact that an application had been dismissed under the 1950 Act might afford no answer whatsoever to the contention of the detenu under the Act as amended in 1951."

#### Is Specification of Period of Detention Required?

##### CONTRADICTORY DECISIONS

Deka J. of the Assam High Court on 8th February 1952 reaffirmed, in the habeas corpus petition of Biewanath Agarwala, the ruling given in similar petitions filed by Hari Prasad Agarwala and Kishenlal Dhanuka (vide p. ii: 229 of the BULLETIN), to the effect that the order of detention for an indefinite period, if passed under sec.11(1) of the Preventive Detention Act while confirming the Advisory Board's recommendation, is bad in law. His Lordship based his decision on the observations of Mr. Patanjali Sastri, Chief Justice of the Supreme Court in the case of Makhan Singh Tarsikka that "the Government should determine what the period of detention should be" in its confirmation order. These words indicate, Deka J. said, that "the Government has to exercise its discretion, or bring its decision to bear on the gravity of the offence charged and the risk of releasing the prisoner, on the receipt of the report of the Advisory Board and then determine the period for which the detenu should be kept in confinement or under restraint."

Contrary to this ruling, Mr. Ram Narayan, Acting Chief Justice of Assam High Court, put, in his judgment on the habeas corpus petition of Narayan Saha, the interpretation that a confirmation order made under sec. 11(1) did not require the duration of detention to be specified (3rd April 1952). His Lordship said:

It seems to me that the language employed in cl. 1 (of sec. 11) does not impose any obligation on the appropriate Government to determine the period of detention when confirming an order of detention. All that it requires is that if the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of such person for such period as it thinks fit. . . . The appropriate Government thus is given the authority to continue the detention subject to the statutory maximum. This would be in conformity with the scheme of the Act. The Act being for a definite period, the appropriate Government could be given the power to keep a person in detention for any period it considered fit, subject to the maximum fixed by the Act, without fixing a shorter period of detention at the confirmation stage.

His Lordship added :

Whether such a discretion should or should not have been given to the appropriate Government is not the question. . . . I am not oblivious of the fact that on this interpretation the period for which a person may be detained after the confirmation of the initial period would remain uncertain subject to the maximum limit of the duration fixed by the Act. It would also make it possible for the State Government to continue the detention for the maximum period which the law permits. Even if this may be regarded as causing hardship, as no non-compliance with the provisions of sec. 11 (1) is involved, the legality of the order confirming detention cannot be questioned.

For this ruling His Lordship drew support from the decision of a division bench of the Bombay High Court in *Pralhad Krishna v. State of Bombay* (A. I. R. 1952 Bom. 1), in which it was held that it was not necessary for the State Government when confirming the order of detention to mention the period for which the detention would be continued. Here it may be stated that in *Maganlal v. Government of Bombay* (A. I. R. 1953 Bom. 59) Vyas and Rajadhyaksha, Judges of the Bombay High Court, referred to the decision of the Supreme Court in *Dattatraya M. Pangarkar v. State of Bombay* (A. I. R. 1952 S. C. 181), in which it was held that non-specification of the period for which the detention was to continue in the order of confirmation made under sec. 11 (1), Preventive Detention Act, after the Advisory Board had considered the cases of detenus, would not make the detention illegal.

#### High Courts' "Reserve Powers" in Detention Cases

##### ANY SUCH POWERS DENIED

In *Maganlal Jivabhai Patel v. Government of Bombay* referred to above in the immediately preceding paragraph, Rajadhyaksha and Vyas JJ. of the Bombay High Court refused (1st April 1952) to accept the reasoning of the Madras High Court that under Art. 226 of the Constitution "reserve powers" are vested in High Courts, in virtue of which the High Courts can pass on the merits of detention and release detenus in "fit cases." Maganlal was detained for activities prior to March 1950, and it was urged that as nearly two years had elapsed since that time, there was no longer any justification for continuing the detention in the changed circumstances. The district magistrate of Ahmedabad under whose orders Maganlal had been detained had stated in an affidavit that "the grounds of detention still subsist," but the Court was asked to use its "reserve powers" in order "to uphold equity and justice" and release the prisoner in view of the fact that times had changed. Their Lordships held that they had no power to interfere with the order of detention. They stated that while a habeas corpus bench had competence to decide whether the detention was mala-

fide, etc., it had no competence to pass on other questions. They said :

It is not open to it, in our view, to go into the question whether on merits the detaining authority had justification to pass the order of detention or continue the detention. That under the Act is a sphere exclusively of the detaining authority and upon that sphere the Court cannot encroach. It is the detaining authority alone whose satisfaction as to whether a person should be detained or not is material and relevant under the scheme of the Preventive Detention Act and it is that authority which has got to see whether the activities of a particular person are prejudicial to the maintenance of public order, security of State, etc.

#### "Absconding" after Detention has Ceased

Achinta Kumar Bhattacharjee was ordered to be detained under the Assam Maintenance of Public Order Act, 1947. The order for detention was passed on 5th January 1949 and was to remain in force for two months. About a month after the order of detention had lapsed, Bhattacharjee was required by an order under sec. 2(6)(b) of the Act to appear before the district magistrate of Cachar within 15 days. He was subsequently arrested some two years later in Calcutta, brought to Assam and at a trial for breach of the order was convicted and sentenced to imprisonment for one year and the sentence was affirmed by a higher court. Against his conviction and sentence Bhattacharjee filed a revision application in the Assam High Court, and on 7th July 1952 Thadani C.J. and Deka J. set aside the conviction and sentence on the ground that an order of the nature passed against Bhattacharjee could not be validly made after the order for his detention had ceased to be in force.

The words "so that the order (for detention) cannot be executed" in sec. 2(6) mean, the Court said, that "but for the fact that the petitioner has absconded or is absconding himself, the order can be executed against him." Their Lordships said :

To put it shortly, once the duration of the order of detention had expired, the authorities competent to act under the Assam Maintenance of Public Order Act, 1947, are debarred from making any order under provisions of the Act, the effect of which is to revive a lapsed order. . . . If an order under sub-sec. (6) of sec. 2 can be made irrespective of the fact whether the order of detention is in force or not, there was no need to add the words "so that the order cannot be executed" in sub-sec. (6) of sec. 2. The words "so that the order cannot be executed" have advisedly been put in the present tense so as to connect the order made under sub-sec. (6) of sec. 2 with an order of detention which is in force, but which cannot be

executed because the person against whom the order is in force has absconded or is concealing himself.

**Sec. 10(1) of the Preventive Detention Act**  
PROVISION MANDATORY, NOT DIRECTORY

Shah C. J. and Baxi J. of the Saurashtra High Court on 19th January 1952 ruled, in eleven petitions for a writ of habeas corpus filed by Gohel Umehsing Narubha and others, that inasmuch as the report of the Advisory Board to whom the cases of the petitioners were referred was not submitted to the Saurashtra Government within ten weeks from the date of the order of detention, as required by sec. 10(1) of the Preventive Detention Act 1950, their further detention had become illegal. The provision as to the submission of the Advisory Board's report within ten weeks was, Their Lordships said, imperative and not directory, as maintained by the Advocate General. This view found support in *Kishorilal Bahati v. The State* (A. I. R. 1951 Assam 169).

On the necessity of meticulously carrying out all the requirements laid down by law in cases concerning the deprivation of the liberty of the subject, Their Lordships quoted the following dictum of Brett L. J. in *Dale's case*. 6 Q. B. 376 (1881):

It is a general rule which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another, he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity, the Courts will not allow the imprisonment to continue.

Although in this case I consider that irregularity a matter of substance, I should be of the same opinion if it were only a matter of form, because, as I said before, I take it to be a general rule that the Courts at Westminster will not allow any individual in this Kingdom to procure the imprisonment of another, unless he takes care to follow with extreme precision every form and every step in the process which is to procure that imprisonment. I consider this to be a wholesome and good rule, and to be in accordance with the great desire which English Courts have always had to protect the liberty of every one of Her Majesty's subjects.

---

## COMMENTS

---

### Legislative Privileges and Liberty of the Press

Fortunately in India the privileges of the legislatures do not override the fundamental liberties guaranteed to citizens at large in the Constitution, and yet these privileges may be so exercised as to impair seriously the right

of free discussion which the Constitution in Art. 19(1)(a) gives to newspapers in commenting on affairs of public interest. An instance of such impairment occurred recently when the "Times of India" was condemned by the Privileges Committee of the Bombay Legislative Assembly for an editorial comment appearing in the issue of 28th March and was deprived of the press facilities granted to the paper. Even if the "Times of India" proves in a court of law that its comment was fair and did not fall within the scope of restrictions, wide as they are, which are specified in Art. 19(2), the court cannot possibly require the legislature concerned to grant to the paper the facilities which have been denied to it. The constitutional remedy being thus unavailable, relief can only come from the self-restraint which the legislature itself may exercise in so interpreting its privileges as not to impinge on freedom of the press.

The "Times of India" editorial referred to questions put in the Legislative Assembly concerning liquor permits granted to High Court judges, the questions being asked on the footing that, according to the belief of the public, granting of such permits "is likely to influence judicial decisions in prohibition cases." If so, would it not be advisable, it was asked, to entrust prohibition cases to judges who were not holders of liquor permits? The "Times of India" condemned the asking of these questions as betraying "a degrading design to lower Their Lordships in public esteem" and said that this was "unworthy of the legislature of what was once a premier State." When called to appear before the Privileges Committee, the editor explained that his sole purpose in writing the editorial was "to uphold and maintain the dignity of the Assembly." Notwithstanding such explanation, the Committee came to the conclusion that the paper had committed contempt of the legislature and imposed on it the penalty of denying access to the chamber. The Legislative Assembly, acting like a private club, can of course decide who shall share in the facilities which it is within its power to give, but unjust denial of such facilities "is likely to result in a grave curtailment of the liberty of the press."

The British House of Commons enjoys plenary power to punish in what way it likes one whom it considers to have been guilty of a breach of its privileges. No constitutional limitations are imposed on this power. This would create an impossible position if the House were arbitrarily to exercise its privileges which it alone can define. But this unlimited power is in fact voluntarily kept in check by the House in order that freedom of the press be not abridged. Mr. Bharucha, the only non-Congress member of the Privileges Committee, cited a very telling instance of the great self-restraint which the House of Commons exercises in interpreting its privileges. A report appeared in the London "Times" concerning some members of the House of Commons, which read:

History will record with amazement that these men whose political existence depends upon an organized system of midnight murder and who draw at once their living and their notoriety from the steady perpetration of crimes for which civilization decries the gallows, are permitted to sit in the British House of Commons.

No condemnation could be severer, and yet, when the attention of the Speaker was drawn to the report, Mr. Bharucha said, his ruling was: "However grave the charges and imputations made in that article may be, I do not think it is a case of privilege. It has been the practice of this House to restrain privilege under great limitations and conditions; and these restrictions and limitations have been, in my opinion, very wisely imposed by the House upon itself.... Of course, if Hon. Members think themselves aggrieved, they have a remedy; and they will not be precluded from pursuing their remedy elsewhere than in this House."

Until our legislatures also learn to exercise such self-restraint, there are likely to be grave inroads on press freedom. It is just because of this concern for press freedom that the radical "New Statesman" of London, in spite of its deep sympathy for the Congress party in India, has expressed admiration for the refusal by the editor of the "Times of India" to tender an apology to the Bombay Legislative Assembly in order to earn the press facilities which it is within its unrestricted power to accord or deny at its own sweet will. Writing in the same paper, Mr. Norman Cliff also praises the editor of the "Times of India," the "Daniel of the Indian press," for the bold stand which its editor took, saying that in these proceedings "the press of India was put on trial before a non-judicial tribunal composed of the complainants, from whose judgment there is no appeal except to public opinion."

#### "The Press Act Must Go"

In his presidential address to the fifteenth annual conference of the Southern India Journalists' Federation, Mr. N. Raghunatha Aiyar said on 25th April:

A year's experience of the working of the Press Act has not shown that there is anything to be said in its favour. Irritated by what he regards as the disgraceful communalism of certain papers in and around Delhi, the Prime Minister has been thinking aloud whether more restrictions might not be necessary! While the gutter press cannot be repressed by law, repression may, by being indiscriminately directed against the more responsible sections, impede the operation of natural correctives. There can be really no half-way house to freedom of the press. The Press Act must go. The mere tinkering which the Government proposes to undertake in a leisurely attempt to

implement the recommendations of the Press Laws Committee will not do.

After referring to a deep-rooted suspicion that the Government of India desires to choke off sources of news, Mr. Raghunatha Aiyar said, obviously having in mind the punishment inflicted on the "Times of India" by the Bombay Legislative Assembly:

And may I respectfully say that the increasing tendency on the part of the legislatures to invoke the terrors of contempt proceedings on any or no provocation is greatly to be deprecated? The sooner precise and definite legislation is brought in to end the anomalous position in which, taking advantage of a loose provision in the Constitution, every legislature in this country claims vast and undefined powers, the better it will be both for the legislatures and for the press. Contempt proceedings in which the accuser also figures as judge should be avoided as far as possible by bodies which by the nature of their constitution and functions may often find it difficult wholly to exclude personal or political considerations. If they must have a minimum of these powers there should be a right of appeal to a judicial tribunal.

In accordance with this suggestion, the conference adopted the following resolution on the privileges of legislatures *vis a vis* the right of newspapers to discuss public affairs freely:

Noting with concern that frequent invocation of the vague and undefined privileges of the legislatures in a manner calculated to stifle free discussion outside the legislatures of matters of public interest, the Conference feels that unless the power to institute contempt proceedings and to deprive newspapers of their normal rights and privileges was strictly defined and limited, the result might be gravely detrimental to the freedom of the press. It, therefore, urges that appropriate legislation be brought forward without further delay to define the powers of various legislatures and thus put an end to the anomalous and unsatisfactory position under the present law in which every legislature is enabled to claim a jurisdiction as wide and unrestricted as that of the British Parliament.

#### Bombay Government's Discriminatory Policy

In its issue of 24th April the "New Statesman and Nation" has a paragraph on this subject by "Critic" who is known to be no other than Mr. Kingsley Martin, the editor of the paper. The paragraph runs thus:

Mr. Frank Moraes, the independent and hard-hitting editor of the "Times of India" is having a splendid

battle with the Bombay Legislative Assembly. The row began because "The Times" bitterly criticised the Government's prohibition policy. Mr. Desai, the Chief Minister of Bombay, described this criticism as vilification and was indiscreet enough to say that if "The Times" did not change its tune the Government's only recourse was to withhold official advertising from its columns. It appears that there exists a secret list of journals whose uncritical treatment of the Bombay Government entitles them to preferential advertising.

The row has taken a new turn now because the "Times of India" has described as "contemptible" an action of a member of the legislature who questioned the grant of a special liquor licence to judges on health grounds. I see that "The Times" has properly refused a demand for an apology by the Assembly. Whether its criticisms have been just is neither here nor there; what matters is that Mr. Moraes is standing boldly for the freedom of the press.

### Freedom of Travel

#### DETENTION OF DR. SYAMA PRASAD MOOKERJEE

Dr. Syama Prasad Mookerjee, M. P., informed Sheikh Abdulla, the Prime Minister of Kashmir, of his intention to proceed to Jammu on 11th May, without taking out a permit, for the purpose of seeing for himself the present conditions in Jammu, adding that he was "anxious to explore the possibilities of creating conditions which may expedite a peaceful settlement." Promptly came Sheikh Abdulla's answer that the time was not opportune for the Jana Sangh leader's visit to Kashmir. Dr. Mookerjee also sent a telegram to Mr. Nehru, saying:

I have intentionally not applied for a permit to enter Kashmir since it has been systematically refused by your Government to several people, including members of Parliament and State legislatures, who differ from your Kashmir policy.

In spite of Sheikh Abdulla's telegram, which amounted to an order banning his entry into the Kashmir State, Dr. Mookerjee decided to carry out his intention. But when he approached the border of the State, an order signed by the Chief Secretary of the State was served on him under sec. 4(1) of the State's Public Security Act forbidding him to set foot in the State territory. Dr. Mookerjee, however, defied the order and entered the State, whereupon he and two of his associates, Mr. Gurudatt Vaid and Mr. Tarachand, who were travelling with him in the jeep were served with an order under sec. 3 of the Act ordering their detention on the ground that their presence in the State constituted a grave threat to public

peace and tranquillity. They were taken in police custody and detained in a house seven miles from Srinagar. The Deputy Chief Minister told journalists that while Dr. Mookerjee was in detention it was impossible for the Chief Minister to entertain any suggestion for holding talks of a political nature with him and he also indicated that Dr. Mookerjee would not be released early.

An ordinance was hastily promulgated by the head of the State to provide for control of entry into the State of Kashmir. It lays down that no person shall enter into the State from any part of India unless he is in possession of a permit or is exempted from the requirement of a permit under the rules to be yet framed. A contravention of the provisions of the ordinance or rules is made punishable with a year's imprisonment or a fine of Rs. 1,000 or both. Under the ordinance the Government has also the power to deport a person who has broken the ordinance outside the State territory.

The question of Dr. Mookerjee's detention was raised in Parliament on 13th May by Mr. N. C. Chatterjee, and while doing so he referred to what had appeared in newspapers that the Deputy Commissioner of the District bordering on the State of Kashmir had stated that he was under the Government of India's orders not to forbid Dr. Mookerjee's entry into the Kashmir State, from which Mr. Chatterjee drew the inference that, so far as the Government of India was concerned, it had no objection to permitting Dr. Mookerjee to enter Kashmir and indeed was willing to permit him to do so. This was denied by Mr. Nehru, the Premier of India, and the Deputy Speaker of the House of the People disallowed the motion. The matter stands here at this writing.

### Racial Discrimination on Railways

#### OUTLAWED BY S. AFRICAN COURTS

Mr. George Lusu, a native, was ordered to leave the European waiting room at the Cape Town railway station and, when he refused to obey the order, was hauled up before a magistrate. The magistrate, however, discharged Mr. Lusu on the ground that waiting room facilities for non-Europeans were inferior to those for Europeans. He ruled that there had been unequal treatment between the two races, which was contrary to the Railway Act of 1906. Against this decision of acquittal an appeal was filed by the Cape Province Attorney General, and the Appeal Court on 23rd March dismissed the appeal, saying that non-Europeans should get "substantially the same" waiting room facilities on South African railway stations as Europeans.

### Ford's Civil Liberties Fund

The Ford Foundation has established a "Fund for the Republic," the object of which is to promote civil liberties and civil rights, ... the Bill of Rights and the Fourteenth and Fifteenth Amendments.