

The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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THIRD DEGREE METHODS

I.—JALMANDIR CASE, SATARA

It is regrettable that the Bombay Government has as yet taken no steps to make a proper inquiry into the truth or falsehood of the allegations which the accused in the Satara Jalmandir case made (vide p. ii:308) to the effect that they were subjected by the police to physical violence of a most brutal type for the purpose of extracting confessions from them. It is true that the case has now been decided so far as the guilt of the accused is concerned. The Resident Magistrate, Satara City, who tried it, discharged all the seven accused, holding that the prosecution failed to make out a prima facie case for framing a charge against them even on the basis of a much lower standard of evidence than was required in such a case. He said in fact: "The evidence on record does not go to connect, or even tend to connect, reasonably, any of the accused with the offences in question."

Thus though the case has ended favourably for the accused in regard to their guilt, it has not come to an end in regard to their allegations of police torture, which to the public are a matter of urgent concern. We of course recognize that use of third degree methods may be charged falsely as well as denied falsely, and we do not ask the Government to move in the matter just because a charge has been made, but because we believe that this particular charge is such that the Government should probe thoroughly into it for the sake of their own good name. An investigation of the allegations of two of the accused was made while the case was about to proceed, and the Government published its findings at that stage, thus exposing themselves to a rebuke from the High Court, before whom they had charged Mr. Mandlik, M. L. C., with contempt of court for having stated publicly that the allegations of the accused that they were infamously ill-treated by the police were substantially correct, notwithstanding the report of the investigating officer to the contrary. Unfortunately for the accused their allegations could not at that stage be scrutinized by the Resident Magistrate, who merely referred to them in his judgment and left the matter to be gone into either by the authorities or by the accused themselves. It is hardly a matter for surprise that the accused, having

hesitate to make a complaint. It will be easy to imagine how terribly handicapped they will necessarily be in producing extrinsic testimonial support for maltreatment while they were in police custody without access to police diaries and other records in the possession of the Government. To expect that they will produce the necessary evidence of the standard required to obtain a conviction in a law court is to load the dice against them. The only practicable remedy is for the Government themselves to institute a searching inquiry and find out whether there is any truth in the allegations of the accused which are grave enough in all conscience. It is up to the Government, in face of such allegations, to get to the bottom of the whole affair and, if any malpractices are found in the police department, rigorously to put a stop to them.

We can say with confidence that the so-called investigation made earlier by the Additional District Magistrate is worse than useless. The very manner in which he proceeded with his work was so entirely vicious (he omitted just those questions which he should have put, how, for instance, and when each injury visible on their bodies was caused) that one would feel as if he was interested more in proving that Messrs. Bhave and Apte were making irresponsible statements than in finding out what the truth was. There are some facts which stand out clearly in regard to this investigation which should prompt the Government to make a fresh and proper inquiry into the matter. One such is that the accused received injuries while in police custody. This is a fact that cannot be got over, and these injuries are mute but unanswerable witnesses to the fact that the accused were subjected to violence. Let the police officials concerned be required to prove that the injuries were either not caused during the period of detention or that they were self-inflicted. The burden of proof must lie on the police, as it will be when the Government will call upon them to account for the injuries which admittedly were found on the persons of the accused. This circumstance that the accused came to have injuries, which were by no means slight bruises, while they were in the custody of the police has made a deep impression on the mind of the public at large, who

are demanding with great insistence that an inquiry must be held, if only in order that in future the police in Satara or elsewhere may not be able to take some innocent people in their charge, harass them and even inflict upon them serious injuries for the purpose of extorting from them confessions of offences in which in fact they had no part or lot.

Another circumstance which is prominent in this case is that the accused were much against their wish left uncounselled till at a late stage. This fact which admits of no dispute and can be proved by the record naturally causes grave concern to the public. And even a more distressing circumstance is that the police seem to have easy access to the accused even after they have surrendered them to magisterial custody. We would not ask the Government to take this on trust; we ourselves would not have given credit to the reports that are current on the subject if we were not told by men with judicial experience and of unimpeachable integrity that, whatever the rules on the subject, in practice no rigid distinction is observed between police custody and jail custody, and that in several places there is no such distinction maintained, the police there being in a position to get at the accused for any nefarious work they may have in hand without obtaining the magistrate's sanction. An inquiry would be worth while if only to find out if any such thing occurred in this case. For, if true, it cuts at the root of all criminal justice.

These are some of the circumstances which in our view imperatively demand an inquiry at the hands of the Government who, we readily believe, are not out to shield the offending police but to check all evil practices wherever they can be discovered. There is no reason to assume that the confessions which the accused made were prompted by the candour of a guilty conscience or an irresistible urge to unburden themselves; there is on the other hand enough material which would seem to show that they were not "voluntary" in any relevant sense. And an inquiry will show to what extent the accused looked upon their confessions as the only means of release from the tightening of the police screws. The point that we here are trying to make is that the Government should not rest upon a feeling that they have done their duty by having already made a kind of investigation, the result of which was to show that the allegations of the accused were baseless. A proper inquiry must now be made, in default of which the police will feel that, if only they will apply the pressure with just a little caution they will be given a green light.

Employment of the third degree is condemned everywhere. The latest authoritative pronouncement on the subject is by the U. S. Wickersham Commission on Law Observance and Enforcement, which described third degree as "conduct . . . violative of the fundamental principles of constitutional liberty." Coercive police methods not only tend to brutalize habits of feeling and action on the part of the police, but they also tend to

affect the moral tone of the community adversely. And one reacts on the other. The public come to regard that some amount of unlawful coercion is really necessary in detecting offences, and this feeling makes the police bolder than ever in applying such methods, with the result that the abuses grow in volume and intensity. They can only be checked by a constant watchfulness on the part of both the Government and the citizens. If Government make a close inquiry whenever there appears a reasonable ground to suspect that police oppression has taken place and bring the facts to light, a wholesome fear will be aroused in the minds of the police and prosecutors, and that will in its turn also help to educate the public, without whose co-operation we can never see the end of such abuses. It is in this larger interest that we have approached this matter. We honestly believe that the Government will have abdicated their obligation to free our criminal justice from all traces of coercive police pressures if, without themselves taking any steps to clear the police of the charges of coercion and violence in the Jalmandir case, they just leave it to the accused to vindicate their allegations and in that way bring the police to book in the ordinary course of things.

II—THE CASE IN THE U. S. SUPREME COURT

In view of the widespread interest aroused by the Jalmandir case, our readers would like to have an account of the Reader's Digest murder case heard by the U. S. Supreme Court in the closing days of the last term. In this case the question at issue was not so much the use of physical violence as of psychological pressure by interrogation on the part of the police in extracting confessions, and it would be interesting to see how the case was dealt with in the courts.

At the trial of three defendants in a New York state court on charges of murder, the evidence on which they were convicted and sentenced to death included confessions by two of the defendants, Stein and Cooper. It was alleged that the confessions were coerced, and in the Supreme Court, when the case went there on certiorari, the petitioners took the stand that the confessions should not have been introduced and made use of in deciding the question of guilt, even if evidence apart from the confessions was sufficient for conviction. New York law provides for exclusion of coerced confessions from evidence. But how is the question to be determined as to whether a confession is coerced or voluntary? The law provides that if after a preliminary hearing the judge thinks that a finding on facts is required, he submits the question to the jury. He instructs the jury to find a confession coerced not only because of "force and intimidation and fear" but also for any "implied coercion because of the manner in which they (the confessors) were kept in custody" (the burden to prove beyond reasonable doubt being placed upon the state in both cases). But the final determination is not left to a lay jury. If the judge thinks that the jury's

verdict was against the evidence he himself decides the question that the confession was not fairly made. The trial judge charges the jury that they should treat a confession as part of evidence only if they thought it was voluntary and was not made under the influence of fear produced by threats.

In this particular case the confessions were admitted and the jury returned a general verdict of guilty against defendants. There is no means of knowing, in case of such a general verdict, what part, if any, the confessions played in the verdict as evidence of guilt. It may be that the jury may have received the confessions as part of the evidence and attached some weight to that evidence. Or it may be that they may have rejected the confessions in their minds as coerced and may not have taken them into consideration at all. No separate verdict being given on the issue of confession, there is nothing to show to what extent, if at all, their verdict was influenced by the confessions. But the point was made in the Supreme Court that the confessions should have been excluded from the evidence altogether, on the strength of *Malinski v. New York*, 324 U. S. 401 (1945), in which the Court ruled that if a forced confession "is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict." Similar statements are found in *Gallegos v. Nebraska*, 342 U. S. 50 (1951), and *Stroble v. California*, 343 U. S. 181 (1952), but these statements the Court in this case treated as "dicta about a proposition not essential to the result, since in each instance those confessions were sustained and the convictions affirmed." The Court, therefore, in a 6 to 3 opinion (Justices Frankfurter, Black and Douglas dissenting), upheld the constitutionality of the procedure laid down in the New York law. The confessions themselves appeared to the Court to narrate true facts (and the dissenting Justices probably agreed in this). About one of the confessions, some twelve pages long, the Court remarked: "It is corroborated throughout by other evidence and its general character is such that it could have been fabricated only by a person gifted with extraordinarily creative imagination." About the other confession, seven pages long, it observed: It is "so complete and dovetailed with the extrinsic evidence that, if it were not true, its author was possessed of amazing powers of divination." The Court said:

The inward consciousness of having committed a murder and a robbery and of being confronted with evidence of guilt which they could neither deny nor explain seems enough to account for the confessions. . . . Cooper's and Stein's confessions obviously came when they were convinced that their dance was over and the time had come to pay the fiddler. . . . Both confessions were "voluntary" in the only sense in which confessions to the police by one under arrest and suspicion ever are. The state could properly find an absence of psychological coercion (and as to phy-

sical violence there was no direct testimony to its use). Slight evidence, even interested testimony, that (violence) occurred during the period of detention or at the hands of the police, or failure by the prosecution to meet the charge with all reasonably available evidence, might well have tipped the scales (in the trial court). Even here, it would have force if there were any evidence whatever to connect the admitted injuries with the events or period of interrogation. But there is no such word in the record.

Anyway, the Court remarked, the confessions were in this case put before the jury "only tentatively, subject to its judgment as to voluntariness and with binding instructions that they be rejected and ignored unless found beyond reasonable doubt to have been voluntary." "Such provisional and contingent presentation of the confessions" cannot be held, under the Fourteenth Amendment, "to preclude a verdict on the other sufficient evidence" after the confessions are rejected. (Both the confessors had an impressive record of felony: one was sentenced on different occasions to 28 years; the other to 37 years, among the crimes they were convicted of being murder, robbery and perjury.)

Racial Restrictive Covenants

Prohibition Carried Further

In *Shelley v. Kraemer*, 334 U. S. 1 (1948) the Supreme Court decided that private agreements designed to exclude persons of a certain race from ownership or occupancy of real property, though valid in themselves, could not be enforced by state courts, because such enforcement would constitute state action denying equal protection of the laws in violation of the Fourteenth Amendment. This decision meant a great deal to Negroes, who were residentially segregated by means of such restrictive covenants. Since this decision implied that if private parties entered into a restrictive covenant and adhered to it of their own volition their action would not be open to objection, the question was as to whether a suit for damages for violation of such a covenant would be allowed by the courts. If damages could be recovered in this way, a way would be found out of the prohibition of judicial enforcement of restrictive covenants.

This question was worrying a great many liberal minds in the United States, but to their immense relief it was held by the Supreme Court in *Barrows v. Jackson* in June last that a person could not sue for damages another person who had broken an agreement prohibiting the sale of property to persons who were not of the white race. This is a great step forward in striking down the residential segregation of Negroes, particularly because in several states it had been held that a claim for damages could be maintained consistently with the decision in the *Shelley* case.

In Los Angeles the owners of some residential estates entered into a covenant, running with the land, restricting

the use and occupancy thereof to persons of the white or Caucasian race and obligating the signers to incorporate this restriction in all transfers of land. Leola Jackson broke the covenant in both respects, and an action was brought against her by other signers. The state courts decided in her favour and later the Supreme Court upheld their judgments, ruling that a restrictive covenant could not be enforced at law by a suit for damages against a co-covenantor who broke the covenant, for a Court's awarding damages constitutes state action under the Fourteenth Amendment. Mr. Justice Minton, speaking for the Court, said:

To compel respondent to respond in damages would be for the state to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. The result of that sanction by the state would be to encourage the use of restrictive covenants. To that extent, the state would act to put its sanction behind the covenants. If the state may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus, it becomes not respondent's voluntary choice but the state's choice that she observe her covenant or suffer damages. The action of a state court at law to sanction the validity of the restrictive covenant here involved would constitute state action as surely as it was state action to enforce such covenants in equity, as in *Shelley*.

But the Court was faced with a difficulty here. If state action awards damages for breach of a restrictive covenant, the persons to suffer will be Negroes who, solely because of their race, will be unable to enjoy property on the same terms as the whites. But no Negro was before the Court, as in *Shelley*, to claim that he was deprived of his constitutional rights. And can a white respondent plead that the rights of others are invaded by a claim for damages from her and on that ground challenge the constitutionality of the claim? On this point Mr. Justice Minton said:

Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party. . . . This is a salutary rule, the validity of which we reaffirm. But in the instant case we are faced with a unique situation in which the action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievances before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained.

There is such a close relationship between the restrictive covenant here and the sanction of a state

court which would punish respondent for not going forward with the covenant, and the purpose of the covenant itself, that relaxation of the rule is called for here. It sufficiently appears that mulcting in damages of respondent will be solely for the purpose of giving vitality to the restrictive covenant, that is to say, to punish respondent for not continuing to discriminate against non-Caucasians in the use of her property. . . . Respondent is the only effective adversary of the unworthy covenant in its last stand. She will be permitted to protect herself and, by so doing, close the gap to the use of the covenant, so universally condemned by the courts.

This was a 6 to 1 decision. The late Chief Justice Vinson was the only dissenter. He relied on the technical point that the defendant could not use the constitutional rights of those who were not before the court as a defence.

NOTES

Elimination of Racial Discrimination

FROM GOVERNMENT CONTRACTS IN U. S. A.

President Eisenhower has taken an important step in furtherance of the Government's fair employment policy in government contracts. He has issued an order casting upon the federal contracting agencies the main responsibility for seeing to it that no discrimination occurred against Negroes and others in any government contracts and sub-contracts. A Government Contract Committee, which the President has set up will receive complaints of alleged violation of the non-discrimination clauses. It is hoped that in this way all traces of racial discrimination will be eliminated so far as work carried on under the auspices of the federal government is concerned. Hailing the establishment of the committee, the American Civil Liberties Union wrote to the President:

There is no greater need in our whole national life than to eliminate the remaining areas of discrimination and prejudice which bar persons from being judged solely on the basis of their individual merit and demerit. This objective . . . must be achieved if we are to convince other peoples in the world of the sincerity of our principle of full equality, and because this principle is intrinsically right. The organization of the Government Contract Committee offers convincing evidence that the executive branch of the Government is determined to do its share in advancing the campaign against discrimination. If the Committee's work will be properly implemented, it can make a notable contribution to the effort to end bias in our nation.

" We can Speak up and out "

U. S. POLICY ON COMMUNIST LITERATURE

At last the United States Government's policy in regard to the banning of Communist books from the U. S. Information Libraries overseas has been finalised. Since Secretary of State Dulles said that he did not think

works of Communist authors should be included in these libraries, it appeared for a time that all books of Communist authorship were to be eliminated or destroyed. This doubt has now been set at rest by a policy statement issued by Dr. Robert Johnson, head of the International Information Administration. The statement is very sound, and as it was made with the approval of Mr. Dulles, it may be taken to represent the Government's policy in its final form.

Dr. Johnson says that it is of course not the obligation of the American government to make available to overseas libraries books that advocate the destruction of American freedoms and institutions, but that if any books require to be weeded out as belonging to the subversive category, the weeding out must be entrusted (not to congressional committees, but) "to carefully selected advisory committees, composed of people of unimpeachable reputation who are experts in their respective fields." He goes on:

In eliminating books, we should not make the mistake of excluding as Communistic all those books which contain any criticism of American policies or institutions, even though those books may criticize the same things that Communists also criticize. We don't want to create the impression that any American writer who honestly criticizes the policies of his Government is deprived of a place on our bookshelves abroad.

America loves controversy, and indeed thrives on it. There is no reason why we need conceal this from the world. It is one of our richest assets. Let totalitarian nations advertise the fact that their people are deprived of political dissent. For our part, we can speak up and out.

Georgia's Anti-Subversive Law

A "CLEAR AND PRESENT DANGER" CLAUSE INCLUDED

The legislature of the State of Georgia recently enacted an anti-subversive activities law which, like the federal Smith Act, makes it a crime to engage in activities or to teach activities intended to overthrow the government either of the U. S. or of Georgia by force, violence, or other unlawful means. But it is infinitely better than the Smith Act inasmuch as it authorizes action to be taken on the basis of overt acts or on the basis of advocacy or the use of force only when such advocacy is made under circumstances constituting a clear and present danger. Contributions to and membership in subversive organizations are, under the law, criminal offences but only if the individual knows the organizations to be subversive. And even members of such organizations, who know them to be subversive are not barred from state employment until they have been convicted of a crime. The section in the law which seems to be open to grave objection is that which gives to a court the right to dissolve a subversive organization. This may in the end pave the way to the outlawing of the Communist Party.

Dr. Holmes Labelled as a Communist Collaborator ACLU REFUTES THE CHARGE

Dr. John Haynes Holmes, known in this country particularly as a devotee of the Gandhian philosophy of non-resistance has been charged by the notorious Un-American Activities Committee of the American Congress with collaborating with the Communist Party in its work of subversion and, what is worse, the Committee published this charge based on the evidence of a witness without giving Dr. Holmes an opportunity to rebut it. That the charge is wholly unfounded can be proved by one simple fact, viz., that he was an active supporter of a resolution adopted by the American Civil Liberties Union in 1940 barring Communists and other totalitarians from its staff and governing bodies, though these bodies co-operate in fighting the cases of Communists who may happen to be deprived of their civil liberties.

Dr. Ernest Angell, chairman of the Union's board of directors, and Dr. Malin, its executive director, have issued a statement in the name of the Union to show how baseless and irresponsible the charge is. The statement says:

The charge is in flat contradiction of Dr. Holmes' devoted defence, over nearly 50 years, of individual freedom. And the besmirching of such an individual who has vigorously fought totalitarianism, is particularly harmful because it confuses the public in its consideration of real subversion.

The statement condemns the manner in which the Un-American Activities Committee released this testimony before giving Dr. Holmes a chance to answer the charge or challenge the accuracy and authenticity of the testimony. It says that the adoption of a rule permitting derogatory information about individuals to be answered by the persons accused before it is made public "would meet the standards of due process and fair play, which are a fundamental part of our democratic system, and provide the public with a complete report—the only basis for fair evaluation and judgment."

HABEAS CORPUS PETITIONS

Supreme Court Orders Release of Saxena

On 3rd December the Supreme Court directed the release of Mr. Shibbanlal Saxena, the Uttar Pradesh trade union leader, who was in detention under the orders of the U. P. Government since January this year.

Mr. Saxena was arrested on 5th January last on orders issued by the district magistrate of Gorakhpur under section 3 (1) (a) (ii) and (iii) of the Preventive Detention Act. The order stated that his detention was in the interest of maintenance of supplies essential to the community (which came under iii) and public order (which came under (ii).)

In the grounds of detention given to the detenu it was alleged that in the course of speeches which he had delivered at Ghugli on certain dates he exhorted

and enjoined upon the cane-growers of the area not to supply sugarcane to sugar mills and thereby interfered with the maintenance of supply of sugarcane. It was also stated that he incited the cane-growers and the public to violence against the established authority and thereby seriously prejudiced the maintenance of public order.

Mr. Saxena made a representation against the detention order to the Advisory Board which upheld his detention under sec. 3 (1) (a) (ii) but did not uphold it under (iii). Advising him of this decision of the Advisory Board, the U. P. Government on 13th March told him that they had revoked the detention order against him in so far as (iii) was concerned and confirmed the other part of the order concerning (ii) under sec. 11 of the Act.

Thereupon Mr. Saxena filed a habeas corpus petition in the Supreme Court challenging the legality of the detention order. In these circumstances, it was contended that the detention order originally made could not stand, for, if the detaining authority proceeded on two grounds to detain a man and one of them was admitted to be non-existent or irrelevant, the whole order was vitiated, as no one could say to what extent the bad ground operated on the mind of the detaining authority.

Dealing with this argument Mr. Justice Mukherjee, who delivered the judgment of the Court ordering the release of Mr. Saxena, said that a court of law was not competent to enquire into the truth or otherwise of the facts which were mentioned as grounds of detention in the communication to the detenu under section 7 of the Act.

What had happened, however, in this case, His Lordship said, was somewhat peculiar. The Government themselves had plainly admitted that one of the grounds on which the original order of detention was passed was unsubstantial or non-existent and could not be made a ground of detention. The question was whether, in such circumstances, the original order made under section 3 (1) (a) (ii) could be allowed to stand.

Mr. Justice Mukherjee said that, in their opinion, the answer could only be in the negative. The detaining authority gave here two grounds for detaining the petitioner. The Court could neither decide whether these grounds were good or bad, nor could they attempt to assess in what manner and to what extent each of these grounds operated on the mind of the appropriate authority and contributed to the creation of the satisfaction on the basis of which the detention order was made. To say that the other ground which still remained was quite sufficient to sustain the order would be to substitute an objective judicial test for the subjective decision of the executive authority, which was against the legislative policy underlying the statute.

In such cases, they thought, His Lordship said, the position would be the same as if one of the grounds was irrelevant for the purpose of the Act or was wholly illusory, and this would vitiate the detention order as a whole.

One of the Grounds Vague

Mr. Jangir Singh and four other persons were detained on 26th January 1952 under sec. 3 of the Preventive Detention Act. They challenged the legality of the order of detention in the Pepsu High Court on the ground mainly that the grounds of detention supplied to them were vague.

The first ground was that they were "constantly engaged in instigating the tenants of the village Khatriwala to take forcible possession of the lands of the Biswedars of the said village," and no particulars of the detenus' activities were given. It was contended on behalf of the State that "all that the Government was required to do was to furnish the detenu with grounds of detention and it was not necessary for them either to supplement the grounds with facts or particulars." This contention was not accepted by the Court. Teja Singh C. J. said on this point:

Even though the Government is not bound to supply the facts and particulars of the 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 exist no grounds for his detention.

Accordingly, the Court held that this ground was vague, but that the other two grounds did not suffer from this defect. As to the petitioners' argument that the grounds did not state the facts correctly, His Lordship said: "It is not within the scope of this Court to inquire into the truth or the falsehood of the grounds." The next question was whether the detention order was entirely vitiated because of the vagueness of one of the grounds. On this point His Lordship said: "As was held by a bench of this Court in *Gurbaksh Singh v. State*, A.I.R. 1952 Pepsu 126, if one out of the several grounds is vague but the others are in order the legality of the detention order is not affected thereby."

[Compare the Supreme Court's judgment in *Mr. Shibbanlal Saxena's case*, supra.]

Still another question was raised. It was contended by the petitioners that though the order of detention was signed by the Chief Minister and authenticated by the Deputy Secretary, no affidavit had been filed by the Chief Minister, which meant that the authority who made the orders of detention was not satisfied regarding the necessity of making the orders. On this point His Lordship said:

Had this been the petitioners' case as presented in the petitions that the orders for their detention were illegal, I would have certainly insisted that satisfaction of the authority who made the orders of detention should be proved, but the petitions being silent on the point I am not prepared to hold that because no affidavit of the Chief Minister who made the orders of detention had been produced, it should be held that he was not satisfied in the words of sec. 3.

PROSECUTION and DETENTION

It was also urged on behalf of the petitioners that since criminal cases had already been started against them under sec. 379, I. P. C., the orders of detention passed were mala fide and were made for a collateral purpose. The argument was that when a person commits an unlawful act which amounts to an offence, it is open to the Government either to prosecute the man under the ordinary law for committing the offence or to order his detention, and when once the choice is exercised and a prosecution is launched in a criminal court, it is not legal on the part of the Government to order the man to be detained under the Detention Act on the basis of the same act. On this point His Lordship reaffirmed what he had said in *Ishar Singh v. the State*, A. I. R. 1953 Pepsu 111 (vide p. ii : 293 of the BULLETIN) :

It cannot be held as a rule of law that when a person is accused of an offence, the only alternative is to prosecute him and there is no legal authority to detain him, and further that the right to prosecute under the ordinary criminal law and the right to detain him are mutually exclusive.

In the result the petitions were dismissed (15th April 1952).

**Suspicious Circumstances Attending Detention Order
BUT THE DETAINING AUTHORITY'S SATISFACTION
CANNOT BE CALLED "PATENTLY SIMULATED"**

The judgment of the Supreme Court in *Ashutosh v. State of Delhi*, delivered on 19th May 1950, has been reported in the *All-India Reporter* in the November 1953 issue, and though a summary of the judgment appeared at the time in the newspapers, it is worth while to study the full text of the judgment which is now available.

Mr. Ashutosh Lahiri, a representative of Bengal on the Working Committee of the Hindu Mahasabha, went to Delhi on 1st April 1950 in order to attend meetings of two Hindu Mahasabha bodies scheduled to take place on that day, but the meetings actually did not come off as they were banned by the State authorities. These authorities, not content with banning the meetings, externed the President, Secretary, and Organizing Secretary from Delhi and, instead of externing Mr. Ashutosh Lahiri with them, placed him under detention in jail under an order issued by district magistrate of Delhi. Mr. Lahiri challenged the validity of the order in the Supreme Court on a habeas corpus petition, and the judgment which is being noticed here is in respect of this petition.

The grounds of detention supplied to the detenu stated that when Mr. Lahiri arrived in Delhi on 27th March (for a different purpose) he held a press conference at which he gave "a highly exaggerated and communal version of happenings" in Bengal (those were the days of a large influx of refugees from East Bengal); that his activities since then (that is, between 27th March and 1st April) "continued to be of a nature inciting communal passions;" and that these activities were "likely to create hatred between different communities which may

lead to the disturbance of public peace and order." Mr. Lahiri denied all these charges and maintained that his detention and the externment of Mahasabha leaders were ordered really in order to "prevent the ventilation of the genuine feelings of the people" at a time when the Prime Minister of Pakistan was about to come to Delhi, and that the detention order against him was thus mala fide.

Two concurring judgments were delivered in the case: one was delivered by Das J. for Kania C. J. and Fazl Ali, Patanjali Sastri and Das JJ, and the other was delivered by Mukherjee J. for Mahajan and Mukherjee JJ: All the six Justices agreed in holding that the petition should be dismissed, and all of them equally agreed that there were suspicious circumstances attending the detention order. Das J. stated first that the satisfaction of the detaining authority that there was likelihood of breach of peace "is the only condition for the exercise of his powers, and that the court cannot substitute its own satisfaction for that of the authority;" and then proceeded to say:

The facts and circumstances set forth in the petition and in the affidavit in reply and summarised above are calculated to give rise to a certain amount of suspicion in the mind of the Court. The recourse to the drastic order of detention rather than to a preventive order under sec. 144, Cr. P. C., lends some colour to the petitioner's contention.

Suspicion is, however, not proof, and I am not convinced that the act of the district magistrate was actuated by any improper or indirect motive. The communal situation in Delhi was tense. . . . The district magistrate in these circumstances felt satisfied, he says, that it was necessary to take action against the petitioner. I am not prepared to say that in view of the prevailing situation his satisfaction was *patently simulated*. (Emphasis added.)

Das J. in his judgment said nearly the same thing. Assuming that the facts stated in the grounds were all true and Mr. Lahiri's presence in Delhi at the time was undesirable, still, he said:

A doubt legitimately arises in one's mind as to the necessity or propriety of making use of the provisions of the Preventive Detention Act against the petitioner. . . . He resides habitually in West Bengal and came to Delhi only to attend certain meetings.

If, as the district magistrate thought, his presence at that time in Delhi might lead to disturbance of communal peace, there were certainly ample powers under the ordinary law which he could exercise for the purpose of preventing the mischief. There are provisions in the Criminal Procedure Code which could be invoked for such purposes. As a matter of fact, the meeting could not be held on the 1st of April as proposed, as the persons who were expected to take leading part in the same were externed from Delhi. It is somewhat difficult to see why a different treatment was meted out to the petitioner and he was consigned to detention in jail.

There could be no better proof of mala fides on the part of the executive authorities than a use of the extraordinary provisions contained in the Act for purposes for which ordinary law is quite sufficient. Though I am unable to hold definitely that there is want of good faith on the part of the authorities, the case is certainly not free from suspicion.

I can only hope that the authorities will take care to see that no instances occur which might savour of injustice or oppression through misuse of those extraordinary powers which the Parliament has vested in the executive in the interests of the State itself.

ABDUCTED PERSONS ACT

Punjab High Court Dismisses Petitions

A division bench of the Punjab High Court consisting of Mr. Justice Kapur and Mr. Justice Dulat on 16th November dismissed two petitions filed by Ram Singh and Pritam Singh challenging the detention in the Jullundur Abducted Persons Camp of Bechan Kaur (alias Rusmat) and Amar Kaur (alias Safo), whose husbands respectively the petitioners claimed to be, for purposes of their removal to Pakistan.

The petitioners urged several grounds against the detention, one of which was that the Abducted Persons (Recovery and Restoration) Act, 1949, under which the detention of the two women was effected, was unconstitutional as being inconsistent with the provisions of Art. 19 (1)(d)(e) and (g) and Art. 22 (1) and (2) of the Constitution. On this point, Mr. Justice Kapur, speaking for the Court, said that although this Court had held (vide p. ii : 140) that the 1949 Act was ultra vires, on appeal the Supreme Court in the State of Punjab v. Ajaib Singh ruled (vide p. ii : 219) that it was intra vires.

The Court held that the tribunal after inquiry had found that the women were abducted persons within the meaning of the Act and that the order of the tribunal being final, the High Court could not issue a writ of certiorari for quashing it. Mr. Justice Kapur observed:

The Act had to be interpreted after taking into consideration not only the language of the statute but also the conditions which gave rise to it and mischief which it was passed to remedy and then they had to give force and life to the intention of the legislature. Duty was cast on the courts to see that the object of the Act was subserved rather than thwarted. According to the Act it was left to the tribunal to decide whether any person was an abducted person or not and this decision was final. Section 8 barred jurisdiction of the courts to question detention in a camp.

It was argued on behalf of the petitioners that witnesses from Pakistan were not examined in their presence and that the procedure which was followed by the tribunal contravened the principles of natural justice. The Court saw no force in the argument. It pointed out that an affidavit filed by a member of the tribunal had said that he gave to Pritam Singh the gist of what was stated by witnesses against him. On this point His Lordship said:

According to the rules of procedure to be followed by tribunals prescribed under the Act they have been authorized to regulate their own procedure, and in disposing of any matter coming before them they are not bound by any law relating to civil or criminal procedure or laws of evidence. All they are required to do is to follow such procedure as will enable them to arrive at a proper decision and they are required to give to every person a reasonable opportunity to

appear before them and be heard. The procedure which has been described, as I have said, is a statutory procedure and it has not been shown in what manner the tribunal infringed the rules made under the statute. Even if this rule was not there I cannot see how principles of natural justice were infringed in this case.

There had been no infringement of the concept of natural justice in this case because (1) the rules themselves prescribe a procedure which has been followed and (2) reasonable opportunity was given to Pritam Singh and Ram Singh, petitioners, to appear and lead evidence. The tribunal having acted within its jurisdiction and no error apparent on the face of record having been proved, this Court could not interfere.

Referring to the submission that the women could not be sent to Pakistan (as they had been sent), His Lordship said, that again was a question which was within the jurisdiction of the tribunal and it was not for this Court acting in its supervisory jurisdiction to revise that decision. So long as the matter was within the jurisdiction of the tribunal this Court would not interfere on facts which had been proved in this case.

COMMENTS

Constitutionality of Racial Segregation

In the Public Schools of the United States

The reader will recollect (vide p. ii : 208 of the BULLETIN) that in the last term of the Supreme Court of the United States the Court was invited by Negro associations in five cases to overthrow, in the case of public education, the "separate but equal" facilities doctrine, first enunciated in 1896 in *Plessey v. Ferguson* in the matter of public transport, and to rule that separation, even if accompanied by provision of equal educational facilities, was per se unconstitutional. The Court completed the hearing of these cases on 9th December and is expected to give its finding next spring when its present term ends. If the Court outlaws the very principle of racial segregation in schools, the decision will obviously have far-reaching social implications, since at present seventeen states and the district of Columbia which is under the federal Government have compulsory segregation in their schools and three permit it, and this involves about two million and a half of Negro children. Nor would it take long to extend the ban to other public activities.

The *Plessey* doctrine permitted segregation provided the segregated facilities were equal. Now the Court is asked to hold that segregation in itself is an inequality within the meaning of the Fourteenth Amendment. The recent trend of judgments is to enforce rigorously the setting up of equal amenities. For instance, in the field of education, we may refer to *Missouri v. Canada*, 305 U. S. 337 (1938) and *Sipuel v. University of Oklahoma*, 332 U. S. 631 (1946), reviewed in these columns at p. ii : 225. We also reported at the time *Sweatt v. Painter*, 339 U. S. 629 (1950) and *McLaurin v. Oklahoma* 339 U. S. 637 (1950), which in effect doomed separate schools at the graduate and professional levels. Within about a year after these decisions more than a thousand Negroes, who were till then denied opportunity for graduate and professional training, were accepted for such training. Thus the pattern of segregation is being broken up area by area, and a major modification in the prevailing pattern of American life is already in the making. But now

an attempt is being made to bring about the change all at once.

That practical difficulties which may arise if segregation is held to be in fact a denial of equality will be, though great, not quite overpowering and insuperable may be seen from the fact that in these cases the Eisenhower Government has pleaded strongly for putting an end to educational segregation as such. The Attorney General, Mr. Brownell, has maintained that when Congress adopted the Fourteenth Amendment, it intended to wipe out all state laws based on race and colour. And the Assistant Attorney General, Mr. Lee Rankin, declared before the Court on 9th December that the Court had "the power and duty" to rule that separate schools for Negro children was illegal under the Constitution.

The Court's decision will be awaited with eager interest all over the free world.

Nehru's Denunciation of Pakistan Constitution

PAKISTANI LAW MINISTER'S DEFENCE

In a public statement the Prime Minister of India condemned the provisions in the Pakistani Constitution emphasizing the Islamic character of the new State (vide p. iii: 22) as "undemocratic" and "mediaeval," and officially conveyed his concern to the Prime Minister of Pakistan, saying about the "inferior" status accorded in the Constitution to the minorities in a letter that this would give a handle to the extremist communal elements in India to foment communal tension.

Immediately the Law Minister in the Pakistani Government, Mr. Brohi, issued a communique dismissing the charge as entirely baseless. Mr. Nehru's principal attack was on the provisions laying down that the head of Pakistan shall be a person of the Muslim faith and making Islam the religion of the State. Mr. Brohi denies that a State must be strictly secular in order to be democratic. He points to the Constitutions of Norway, Sweden and Denmark, all constitutional monarchies which provide that the King shall profess the Evangelical Lutheran religion and shall be a member of the Evangelical Lutheran Church. Since the head of the State is to be a constitutional ruler guided in all his official acts by the advice by the Prime Minister and other Cabinet Ministers, none of whom are required by the Constitution to be Moslems, the provision in the Pakistani Constitution that the head of the State must be a Moslem can have (says Mr. Brohi) but a "symbolic value;" it cannot possibly be a source of oppression to non-Moslems.

In order to show that democracies of a highly advanced type also takes account of religion in their Constitutions, he refers to Switzerland whose Constitution, while guaranteeing free exercise of religion, puts a ban on the Order of Jesuits in Art. 51. Similarly he refers to the Constitution of Eire, which, while recognizing other Churches, in Art. 44 (2) accords a special status to the Holy Catholic Apostolic and Roman Church "as the guardian of the faith professed by the great majority of the citizens." Mr. Brohi claims that as Pakistan has a Moslem population of 85 per cent., it has merely followed in the footsteps of these democracies in framing its Constitution and has done nothing which can be characterized as "undemocratic" or "mediaeval."

As to the apprehension that Pakistan being declared an Islamic Republic will interfere with the personal law of minorities, he said that there was no reason for such an apprehension and added: "in fact there is a positive provision that ensures due safeguarding of the personal law of

non-Moslems." The Constitution provides for separate electorates, to which the minorities strongly object. In regard to this, Mr. Brohi repeated his earlier suggestion that when elections to the federal legislature under the new Constitution come to be held the representatives of the minorities should make their demand for joint electorates a part of their electoral manifesto, fight the elections on this footing and seek a verdict in their favour. If this were done, he said, the legislature of the future would in honour be bound to alter the relevant constitutional provision and concede joint electorates. He denied that the Pakistan Constitution proposed to create two classes of citizens, assigning an inferior position to non-Moslems. Altogether, he said, Mr. Nehru's criticism of the provisions of the Pakistani Constitution could only be based on "misunderstanding and misapprehension of the import of the provisions."

Pakistani Prime Minister's Statement

A similar statement was made by the Prime Minister of Pakistan, Mr. Mohammad Ali, on 1st December in his broadcast message. Referring to the "unfortunate event," namely, the walk-out of Hindu members from the Constituent Assembly, the Prime Minister said he was particularly distressed by it as he thought this decision ill-advised. It was neither in their own interests nor was it in the larger interests of the country. He said that he would assure the minorities that their fundamental rights would be safeguarded in the Constitution. There was no religion which preached and practised greater tolerance, universal brotherhood and equality without any distinction of caste or community than Islam, he said.

Expressing grief at Mr. Nehru's public denunciation of Pakistan's Constitution, Mr. Ali said that Mr. Nehru's charges were without any foundation. He assured Mr. Nehru that the objectives resolution which now formed part of the directive principles of State policy safeguarded the rights and privileges of the minorities. These rights and privileges included those envisaged in the Prime Ministers' agreement of 1950. Mr. Mohammad Ali said that the minorities would continue to enjoy all rights and privileges enjoyed by Muslims. Referring to the provision regarding the head of the State being necessarily a Muslim, the Prime Minister said that it was doubtful whether this was any substantial disability because the real power rested with the Central and Provincial Cabinets, whose membership was open to all communities.

Maulanas' Pressure

Whatever the faults of the Pakistani Constitution may be, in that it has emphasized the religious nature of the State, it must be recognised that they flowed essentially from the very manner in which the State came into existence, viz., the partitioning of the country solely on the ground of religion. Nor can it be denied that the Government has made an attempt to keep down the fanaticism of the Mullahs, as is exemplified by the fact that the power to decide as to whether a law was inconsistent with the precepts of the Quran has now been entrusted to the Supreme Court and not to a Mullah Board, as was originally proposed.

There is evidence to show that the Mullahs have been bringing pressure to bear on the Government and that the Government has to a certain extent been successful in resisting it. For instance, Maulana Sultan Ahmed,

head of the Jamaat-i-Islami of Pakistan, recently expressed his discontent at the fact that the Pakistani Constitution had not gone nearly far enough in the process of making Pakistan a truly Islamic State. He is not satisfied that the Constitution bars a non-Moslem from the headship of the State. He insists on a provision limiting the office of Premier or other Ministers also to Moslems. In fact he wants that no non-Moslem should be permitted under the Constitution to hold any key positions in the State, for instance, those of Judges. He asks how can any non-Moslem Judge on the Supreme Court bench possibly decide whether a particular law was repugnant to the Quran or the Sunnat or not? And if non-Moslems are not to participate in the administration on the highest level, there is no reason, he says, why they should have the right of franchise either. Such are the thoughts that are running in the minds of the Maulanas, and one can well imagine that it must have cost the Government no small effort in putting a foot on them in the framing of the Constitution.

Hindu Mahasabha Condemns Pak Constitution

At a meeting of its Working Committee the Hindu Mahasabha on 6th December condemned the Constitution of Pakistan which, it declared, had created "a theocratic State based on inferior status for non-Moslems." The resolution said: "The Pakistan Constituent Assembly's decision to create, under State auspices, a department for the propagation of Islam and to declare that such laws as are inconsistent with the Quran and the Sunnat will be ultra vires, was designed to create an impossible situation for the Hindu minorities in Pakistan." Since there were eight million Hindus in East Pakistan alone, the resolution expressed the view that if Pakistan persisted in its present policy, "there will be no other alternative but to insist on exchange of population and readjustment of territories."

Human Rights Covenants Boggled Down

The Economic and Social Committee of the United Nations which met in the summer in Geneva for the purpose of considering the International Covenants on Human Rights, as presented by the ninth session of the Human Rights Commission, merely passed on these Covenants (the drafting of which is still unfinished) to the General Assembly, with a request that the Assembly send them back to the Commission for finalising the draft next year at its New York session.

Thus no improvement has been effected in the covenant on civil and political rights. We have been particularly concerned ourselves with two of these rights: Freedom of Person and Freedom of Expression. The Articles relating to them remain most unsatisfactory. We shall give relevant portions of them here, if only to refresh the memory of our readers. The Article on Freedom of Person, which is now Art. 9, reads:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that such court may decide without

delay on the lawfulness of his detention and order his release if the detention is not lawful.

The Article, it will be noticed, is as vague and meaningless as Art. 21 in the Indian Constitution; indeed it borrows the language of our own Constitution, with the result that the right of personal freedom is totally ineffective. The national legislatures can impose what restrictions they please on the exercise of the right. Sec. 4 of the Article no doubt speaks of a judicial remedy, but if a national legislature chooses to abolish, as our Parliament has done, the writ of habeas corpus, access to courts will be barred and the detention will automatically be held legal.

The Article on the right to Freedom of Expression, which is now Art. 19, reads in part:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds . . .

3. (The exercise of the right may be) subject to certain restrictions, but these shall be such only as are provided by law and are necessary . . . for the protection of national security or of public order . . . Again, it will be seen that it is left to the national legislatures to restrict the right of free speech and free press, and "public order" is specifically mentioned as a basis of the restrictions.

Humanly speaking, there is no prospect of the Human Rights Commission putting these rights, the most basic of all rights, in proper shape, the very composition of the Commission forbidding it. The United States Government, being tired of the continuous wrangling that goes on in different national blocs, had suggested at the commencement of the last session of the Commission (vide p. ii: 299) that the work of drafting shall be taken away from this politically constituted body and entrusted to a body composed of experts on civil liberties problems. This was no reflection on the Human Rights Commission, whose members have themselves asked to be relieved of this duty which they were unable to discharge properly on account of the political complexion of the Commission necessarily leading to disputes in which conflicts of world politics are reflected. But no heed has been given to this suggestion which, it should be noted, was supported by the International League for the Rights of Man. Nor were the U. S. proposals for undertaking an active programme for educating public opinion in civil rights considered by the Ecosoc; it merely forwarded these proposals, without comment.

Pakistan Withdraws Patronage from Newspapers

On the ground that "a series of inflammatory articles" appeared in them, which "tend directly to bring the Government into hatred or contempt and set one section of the people in the country as against another," the Pakistan Government issued a press note on 15th November, announcing that the "Dawn" and the "Evening Star" would be debarred from Government advertisements and that they would be denied all press privileges like access to Government offices or invitations to press conferences. The editor of the newspapers has on the other hand challenged the Government in a defiant article to prosecute the papers in open court if they are thought to have infringed provisions of the law.