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FREEDOM OF THE PRESS

PRESS COMMISSION'S VIEW OF THE AMENDED ART. 19 (2)

The reasoning which has led the Press Commission to the conclusion that it would not be possible to cancel the restrictions added by the Constitution Amendment Act of 1951, to those enumerated in Art. 19 (2) as originally adopted is that in conceivable circumstances restrictions on the freedom of expression may have to be imposed which do not come strictly within the ambit of restrictions permitted before the Article was amended. It agrees with the Prime Minister when he stated while the Amendment Act was under discussion in Parliament that the additional categories of restrictions were expressed in the Act in very wide terms, so that any particular law imposing restrictions, while within the constitutional limits of permissible legislation, might yet be such that it would conflict with the fundamental concept of freedom of speech and freedom of the Press. But the Prime Minister felt confident that the legislatures in India would not in fact be so foolish as to restrict freedom of expression unduly though even such restrictions might well be within the outer bounds set by the Constitution, and he frankly stated that he saw no reason why the people should not trust the legislatures but should hanker after constitutional limitations on legislative power. The Press Commission too conceives it be the function of the Constitution merely to specify the heads of permissible restrictions; it does not believe that the Constitution must also set strict limits to the restrictions under these heads in order that they would be justifiable. Proceeding on this basis, it sees nothing wrong with the overbroad language of the restrictions added in 1951, though the Constitution itself does not contain any delimiting words to confine the restrictions to certain types of situations so that may not infringe the underlying principles of freedom of expression. It therefore has to admit, with the Prime Minister, that legislation adopted under the words added to Art. 19 (2) may on occasion be violative of the basic right of freedom of the Press, though on its face such legislation may not be unconstitutional. Like the Prime Minister, the Commission believes that the extensive power which the constitutional amendment confers on the legislatures will be wisely used; it says: "Although the

Constitution invests the legislatures with power to place restrictions on the freedom of speech and expression for certain purposes, the power would, we trust, be exercised with discrimination and circumspection." And it is further of the opinion that in case the legislatures should trespass on the legitimate field of this freedom (which according to it, would be a rare occurrence), the High Courts and the Supreme Court would afford the necessary protection. It believes that since it is provided that the restrictions imposed must be "reasonable," the insertion of this word in Art. 19 (2) "will ensure that the power is not exercised by the legislatures in an arbitrary or unreasonable manner."

This reasoning would imply that whatever other categories of restrictions may be added and whatever legislation may be passed under them, citizens have no need to fear that their freedom will be unduly curtailed: the word "reasonable" will be their bulwark. There is no reason to suppose then that if freedom of expression was to be restricted under a new category proposed to be added by the Constitution Sub-Committee of the Congress Working Committee, under which freedom would be denied to publications deemed by the authorities to be "objectionable in public interest" (vide p. iii: 97 of the BULLETIN), the Press Commission need take exception to it, though these words of the widest imaginable amplitude would give almost unlimited power to the legislatures to curb freedom of expression; the provision that the restrictions, to be constitutional, must be "reasonable" will, according to this reasoning, be an adequate safeguard. We cannot accept this reasoning as sound. But the Commission itself seems to have some doubts on this point. If it were not so, why would it have thought it necessary to suggest, while saying that "friendly relations with foreign powers" is a category of restrictions that may well be added to the list given in the unamended Art. 19 (2), that Parliament should confine its restrictive legislation on this subject to "systematic diffusion of deliberately false or distorted reports" and that "dissemination of true facts" should not be brought within its scope? It is obviously because it feels that legislation punishing the

latter type of publications will be constitutionally valid, and that the provision about "reasonable" restrictions cannot be depended upon to exclude it, as it ought to be, from the power of Parliament. (We should state here that we do not approve of this restriction, even so limited.) What a broken reed the presence of the word "reasonable" in Art. 19 (2) is shown by the decision of a divisional bench of the Patna High Court in *Debi Soren v. The State* [A. I. R. 1954 Pat. 254], reported by us on p. iii:119 of the BULLETIN. The Judges in that case ruled that even though in their opinion the Privy Council's interpretation of the provisions of sec. 124 A in *Emperor v. Sadasbiv Narayan* (1947), confirming Strachey J.'s opinion in the *Tilak* case (according to which disturbance or outbreak was not a necessary ingredient of sedition) was too wide, even on that interpretation the provisions of the section "impose 'reasonable' restrictions 'in the interests of public order.'" They say that "the expression 'in the interests of public order' has a wide connotation," and that it embraces all "such action as undermines the authority of Government by bringing it into hatred or contempt or by creating disaffection towards it." In the Press Commission's view, the section is not saved even by the amended cl. 2 of Art. 19. We welcome the recommendation of the Commission for the repeal of sec. 124A, but, frankly, we do not think that the ruling of the Patna High Court is wholly unreasonable in view of the broad terms in which the amended Constitution permits restrictions to be imposed. The point is that introduction of the word "reasonable" in Art. 19 (2) is no guarantee that all speech which is lawful will be so held by the judiciary.

If the Constitution is to sanction imposition of any restrictions on the exercise of civil rights, it must do so in precise terms. This is recognized everywhere. If this were not the case, why would there be such wrangling over the draft of the Covenant on Human Rights in the Human Rights Commission and other U. N. bodies? The Declaration of Human Rights, which contains a general statement on these rights, is already a thing accomplished. But because this general statement is now sought to be converted into a code of law, in which loose expressions are out of place, every Article is thoroughly scanned and an attempt is made to define the exact content of the right with which it deals. And that is the sole reason why there is so much controversy about the phraseology to be used in the Covenant. The method followed by the Human Rights Commission is the right method, however unsatisfactory the outcome of its labours may be. But Parliament, under the guidance of the Prime Minister and the Law Minister, followed just a contrary method when it passed the Constitution Amendment Act. These Ministers said that the additional restrictions, though too wide in extent as they stood, were merely enabling provisions (and the Press Commission has swallowed this theory wholesale), whose governing scope would have to be limited when giving effect to them in the form of specific laws. The result of following this procedure has inevitably been that the

Constitution sanctions larger restrictions than what the Prime Minister himself admits laws should sanction. And yet the very purpose of constitutionally limiting the power of the legislature in a Bill of Rights is to prohibit the legislature from doing what it might be tempted to do but ought not to do. One may not approve of the method of safeguarding any rights in the Constitution by limiting the authority of the legislature, and one who does so is not necessarily unfriendly to civil liberties; but those who are in favour of enshrining such rights in the Constitution must necessarily take care to see that the constitutional limitations are expressed in terms of precise significance. Otherwise the purpose of protecting fundamental rights from legislative infringement cannot possibly be accomplished. That is the reason why the representative of Lebanon objected to the insertion of the words "public order" in the U. N. Covenant as a basis of restrictions in the fifth session of the Human Rights Commission. He said: "No dictator would have the slightest compunction in acceding to a covenant drafted in such terms, nor, when he had acceded, would he find that it in any way inhibited his repressive activities; he could invoke the exception 'in the interest of public order,' embodied in Arts. 13,14,15 and 16." This is so obvious that we are surprised to find the Press Commission saying every now and then (taking in this respect the cue from the Prime Minister and the Law Minister): "The Constitution can at best merely indicate the topics in respect of which there may be reasonable restrictions on the freedom of speech and expression." The Constitution can certainly do more: it ought to put the exceptions in as exact terms as possible. In any case the exceptions must not be so broad as to cover a wider field than that which the Constitution-makers themselves recognise the legislature should not fully occupy. Otherwise the constitutional limitations become meaningless. The point was thus expressed in the memorandum of the All-India Civil Liberties Council to the Press Commission:

The *raison d'être* of a constitutional guarantee of fundamental rights is that in no circumstances should the legislatures be in a position to invade these rights. It becomes a wholly topsy-turvy arrangement, first to give authority to the legislatures to exceed what are admitted to be proper limits, and then to make an endeavour to persuade them not to do so. This will defeat the very purpose of incorporating any right in the so-called Fundamental Rights. Such rights must receive constitutional protection; the Constitution itself must prevent all legislative interference with them. . . . When the Government admit, as they have done [and as the Press Commission has done in respect of all the three additional restrictions], that the constitutional provisions are too wide but plead that governments will in actual practice keep well inside the limits set by the constitutional provisions, they in effect admit that the constitutional barriers are down, that the fundamental right to freedom of expression has been abolished, and that the people must be content

to have only as much of liberty of speech and liberty of the Press as the legislatures will be pleased to allow. If the liberty that people enjoy, whether large or small, is to be on legislative sufferance, they are deprived of all liberty as a matter of right, and Freedom of Expression comes practically to be scored out from our charter of fundamental rights. A right which is protected only by statutory provisions but is left unprotected by constitutional limitations cannot properly be called a fundamental right. The free trade in ideas which the Constituent Assembly desired to establish in India by means of Art. 19 (1) (a) visually disappears when the legislative branch of government is given power to regulate the right of free speech and free press. The amended Art. 19 (2), which permits restrictions that it is desired the legislatures should *not* impose, "puts free speech under the legislative thumb," in the expressive phrase of Justice Douglas [of the U. S. Supreme Court], making the legislative judgment supreme. When this happens, free speech in the constitutional sense disappears. For the essence of the guaranteed right of free expression is that the right should not be under legislative control, that it should not be left to the legislatures to determine its meets and bounds.

If in the Constitution you leave to the legislatures too great a latitude for restrictive legislation, you necessarily make it impossible for citizens to invoke the Constitution's protection against laws which you yourself admit to be unduly harsh.

However, one observation made by the Press Commission, if it be seriously meant and if it be given effect to, would relieve almost all our anxiety. Speaking about the body of principles which the United States Supreme Court has evolved in deciding free speech cases, it refers to the "clear and present danger" doctrine and says that though this test cannot be embodied in our Constitution, "the implication of that test would be a legitimate consideration when courts have to decide whether a particular law dealing with the matter is reasonable or not, having due regard to the imminence and character of the danger sought to be averted by the legislation." We interpret this sentence to give an assurance that just as the Supreme Court of the United States, in which country the sphere of legislative abridgment of free speech is not defined in the Constitution, gives adequate protection against such abridgment by applying the "clear and present danger" test, so will our Supreme Court also apply the same test in interpreting the word "reasonable" in regard to the restrictions imposed by our legislatures. The restrictions which the text of the Constitution by itself permits may be, and are, too wide, but no one need bother about it, because they have to be "reasonable," and our judiciary will hold only such restrictions to be justifiable as fulfil the U. S. Supreme Court's test. If this is really what the Commission means, and if our judiciary utilises the "clear and present danger" doctrine as

a litmus with which to test the constitutionality of any law restrictive of freedom of expression, we for our part shall not bother about the form which Art. 19 (2) has now assumed. We shall not mind the restrictions added in 1951 or even the restriction that the Constitution Subcommittee of the Congress Working Committee would like to add. Whatever the restrictions may be, the final outcome will be satisfactory in spite of all such restrictions, if this test is applied. The meaning of the "clear and present danger" doctrine was thus expressed in *Bridges v. California*, 314 U. S. 252 (1941), and the Press Commission itself has quoted it:

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthestmost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights.

Defamation of Public Servants

Special Protection Proposed

The Joint Select Committee of Parliament on the Code of Criminal Procedure (Amendment) Bill has recommended against the provision in the Bill making defamation of a public servant a cognizable offence, holding with the Press Commission that such a provision may "well constitute an instrument of oppression" to newspapers whose duty it is to expose to public view any misdeeds that those who are in public employ may have committed. But the Joint Committee is not in favour of allowing the law in this respect to stand as it is, but has recommended, like the Press Commission, an amendment of the law, though its proposals for amendment differ in some particulars from those of the Commission. And we cannot say that the Committee's proposals are an improvement the Commission's.

The Committee too, like the Commission, is persuaded that in such cases action by proxy is required and that some authority other than the aggrieved official must be empowered to set the law of defamation in motion. The Commission recommended that a complaint might be made by an official senior to the one defamed. The Committee would instead give the Public Prosecutor the right to launch prosecution against any person alleged to have committed an offence of defamation against a public servant in the discharge of his public duties. The complaint is to be lodged in a court of sessions, which will be authorized to take cognizance of the complaint without the accused being committed to it for trial, and the court is thereupon try the case without jury and, in trying the case, is to follow the procedure prescribed for the trial

of warrant cases by magistrates. No complaint can be made by the Public Prosecutor without the previous sanction of the Union or the State Government as the case may be, which is natural enough; but similarly he will have no power to make the complaint without the previous sanction of the official defamed either. This latter proposal is obviously intended to satisfy the requirement of the principle underlying sec. 198 of the Cr. P. C., viz., that in the matter of offences against persons the complaint must be laid by the aggrieved person himself.

The Committee probably thought that since it was averse to making what was an offence against the person into an offence against the State, as the original proposal in the Bill would do, it must provide for the prior consent of the official concerned before the law is set in motion. But this defeats the whole purpose which the Press Commission had in view in recommending an amendment of sec. 198, viz., to make it possible for Government to proceed against their servants, "perhaps with guilty consciences, who would not be willing to bring cases into courts and to clear themselves of the defamatory allegations." Because no inquiry into the truth of such allegations can be instituted judicially if the section stood as it is, the Commission suggested an amendment of the section allowing the law to be set in motion by proxy the special procedure it proposed was that, on the complaint of an officer senior in rank to the one defamed, a magistrate might take cognizance of the offence and either himself inquire or cause an inquiry to be made in order to decide whether action was necessary. If the inquiry shows that "there is some truth in the allegations," action may be taken against the public servant concerned. The Select Committee's recommendation blocks an inquiry into the defamatory allegations if the public servant against whom charges are made refuse to take the matter to the courts for fear that prosecution would have a boomerang effect. Rather than such prosecution be stopped altogether we would have the Press Commission's recommendation for amending sec. 198 put into effect, but really the amendment is unnecessary. The Commission has stated in para. 1127 that "in France a peculiar feature of the law of libel is that persons holding a public office must, if libelled, bring the matter before the criminal courts." If public servants cannot in this way be compelled to initiate proceedings unless the section is amended, Government can as well make an executive rule to the effect that if criticisms made in the public press of any of their employees are found after a departmental inquiry to have substance in them, the employee concerned must clear himself of the charges made on pain of losing his job. This will obviate the necessity of amending the section and yet afford the means of ensuring purity of administration.

The strongest objection to the Select Committee's proposal is that the adoption thereof would result in sidestepping an important safeguard for the accused in such

cases "by dispensing with the existing requirement," as the "Hindu" says, "that the complainant should be examined on oath before the magistrate can take cognizance of an offence." The Press Commission's recommendation is also open to the same objection. The dissenting minute of Acharya Narendra Dev and three other members says: "If the complaint is to be filed, as suggested, by another public servant, the aggrieved public servant escapes the examination which would take place before cognizance is taken," and there is no reason why he should be so exempted from examination. One of the reasons which led the Commission to recommend a special procedure in the case of public servants is that the public servant who is defamed may be serving outside the country and may thus be unable to prosecute the person who has defamed him, and in pointing out the advantages of the procedure it has said: "When the public servant is *physically unable* to file a complaint some other officer can set the law in motion." But its recommendation is not limited to such public servants but applies to all. Moreover, a public servant in that position would not be under any disabilities which a non-official who has gone abroad would not suffer. Another reason which the Commission has advanced in treating public servants differently is that in such proceedings the complainant is subjected to much mud-slinging in cross-examination. But the same consideration applies to private persons. Limits may be set to cross-examination if that be found desirable, but whatever the law may be, it should apply to all, whether the person defamed is a public servant or not.

No special protection of public servants is either called for or justified. One of the reasons which the Press Commission has adduced for recommending special procedure in their behalf is that the Indian Penal Code has already assigned a special position to public servants in Chapter 9. The dissenting minute has well brought out the flimsiness of the contention. It says: "No unusual or unjustified obligations are imposed on public servants if they are expected not to take gratification or disobey law or unlawfully do certain things. The rest of the law in general applies to public servants as much as to anybody else, and public servants cannot claim that because they are required to observe the restraints and not commit the offences included in Chapter 9 of the Indian Penal Code, they are entitled to be exempted from the due legal process in defamation cases." The conclusion of the minority members of the Commission is (and it is one which will be heartily endorsed by the public): "It is in public interest that public servants should accept the obligations that should be common to all citizens in cases of defamation, which is an offence relating to the person. Any other course would be a fetter on the Press in the discharge of its responsibilities and would lead to undermining of public confidence in the administration."

ANTI-COMMUNIST LEGISLATION IN U. S.

In the mad rush to score a point against each other with an eye cocked to the November elections, both Republicans and Democrats managed to pass through Congress, in the last hectic days before adjournment, an anti-Red bill, about which the "New York Times" very aptly said: "Congress has been giving just about the most vivid exhibition of how *not* to legislate that it has presented in years; ... this is a very sorry spectacle."

When the Senate was considering a Republican bill designed to deprive labour unions, proved to be Communist-infiltrated and Communist-dominated, of the right of collective bargaining under the National Labour Relations Act (vide p. iii : 108), some Democratic Senators sprung a surprise by tacking on to the bill a provision outlawing the Communist Party. Starting from the premise as a "finding of fact" that " the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States," the measure went on to make the party illegal, subjecting membership of the party or its aides willingly co-operating with its objectives to a fine up to \$10,000 and imprisonment for five years or both. The only redeeming feature of the Bill was an amendment moved by a Republican Senator and accepted by the Senate to the effect that to be found guilty of membership of the Communist Party an individual must commit some overt act " designed to carry into effect " the conspiratory purposes of the party. This Senator, citing the First Amendment, said that a man could not be penalized for his thoughts and should be free to join any organization. Punishment, he contended, should be for overt acts, not for mental processes. Fortunately, the Senate agreed to this amendment. Similarly, under the bill a member of the Communist Party will be liable to be prosecuted if it can be proved by legal evidence that he joined the party with " full knowledge of the revolutionary object or purpose, " viz., that of overthrowing the Government by force or violence. The vital section of the measure reads as follows:

Whoever knowingly, willfully and intentionally becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure or overthrow of the Government of the United States, or the government of any state or political subdivision thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization, and commits any act designed to carry into effect the purpose of such Communist party or organization, shall upon conviction be punished as provided by the penalties provision, section 15, of the Subversive Activities Control Act of 1950.

Why did the Democrats take the initiative in proposing such a measure? As a party, they are opposed to banning Communists. But they are constantly being taunted with

being "soft" towards communism. The Republicans charge that ever since the Roosevelt Administration the Democrats have done nothing for two decades to control the nefarious activities of the Communists: these were two decades of "treason." The Democrats thought that a charge like this, if not effectively answered, would ruin their chances in the elections which were at the door, and that the best way of rebutting the charge would for themselves to propose what the Republicans themselves would not dare to do. One Democratic Senator in fact said: " You are merely cutting away some leaves or branches of the Communist tree. We are the people who lay the axe at the very root. " The Republican Senators could not bear the thought of lagging behind, although they knew that President Eisenhower and Attorney General Brownell were unalterably opposed to an outlawry measure. For one thing, the Administration feels that such a measure would be unconstitutional; for another, that it was unworthy of any democracy to put any party outside the law; and for a third, to ban a party would only result in driving it underground, making it difficult to watch its activities. The Administration therefore is following a different method in dealing with the Communists. It prosecutes the party leaders under the Smith Act which makes it a crime to conspire to teach and advocate the use of force; it has obtained convictions of over 80 such leaders in different parts of the country so far. Besides, under the McCarran Act, the Subversive Activities Control Board has held that the Communist Party must register as agent of a foreign power. This ruling is now under adjudication before the Court of Appeals, and if sustained by the latter will certainly go to the Supreme Court; and if the highest tribunal also says that the relevant section of the Act is constitutional the party will have to register. But the leaders of the party have declared that in no event will it register, which will mean that it will automatically outlaw itself. But in disregard of the wishes of the Administration the Republicans joined in the cry raised by the Democrats. Action on the part of both was purely partisan, each hoping that in the House of Representatives the bill would be either thrown out or radically altered. But the immediate result was that the Senate gave its unanimous approval to a measure detested by all responsible men, whether Republican or Democratic.

This happened on 12th August. When the measure went to the House of Representatives four days later, it assumed a less drastic form. The House adopted the Senate's thesis that the Communist Party was not a real political group but an integral unit of a world conspiracy seeking the destruction of government as the free world practised it. It therefore agreed to outlaw the party but dropped from the bill the penalties which were attached to membership of the party by the Senate. Instead, the

House provided that the party as such should be stripped of the "rights, privileges and immunities" given to legal political organizations. The "findings of fact" on which the Senate bill was based, were adopted by the House too; this preamble reads like a stump speech. It says:

Unlike members of other parties, members of the Communist party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. [The party] acknowledges no constitutional or statutory limitations upon its conduct or that of its members. [It] is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means.

The peril inherent in its operation arises not from its members, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including force or violence. Holding that doctrine, its role as the agent of a hostile foreign Power renders it a continuing threat to the security of the United States.

This modified and somewhat softened-down measure too was passed by both Republicans and Democrats almost unanimously.

The following day the Senate re-wrote into the bill, as it had come from the House of Representatives, the provision making membership in the Communist Party or other organizations giving aid to its conspiratorial programme a crime, which the House had deleted from the bill when the Senate originally passed it. And, curiously enough, the House on that day, going back upon its earlier position, agreed by 208 to 100 votes, to the insertion of the felony feature of the bill, penalising individual members. A series of criteria were prescribed by which Communist-front organizations were to be identified as being subject, equally with the Communist Party, to the penalties of fine and imprisonment. Judges were to instruct juries that the enumerated categories of persons would be liable to prosecution; e. g., those who had made financial contributions to the Communist Party, had made themselves subject to the discipline of the organization, had executed its orders or plans, had acted as its agent, had been accepted to their knowledge as officers or members of the organization, etc. It is said that, when asked what he would do if the bill in that form came to him for his signature, the President described it as "the worst can of worms" that he had ever received.

After a conference between the two legislative branches to adjust differences, an agreed measure was passed by both Chambers on 19th August and sent to the President for

his signature. In this final version the plan to make mere membership in the Communist Party an automatic felony punishable by fine or imprisonment was dropped, and it was provided that a person found by the Subversive Activities Control Board set up under the McCarran Act to be a conspirator would be deprived of certain citizenship rights attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof. Such a person would further be required to register under the McCarran Act. If he refused to register he would face the penalties which mere membership in the Communist Party would have exacted, as provided in the Senate's earlier version of the bill. It also provided that a member of the Communist Party or a Communist-front organization be shown to have had knowledge of the conspiratorial purpose of what he had signed before being exposed to the penalties of the law. The bill retains the criteria to be applied by juries in determining whether a person is a Communist Party member, for instance, whether he is on a membership list, has contributed funds to the party, has executed its orders or has indicated willingness to carry out its purposes. The bill contains the declaration as the basis of the bill that the Communist Party is "an instrumentality of a conspiracy to overthrow" the Government and is "the agency of a hostile foreign power."

This Communist Control Bill, as it has been called, came to the President with the almost unanimous approval of both branches of Congress; the approval however was not from genuine conviction but because the full House and one-third Senate were to be elected three months thereafter, and outlawry of communism would be a politically popular thing to vote for. The President could hardly have vetoed a measure which received such overwhelming bi-partisan support; and if he had done so, his veto would surely have been overridden. He signed it reluctantly on 3rd September, only because the loss of citizenship that the law entails on Communists shall be effective only upon conviction by a court of competent jurisdiction, which is in conformity with due process of law. He added, however, that the full impact of what had now become law "will require further careful study." Many points in the law are open to constitutional challenge. The law deprives the Communist Party of its legal and political status. Literally interpreted, this would mean that it cannot place candidates for election on the ballot, that it cannot sue in the courts, that it cannot engage in corporate business activity. This provision is certainly due for a court test—probably on the simple question, at first, of whether the law can deprive any individual or group of recourse to the courts. Another inevitable test, it is assumed, will be on the constitutionality of outlawing a political party. The net result of the enactment will be almost nil at any rate in the near future; the Justice Department has already indicated that it plans to

take action only under that provision of the law which prescribes Communist-dominated labour unions. And this will also be subject to a court test. It may well be that the President hopes that after the election fever is over Congress may be persuaded to remove some of the doubtful features of the law. The "New York Times" says that the law is so worded "as to raise grave doubts over its constitutionality, its desirability and its practical effectiveness." And it adds:

The country is not in such internal danger from communism or anything else that it has to plunge ahead with hastily drawn, loosely worded laws that actually may interfere with intelligent communist control, may do violence to the liberties of loyal Americans and may further shake our confidence in ourselves and the free world's confidence in us.

Political Segregation in S. Africa

In the elections to the Provincial Councils (vide p. iii: 115), which otherwise have not much significance but which were fought by Dr. Malan's Nationalist Party with the sole object of obtaining a mandate to put the Coloured people on a separate electoral roll, the ruling party has made significant gains. When last June the bill for abolishing the entrenched voting rights and for validating the Act for depriving the Coloureds in the Cape Province of the common franchise which they have been enjoying for over a hundred years was before Parliament, Dr. Malan had declared that if the bill failed to secure the two-thirds majority required under the present Constitution, the issue at the provincial elections would be: "Will we (the whites) be able to remain a white nation? Will the white man retain domination in this country, or will he go under?" The outcome of the elections is largely what he desired; he can well claim now that the electorate has given him a mandate to maintain the domination of the whites, who form but a fifth of the population, by all apartheid measures, which are supposed to be required in order to prevent the Europeans from being "submerged." For the elections have given a clear majority to the Nationalists in the Cape and Transvaal councils and have completely wiped out the United Party, which is the main Opposition party, from the Orange Free State council.

This result, it is true, will, by itself make no immediate difference to a similar bill when it will come before Parliament, but it shows a trend which makes one feel that the Nationalists will soon attain the end on which they have set their hearts. Even in June they failed to get a two-thirds majority of the total membership of both Houses at the joint sitting of Parliament by a very few votes: the total number of members is 207, and a full two-thirds of that number is 138; of these the Nationalists who voted for the bill were 128, the number thus falling short by only 10. There have already been serious defections in the ranks of the United Party, and

the result of the provincial elections will tend to accelerate such defections in future.

What will contribute to the thinning of the United Party is the concession which the Government offered to make in June, the concession, viz., to protect the existing franchise rights of the Coloured people. The Government proposed that those who were then on the common roll would remain on that roll unless they themselves applied for their names being transferred to a separate Coloured voters' list, which would also be opened. On this list would be entered the names of those Coloured people who would hereafter be qualified to be voters and those who, being now on the common roll, would themselves elect to have their names put on the Coloured voters' list, in order to be enabled to participate in the separate representation which the Coloureds would enjoy in Parliament and the Cape Provincial Council. Eventually the Coloured population will have four representatives in the House of Assembly (the full quota being reached gradually), but it is provided that only those will be capable of being elected as members who are on the Coloured voters' list. The first member to represent the Coloured people will be appointed when 4,000 Coloured voters come off the common roll by their own choice, the second when additional 11,000 voters similarly remove their names from the common roll, the third when another batch of 11,000 transfer their names from the common roll, and the fourth when 10,000 more voters do the same. This change from a compulsory to an optional separate register, so far as the present Coloured voters are concerned, constitutes a big concession, inasmuch as it means that separate electorates will not be forced on the Coloureds as it was forced upon the Natives in 1936. The offer of this concession will in all likelihood cause further defection in the United Party.

This Party opposed the bill, but only because it thought that the Coloured voters were not numerous enough now to give rise to any serious apprehension. But no one can tell what would be its attitude, when the number of Coloured voters grows. One or two of its members tentatively suggested that the franchise qualifications might be raised for the Coloured people but not for the Europeans. Such an artificial limitation of the number of Coloured voters is essentially no better than the method that the Nationalists would follow. And Canon Collins, Chancellor of St. Paul's, truly said after a visit to South Africa that "the United Party on racial issues is basically no more worthy of the support of non-racialists than is the Nationalist Party." Indeed, there is no solution to the problem, unless one is prepared to discard the principle of maintaining eternally the domination of the whites in a country in which the whites are in a small minority. The Liberal Party, whose Leader is Mrs. Ballinger, is willing to give up such domination, as other races come up in education and political consciousness to a position of equality with the Europeans; this party can thus offer a morally well-grounded opposition to the bill, because it is prepared to face the contingency of

the Europeans being, in course of time, in a minority in the electorate, as they are in the population. This is the only lasting solution to the problem, all others, whether favoured by the Nationalist Party or the United Party, being mere makeshifts; and this solution alone is in conformity with moral principles.

COMMENTS

A Law Commission

TO EXAMINE THE CONSTITUTIONALITY OF EXISTING LAWS

The Law Ministry of the Government of India is reported to have under consideration the desirability of appointing a Law Commission for the purpose of scrutinising the existing laws with a view to finding out which of them are inconsistent with any of the provisions of the new Constitution. The only way at present available to the public to determine the constitutionality or otherwise of any legislation is to bring up the legislation before the Supreme Court or the High Courts in particular cases and to obtain the opinion of these Courts on this point. But this is obviously an inadequate remedy for the purpose, and accordingly the All-India Congress Committee in its recent session at Ajmer adopted a resolution recommending the appointment of a Commission by the Government in order to discover such laws passed before the Constitution came into force which have been rendered void by the constitutional provisions, so that the Government can repeal or amend those laws even before their validity is challenged in courts.

The need for such a Commission has been felt ever since the enactment of the new Constitution, and the fourth session of the All-India Civil Liberties Conference held in Bombay in 1952 adopted the following resolution on the subject:

This Conference urges upon the Government of India appointment of a Committee, consisting preferably of lawyers and members of the legislatures, for the purpose of examining Central and States legislation and reporting which parts of the legislation, if any, contravene any provisions in Part III of the Constitution relating to fundamental rights and what changes are required to bring them into conformity with those provisions.

The resolution was sponsored by such veteran advocates of Bombay as Messrs. D. G. Dalvi and J. R. Gharpure in speeches of great cogency and was enthusiastically passed by the Conference.

We very much wish that the Government of India will appoint such a Commission and give it wide terms of reference, so that both central and local laws would be within its jurisdiction. The Commission will perhaps find that some of these laws contravene the Constitution on the very face of them; in regard to some others it may find that their constitutionality is somewhat doubtful and will,

in that case, suggest some amendments which will render them conformable to the Constitution without a doubt, as for instance the Press Commission did in the case of secs. 124 A and 153 A, I. P. C. Even so, of course, the courts may declare any of the laws which have survived the scrutiny of the Commission to be null and void, but in any case the prior consideration of the question by the Commission will in many cases save the Governments concerned from unnecessary rebuffs at the hands of the courts.

The Special Powers Act of U. P.

All extraordinary legislation will have to undergo a specially searching examination at the hands of the Law Commission. We doubt whether, in view of the fact that there was a difference of opinion among judges of the High Court, the Commission, if it were appointed earlier, would have held that the U. P. Special Powers Act contravened the Constitution and required to be amended. But, apart from this point, it is surprising that this legislation, avowedly meant to meet a special temporary emergency, has continued to be in force from year to year for two decades in that province, long after the emergency had passed.

The legislation was passed as early as 1932, and even as it was passed the Government which was then in control agreed to limit its duration to three years, in response to the suggestion made by the Opposition that after a new self-governing constitution, which was then in prospect, was inaugurated there would be no need for such repressive legislation. The member in charge of the Bill had his own doubts as to whether the legislation would not remain in force even after a Government fully manned by Indians had taken the place of the existing Government. In fact he predicted that after the transfer of power the new Government would elect to remain armed with the powers which the bill under discussion proposed to give. Yet he was prepared to limit the duration of the measure to three years, which was the earliest period within which it was thought self-government would be established and thus throw the responsibility of continuing the measure on Indian Ministers. But the Opposition was not satisfied with this limitation, and in order to meet their wishes he made a further concession, viz., that the Act would remain in force for one year to start with, but with the proviso that the Government might by notification extend its validity for another year and for a third year, so that the maximum duration of the Act would be three years since it was passed by the legislature. That is to say, without any formal repeal the Act was to expire before the end of 1935. In spite of this it has remained on the statute book for twenty years in succession! How this came about we do not know, but it is manifest that the present Government prefers to function with the aid of all the previous coercive legislation which, while not in power, they loudly condemned.

Detention Law then cannot be Temporary

On a later page in this issue we have reported two cases of detention in which it was argued that since the persons concerned might well have been dealt with under the ordinary criminal law but were in fact placed under detention without trial, their detention was bad in law, inasmuch as the detention in the circumstances amounted to punitive instead of preventive action, which alone was contemplated under the Preventive Detention Act. The argument was rejected in both cases, it being apparently the judicial view that where prosecution under the ordinary law and detention under the extraordinary law were both possible, it was just a matter of choice for the authorities to take action under whichever law they would prefer. It has certainly been held in some cases that even if a prosecution is started in the normal way, that course may later be dropped and resort had to preventive detention.

In the cases here reported there were peculiar circumstances in which prosecution probably seemed to the authorities to be no practical alternative. For they were dealing with persons who in their eyes were desperados who, by intimidation of witnesses, would succeed in preventing the normal course of judicial trial. What is to happen in such conditions? One Judge modestly says it is not for the Court to suggest whether recourse should be had to preventive detention in such cases. Another says that such recourse would be wholly justifiable.

The question that would occur to any one is, if in cases where it would be difficult or almost impossible to procure witnesses, preventive detention is the only alternative that is left to the executive, how is it that in the course of our long history, or in the history of any other country, preventive detention is not thought of to meet such situations? And, further, why does the Government of India always tell us that preventive detention is resorted to at present only on account of the abnormal conditions existing in the country and that the law of preventive detention is only temporarily in operation, to be repealed when normal conditions are restored? It is on this basis that the law is extended every time by a year or two years. But will there be any time, one would like to ask, when there would be no desperados in the country? Why not then make the law permanent?

Detentions in Kashmir

EARLY RELEASE NOT LIKELY

A correspondent of the "Statesman" in Kashmir says: "According to present indications, there is practically no chance of Sheikh Abdullah and some of his close associates, detained since August 9 last year, being released in the near future." He then goes on to state what the differences are between the provisions of the Preventive Detention Act in this country and in Kashmir, which is part of India only in regard to three subjects, of which

foreign affairs is the most important one, maintenance of law and order in the State being the State's sole concern.

The Kashmir Act makes a distinction, not known to the Indian Act, between two categories of detenus, viz., those detained in the interest of the security of the State and the maintenance of public order on the one hand and those detained in the interest of the maintenance of supplies and services essential to the community, etc., on the other. While the cases of the latter category of detenus are to be reviewed by an Advisory Board whose opinion will be binding on the Government, the cases of the former category of detenus are to be reviewed, under sec. 14 (1) of the Act, by the Government in consultation with an Advisor within a period of six months from the date of detention under the order and thereafter at intervals of every six months if the detention is to continue. While it is obligatory for the Government to accept the recommendations of the Advisory Board, it is not bound by the opinion of the Advisor as provided in secs. 14 (2) and 19 (1), even if it be that the detention should not continue to be in force. Thus, political detenus of this category are liable to be held in detention as long as the Government thinks such a course expedient, the only limitation on its power being that they have to be released after a maximum period of five years.

C. L. NEWS

Civil Liberties Union for Andhra

Last month Mr. S. G. Vaze, Secretary of the All-India Civil Liberties Council, made a week's tour in the Andhra State with a view to exploring the possibilities of forming a Civil Liberties Union for that State. He visited only two cities, Guntur and Vijayawada, and addressed five meetings on various topics concerning civil liberties. In both the places he found that the people at large and the lawyers in particular were full of enthusiasm for the cause. So encouraging was the response that a meeting was convened in Guntur under Mr. Vaze's presidency, at which the Andhra State C. L. Union was formally inaugurated with a nucleus of 35 members. Later more members will be enrolled from Vijayawada and other places and at a meeting of such members the constitution of the Union will be adopted and its office-bearers elected. The formation of the Union is due almost entirely to the impetus which Mr. P. S. T. Sayee, barrister-at-law, with his great influence gave to the movement. There is little doubt that the Union will soon be very strong. It may also be stated that it is the intention of Mr. Sayee and his associates to convene the sixth session of the All-India Civil Liberties Conference at Guntur, which is the seat of the newly formed High Court of the Andhra State. Those who wish to have more information either about the Union or the proposed Conference may write to Mr. Sayee at Guntur.

HABEAS CORPUS PETITIONS

Dr. Lohia Released

PART OF SPECIAL POWERS ACT HELD INVALID

Dr. Ram Manohar Lohia, the Praja Socialist Party's leader, was arrested on 4th July at Farrukhabad on the charge of having committed an offence under sec. 3 of the U. P. Special Powers Act of 1932 in that he delivered two speeches, one at Karimganj on 4th July and another at Farrukhabad on the same day. In these speeches he was alleged to have incited cultivators not to pay the enhanced irrigation dues to Government.

He made an application to the Allahabad High Court for a writ of habeas corpus under Art. 226 of the Constitution, contending that sec. 3 of the Act under which he was arrested and detained in jail was inconsistent with Art. 19(1)(a) of the Constitution guaranteeing freedom of speech and expression and, therefore, void and inoperative. Sec. 3 of the Act as passed in 1932 reads:

Whoever, by words either spoken or written, or by signs or by visible representations, or otherwise instigates, expressly or by implication, any person or class of persons not to pay or to defer payment of any liability, and whoever does any act with intent or knowing it to be likely that any words, signs or visible representations containing such instigation shall thereby be communicated directly or indirectly to any person or class of persons, in any manner whatsoever, shall be punishable with imprisonment which may extend to six months or with fine, or with both.

The application was heard by a division bench consisting of Mr. Justice Desai and Mr. Justice Chaturvedi, and quite a number of days after the arguments of the counsel, they delivered on 12th August differing judgments, Mr. Justice Desai allowing the application and Mr. Justice Chaturvedi rejecting it.

Mr. Justice Desai, in his judgment, holding sec. 3 of the Special Powers Act illegal, considered that non-payment of canal dues was not an offence under the Northern India Canal and Drainage Act and it was not an offence under any other enactment also. It was further held by His Lordship that the U. P. Special Powers Act clearly infringed the guarantee of freedom of speech contained in Article 19 (1) (a) and the security of the State was not affected under Article 19 (2) merely by incitement to the cultivators not to pay irrigation dues. According to His Lordship, non-payment of irrigation dues itself did not affect the security of the State and incitement to non-payment still less affected it.

Mr. Justice Chaturvedi, in his dissenting judgment, said that exhortation to the members of the public to disobey duly promulgated and valid laws, specially where the laws happened to authorise the public servants to realise dues by coercive processes was an act which could be classed as subversive of public order. Taking the defini-

tion of public order to mean public peace and tranquillity, he thought that the making of instigation in this respect penal was really in the interest of public order and the legislation was justified under the amended provisions of Article 19 (2) of the Constitution. The provisions of the statute, he added, did not create an unreasonable restriction on freedom of speech.

The Judges therefore referred the following points arising from the application to a third Judge:

1. Is the provision of sec. 3 of the U. P. Special Powers Act of 1932 making it penal for a person, by spoken words, to instigate a class of persons not to pay dues recoverable as arrears of land revenue, inconsistent with Art. 19 (1) (a) of the Constitution on the 26th of January 1950, when the Constitution came into force?
2. If so, is it in the interests of public order?

The third Judge appointed to decide these points was Mr. Justice Agarwala. On 26th August he delivered his opinion. The first of the two questions was answered by him in the affirmative and the second in the negative.

Mr. Justice Agarwala agreed with the view of Mr. Justice Desai holding section 3 of the U. P. Special Powers Act ultra vires the Constitution.

Mr. Justice Agarwala held that the object of sec. 3 of the Special Powers Act was clearly to restrain a particular kind of speech and expression and it was an infringement of the freedom of speech and expression guaranteed in Article 19 (1) (a). Non-payment of canal rates under the Northern India Canal and Drainage Act had not been made an offence and the dues were recoverable by the collector as arrears of land revenue. This liability for the payment of the dues was a civil liability and non-payment of such dues or incitement for non-payment had no connection with public order, namely, the maintenance of peace and tranquillity. In his opinion, such instigation could not reasonably be held to threaten public order.

When the application came back to the division bench for disposal on the following day, Their Lordships said, in their order:

We differed on two points of law in this petition and referred them to a third Judge. He has now given his opinion and he has answered both the questions in favour of the petitioner. The result is that the petition must be allowed and we direct that he should be released forthwith.

Their Lordships considered that a substantial point of law was involved in the petition and so granted leave to appeal to the Supreme Court.

Following this decision, the Government ordered the immediate release not only of Dr. Lohia, who was in confinement for 50 days before he was released, but also of all others, over 2,000, arrested under the Special Powers Act or under sec. 144 of the Cr. P. C. in connection with the agitation against the enhanced irrigation rates.

**Detention in Place of Prosecution
NOT NECESSARILY MALA FIDE**

In *Rambhaj v. Punjab* decided on 2nd January this year it was contended that the detention of Chaudhri Rambhaj, arrested and placed under detention by an order of the district magistrate of Rohtak on 19th October 1953, was mala fide, since several of the grounds on which the detention order was made were such as might have been made the basis of action against the detenu under the ordinary criminal law. For instance, there was an allegation of extortion and of interference with the course of justice against the detenu, and these might have justified action under one or other of the security sections of the Criminal Procedure Code. But that, instead of applying the ordinary law against him, he was subjected to preventive detention shows (it was argued) that his detention was mala fide. Reliance for this argument was placed on the remarks of Mukherjee J. in *Ashutosh Lahiri v. State of Delhi* [A. I. R. 1953 SC 451] to the effect that 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 Preventive Detention Act for purposes for which ordinary law was quite sufficient.

Falshaw J., who heard the habeas corpus petition of Rambhaj, rejected this argument, saying:

This remark was made, however, in a case in which the detenu's petition was dismissed, and there does not appear to be any decision of the Supreme Court in which it has been definitely held that because a man might have been prosecuted on the basis of allegations put forward as grounds for his detention, his detention is necessarily illegal. It is indeed quite easy to conceive of circumstances in which, even in such a case, the main purpose of detention is evidently preventive and not punitive.

It is also a moot point whether, in dealing with a man such as the present detenu is alleged to be, the ordinary law can be said to be sufficient. The whole gravamen of the grounds of detention in the present case is that the detenu is so powerful himself, and is also a close associate of such desperados, that it is impossible to procure witnesses to appear against him for the purpose of dealing with him under the ordinary law. That such a state of affairs could exist is deplorable, but it may nevertheless be a fact, and, if it is so, it seems to me that recourse to the powers of preventive detention by the authorities is not only legitimate, but is the only course which they could adopt for the purpose of restoring a healthier atmosphere in which the ordinary processes of law can be exercised properly.

The petition was dismissed.

The same kind of contention was raised and similarly disposed of in *Kadam Singh v. State of Madhya Bharat* decided on 16th February this year. Kadam Singh was

arrested on 12th January 1953 and detained in pursuance of an order by the district magistrate of Morena for action prejudicial to the maintenance of a public order. It was contended by his counsel before a divisional bench of the Madhya Bharat High Court (Gwalior Branch) consisting of Dixit and Chaturvedi JJ., who heard his habeas corpus application, that as the acts of the applicant referred to in the various grounds of detention constituted offences under the Penal Code, his detention was mala fide, since it was punitive and not preventive. The Court did not accept the contention. Dixit J., who delivered the judgment, said on this point:

The object of the Preventive Detention Act is no doubt preventive and not punitive detention. But I think from this object of the Act it is erroneous to infer that past penal acts of the would-be detenu cannot be taken into account in finding out his likely course of action in the future. Moreover, when a number of notorious dacoits operate in co-ordination over extensive areas, aided and abetted by their agents who give them shelter, arms, information as regards police posting and who intimidate witnesses from giving evidence against the dacoits, the normal processes of investigation and trial according to the Criminal Procedure Code may be found to be ineffective and inadequate to meet a real situation of lawlessness. The question whether in such a situation a person should or should not be detained in order to prevent him from acting in a manner prejudicial to the maintenance of public order is not for the decision of the Court.

The application was dismissed.

NOTES

Justice in China

The former Prime Minister of Britain, Mr. Clement R. Attlee, and seven other Labourites, who made an eighteen-day tour of new China last month, have formed on the whole a very favourable impression of the Chinese Government's "extraordinary activity" in putting through "certain definite reforms." This group does not agree with the principles by which Communist China is being governed, but it found that Peiping showed "less rigidity" in its Marxist practices than Moscow, which also the group visited two days earlier. Full of admiration for the practical work done by the new China, Mr. Attlee said on 2nd September in Hong Kong that individual freedom in that country was limited, including freedom of speech and thought, but "the evidence seems to show a government which is based on the good-will of the peasant population." Since then he is giving an account of his experiences in various fields, and this is what he writes about the administration of justice in China:

In the afternoon we had a session with the Prime Minister and some of his principal colleagues. This

was entirely informal and everyone was encouraged to speak his mind freely as between friends. We sought to get explanations of some aspects of the new Constitution, in particular as to the position of the citizen in relation to the Government and the law. My conclusion was that the Chinese have no real conception of the law as something quite apart from the will of the Government. It appeared that after a judge had given a decision, his sentence could be overruled by the National Assembly. When we asked whether there would not be a conflict between the judiciary and the Government, we were told that in fact it would never arise because the judiciary and the Government were in agreement on policy. I said that in Britain I should regard this as a most disturbing thing. We have, I think, got to recognise that there is a complete difference of view here. I do not think that this is specially due to the Communist doctrine. I think that it has always been so in China.

Ban on Segregated Schools in U. S.

The U. S. Supreme Court's decision banning segregated schools applies at the moment to the five States which brought complaints to the Court, but it is the intention of the Court to make it applicable throughout the country. When the Court's October term commences it will hear arguments from the States' Governments on whether its ruling should be put into effect forthwith or gradually and whether it should issue detailed or general instructions on desegregation policy.

In the meanwhile in some of the Southern States in which the decision is not effective at present (because they are other than the five States which brought anti-segregation cases into the Supreme Court), attempts are being made to have Negro children admitted in white schools. In Montgomery, Alabama, 15 coloured children tried to register in a new all-white elementary school on the very first school day, but they were refused admission. The Constitution of Alabama itself prohibits the mixing of races in schools, and the State Legislature strengthened its position by passing laws designed to continue segregation in spite of the Supreme Court's ruling declaring segregation illegal. Similarly at a place in Louisiana 30 Negro children sought admission to an elementary school for whites, but the headmistress refused to accept them. In Austin, Texas, a Negro who was at first accepted as an undergraduate student in the University of Texas has been told that he would not be admitted, the ground for refusal being that the subject he had chosen for study was offered at other Negro colleges

in the State, and that the University admitted only such Negroes as had taken courses which were not available in colleges for Negroes.

In the federal Government, however, the policy of racial non-discrimination is being pursued vigorously. President Eisenhower has already made it known that in contracts given by the Government to private contractors the latter must not discriminate against Negroes. In order to strengthen this ban on racial and religious discrimination, he signed on 4th September an order which provides for the posting of a conspicuous notice by Government contractors, for the benefit of employers and applicants for jobs, that they operate under the "non-discrimination" regulation.

Dismissal of Public Servants

WITHOUT THE RIGHT OF APPEAL

We referred in a previous issue (p. iii: 99) to a recommendation made by a committee of the Congress to deprive public servants whom the Government proposes to dismiss from service of the protection which Art. 311 (2) of the Constitution gives them, viz., that no public servant shall be visited with such extreme disciplinary action unless he has been afforded "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him." In connection with this recommendation we note that the Turkish Government has already adopted a measure that will give it the authority to dismiss civil servants without the right of appeal. This measure has caused much apprehension in Turkey, following as it does other measures which it is feared may threaten the future of democracy in that country. As in India, Premier Menderes' Government was powerfully supported in the last election, and there is no question about the Government's ability to put through any measures that it considers necessary. But the recent trend of legislation has shown that the Government, in its desire to promote the welfare of the people committed to its charge, is apt to depart from some of the restraints which a democracy must impose upon itself. Adverting to this measure, the "New York Times" says: "Dismissal without appeal is drastic under most conditions. It is not easy to believe that the situation in progressive Turkey is so bad as to require this Draconian remedy."

With this issue comes to a close the fifth year of the Bulletin's existence, and we shall enter upon the sixth year next month. Subscribers are requested to renew their subscriptions.