

The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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A NEW STANDARD OF OBSCENITY SET IN THE U. S. A. "WHO SEES OR READS IT" HELD TO BE THE TEST

In the United States the major responsibility for dealing with obscene literature or horror comics, thought to contribute to juvenile delinquency, lies with state governments, for under the Constitution of that country the police power, one of the basic purposes of which is the protection of public morals, rests with the states. The national government does not deal directly with such problems. But it acts in two ways to control obscene and objectionable matter : the Postal Department can bar the use of the mails for the circulation of obscene literature or pictures and the Customs Department can exclude what it regards as pornographic books or pictures by preventing them from being imported into the country. In exercising its control over importation the Customs Department has now taken what is held as a big step forward in determining whether particular books or pictures ought to be excluded.

For the last seven years the Indiana University's Kinsley Institute for Sex Research (so named after its founder, the late Dr. Alfred C. Kinsley) has been waging a battle with the Customs Department. It wanted to import books, photographs, Chinese paintings, statuettes and what were regarded as "lavatory wall inscriptions" for the purpose of research. But the Customs Department every time barred the importation of such material, some of which at least it was believed would stir the sex impulses of the common people. The Institute's contention was that the material was required for carrying on scientific research and should be allowed to come in. The Government recently brought suit in a federal district court to have the impounded material destroyed, and on 1st November last Judge Palmieri rejected the suit. He held that the Kinsley Institute was entitled to have it because it had a genuine scientific purpose in importing it.

The Government pondered over this decision for two months as to whether it should appeal from the decision or not, and now it has come definitively to the conclusion that no appeal should be preferred but that the decision be accepted, viz., that instead of holding anything as obscene in itself, no matter who reads or sees the material, as was its policy hitherto, it should hereafter treat the

material as not legally obscene if it is unlikely to arouse the "prurient interest" of those who will read or see it.

The "Probable Audience" Factor

The new standard of obscenity that will be applied in future consists in taking account of the "probable audience" of the books to be imported — a factor which has been completely ignored in our Horror Comics Act, passed recently without any adequate consideration of its grave implications. The Act purports to aim at publications tending to corrupt the morals of the youth but is made applicable indiscriminately to books obviously meant for adult reading. The importance of this factor, as we have pointed before, was brought out strikingly by Justice Lummus of the Massachusetts Supreme Judicial Court in the famous "Strange Fruit" case. It was argued in this case that the novel might corrupt the youth. Justice Lummus, rejecting this argument, said :

The record contains no evidence to warrant the assertion or to show that any adolescent ever read the book or would read it under normal conditions. . . . Such knowledge as I have leads me to believe that, without such artificial stimulation [as the publicity resulting from prosecution], novels of the class into which the book in question falls are read by few girls and practically no boys. The great mass of readers are mature women. Plainly the book was not written for juveniles. They would find it dull reading. Under normal conditions I think the book could do no substantial harm to the morals of youth, for few juveniles would ever see it, much less read it. And if perchance some should wade through it, I think it could not reasonably be found to have any erotic allurements, even for youth.

In safeguarding the right of the community to be protected against the undermining of public morality, care must be taken not to infringe unduly the right of the public to read and see or the right to publish, circulate or sell freely.

The Horror Comics Act

Our Horror Comics Act provides no safeguard that the latter two rights will not be invaded. This legislation took as its model the British Government's Horror Comics Bill but it lacks all the safeguards which the British Bill had originally introduced and which were later incorporated therein in response to enlightened public opinion. The British Bill, as introduced in Parliament, had not taken account of the probable audience of the pictorial publications brought under its purview. That is to say, the Bill was made applicable to all publications which tell stories of acts of violence, etc., tending to corrupt young persons, even if they were not intended for young persons or were not likely to reach them. They were liable to be suppressed as harmful publications even if in the normal conditions they would circulate only among adults who could very well take care of their morals. But this objection to which the Bill was open was later removed on the motion of Lord Jowitt, Attorney General in the Labour Government. The scope of the operation of the Bill was restricted by means of an amendment to the effect that even if a publication was such as to tend to corrupt the youth, it must further be "of a kind likely to fall into the hands of young persons," thus saving books meant for adults and likely by their nature to circulate among them. Sir Frank Soskice, a critic of the Bill, said of the amendment.

(This amendment) provides an additional safeguard by excluding from the Bill the kind of work against which the Bill is not aimed at all. Many examples have been given such as that of pictures of atrocities to which grown-up people should have access because it is necessary from time

to time to remind people of the atrocities committed in concentration camps and so on. They would be excluded by the insertion of these words. I believe that the amendment provides a necessary and useful safeguard by limiting the purpose of the kind of publication envisaged, which does in fact constitute the mischief at which we aim.

One of the many blemishes of our Horror Comics Act is that it completely ignores the "probable audience" factor.

The Hicklin Test

Another defect in the Horror Comics Act is that it does not take into account the effect of following the judgment in *Regina v. Hicklin*, 3 Q. B. 360 (1868), which controls the law of obscenity in India. We refer to this again because the point has been so well emphasized in *Roth v. United States* decided in June last year. The Supreme Court says in its judgment in this case:

The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons (the Hicklin decision). Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press.

FUNDAMENTAL (?) LIBERTIES

THE PUNJAB PRESS ACT CASE

The Supreme Court's decision in the "Pratap" and "Vir Arjun" case is fraught with dangerous consequences as it permits the States to impose prohibition on publication of news or comments about a specified matter in a newspaper in the State and prohibit entries of newspapers from outside. It not only makes freedom of the press a mockery but also threatens the very foundation of democratic government. The Supreme Court seemed to proceed on the assumption that freedom of the press is at the mercy of a legislature which need only authorize the government to suppress it the moment the government is satisfied that it is in danger.

In *State of Madras v. V. G. Row* [A. I. R. 1952 S. C. 196], the Supreme Court had declared that the curtailment of the right to form an association or a union "was fraught with potential reactions in religious, political and economic fields." Presumably the right to freedom of expression has as wide and varied a scope for its exercise and its curtailment may also be said to be fraught with potential reactions in religious, political and

economic fields. "The vesting of authority in executive government to impose restrictions on such rights without allowing the grounds of such imposition to be duly tested in judicial enquiry," the Supreme Court declared in that case, "may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits." In the present case, as in the Madras case, the Supreme Court was given no grounds enabling it to hold that any "very exceptional circumstances" existed. In fact it surrendered its authority to examine the circumstances to the State or its nominee.

But it had held in the Madras case that "restrictions on fundamental rights imposed on the subjective satisfaction of the government or its officers... may be viewed as reasonable only in very exceptional circumstances." The Court made no attempt to find out whether any such exceptional circumstances existed in the present case.

It is true that the legislature had armed the government with this power, but the very fact that it

had done so not in a temporary measure but by a permanent Act seemed to imply that the legislature attached no importance whatever to constitutional guarantees of freedom of expression. It was not the existence of any exceptional circumstances in the Punjab at the moment which the legislature examined and provided against. It placed the right of freedom of expression in the Punjab for all times at the mercy of the government. This is exactly what the Supreme Court has said so often it would not allow to happen. It was a "political" question which the Supreme Court was leaving for the government to decide, as the Supreme Court in the United States does sometimes. It was a fundamental liberty which it was sacrificing to what a government in power may be momentarily led to believe, even erroneously, is to its advantage.

The Supreme Court declared that it was prepared to concede that the restrictions on the fundamental rights in this case were reasonable because the aggrieved party had a right to make representation to the state government. In *State of Madras v. V. G. Row*, a unanimous Court had held that even when "an advisory board [whose opinion the State Government was required to accept] was thrown in to review the material on which the government seems to override a basic freedom," restrictions on fundamental rights "imposed on the subjective satisfaction of the government or its officer" "may be viewed as reasonable only in very exceptional circumstances." No exceptional circumstances were pleaded in this case.

But, following the Court's decision in *Dr. Kbare's case* [A. I. R. 1950 S. C. 211], it may be argued that because the original order of prohibition was limited to a period of two months, exceptional circumstances existed in this case. But as the Court itself said in that case, "What may be regarded as reasonable restrictions under near-emergency conditions in a temporary measure would not necessarily be so in a permanent Act." Here again, on the Court's own reasoning, there was no ground to hold that the present restrictions in a permanent Act were reasonable.

In *Gurbachan Singh v. State of Bombay* and *Another* [A. I. R. 1952 S. C. 221] and other externment cases, the Supreme Court had condoned the absence of judicial supervision in cases where citizens had been deprived of fundamental rights. It refused to interfere "having regard to the class of cases to which the law applies and the menace which an externment order is intended to avert and because before an order was passed an externnee was permitted to appear through an advocate, file a written statement and produce character-witnesses." Neither of these considerations was present in the case before the Court now.

In order to understand the full magnitude of the Supreme Court's decision, it is necessary to remember that it justified curtailment of almost all fundamental rights in this group. What is a reasonable restriction in

the interest of public order on freedom of expression may as well be a reasonable restriction on freedom of speech, freedom of movement and freedom of association. Thus, the preferred liberties which make democratic government possible may all be entrusted to the tender mercies of a government hostile to such freedoms.

We may visualise a state government prohibiting with impunity for a short period of two months, or a little longer, the holding of public meetings, the functioning of associations and publication of news in the press about all matters concerning, for example, the elections in the State. With the Supreme Court unable to help the citizens under its present ruling, the government may very well carry through a revolution during an election. The government in power need show scant respect for any liberties and may do so with impunity if its prohibitory orders are issued originally for a short period only, and if it allows representation to be made to itself against such orders. The way to a bloodless revolution is thus made clear!

It is no use arguing that no government is likely to do so. The Government of Punjab has done so and it has been upheld by the Supreme Court. It has even gone further. As advised by the Supreme Court, it has closed the lacuna in its authority to ban the entry of newspapers. The Act has now been amended and by providing for representation to the State government and by limiting the order banning entry into the province to a short period, the Punjab government has got over the defect which the Supreme Court had earlier detected in the Act. Other States may follow the lead of the Punjab government and may even do better in suppressing with impunity the fundamental rights of citizens.

Tested by its actual effect, the powers assumed and exercised by the Punjab government under the impugned Act were used as recklessly as the powers for preventive detention. The Punjab government restrained the liberty of its opponents by putting them under preventive detention on grounds which it could not sustain in more than 80 per cent. of the cases. The Supreme Court could not take cognizance of this fact in the present case. If it had done so, it may not have been satisfied with placing the liberties of citizens at the tender mercies of the Punjab government and its officials.

May we not hope that in a case that comes next before the Supreme Court, some of the Justices would have second thoughts about the matter and boldly go back on their decision to surrender fundamental liberties into the hands of the executive? Or shall we cease to regard the Supreme Court as an effective bulwark of fundamental liberties and trust to political action alone in keeping them alive? It would be a sad day if the second course only were open before us. It will make a mockery of our democratic republic by leaving the state governments sovereign.

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Postal Ban on Nudist Magazines

Struck Down by the Supreme Court

The Postal Department of the U. S. A. imposed a ban on the mailing of the 1955 February issues of two magazines, "Sunshine and Health" and the "Sun", in the sense that it refused to grant them third-class mailing privileges on the ground that they contained obscene matter. The action was taken under a federal law which declares "every obscene, lewd, lascivious or filthy" publication or picture to be non-mailable and punishes a person who "knowingly" mails such material. These magazines are published by non-profit corporations and are devoted to the advocacy of nudism for health purposes. They are edited by a 78-year-old Baptist minister. The magazines are in intermittent battle with the Post Office since 1948. The banned issues included photographs of nude men, women and children.

The Post Office gave a hearing in regard to these magazines and after the hearing the examiner of the department upheld the ban, finding the magazines obscene. The nudist corporations sued. A federal district judge held the text of the magazines unobjectionable but the pictures obscene. The Court of Appeals affirmed by vote of 5 to 3.

The nudists filed a petition in the Supreme Court for review, and on 13th January the Court unanimously reversed the ban on the mailing of the magazine. The order striking down the ban cited the Roth case of June 1957 (vide p. iv : 307 of the BULLETIN), which, while holding that "obscenity is not within the area of constitutionally protected speech or press," warned that "ceaseless vigilance is the watchword to prevent their erosion by Congress or by the states" and that "the door barring federal and state intrusions into this area cannot be left ajar; it must be kept tightly closed." The Court then said :

It is therefore vital that the standards of judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.

"Appeal to prurient interest" is thus the test of obscenity and in the Roth case the conviction of the defendants was affirmed because, as Chief Justice Warren said in his concurring judgment, they "were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." The brief unsigned order to lift the ban in the instant case meant that the magazines did not appear to the Court to be obscene; that the lower courts had applied a wrong standard to judge obscenity; and that a rigorous, narrow definition of obscenity must be insisted upon. As one lawyer put it: "The Court is going to keep a real weather-eye out itself to prevent censorship of anything but what might be called hard-core pornography."

Ban on the Sale of an "Obscene" Book VIOLATION OF FREEDOM OF THE PRESS AND DUE PROCESS

Following the Supreme Court's decision in *Butler v. Michigan* (vide p. iv : 261 of the BULLETIN), invalidating a section of the 116-year old obscenity law of Michigan as in violation of the due process clause of the Fourteenth Amendment, a circuit court judge some five weeks thereafter ruled on the order of the Police Commissioner of Detroit in Michigan state banning a book which the latter thought was obscene. The Police Commissioner ordered that a novel by John O'Hara entitled "Ten North Frederick," which was already being sold in bookstores and distributed in circulating libraries of Detroit, should be withheld from sale. He informed library officials that the novel had been placed on the city's objectionable list and its sale prohibited because it was obscene.

The order was challenged in the courts by the publishers. The circuit court Judge, Mr. Weideman, enjoined the police "directly or indirectly" from ordering a person to stop selling the book or threatening to arrest the distributors. He said that the Commissioner had circumvented the judicial process by ordering the book to be banned from sale and that the order was in contravention of the free press and due process clauses of the Constitution.

In regard to similar police action in the city of Cleveland threatening arrests of people selling the novel, the local branch of the American Civil Liberties Union raised a protest, pointing out that the courts have consistently ruled that suppression of books or newspapers through a threat of arrest is illegal. For instance, in *Dearborn Publishing Co. v. Fitzgerald*, the district court ruled that the publication complained of was not indecent, obscene or scandalous and stated that, even if it were, "the limit of the city's power would be to conduct a prosecution for the specific offence and not the establishment of a censorship in advance of future publications, and prohibition generally of the sale thereof upon the streets, in the same manner as other publications may be sold."

The Rule of the Jencks Case

Extended by the Appeals Court to Administrative Proceedings

The Jencks case rule laid down by the Supreme Court (vide p. iv : 299), viz., that the Government must in criminal trials produce secret reports made to it by its witnesses to aid in cross-examination, was extended by the Court of Appeals in Washington to hearings before administrative tribunals by a unanimous judgment on 9th January.

The case arose in an appeal filed by the Communist Party against the finding of the Subversive Control Board, constituted under the Internal Security Act 1950, that the Party, being a "Communist-action organization", must

register as a subversive body. Under the Act the Board, consisting of five members appointed by the President and confirmed by the Senate, has power to classify any organization as a "Communist-action" or "Communist-front" organization and then order it to register, with the obligation to send annual reports of the officers, finances, etc., to the Attorney General who is to keep them open for public inspection. The object of such compulsory registration was stated to be that of forcing the subversive elements of the population into broad daylight. Registration means loss of many civil rights like denial of passports to members. The Act provides for judicial review of Board decisions, and in 1956 the Supreme Court, in *Communist Party of U. S. v. Subversive Activities Control Board*, upset the Board's ruling of 1953 that the Communist Party must register, on the ground that the Board had relied on the "tainted testimony" of three questionable witnesses. The Board then struck the testimony of these witnesses and again ordered the Party to register. This time the Appeals Court reversed the finding of the Board.

In order that an organization might be held to be a "Communist-action" organization, the Board must find that it is controlled by a "Communist foreign Government" and advances the aims of the "world Communist movement." Such evidence was given by one Mrs. Markward, who was an agent for the Federal Bureau of Investigation inside the Communist Party from 1943 to 1949. At the hearing before the Board she testified that she had heard one Communist leader say that party members "would not bear arms in any conflict between the United States and the Soviet Union." On cross-examination she admitted to some confusion in her recollection of this event and said she had made a report to the F. B. I. about it at the time. The Communist Party asked to see the report to check her recollection. But the Board refused. Some other incidents like this also happened at the hearing, at which the attorneys of the Communist Party could not get reports made by witnesses to the F. B. I. The Appeals Court made this the ground for setting aside the Board's finding and sending it back to the Board for further action. The Court said :

The opinion of the Supreme Court in the Jencks case, as we read it, is based upon the elementary proposition that the interest of the United States is that justice be done. The same elementary proposition applies here and leads to the same result.

We think simple justice, the fundamentals of fair play, require no less.

If this were a civil action in a court, or if it were a criminal case, the party would be entitled to the production of these reports. The question here is whether production is one of the fundamentals of fair play required in an administrative proceeding. We think it is.

Sequel to Supreme Court's Jencks Decision

It will be recalled (vide p. iv : 299) that the Supreme Court on 3rd June ordered a new trial of Mr. Clinton E.

Jencks, a labour leader from New Mexico, because his conviction was obtained on the basis of reports that an informer had made to the Federal Bureau of Information which the Government refused to produce to Mr. Jencks' counsel for cross-examination. Mr. Jencks had been convicted in 1954 of filing a false non-Communist affidavit with the National Labour Board mainly on the strength of the notorious turncoat informant, Matusow. Shortly after the conviction Matusow publicly repudiated the testimony he had given at the trial, asserting that it was false. On the basis of this turnabout the defence moved for a new trial. This was denied by the district court, which held that Matusow's original testimony was true and that his recantation was false. Late in 1955, the conviction and denial of new trial were affirmed by the Court of Appeals. The case then went to the Supreme Court. The high court set aside the conviction, saying in effect to Government: either produce the reports made to the F. B. I. by informers called as prosecuting witnesses or drop the prosecution.

When the case came before the district court for a new trial, the Government asked that the indictment be dismissed, the reason behind the motion for dismissal being, it is believed, the Government's reluctance to compel the F. B. I. to open its confidential files to defence attorneys. The district judge on 31st December granted the motion and dismissed the Government's case, saying however that he still thought that Mr. Jencks was guilty of the charges against him. He remarked :

In these dangerous days, men like Jencks and Matusow who have no respect for our law and courts and who will tear down and destroy our system of free government should not be permitted to run at large if the evidence is sufficient for conviction.

COMMENTS

Detention Without Trial

"Preventive Arrests" for Possible Future Wrong-doing

Referring to our article on this subject in the last issue (vide p. v : 43) in which we attempted a refutation of Mr. D. K. Sen's thesis that "preventive detention is to be found in the legal armoury of all democratic Governments," a valued friend cites the U. S. Internal Security Act of 1950, commonly called the McCarran Act, which came as a climax to the Government's measures to counter-act Communist subversion. The Act falls into four parts, one of which allows internment of American citizens in concentration camps. "But this very legislation, though purporting to do what Mr. Sen says every democratic country does, illustrates in a very remarkable way," writes our friend, "how far from truth Mr. Sen's thesis is." He emphasizes the fact, first, that this legislation was forced upon the Government by Congress, inasmuch as it was opposed by the Departments of State, Justice and Defence and vetoed by President Truman, and, second, that the legislation has not yet been enforced at

all. Then our friend proceeds: Let us see what the detention provisions in this part of the Act are. They are thus summarized:

The President is empowered to proclaim an "internal security emergency" if our territory is invaded, if war is declared by Congress, or if there is an insurrection in the country in aid of a foreign enemy. In such an emergency the President, through the Attorney General, may detain any person "as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others who engage in, acts of espionage or of sabotage."

Thus, our contributor says, this is emergency legislation to be put into force only in conditions like those in which the emergency provisions of our Constitution can be enforced, and, moreover, espionage and sabotage are the only activities aimed at.

Such person [i. e., a person probably engaged in these acts] is to be confined in a place of detention provided by the Attorney General. Within forty-eight hours after detention he shall be given a hearing before a preliminary hearing officer. At this hearing he is to be told the grounds of his detention, is to be represented by counsel if he so desires, is allowed to introduce evidence in his behalf, and is permitted to cross-examine witnesses against him except those whom the Attorney General in the interests of national security does not wish to have appear. From an adverse finding by this preliminary hearing officer, the detainee has the right to appeal to a bi-partisan Detention Review Board of nine members, and from their decision either he or the Attorney General has the right to appeal to the United States Court of Appeals which may set aside the order of the Board.

This will show that even this emergency detention restricted to espionage and sabotage is subject to a judicial review. Indeed, the privilege of the writ of habeas corpus cannot be suspended under the U. S. Constitution except in specified conditions in which it may be said courts will not be able to function at all.

Even so, our friend writes, the Act is denounced by all competent writers on constitutional law. Mr. Robert E. Cushman says:

In spite of the elaborate safeguards set up here and the obvious necessity for protecting the national security, there will be sharp controversy over the propriety of interning an American citizen on the basis, not of unlawful conduct, but of what officers of the Government believe he will "probably" do. The doctrine of "preventive arrests," so familiar a practice in totalitarian countries, has never found favour with us.

Mr. Zechariah Chafee wrote:

It is something quite new to punish men drastically who have done nothing wrong, merely for fear that they might do something wrong. Such a practice is wholly alien to the traditions of English-speaking freedom. These traditions were ably set forth by Justice Jackson, in allowing bail for the eleven Communists convicted in New York in 1950. [The Government had asked the Court to deny bail pending appeal of the case, asserting that there were no substantial grounds for the appeal, *Dennis v. United States*, 341 U. S. 494 (1951), and the defendants were a threat to the national security if left at large. The Court refused the request.] Justice Jackson said: "If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. *Imprisonment to protect society from predicted but unconsummated offences is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it.*"

Preventive Detention in Pakistan

The Security Act of Pakistan, which last year was kept alive with the help of Ordinance on two occasions, has now been given a new lease of life. The Act retains the provision of detaining suspected persons without trial. The only substantial changes made in this provision are that Advisory Boards would now be constituted to consider cases of detention and that the grounds of detention would be supplied to the detenu within fifteen days of his arrest. But these changes were required by the Pakistani Constitution and are not a concession on the part of the Government. The former Premier, Mr. Suhrawardy, had held out the hope that the whole of the Security Act would lapse and had made a promise that even if it had to be renewed it would no longer confer the power of detention. But neither the hope nor the promise has been realized. Public opinion in Pakistan is as hostile to preventive detention as public opinion in India. The "Pakistan Times" of Lahore has written as follows on this subject:

The cynical idea that the Security Act is an inevitable accompaniment and a vital safeguard of our freedom and sovereignty, which are in perpetual danger from internal enemies, runs counter to the basic postulates of democracy. It has been denounced by the people in the most unambiguous terms, because it does not give them credit for understanding the dictates of patriotism and distinguishing between liberty and licence and between well-meant opposition and sedition. It has never been intelligible to the people why transgressions of democratic freedom should be necessary for the preservation of peace and

tranquillity in this country when other democratic countries do not need them. It is only a people cherishing and enjoying personal liberty within a democratic system of law who appreciate the blessings of national liberty and know how to safeguard it. The Security Act is a denial of personal freedom ; and in its essential nature repugnant to the spirit which sustains national freedom.

The Government also retains the far-reaching and extremely tempting powers to coerce and abridge the freedom of the Press. It might impose pre-censorship, prohibit the publication of certain news and comments, and refuse to let a person publish a journal. The powers are, of course, in addition to the very stringent normal laws which govern the working of the Press.

Mass Treason Trial in South Africa

It will be recalled that in December 1955 as many as 155 persons in South Africa were arrested on a charge of high treason. The preliminary inquiry before a magistrate was concluded at the end of last month. A month previously the Government had withdrawn allegations of treason against 61 of them, which meant that the Government had discovered no material against them enough to sustain a charge of treason. The dropping of the charge against them itself proves, as the "New Statesman" writes, "the political nature of this affair." "So far only the prosecution's case has been heard. Apparently, therefore, the charges have been dropped before any defence has been offered and on the same evidence available when the arrests were made. In short, these 61 persons have been taken away from their homes and jobs and have lost a year of their normal lives simply at the arbitrary whim of the Nationalist Government. It is clearly an attempt to frighten all those courageous enough to offer opposition to apartheid. It is equally obvious that through incompetence these persons were arrested without even the evidence capable of sustaining charges against them within the wide confines of South African law. The Government has not even suggested that compensation might be paid."

All the remaining 95 persons were committed on 30th January last, the magistrate saying that the court had decided that there was "sufficient reason for putting all the accused on trial on the main charge of high treason." The accused include Indians, Africans and Europeans, men and women. High treason under South African law is a capital charge, the maximum sentence for it being death by hanging. As Father Huddleston says: "If these prisoners are declared guilty, then to love freedom is treachery and to proclaim it is high treason." The "New York Times" writes: "To fight for freedom is treason only to tyrants. To fight for racial equality, as these ninety-five people and thousands of others are doing in South Africa, is treason only in the eyes of those

who have passed laws giving themselves a godlike, omnipotent superiority because they are white men."

Sheikh Abdullah's Stand

ON KASHMIR'S FUTURE AFFILIATIONS

The release of Sheikh Abdullah, who was imprisoned four years and a half ago without formal charges, has certainly raised India in the estimation of the democratic world, which in its turn has improved her case in the Kashmir dispute ; but the release cannot be said to have made it easier for India to settle the dispute in the way she would like it to be settled.

Stoutly denying that he had conspired with foreign powers against India and asking for an independent inquiry into the reasons which led to his arrest and prolonged detention (Bakhshi Ghulam Mohammed, his successor in the premiership of Kashmir, who had formerly declared that he had documentary evidence to prove Sheikh Abdullah's treasonable activities, is now silent on this aspect of the matter and evidently is not in a mood to institute an inquiry), Sheikh Abdullah has been making a vigorous demand for a plebiscite to be held to decide the future of Kashmir as the only peaceful solution of the problem. The accession of Kashmir to India, to which he was a party was, according to him, forced by the then prevailing circumstances and was in any case provisional by all accounts. The link then established has therefore to be tested, he says, by consulting the wishes of the Kashmiri people. He does not accept the position of the Indian Government that the question of a plebiscite to which India had agreed must in the changed circumstances take a back seat and that priority must now be given to the question of liquidating the aggression that has taken place in Kashmir. Sheikh Abdullah says that since India had undertaken to hold a plebiscite in Kashmir after the tribal raiders had been driven back, it means that India of her own free will consented then to relegate the question of aggression to the background, and that it would serve no useful purpose to press this point of view now. In order to prove that the accession to India was meant to be provisional, he said :

The basis of my contention is: (a) Lord Mountbatten's letter of acceptance of the instrument of accession; (b) The innumerable statements made by Panditji (Mr. Nehru), the late Sardar Patel, the late Mr. Gopaldaswami Ayyangar and others on the floor of the Indian Parliament; (c) The statements made before the U.N. Security Council by various representatives of the Government of India, including the late Mr. B. N. Rau and Mr. Gopaldaswami Ayyangar and the decisions of the Security Council on the Kashmir question; (d) The white papers issued by the Government of India from time to time; and (e) The joint communique of the Prime Ministers of India and Pakistan in August, 1953.

Sheikh Abdullah seems to lay more emphasis on India's offer of a plebiscite to the Kashmiris than to her commitments with the United Nations, meaning that even if India can get away in the Security Council on the plea that a plebiscite cannot be thought of until the pre-conditions to the plebiscite are fulfilled, her promise to the people of Kashmir must in any event be fulfilled, and he lays much store by the assurance given by Mr. Nehru at a meeting in Lal Chowk in Srinagar in November 1947, after the valley had been cleared of the invaders, that the ultimate decision on the question of Kashmir's accession must rest with the people of Kashmir. The question cannot be disposed of, he says, by India or Pakistan, America or Russia. The only people who can decide are the people of Kashmir — four million men, women and children, Hindus and Muslims who inhabit the land; and India cannot go back on her promises to them. At one time, when Sheikh Abdullah was Premier, he is known to have favoured independence of Kashmir, and though after his release he has not put forward the demand for independence in explicit terms, he does not seem to rule out that contingency altogether. He interprets the self-determination which India has assured to the Kashmiris to include independence as an alternative to accession to India or Pakistan. He sees no reason to restrict the scope of self-determination by asking the people of Kashmir to decide only whether Kashmir's link should be with India or Pakistan, but he thinks that, in view of the irreconcilable differences on this question between the two countries, it would perhaps be best to let Kashmir exist as a neutralized zone, seeking the friendship of both India and Pakistan. In fact, Sheikh Abdullah, in speaking to the Kashmir State Assembly in 1951, had mentioned independence as one of the three alternatives before the Kashmiri people, though for his part he was then in favour, upon the whole, of accession to India. That he has been speaking of independence as a possible alternative seems to Bakshi Ghulam Mohammed as nothing short of treason, lending justification for his internment in 1953.

It is interesting to note that when in 1947 partition took place and a referendum was held to decide whether the N. W. Frontier Province and the border areas should go to India or Pakistan, the Frontier Gandhi had raised the same objection, viz., that the referendum was limited in scope to determine whether the Province should accede to India or Pakistan and did not extend to the determination whether it should be an independent territory, and because of this objection Khan Abdul Ghaffar Khan and his followers had boycotted the elections. One is reminded of this fact by an appeal recently made by the followers and adherents of the movement for the creation of Pakhtoonistan as a separate State, who are residents in the United States, to President Eisenhower to the effect that the military aid offered by his Government to

Pakistan should be withheld. In the appeal it is stated that Pakhtoon in race, language, form of government and every other thing is different from Pakistan; the only thing in common to both is religion. The people of that region should have been given the option in 1947, when referendum was taken, to decide not only whether they should form part of India or Pakistan but whether they should be allowed to live separately in an independent State. But Britain denied this choice to them and instead put their leaders — Khan Abdul Ghaffar Khan, Dr. Khan Saheb and others — into gaol. If now America gave military aid to Pakistan, then Pakistan would become strong and Pakhtoon's struggle for independence would receive a severe blow; therefore this aid should not be extended to Pakistan. Sheikh Abdullah's stand for self-determination which comprehends Kashmir's independence as a possible alternative is regarded as no less treasonable by Bakshi Ghulam Mohammed than the demand for independence by Pakhtoons was regarded by Britain in 1947. Anyhow the stress laid by Sheikh Abdullah on India's promise of a plebiscite to the Kashmiris as apart from her promise made in the U. N. injects a new political factor into a situation already complicated. Bakshi Ghulam Mohammed's hope apparently is that since he can point to much improvement in Kashmir's economic condition, effected largely at India's expense, he would be able to exert a much larger influence on the masses of Kashmir than Sheikh Abdullah, who can only appeal to nationalist sentiment can possibly exert, and that Sheikh Abdullah would soon cease to be the explosive element he was before his internment.

"Judicial Separation" in Bengal

The "Times of India" in an editorial says on this subject: "An item of news from West Bengal strikes us as really astonishing. Immediate steps, we are informed, are being taken by the State Government to separate the judiciary from the executive; and that not because of the intrinsic evil of the illicit union, but because, in the opinion of the Government, "various nation-building works now in progress are suffering owing to the double function of district officers." No plank in the political platform of the National Congress ever since its inception has been more insistently trodden upon and literally worn out by generations of nationalists than this one. And yet, Bengal, always in the forefront of political progress, has allowed ten years of independence and twenty years of self-government to elapse without implementing this elementary reform. The combination of executive and judicial functions in a single authority is obviously and radically wrong in principle; for it is calculated to make executive action virtually immune from the salutary check of judicial control. The British, for the sake of administrative convenience and conservation of power, found it necessary to combine the two inconsistent functions in a single authority, who was

revenue collector, head of the district police and district magistrate, all in one. This concentration of powers in a single officer tended to make him autocratic and irresponsible; and the Congress as the champion of the people's rights and liberties rightly cried itself hoarse over the matter. The union of executive and judicial powers in a single hand has, like England's Merry Monarch, taken an unconscionably long time dying. The only redeeming feature of the sorry show appears to be the decision of the West Bengal Government to abandon the idea of setting up a 'high-power committee' to prepare a scheme for such separation. The idea or at least the effect of setting up such a committee would only be to delay the matter indefinitely; for no committee of any calibre whatsoever is at this time of day needed to examine the merits and defects of the question and prepare a scheme of separation."

NOTES

All Wiretaps Ruled Illegal

By a Judge of the New York State's Supreme Court
SEQUEL TO FEDERAL SUPREME COURT DECISION

We reported at p. v. : 45 in our last issue the U. S. Supreme Court's judgment in a New York State case, declaring that evidence obtained by state officers through the use of wiretaps was inadmissible in court in federal prosecutions (formerly, the evidence obtained by wire-tapping by federal agents alone was held inadmissible in federal prosecutions). This decision had a remarkable sequel.

Although the Supreme Court now treats wire-taping by state or local police officers as a federal crime, even though a state law may permit it, it limited the scope of its decision to evidence to be used in federal prosecutions. The judgment was silent about the use of wiretap evidence in state prosecutions. It was generally believed that state courts would still be constitutionally free to admit such evidence if under their own rules of evidence this was permissible. But a Judge of the New York State's Supreme Court, Justice Hofstadter, has put a wider interpretation on the Federal Supreme Court's decision.

The police department generally applies for permission to use wiretaps for the detection of crime in New York City to the Supreme Court in New York County, and when Justice Hofstadter began sitting in this capacity on the Supreme Court, he declared on 2nd January that he would no longer sign any orders for wire-tapping although New York State's law permits the use in state prosecutions of evidence obtained by wire-tapping, and gave as his reason for refusing such requests of police officers the U. S. Supreme Court's judgment in the Benanti case, referred to above, which, according to him, had held that the state law on wiretaps was a

violation of federal law. Justice Hofstadter remarked that the Federal Supreme Court had ruled in that case that any "orders authorizing interceptions are contrary to the controlling federal law." He said:

The Supreme Court has held that the Communications Act is an "express absolute prohibition" against interception or divulgence of wire-tapping with no qualifications—that when state officers indulge in wire-tapping they are violating federal law and subject themselves to federal prosecution.

Clearly a judge may not lawfully set the wheels in motion towards the illegality by signing an order; the warrant itself partakes of the breach, wilful or inadvertent, of the federal law.

The Judge admitted that some might "differ from this interpretation." In that event, he suggested, his view should be challenged for "authoritative determination by our state appellate courts, subject of course to any ultimate review in the United States Supreme Court."

The Attorney General of New York State said: "If an action is brought attacking the constitutionality of the state law, I will appeal in my capacity as Attorney General to uphold the law." A district attorney remarked that the federal decision cited by Justice Hofstadter covered only "intercepting and divulging." He said, "it still does not say interception without divulging is a crime."

A bill has been offered by six Senators which, if passed, would reverse the above decision of the Supreme Court to the effect that the provision of the Communications Act of 1934 prohibiting wiretaps applies to state officials. The proposed legislation would amend the Act to provide that such wire-tapping is not a federal crime. It would exempt tapping of wires by state officials only where it was authorized by a state statute and where the tap was made under court order, as was the case in the Benanti case. At present only four states are understood to have specific wiretap statutes of this kind, and New York is one of these states. Proponents of the amendment are members of what is called the Senate racket committee, or the Committee on Improper Activities in the Labour or Management filed, and they favour exemption of wire-taps presumably because they have found that wire-taps, if made under proper safeguards, are a potent instrument of unearthing improper activities in industry.

Dismissal of Employees in Non-Sensitive Jobs

Eighteen-Month Limit on Suits Struck Down

It will be recalled that in the case of *Cola v. Young* (vide p. iv : 130 of the BULLETIN) the Supreme Court set aside the dismissal, as a security risk, of Mr. Kendrick M. Cola, who was employed on a non-sensitive federal job.

The dismissal had been ordered under the 1950 Act, which empowers, first, suspension and, afterwards, non-appealable dismissal by a departmental head under the security programme. The Act originally limited the power of discretionary dismissal to employees in eighteen departments like defence which are directly concerned with national safety. But later President Eisenhower by an executive order extended the operation of the Act to all federal employees under a provision of the Act authorizing such extension to other departments if in the opinion of the President this was "necessary in the best interests of national security." In the Cola case the Supreme Court decided that President Eisenhower had exceeded the authority which the Act had given him in extending the provisions of the Act to non-sensitive positions, as Mr. Cola's was, since the Act was aimed only at "those activities of the Government that are directly concerned with the protection of the nation from internal subversion or foreign aggression."

After this decision, which amounted to a ruling that all summary dismissals, as security risks, of federal employees in all non-sensitive positions, not concerned with the nation's safety, were illegal, the Government began promptly reinstating all those who had been discharged within eighteen months before the Cola decision and it laid down a rule barring reinstatement of alleged security risks who waited for more than eighteen months to challenge their dismissals in the courts. This policy was based on the legal doctrine of "laches", which means "undue delay in asserting a right." The Government's rule meant that those who had not sued for restoration within this time-limit were guilty of laches or excessive delay.

One Mr. Johnnie C. Duncan, an employee of the Post Office, who was dismissed as a security risk in February 1954, brought suit in a federal court for reinstatement after waiting for more than two years after his dismissal. The Government conceded that Mr. Duncan had held a non-sensitive job and that, under the ruling in the Cola case, his dismissal was illegal, but contended that his suit should be barred because waiting more than eighteen months to sue amounted to laches. The trial court upheld this contention.

Mr. Duncan then appealed to the Court of Appeals in Washington, which on 1st January held, in a 2 to 1 decision, that the eighteen-month limit was unreasonable. It ruled that Mr. Duncan — and others in his position — were justified in awaiting the Cola decision and said laches would not apply to anyone who sued within a "reasonable time" after that decision. The court thus struck down the eighteen-month rule and upheld Mr. Duncan's suit for reinstatement.

The Government has indicated that it will probably not appeal from this ruling to the Supreme Court. If the ruling stands, it will pave the way for reinstatement with back pay of all non-sensitive employees summarily fired before the Cola decision, whose number was estimated in 1956 at about 300.

Curb on Organization of Labour

Statute Held "Void on its Face"

The city of Baxley in Georgia state has an ordinance which requires labour union organizers to get a permit from the mayor and city council before soliciting new members. The mayor and the council, in passing upon an application for a permit for any person for seeking members for "any organization, union or society," are to consider "the character of the applicant, the nature of the business of the organization... and its effects upon the general welfare of the city of Baxley."

A labour worker, Miss Rose Staub, sought to organize members of a labour union without a permit and was convicted in the Georgia courts of violating the Baxley statute and sentenced to pay a \$300 fine or, in the alternative, to undergo imprisonment for thirty days. She challenged the validity of the ordinance in the Supreme Court.

On 13th January the Court declared the ordinance "invalid on its face" on the ground that it gave "uncontrolled discretion" to the mayor and city council to grant or deny permits and thus violated the Fourteenth Amendment's provision that no state may deprive one of liberty without due process of law. This provision has been held to apply to the states the free speech guarantee of the First Amendment. The ordinance was thus held to be an infringement of the right to freedom of speech. Justice Whittaker, who wrote the Court's opinion, said:

An ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official... is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

The Court was told at the hearing that similar ordinances were in force in many other Southern towns and cities. According to legal experts these also will be voided by the precedent of this judgment.

This case calls to mind the famous decision in *Thomas v. Collins* 323 U. S. 516 (1945), in which it was held that the right to freedom of assembly was abridged by requiring a union official to register with public authorities before soliciting union membership.