

The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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SUPREME COURT'S JUDGMENT IN THE LITTLE ROCK CASE

STERN INJUNCTION TO END SEGREGATION

The Supreme Court on 12th September unanimously rejected the Little Rock school board's appeal for delay in racial integration of the Central High School. This it did in a brief per curiam order by affirming the judgment of the Court of Appeals for the Eighth Circuit of 18th August, which reversed the order of the district court granting Little Rock postponement of two and one-half years in the integration plan devised by the school board in 1956. The school board had cited in its brief the public resistance to its plan and the violence which marked this resistance last year as proof sufficient that the delay it requested was necessary if its integration programme was to become workable. The board's petition for certiorari said that the Court should not "simply return the school district to the bedlam, turmoil and chaos which have been destroying the school district." "It would be height of irony," the petition said, "if the Little Rock school district, having made the start in good faith compliance to the Supreme Court's school decisions, were denied this postponement at the expense of the entire educational programme at the high school level." Failing such delay, it said, the Court should issue a "comprehensive" opinion laying out some solution to the threat of renewed violence. The National Association for the Advancement of Coloured People in its brief said :

Neither overt public resistance, nor the possibility of it, constitutes sufficient cause to nullify the orders of the federal court directing [the school board] to proceed with their desegregation plan. This court and other courts have consistently held that the preservation of public peace may not be accomplished by interference with rights created by the federal Constitution. Even if it be claimed that tension will result which will disturb the educational process, this is preferable to the complete breakdown of education which will result from teaching children that courts of law will bow to violence.

On 29th September the Supreme Court handed down its opinion giving reasons for its earlier per curiam

decision. As in the decision of May 1954 outlawing racial segregation in public schools, the Court was unanimous ; it wrote but one opinion presented by the Chief Justice, thus indicating unanimous agreement on the reasons as well as the result. In fact all the nine Justices were named as joint authors of the opinion, to emphasize the Court's continuing unanimity on the school issue. Because the opposing briefs had laid stress on the factor of violence or a threat of violence as a reason either for delaying or not delaying desegregation, the Court in its opinion gave particular consideration to this aspect of the question and said that while there might be valid reasons for delaying school integration in certain areas, mere local hostility to racial desegregation is not a valid reason for delaying integration. It also spelled out, to a certain degree, what it meant by "deliberate speed" in the decree which it handed down in May 1955 to implement its anti-segregation decision of 1954. Aware of the social upheaval which is bound to attend desegregation in the southern states, the Court permitted reasonably gradual adjustment to its ban on segregation. The decree took into account two factors: first, that desegregation will be more difficult in some communities than in others and, second, that "a prompt and reasonable start toward full compliance with our May 17, 1954, ruling" be made. It left to the federal district courts, however, the duty of supervising the difficult enterprise. These courts may allow extensions of time for carrying out the decree "with all deliberate speed," should there be reasonable grounds for doing so. During the entire period of transition, the courts retain full jurisdiction.

Following are excerpts from the text of the opinion: Central Issue

As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the governor and legislature of a state that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of

the United States Constitution. Specifically it involves actions by the governor and legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education*, 347 U.S. 483. That holding was that the Fourteenth Amendment forbids states to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property [alluding evidently to plans for setting up "private" school systems in Little Rock and elsewhere].

In affirming the judgment of the Appeals Court which reversed the district court, the Supreme Court accepted the good faith of the Little Rock school board in the matter of desegregation and also the district court finding that the progress of the school has suffered, but said :

The significance of these findings, however, is to be considered in light of the fact, indisputably revealed by the record before us, that the conditions they depict are directly traceable to the actions of legislators and executive officials of the State of Arkansas, taken in their official capacities, which reflect their own determination to resist this Court's decision in the *Brown Case* and which have brought about violent resistance to that decision in Arkansas. In its petition for certiorari filed in this Court, the school board itself describes the situation in this language: "The Legislative, Executive, and Judicial departments of the State Government opposed the desegregation of Little Rock schools by enacting laws, calling out troops, making statements vilifying federal law and federal courts, and failing to utilise state law enforcement agencies and judicial processes to maintain public peace."

One may well sympathise with the position of the board in the face of the frustrating conditions which have confronted it, but regardless of the board's good faith, the actions of the other state agencies responsible for those conditions compel us to reject the board's legal position. . . . The members of the school board and the superintendent of schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the state.

Constitutional Rights of Negroes

The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the governor and legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation [the right to acquire and occupy property without discrimination of race or colour]: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public

peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution" (*Buchanan v. Warley*, 245 U.S. 60, 81).¹

Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties, as counsel for the board forthrightly conceded in the oral argument in this Court, can also be brought under control by state action.

The controlling legal principles are plain. The command of the Fourteenth Amendment is that no state shall deny to any person within its jurisdiction the equal protection of the laws. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's

1 *Buchanan v. Warley*, 245 U. S. 60 (1917), struck down an ordinance of Louisville (Kentucky), which forbade Negroes to move into any block wherein the greater number of houses were occupied by whites, and vice versa. The ordinance was challenged by a white owner who desired to convey a lot to a Negro, and the Supreme Court held that such laws establishing exclusive residential zones for whites and blacks could not be sustained as they involved a taking of the owner's property without due process of law resulting from the depression of property values in the restricted zones. The Court said:

That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control and to which it must give a measure of consideration, may be freely admitted. But the solution cannot be promoted by depriving citizens of their constitutional rights and privileges.

The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of colour and of a coloured person to make such disposition to a white person.

It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution.

It is said that such acquisitions by coloured persons depreciate property owned in the neighbourhood by white persons. But property may be acquired by undesirable white neighbours or put to disagreeable though lawful uses with like results.

We think this attempt to prevent the alienation of the property in question to a person of colour was not a legitimate exercise of the police power of the state and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case, the ordinance cannot stand.

power, his act is that of the state. This must be so or the constitutional prohibition has no meaning.

"All Deliberate Speed" Clarified

The Court then proceeded to consider whether suspension of the Little Rock desegregation plan for thirty months is within the definition of "deliberate speed" prescribed by its 1955 decree. This ordered school desegregation everywhere to proceed "with all deliberate speed," but with the qualification that "additional time" would be allowed if school boards asking for it could demonstrate, to the satisfaction of the federal judiciary, that this "was necessary in the public interest and is consistent with good faith" in executing the decree. In elaborating the procedure, the Court said in the instant case:

Of course, in many locations obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a district court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation) might conclude that justification existed for not requiring the present non-segregated admission of all qualified Negro children. In such circumstances, however, the (district) court should scrutinise the programme of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation and had taken appropriate steps to put their programme into effective operation.

It was made plain (in the previous desegregation decision) that delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance. State authorities were thus duty-bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system.

There is a critical reference in the judgment to a "pupil assignment law," one of several moves by Arkansas that the lower court has said were designed to "perpetuate racial segregation." The point was made again that any state action in connection with a school would subject it to the rule of non-discrimination. After citing two Court of Appeals cases upsetting efforts to lease a courthouse cafeteria in Texas and a state park in Virginia in attempts to continue segregation, the Court said:

In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or colour can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly

by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."

Federal v. State Power

What has been said, in the light of the facts developed, is enough to dispose of the case. However, we should answer the premise of the actions of the governor and legislature that they are not bound by our holding in the Brown Case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.

Every state legislator and executive and judicial officer is solemnly committed by oath to support the federal Constitution. No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery. . . ." (United States v. Peters, 5 Cranch 115, 136.)² A governor who asserts a power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, "it is manifest that the fiat of a state governor, and not the Constitution of the United States would be the supreme law of the land; that the restrictions

² From the commencement of the U. S. Constitution the Supreme Court has always asserted the supremacy of the federal power when its authority was attacked by the states. United States v. Peters, 5 Cr. 115 (1809), is an early instance in which the doctrine that a state law in conflict with the federal Constitution would be disregarded was applied.

The Pennsylvania Legislature and Governor had protested against enforcement against a Federal court money judgment stemming from pre-Constitution privateering days. Chief Justice Marshall nevertheless insisted that the judgment be collected.

Pennsylvania sent militia to oppose Federal marshals. But after a short time the Legislature gave way. The commander of the militia, Gen. Michael Bright, was convicted of defying Federal authority.

In this case, Chief Justice Marshall, speaking for a unanimous Court, said:

If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution becomes itself a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all, and the people of Pennsylvania, as well as the citizens of every other state, must feel a deep interest in resisting principles so destructive of the Union and in asserting consequences so fatal to themselves. . . . The State of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause.

It will be readily conceived that the order which this Court is enjoined to make by the high obligations of duty and of law, is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty, and therefore must be performed. A peremptory mandamus must be awarded,

of the federal Constitution upon the exercise of state power would be but impotent phrases. . . ." *Sterling v. Constantin*, 287 U. S. 378, 398.)³

It is of course, quite true that the responsibility for public education is primarily the concern of the states, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no state shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law (*Bolling v. Sharpe*, 347 U. S. 497)⁴.

3. In the October 1957 number of the BULLETIN, at p. v: 7, we have given an account of *Sterling v. Constantin*, 287 U. S. 378 (1932) to show that the federal district court had power under the Constitution to enjoin Governor Faubus from using state troops for the purpose, as he stated, of preserving order and that the Court had power to review the propriety of his action. In this case Mr. Ross Sterling, Governor of Texas, had declared martial law at each oil well in an effort to enforce pro-rationing in the oil industry, contending that "the Governor has power to declare martial law; that courts may not review the sufficiency of facts upon which martial law is declared; that courts may not control by injunction the means of enforcing martial law; and that the finding of the Governor of necessity to take property [oil wells in this case] is due process of law." Chief Justice Hughes in the great opinion in this case repudiated the contention that the district court was powerless to intervene by injunction and "that the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal Government." The opinion declared: "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."

4 *Bolling v. Sharpe*, 347 U. S. 497 (1954), is a companion case to *Brown v. Board of Education of Topeka*, 347 U. S. 483 (1954), which came from the four southern states of Kansas, South Carolina, Virginia and Delaware. In the latter case the Supreme Court held that the equal protection clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. In the former case which came from Washington, the Court held that the due process clause of the Fifth Amendment prohibits racial segregation in the public schools of the District of Columbia.

"Segregation persisted in the District of Columbia, owing to the fact that the District was carved out of the southern states of Virginia and Maryland, and the native population of the District inherited the traditions of southern communities on this problem. Congress itself has taken no legislative action with respect to segregation in the District. In 1953, however, the Supreme Court unanimously held valid and in full force an act passed in 1872 by the Legislative Assembly of the District which made it a crime to discriminate

(Continued on Second Column)

Equal Justice Under Law

The basic decision in *Brown* was unanimously reached by this Court only after the case had been briefed and twice argued and the issues had been given the most serious consideration. Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the states to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of Equal Justice under Law is thus made a living truth.

Crisis in the Taiwan Strait

Signs of Realignment in U. S.'s Muddled Policy

At this writing the crisis in the Taiwan Strait has eased, and there is a chance for the United States to straighten out her entanglements in that region, which might force her into a major war due to pressure either from Nationalist or Communist China and to relieve herself from a position of isolation from her friends into which she has needlessly brought herself. It is clear that Red China's blockade of the offshore islands has a limited objective and is not intended to lead to an amphibious assault, particularly because latterly the artillery duel there has proved more difficult for the Communists than had at first appeared. A change in U. S. policy towards this problem is already visible. Secretary of States Dulles said recently at a press conference it was "rather foolish" for the Kuomintang to have put such large forces on the Quemoy and Matsu groups of islands in the first place and that if the Peking Government would stop their bombardment and even if a de facto cease-fire (such as now is in force) could be arranged it would "not be wise" to keep them there, indicating that he would press Chiang Kai-shek to reduce, if not to withdraw, these forces from the islands. On the other hand the Peking Government has suspended artillery fire in order to facilitate a solution of the offshore islands by negotiation and has announced that even in regard to Taiwan, with which alone the U. S. Government should really concern itself, she would be prepared, while maintaining her claim on it, to discuss its future without resort to force and that whatever the out-

(Continued from First Column)

against any person on grounds of race or colour in any restaurant or other eating place (*District of Columbia v. Thompson Co.*, 346 U. S. 100). The District enjoyed a measure of self-government at that time. The Court held the Act could not be deemed abandoned or replaced as a result of non-use. Since this decision in *Bolling v. Sharpe*, 347 U. S. 497 (1954), the end of segregation in the District seems clearly in sight. — R. E. Cushman in "Civil Liberties in the United States."

come of the discussions both parties should renounce acts of war. On this question Mr. Dulles for his part stated that any renunciation of force by the Communists would apply equally to the Nationalists, saying that it would be "quite impractical and quite wrong to ask the Chinese Communists to abandon use of force if they were being attacked by the Chinese Nationalists." He further declared that the return of the Nationalist regime to the mainland is "highly hypothetical" and that in any case the United States has "no commitment of any kind to help the Nationalist Government in such an adventure." President Eisenhower himself says that the retention of the offshore islands in the hands of the Chiang Kai-shek regime is not really vital to the defence of Taiwan, to which the U. S. is committed, and that as a soldier he does not regard it a good thing that the Chinese Nationalists should have maintained such a large garrison there. This realistic view should enable the United States Government to realign its policy both in regard to the offshore islands and Taiwan in such a way that it would appeal to its allies and the whole world as a right and sound policy.

The Quemoy islands which lie just off Amoy harbour three to five miles from the coast and the Matsu islands off Foochow about ten miles from the mainland, have happened to remain in possession of Generalissimo Chiang Kai-shek when his Government collapsed on the mainland in 1949 and he fled to Taiwan and several of the smaller offshore islands, only because the Communist regime at that time had no navy to capture them. They lie within the artillery range of the Red Chinese in the mainland and are in fact indefensible unless the United States is willing to run the risk of a war for their sake. They are of no particular strategic value to the Nationalists either. They are utilised by the Nationalists to blockade the important ports of Amoy and Foochow and the coastal shipping lanes and as bases for espionage and hit-and-run commando raids against the mainland. In Chiang's hands they are useful only for thus harassing the Communists and serve as a symbol that one day he may use them as an offensive base for reconquering the mainland. There is no sane man who thinks that this dream would ever come true. But clinging fast to it, he has concentrated a third of his entire military forces on these islands. In face of such provocation it is but natural for Peking to assert dominion over these islands which lie on its doorsteps. Historically and geographically, the islands are part of the mainland and it is impossible to conceive that Peking would let them remain with Chiang for long without making an attempt to capture them. President Eisenhower treats such attempts as armed aggression; but they really form part of the long-standing civil war between the Reds and the Nationalists and international law gives the U. S. no right to interfere with them.

It would have been a different thing if the defence of the offshore islands were necessary for the defence of Taiwan and the Penghus, which the United States is

under a treaty obligation to defend. But all experts have said that Nationalist China might well evacuate the islands and yet maintain her hold over Taiwan—of course, with U. S. support. In fact, they say that the large military build-up on the offshore islands is really a source of weakness to the Taipei Government. "For a Communist attack on those islands (i.e., Formosa and the Pescadores) would certainly by-pass the offshore islands, leaving their garrisons to 'wither on the vine.' Their present location actually weakens Chiang's capacity to defend or attack. If he entertained serious intentions of invading the mainland he could ill afford to run the serious risk of losing half his total offensive strength in all-out defence of Quemoy. Moreover, the troops on the offshore islands are poorly located, since it would not be logical to attempt an invasion into the Fukien Mountains opposite Quemoy and Matsu. Based on Formosa, these troops could be trained for offensive action, either in defence of that island or in operations against the mainland from Shanghai to Canton. In their present position they are immobilized in a static defence and exposed to destruction." The best plan for the United States would be to take the whole question to the United Nations both of the temporary defence of the status quo and a decision as to the ultimate ownership of the islands. The U. N. would probably recommend evacuation of the islands by Chiang; neither he nor the U. S. would suffer any serious loss if the recommendation were carried out. It would then be for the U. S. to persuade Chiang to remove his garrison to Taiwan, as was done in 1955 in the case of the Tachen islands.

But the more important question is about Taiwan itself. The United States is pledged by a mutual security treaty to defend Taiwan and the Penghus against attack. The U. S. interest in these islands—a very proper interest—is that Taiwan should not again be used to mount an attack on the Philippines and the Western Pacific, as Japan employed it prior to Pearl Harbour. The U. S. regards Taiwan as a vital link in the island chain which extends from the Aleutians south through Japan, Okinawa, the Philippines and Singapore and which constitutes the free world's defence perimeter, and it has been spending one hundred million dollars annually to preserve this region for the free countries. But it is doubtful whether the U. S. should unilaterally assume such a tremendous responsibility alone. A better course would be to promote plans in the U. N. for leaving the decision on the future status of Taiwan to Taiwanese themselves. Taiwan's position is very different from that of Quemoy and other offshore islands. Communist China can lay no legal or moral claim to it, nor can Nationalist China. The Japanese peace treaty deprived Japan of any interest in Taiwan but did not specify to whom it was to belong in future. So the island of Taiwan is not as yet a part of China, and in fact it has not been governed for many generations from the mainland. "The Taiwanese are a mixture of the Chinese who settled the

island about three hundred years ago and the then natives who were of Malayan origin. The language is a corrupt Chinese dialect. The Taiwanese are not true Chinese." Mr. Finletter, former Secretary of the Air Force, has suggested that the question of who is to exercise sovereignty over Taiwan and the Penghus as a unit should be referred to the United Nations and that the United States should propose to the world organization that the future status of these islands should be the subject of a plebiscite by these who live permanently on these islands. Mr. Walter Lippman has made the same proposal, that the U. S. should go to the United Nations and propose that Formosa be constituted an "autonomous territory neutralized and demilitarized under international supervision." It would be a corollary, he says, of such a proposal that the bulk of the mainland Chinese in Formosa should be repatriated to the mainland and that Chiang and his lieutenants should be given asylum in some safe place. Several other thinkers have propounded such a solution.

Mr. Lewis Mumford, e. g., endorses a proposal "to establish the Formosans as a self-governing nation, free from both Chinese Communist or Chinese Nationalist dominion," and says that "this might well be made a condition for Communist China's prompt admission to the United Nations." Everyone realizes that there is little chance of Red China agreeing to this plan. But the moral effect of the U. S. putting forward such a proposal would be tremendous. Even if in the United Nations such a recommendation does not go through, such a plan would be regarded everywhere as an attempt to find a just solution to an intricate problem. In any case, as Mr. Finletter says:

American prestige would rise enormously with the proof that we stand for self determination and do not arrogate to ourselves a foreign authority we cannot justify. We should have created a situation where we would not alone be running the risk of total war against the Sino-Soviet Communist mass.

LOYALTY OATH REQUIREMENT STRUCK DOWN

AS A DEVICE TO COERCE CONFORMITY OF OPINION

Besides the oath which all public officials have to take to support the Constitution, many states in the U. S. A. also require a loyalty oath of various kinds to be signed in a number of proceedings. California, for instance, under its law of 1953 provides that all applicants for exemptions from property tax, war veterans and churches, primarily, must swear that they do not advocate overthrow of the government by force or violence, "nor advocate support of a foreign government against the United States in the event of hostilities." The First Unitarian Church of Los Angeles and the Valley Unitarian-Universalist Church and two-war veterans, who had been denied tax exemptions because of refusal to sign the oath, came to the Supreme Court in appeal against the state supreme court's 4 to 3 decision upholding the loyalty oath, and the Supreme Court on 30th June, by a majority of 7 to 1, voided the oath requirement on the ground that the statute, by placing the burden of proof of non-advocacy of the proscribed doctrines on the taxpayer instead of the state, violated the due process clause of the Fourteenth Amendment. This is another of the Supreme Court's recent decisions of far-reaching importance. (We somehow missed the decision at the time, and in any case we could not then have given as full a report as we are able to give now. We make no apology therefore for referring to this matter even at this late stage.) The decision directly affects over 35,000 churches and more than one million veterans. But the sweep of the decision is very much wider still. It not only bars the use of a loyalty oath in such tax exemption cases, but also halts the further spread of loyalty oaths for any collateral purpose: for, as Mr. Wirin who appeared as counsel in these two church cases said, "The decision, in shifting to

the tax authorities the affirmative burden of demonstrating disloyalty as to each particular tax exemption claimant, establishes the precedent which could nullify all loyalty oaths, since the basis of such oaths up to the time of this decision has been that the burden is on the citizen to assert his non-disloyalty."

Justice Brennan, speaking for the Court, said:

To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the state were to fine them for this speech.

The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished is finely drawn. The separation of legitimate from illegitimate speech calls for more sensitive tools than California has supplied. In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. . . . Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact-finder of his guilt. Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the state bear the burden of persuasion to show that the applicants engaged in criminal speech.

The vice of the present procedure is . . . that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear these burdens.

We hold that when the constitutional right to speak is sought to be deterred by a state's general taxing programme due process demands that the speech be unencumbered until the state comes forward with sufficient proof to justify its inhibition. The state clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech. Accordingly, (the California statute's) enforcement through procedures which place the burdens of proof and persuasion on the taxpayer is a violation of due process.

Justice Black wrote :

The case offers just another example of a wide-scale effort by government in this country to impose penalties and disabilities on everyone who is or is suspected of being a "communist" or who is not ready at all times and all places to swear loyalty to State and Nation. Government employees, lawyers, doctors, teachers, pharmacists, veterinarians, subway conductors, industrial workers and a multitude of others have been denied an opportunity to work at their trade or profession for these reasons. Here a tax is levied unless the taxpayer makes an oath that he does not and will not in the future advocate certain things; in Ohio those without jobs have been denied unemployment insurance unless they are willing to swear that they do not hold specific views; and Congress has even attempted to deny public housing to needy families unless they first demonstrate their loyalty. These are merely random samples; I will not take time here to refer to innumerable others, such as oaths for hunters and fishermen, wrestlers and boxers and junk dealers.

Loyalty oaths, as well as other contemporary "security measures," tend to stifle all forms of unorthodox or unpopular thinking or expression—the kind of thought and expression which has played such a vital and beneficial role in the history of this Nation. The result is a stultifying conformity which in the end may well turn out to be more destructive to our free society than foreign agents could ever hope to be. The course which we have been following the last decade is not the course of a strong, free, secure people, but that of the frightened, the insecure, the intolerant. I am certain that loyalty to the United States can never be secured by the endless proliferation of 'loyalty' oaths; loyalty must arise spontaneously from the hearts of the people who love their country and respect their government. I also adhere to the proposition that "the First Amendment provides the only kind of security system that can preserve a free government—one that leaves the way wide open for people to favour, discuss, advocate, or incite causes and

doctrines, however obnoxious and antagonistic such views may be to the rest of us.

Justice Douglas wrote in a separate judgment :

The state by the device of the loyalty oath places the burden of proving loyalty on the citizen. That procedural device goes against the grain of our constitutional system, for every man is presumed innocent until guilt is established. This technique is an ancient one that was announced in an early period of our history.

If the government may not impose a tax upon the expression of ideas in order to discourage them, it may not achieve the same end by reducing the individual who expresses his views to second-class citizenship by withholding tax benefits granted others.

The California oath is not related to unlawful action. . . . There is still a clear constitutional line between advocacy of abstract doctrine and advocacy of action. . . . No conspiracy to overthrow the government was involved. Speech and speech alone was the offence. I repeat that thought and speech go hand-in-hand. There is no real freedom of thought if ideas must be suppressed. There can be no freedom of the mind unless ideas can be uttered.

I know of no power that enables any government under our Constitution to become the monitor of thought, as this statute would have it become.

There is no power in our government to make one bend his religious scruples to the requirements of this tax law.

COMMENTS

Whither Pakistan?

The exceedingly drastic action (nothing could be more drastic) taken by the President of Pakistan—abrogation of the Constitution, dismissal of Ministries, dissolution of the legislatures, disbandment of political parties and imposition of martial law on the whole country—appears from the appalling state of things in that country to be wholly justified. Independent journals in Pakistan not attached to any political party fully endorse the anarchic condition that prevails in that country. It is said that life is not secure even in the big cities, not even in the capital; one is always afraid of being waylaid by goondahs, and the worst part of it is that these goondahs are maintained by influential politicians who see to it that they escape punishment and are able to carry on their nefarious activities for their own profit. Recently two municipal councillors of the Karachi Corporation belonging to the Muslim League were arrested under the Security Act, and the people were so relieved that they began crying out: why cannot the Ministry do in the rest of the country what the Commissioner has done in Karachi?

Complaints are rampant that hoarding, profiteering and blackmarketing go on unchecked, and that whenever controls are imposed they are so worked as to profit those whom influential politicians want to favour, causing artificial shortages of the necessities of life and sending up their prices to unprecedented heights. Big landlords and industrialists have the free run of the country and the common man who toils on the farm or works in a factory is relentlessly exploited. Political parties may have or profess to have differences of opinion in regard to some big matters like the foreign policy of Pakistan or one unit of Western Pakistan or elections on common or communal electorates, but all of the parties seem to be united in being unable or unwilling to check the activities of those whose one aim is to grind down the poor. Even on the big questions the policy which any particular party may espouse appears to be related not to any principles but to the advantage that that party may temporarily expect to derive from striking that particular attitude. If respectable journals of that country are to be believed, there is hardly a political leader of any stature who can be trusted not to succumb, in determining the policy of his party, to sheer unprincipled opportunism or to be above corruption, jobbery or nepotism. Open incitement to violence is preached, and it is left to such independent newspapers to condemn it.

There seems little doubt that under the suspension of the Constitution, the lot of the common man will improve, whatever may happen to the politicians. Maj.-Gen. Iskandar Mirza hopes after some time, when the rot has stopped, to frame a new Constitution and submit it to a referendum of the people. This idea apparently suggested itself to him by what Gen. de Gaulle did in France, but Pakistan's malady is more deep-seated than France's, and it is doubtful if within a measurable distance of time it will be possible to introduce democracy in Pakistan. We in India view this debacle with great grief. Indians did not like the creation of Pakistan as a separate state, but that having been established, everyone would like to see it grow into a stable and prosperous country. It is to India's own interest that her neighbour should make progress socially, economically and politically. We wish she would be able soon to start on that new road.

De Gaulle's Astonishing Victory

That such a heavy majority (about 80 per cent.) of the 26 million registered voters of continental France voted for Gen. de Gaulle's Constitution of the Fifth Republic is a great tribute to the faith which the French people have in his honour and integrity. It was widely recognized that the new Constitution must provide for effective executive authority which was lacking in the four previous Republics and must curb the power of the Legislative Assembly which had turned a Government out once every six months since the war-time liberation

of France in 1944. But the French people would not have agreed to give almost dictatorial powers to the President (and the next President would be de Gaulle himself) if they had not felt confident that however little respect de Gaulle might have for formal democracy, he would not use those powers for personal aggrandisement. Those who know him vouch for the fact that de Gaulle is no dictator, still less a military adventurer. He has a sense of mission, and the people of France have a feeling that he may achieve results which no lesser person has a chance of achieving in the parlous situation which faces France at present. The heavy approving vote in the referendum is an endorsement of his leadership.

The President is the fulcrum in the new Constitution. He is to be the arbiter and guide for the entire nation. He is to be indirectly elected by a college of about 75,000 persons consisting of the members of Parliament, members of the General Councils representing the departments and the representatives of the municipal councils chosen on the basis of roughly one per thousand of population. During his seven-year term, he will not be accountable for his actions except in cases of grave dereliction to the performance of his duty such as an attempt to subvert the Government, which would be punishable as an act of treason. The President is specifically authorized to exercise authoritarian powers in an emergency. These exceptional powers, the Constitution states, may be assumed only when the institutions, independence and territory of the Republic are threatened and when its Government ceases to function normally — as was the case in the German invasion of 1940. The Constitution also provides that when assuming such powers, the Premier, the Presidents of the Assembly and the Senate and the Constitutional Council must be consulted and that " the National Assembly cannot be dissolved during the exercise of the exceptional powers. " But otherwise the Assembly is subject to Presidential dissolution. This right is however hedged by the provision that the Premier and the Presidents of the Assembly and the Senate must be consulted and general elections held within twenty to forty days after the dissolution. The Constitution defines thirteen broad categories of legislation as Parliament's particular province ; and these include : civil rights and liberties, property rights, justice, education, taxation and finances, social and labour legislation and national defence. But on the whole the President can be a dictator if he wants to, and the French people seem convinced that though the letter of the Constitution exalts the role of the executive it will not in practice, while de Gaulle is at the helm of affairs, be too much enhanced so as to destroy the concept of a Republic.

The vote cast in the overseas territories was still more overwhelmingly in favour of the Constitution, i. e., in favour of these territories staying within the French

community. Only Guinea has decided to sever its ties with France. The adhesion of all the other territories is undoubtedly due to the fact that French colonial policy during the later stages of the Fourth Republic was liberal. "Besides enjoying an increasingly large measure of home rule, the rising African politician appreciates that at the present stage French experience is still valuable." But the main question, the one for which de Gaulle was called to office with unprecedented powers, is: how will he deal with the Algerian revolt? There can be no doubt that he will try for a negotiated settlement, and possibly as a step towards it he has offered the Africans an ambitious five-year plan of economic and social development of which the main features are the following:

Ten per cent of the young men and women entering civil service in metropolitan France shall be drawn from Arab, Kabyle or Mzabite communities.

Algerian wages shall be increased until they are comparable to wages in France.

About 625,000 acres of land shall be distributed to Moslem peasants.

Before the end of five years "the first phase of an agricultural and industrial development plan will be completed." This plan includes utilization of the oil and gas of the Sahara, large metallurgical and chemical combines, dwellings for 1,000,000 persons, development of adequate sanitary equipment, ports and highways. It is to bring permanent employment to 400,000 new Algerian workers.

Two-thirds of the Algerian children shall be going to school at the end of five years. Three years later there shall be schools for all.

In the elections to be held within two months Moslems and Europeans will vote on an equal basis, giving at least two-thirds of the representation to the Moslems, which will demonstrate that the second class citizenship of the Algerians has disappeared for ever. De Gaulle is yet feeling his way, and it is to be hoped that if it becomes eventually necessary he will not deny Algeria, merely because juridically it is part of metropolitan France, the independence which he offered to other overseas territories and which has in fact become effective in the case of Guinea.

SEA CUSTOMS ACT

Sec. 178 A (1) Voided by Madras High Court

THE BURDEN OF PROOF PROVISION

A divisional bench of the Madras High Court consisting of Rajagopalan C. J. and Balakrishna Aiyar J. on 11th September held, while allowing two writ petitions, held sec. 178 A (1) of the Sea Customs Act void under Art. 13 of the Constitution. The section reads as follows:

Where gold is seized under this Act in the reasonable belief that it is smuggled gold, the burden of proof that it is not smuggled shall be on the person from whose possession the gold was seized.

The petitions were filed by the proprietor and an employee of a firm which carries on business in bullion and jewellery at Madras. When the employee of the firm alighted from the Bombay Mail at the Madras Central Station on 26th June 1956, he was in possession of four blocks of moosa gold weighing about 100 tolas. He was not then in possession of any bill or purchase receipt or weight slip for the gold. The customs officials seized this gold in spite of the employee's claim that he had purchased the gold for the proprietor. The Collector of Customs, Madras, issued a notice to the employee to show cause why the gold should not be confiscated, as he had not discharged the burden of proof imposed upon him by sec. 178 A (1) of the Sea Customs Act to prove that the gold was not smuggled gold. Not satisfied with the explanation, the Collector passed an order on 11th March 1957 confiscating the gold. The writ petitions challenged this order in the Madras High Court.

After examining in detail the contentions of the petitioners and the arguments advanced by the Advocate-General, Their Lordships observed, in dealing with the first ground on which the order of confiscation was attacked, that the question they had to determine was: "Does the imposition of the statutory burden by sec. 178 A of the Sea Customs Act offend against the fundamental rights guaranteed to the petitioners as citizens of India by Art. 19 (1)(f) and/or Art. 19 (1)(g) and can that burden be viewed as a reasonable restriction on the exercise of these rights within the limits prescribed by clauses (5) and (6) of Art. 19 of the Constitution?"

Their Lordships referred to the decisions of the Supreme Court and the Bombay High Court bearing on the question, and observed that in examining the reasonableness or otherwise of a statutory restriction imposed on the exercise of the fundamental rights guaranteed by Art. 19 (1), they had to consider among other things, what need it was that the statutory provision was intended to serve. From the statement of objects and reasons of the Bill by which sec. 178 A was incorporated into the Sea Customs Act, two factors emerged. One was that the section was intended to prevent smuggling of gold, among other commodities, to safeguard the revenues of the State and to prevent smuggling in contravention of the Foreign Exchange Regulation Act. The other factor was that it was not always easy for the customs authorities to prove that the goods were smuggled goods. In that case it amounted to saying: "You may, from the facts within your personal knowledge, prove that you bought gold bonafide in the open market. But that is not enough,

You must establish by positive evidence when and under what circumstances this piece of gold came into this country." Put that way, Their Lordships said, the unreasonableness of the demand sanctioned by sec. 178 A (1) of the Sea Customs Act becomes clear.

Their Lordships agreed that it was not to every piece of gold found in the country that sec. 178 A of the Sea Customs Act would apply. The section limited it to gold that was seized "in the reasonable belief that it was smuggled gold," in which case it was for the person from whom it was seized to prove that it was not smuggled. As the Supreme Court had pointed out, the only pre-requisite for the application of the section was the subjectivism of the customs officer in having a reasonable belief that the goods were smuggled. Certainly, it was not every seizure that ultimately resulted in confiscation. But to those brought up to believe almost as an article of faith in the initial presumption of innocence in the case of a person charged with the commission of an offence punishable under the law, it should be obvious that for the legislature to cast the initial burden of proof on such a person was per se a violation of the safeguards provided by the Constitution. If such a legislative provision affected or abridged any of the fundamental rights guaranteed and constituted a restriction on the exercise of those rights, the Courts would have to examine the reasonableness of the restriction.

After referring to a recent Bombay decision, Their Lordships upheld the first contention of counsel for the petitioners that sec. 178 A (1) of the Sea Customs Act constituted an unconstitutional infringement of the fundamental rights of the petitioners secured by Art. 19 (1) (f) and (g) and was, therefore, void under Art. 13 of the Constitution and was unenforceable against them.

Their Lordships also upheld the second contention, that unless it was established that the gold was seized "in the reasonable belief that it was smuggled gold," sec. 178A (1) could not apply. It was "belief" and "reasonable belief" of the officer who effected the seizure that was required, and not mere suspicion. In the present case the order of seizure stated that it was "for further investigation." There was no indication that the Customs Inspector who seized the gold "reasonably believed" at that stage that the gold was smuggled gold. Therefore, the second contention of the petitioners should prevail and that by itself was sufficient to set aside the order of the Collector of Customs.

In the result Their Lordships held that the Collector's order of confiscation was based on sec. 178 A (1), which was invalid and inoperative. The order was set aside. The other relief prayed for was the return of the seized gold. Their Lordships held that the petitioners were entitled only to a writ of mandamus to the Collector to hear and determine the question afresh without reference to sec. 178 A of the Sea Customs Act.

NOTES

Tightening of Anti-Obscenity Statute

Two bills were passed by the U. S. A. Congress in its last session which tighten the provisions of the current federal statute relating to obscenity, and the bills, having been signed by the President, have become law.

This statute provides that every writing which is obscene, lewd, lascivious, filthy or of an indecent character is non-mailable, and that any person knowingly depositing for mailing or delivery any such writings shall be subject to criminal penalty. Under the statute anti-obscenity prosecutions could be brought, it was believed, only in the district in which the material was mailed. The scope of the statute has now been widened by an amending bill permitting prosecution also in the district where such material was received. The other bill amends the law passed two years ago permitting postal authorities to impound obscene material for twenty days while seeking a permanent court injunction. The law had exempted certain categories of material from the operation of its provision. The new law removes the exemption of two such categories.

The statute barring obscene literature from the mails has been pronounced to be constitutional on many occasions in the past, and most recently in *Roth v. United States*, 354 U. S. 476 (1957)—vide p. iv: 307 of the BULLETIN. In this case the Supreme Court, although acknowledging that all "ideas having even the slightest redeeming social importance" have the full protection of the constitutional guarantees of free speech and press notwithstanding that they are unorthodox, controversial or even hateful to the prevailing climate of opinion, ruled that "obscenity is not within the area of constitutionally protected speech or press." The test of obscenity which the Court applied (specifically rejecting the *Hicklin* test current in Britain) was: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

It may be noted here that Dr. Gellhorn, Betts Professor of Law at Columbia University's Law School, has attacked this *Roth* decision, liberal as it is, on the ground that it still permits of censorship. He says:

Much of the support for censorship derives from a widely held belief that reading is likely to be reflected in behaviour. The admittedly incomplete scientific evidence now at hand suggests quite the contrary. Extensive studies of delinquent children are strongly persuasive that their delinquent behaviour is not connected with "bad" reading.

Those who oppose censorship neither deny the existence of immorality and crime, nor approve of them. They doubt that censorship will in fact eliminate or moderate them, because their causes lie elsewhere than in reading matter.