

The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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PARLIAMENTARY PRIVILEGE

I.—LAW AND CUSTOM IN COMMONWEALTH COUNTRIES

In England the unwritten law of Parliament was supposed to confer vague and extensive privileges on MPs and for quite a long period they were enforced too, often with great severity. But later a good many of the privileges fell into desuetude and only a few were really available for active exercise. "By the time of the Reform Act of 1832, the only privilege remaining to members beyond the walls of St. Stephen's were freedom from arrest, assault, insult or menace in their coming or going from the House, and inviolability, so far as the outside world was concerned, for their utterances within the Chamber." (Arthur Beauchesne, K. C., LL. D.) Commonwealth countries in the beginning adopted all the privileges in theory but took power to define which of them would be in force for their legislative bodies. It may be stated as a general proposition that even in those countries where they were left undefined, sparing use was made of only a few of the more important ones, and that in those countries where they were defined they were limited to only two or three, which were regarded as necessary to enable the legislatures to perform their duties effectively. Some Commonwealth countries prescribed their own privileges without reference to those of the Mother of Parliaments. We shall attempt here a survey of the state of the law in this respect, which will show that the remark made by Mr. Leo Kohn in regard to the Irish Free State is generally true of most of the Commonwealth countries, viz.:

The wide sphere of parliamentary privilege, the repository in the British Parliament of latent powers of extensive scope, has been restricted by the Irish Constitution within the narrow limits of practical expediency.

Before proceeding however to state how Commonwealth countries defined parliamentary privilege, it may be observed that to define privilege was itself foreign to the concept that prevailed in England. That concept was:

The dignity and independence of the two Houses are in great measure preserved by keeping their privileges indefinite. If all the privileges of Parlia-

ment were set down and ascertained, and no privilege was to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof, to harass any refractory member and violate the freedom of Parliament.

Canada and Australia

Canada was the first country to achieve independence, and its Constitution (the British North America Act, 1867) in sec. 18 provided for parliamentary privilege. This section, as slightly amended in 1875, runs as follows:

The privileges, immunities and powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the members thereof, respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities and powers shall not confer any privileges, immunities or powers exceeding those at the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

The next country to become independent was Australia, and the Commonwealth of Australia Act, 1901, contains a provision in sec. 49 corresponding to sec. 18 of the Canadian Constitution. It is as follows:

The powers, privileges and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

It will be noticed that the section does not contain the limitation mentioned in the British North America Act, viz., that the privileges shall not exceed those of the British

House of Commons, and that the Australian Parliament had in theory unrestricted authority to define and declare its privileges. But, as we saw in the last issue, the privileges, actually enforced, were not many and till 1955 no punishment was imposed for a breach of privilege.

Sec. 49 is followed by another which confers on the Commonwealth Parliament the privilege of "exclusive cognisance of matters arising within it." It provides that both Houses shall have full power to regulate their procedure. Sec. 50 (1) says :

Each House of the Parliament may make rules and orders with respect to the mode in which its powers, privileges and immunities may be exercised and upheld.

It will be remembered that Dr. Evatt pleaded in 1955 that in laying down the procedure for the enforcement of privileges under this section care should be taken to see that privileges can be exercised only in a way so as to be in consonance with established canons of justice, which he said was not the case in England in determining and dealing with contempt or breach of privilege.

South Africa

The Union of South Africa was the first Commonwealth country which, in determining the privileges of its own Parliament, made no reference to the privileges of the British Parliament. Sec. 57 of the South Africa Act, 1909, provides :

The powers, privileges, and immunities of the Senate and of the House of Assembly and of the members and committees of each House shall, subject to the provisions of this Act, be such as are declared by Parliament, and until declared shall be those of the House of Assembly of the Cape of Good Hope and of its members and committees at the establishment of the Union.

The privileges of the House of Assembly of the Cape of Good Hope are, we believe, those that are mentioned in Cape Colony's Act No. 1 of 1854. We quote the relevant portions of it here in full.

WHEREAS it is essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise Legislation, that the Freedom of Speech and Debates, or Proceedings in Parliament, should not be impeached or questioned in any court or place out of Parliament, and that no obstructions or impediments should exist to the Publication of such Reports, Papers, Votes, or Proceedings of either House of Parliament as such House of Parliament may deem fit or necessary to be published :

And whereas it is fit that such Freedom should be secured by Law, and that all such obstructions or impediments, should any arise, may be summarily removed :

Be it therefore enacted by the Governor, by and with the advice and consent of the Legislative Council and the House of Assembly, that there shall be Freedom of Speech and Debates, or Proceedings in Parliament, and that such Freedom of Speech and Debates, or Proceedings in Parliament, shall not be liable to be impeached or questioned in any court place out of Parliament.

II. And be it enacted, that it shall and may be lawful for any person or persons who may be a defendant or defendants in any civil or criminal proceeding, commenced or prosecuted in any manner soever, for or in respect of the publication of any Report, Paper, Votes, or Proceedings, by such person or persons, by or under the authority of either House of Parliament, to bring before the court in which such proceeding shall be commenced or prosecuted, or before any judge thereof (should the proceedings be in the Supreme or any Circuit Court), first giving twenty-four hours' notice of his intention so to do to the plaintiff or prosecutor in such proceeding, a certificate under the hand of the President of the Legislative Council for the time being, or of the Clerk of the Legislative Council, or of the Speaker of the House of Assembly, or of the Clerk of the same House, stating that the Report, Paper, Votes, or Proceedings, as the case may be, in respect whereof such civil or criminal proceedings shall have been commenced or prosecuted, was or were published by such person or persons, or by his or their servant or servants, by order or under the authority of the Legislative Council, or the House of Assembly, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay any such civil or criminal proceeding; and the same and every writ or process issued thereon shall be, and the same shall be deemed and taken to be, finally put an end to, determined, and superseded, by virtue of this Act.

III. Provided always, and it is hereby expressly declared and enacted, that nothing herein contained shall be deemed, or taken, or held, or construed, directly or indirectly, by implication or otherwise, to affect the rights and privileges of Parliament, in any manner whatsoever.

It will be observed that the privileges here provided for are two, really the only ones that may be considered necessary, viz., (1) the right of free speech in Parliament without liability to action or impeachment for anything spoken therein; and (2) protection of all official reports of Parliament. The first has been established by sec. 9 of the Bill of Rights, 1689, that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." And the second accords to publications of Parliament, in almost the same terms, the protection

which the Parliamentary Papers Act of 1840 was enacted to give in Britain. The only other privilege that might be considered desirable is that of freedom from arrest.

Ireland

Ireland was the first Commonwealth country which neither made its parliamentary privileges depend upon the privileges of the House of Commons nor defined them temporarily but defined them permanently in its Constitution. The Irish Free State's Constitution, 1922, enumerated these in Arts. 18, 19 and 20 as follows:

18. Every member of the Oireachtas shall, except in case of treason, felony, or breach of the peace, be privileged from arrest in going to and returning from and while within the precincts of either House, and shall not, in respect of any utterance in either House, be amenable to any action or proceeding in any court other than the House itself.

19. All official reports and publications of the Oireachtas or of either House thereof shall be privileged and utterances made in either House wherever published shall be privileged.

20. Each House shall make its own Rules and Standing Orders, with power to attach penalties for their infringement and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties.

We shall deal seriatim with the privileges as defined in these Articles.

Freedom from Arrest. Freedom of MPs from arrest guaranteed under the Irish Constitution is in one respect less than that accorded under English law, which protects members, wherever present, from arrest whilst attending Parliament, and for forty days after every prorogation and for forty days before the next appointed meeting. But the immunity is wider in another respect. In England it was claimed by a resolution of the House of Commons of 20th May 1675 in words similar to those adopted in Art. 18 of the Irish Free State's Constitution: "That by the law and usage of Parliament, privilege of Parliament belongs to every member of the House of Commons in all cases except treason, felony and breach of the peace." But the committee of privileges in 1831 said: "Since that time (i. e., since Wilkes' case) it has been considered as established generally that privilege is not claimable for any indictable offence." This would show that in England parliamentary immunity is excluded in every case of an indictable offence, and, moreover, as Erskine May points out, after referring to Cochrane's case, "little protection is practically afforded by privilege in criminal cases."

Freedom of Speech is guaranteed to members in the terms of the Bill of Rights. Members are exempt for

what they say in Parliament from judicial proceedings in any court of law. They can merely be made the subject of disciplinary action by Parliament itself.

Protection of Official Reports. The Irish Constitution purports to give wider protection to reports and publications of Parliament and to parliamentary utterances than the British Constitution has been interpreted to do. It declares that such reports and utterances, "wherever published, shall be privileged," and the intention seems to be to exempt them from the consequences of judicial decisions in cases like those of *Stockdale v. Hansard* and *Wason v. Walter* involving libel. But it is open to doubt whether the Article in the Irish Constitution would in fact give the complete immunity that is sought thereby for slander against third parties and it is an open question whether such protection is desirable even if legally practicable, the reasoning for according protection being that public interest demands that "serious charges of a public nature be ventilated in public through the reproduction of parliamentary debate, when any other form of their expression might be estopped by fear of civil or criminal proceedings for defamatory libel."

Power to Regulate Procedure. This, strictly speaking is not a privilege, and the Constitution of Eire, 1937, which replaced the Constitution of the Irish Free State, omits it as perhaps unnecessary, while retaining in almost the same words the three privileges mentioned above.

Ceylon, Burma and Pakistan

The Ceylon (Constitution) Order in Council, 1946, authorizes the Ceylonese Parliament to determine what privileges of members will be in force, subject to the limitation, however, as in the Canadian Constitution, that such privileges shall not exceed those of the British House of Commons. It makes no further reference to the law of Parliament in England.

Burma, having gone out of the Commonwealth, naturally does not make any reference to the privileges of House of Commons in its Constitution of 1947. It specifically mentions two privileges, viz., freedom of speech in Parliament and protection of publications of Parliament, and takes power to define any other privilege by legislation.

Pakistan, though within the Commonwealth, does not depend for determining its privileges on the House of Commons privileges. In its Constitution of 1956 it provides for just the two privileges for which the Burmese Constitution provides, and for the rest says that "subject to this Article the privileges of the National Assembly, the committees and members thereof, and the persons entitled to speak therein, may be determined by Act of Parliament."

II.—JUDICIAL POWERS FOR PARLIAMENT

The above account bears testimony to the tendency in Commonwealth countries to restrict the scope of parliamentary privilege in law as well as in practice, but the main question is whether the concept of parliamentary privilege in all these countries was the same as that in England, i. e., whether the Parliaments there claimed the right to constitute themselves a tribunal for adjudicating breach of privilege and to commit for contempt. The English concept is :

The power of commitment with all the authority which can be given by law becomes the key-stone of parliamentary privilege. Either House may adjudge that any act is a breach of privilege and contempt, and that if the warrant recites that the person to be arrested has been guilty of a breach of privilege, the courts of law cannot enquire into the grounds of the judgment, but must leave him to suffer the punishment awarded by the High Court of Parliament, by which he stands committed.

Earlier Commonwealth countries like Canada and Australia no doubt accepted in full the implications of the *lex et consuetudo parliamenti*, but it is open to question whether later Commonwealth countries understood privilege in that technical sense. It is difficult to believe, e. g., that Eire, which is hardly within the Commonwealth, and Burma, which is openly outside it, gave to privilege the connotation which it bears in England. In any case, there is ground to maintain that the Irish Free State used the word "privilege" loosely in its Constitution. Mr. Leo Kohn says in his book, "The Constitution of the Irish Free State":

Despite some ambiguous phrases in the Constitution, the Irish Parliament, however, retains none of the semi-judicial attributes which are still regarded as vested in the British "High Court of Parliament" by virtue of privilege.

The last few words in Art. 18 of the Constitution viz., that "a member shall not be amenable for his utterance to any action or proceeding *in any court other than the House itself*," seem to suggest that Parliament set itself up as judge and jury for some offence committed by one of its members, say, libel or slander. The italicized words were not in the Article as it originally stood, and it was pointed out that in that form members would go scot-free altogether: they would not be amenable to any court nor to Parliament itself. The words were therefore added in order to retain for Parliament the power to deal with members who might commit a breach. The question was: Is it intended that Parliament itself "might constitute itself a court of law to try the offender as a legal case and punish him?" The member in charge, Mr. Kevin O'Higgins, answered the question in the affirmative in the Constituent Assembly. He said: The added words would

preserve the right of the House to commit any member for what it considers gross contempt. Parliament is the highest court, and the power must not be taken away from Parliament to protect itself, and the power must not be taken away from it to commit a member for contempt, just as any other court.

But subsequently, the President of the Executive Council, Mr. Cosgrave, explained the position differently. He remarked that, under the Article as it was, "the statements in the House would be privileged; that is to say, an action for libel would not lie against a member making a statement in the House." But was the House to be prevented "from taking disciplinary action against a member who was responsible for disorder, or committed contempt of the House?" "The real intention behind the addition of the words," he said, "was to preserve that right of the House to make such Standing Orders (referred to in Art. 20) as would enable them to deal with such a member."

The other ambiguous words in the Constitution are those in Art. 20 which authorize the Irish Parliament to attach penalties for the infringement of its rules enacted to prevent outside interference, implying that to that extent Parliament may exercise judicial powers. [Art. I, sec. 5, sub-sec. 2, of the Constitution of the U. S. A. which gives power to Congress to "determine the rules of its proceedings," empowers Congress to "punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member."] On this point Mr. Kohn says:

It is, however, clear from the Standing Orders that the power to attach penalties must be interpreted as limited to the disciplinary measures of suspension authorised by the latter, and that no power of actual trial or of commitment, such as was still exercised at Westminster in the case of Bradlaugh, is vested in the Irish Parliament. Nor can the injunction empowering the Legislature to protect its members against molestation or corruption be interpreted as investing it with judicial powers over persons not members of the House. Parliament may by legislation specify the offence and enact penalties, as was done by the Prevention of Electoral Abuses Act (No. 28 of 1923), but proceedings can only be taken before the ordinary Courts of Law, and there is no implied authority to call offenders to the Bar of the House.

Referring to Art. 18, Mr. Kohn says that the object of the Article was "not to invest Parliament with any judicial powers but merely to preserve its right to make Standing Orders to enable disciplinary action to be taken against any member responsible for disorder or contempt." He proceeds:

There is, moreover, it would seem, nothing in the Constitution or in the Standing Orders of either House to authorize Parliament to call a member to account for any utterance made by him outside the House in reference to proceedings or to other members of the House, such as is still regarded as the privilege of the House of Commons. Disciplinary action against a member, it would appear, can only be taken for misbehaviour in Parliament; its scope is restricted under the Standing Orders to a limited period of suspension [for one month at the utmost]. The Irish Parliament has, under its Standing Orders, no authority to inflict any other form of penalty nor the power to expel a member, which is still the undoubted privilege of the House of Commons.

It is inevitable that there should be a certain tendency to view the Oireachtas in the light of the conceptions inherited from the House of Commons; but it is evident from the context of the Constitution that the Irish Parliament is not the omnipotent assembly for which Dicey could claim that its powers "make a near approach to an authority above that of the ordinary law of the land." Its scope is so rigidly fixed by the terms of a written Constitution, its functional relationship to the other organs of the State so clearly defined, that it is not permissible to invest it with those attributes of "sovereign" authority which have accrued to the House of Commons during its conflicts with the Crown. It is invested by the Constitution with comprehensive and adequate powers to regulate its business and to maintain its authority. It has none other.

That in the Constitutions of at least some of the Commonwealth countries, the word "privilege" must have been employed in a loose sense to connote the inherent powers of legislative bodies and not the law and custom of Parliament (*lex et consuetudo parliamenti*) as understood in England is proved by the fact that the Government of India Act, 1935, conferred in sec. 21 the "privilege" of freedom of speech on members of the Federal Legislature and in sec. 71 on members of the Provincial Legislatures (and in fact the same privilege had been conferred by the earlier Government of India Act, 1922, in secs. 67 and 72 respectively). Sub-sec. (1) of sec. 28 of the 1935 Act said:

There shall be freedom of speech in the Legislature, and no member of the Legislature shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either chamber of the Legislature of any report, paper, vote or proceedings.

Lest the privilege may be understood to cover punishment, by the Legislature's own process, of a

member or an outside person, sub-sec. 3 of sec. 28 makes clear that this is not to be construed as conferring on the Legislature "the status of a court, or any punitive or disciplinary powers other than a power to remove or exclude persons infringing the rules or standing orders or otherwise behaving in a disorderly manner," thus completely negating the central idea conveyed by "privilege" in the constitutional law of the United Kingdom.

It may be that judicial powers were denied to the Indian Legislature in 1935 because the Legislature was still a colonial legislature at the time, and the governing principle in this respect is considered to be that "a colonial legislative body, whether it has been established by a Royal Charter, or by statute of the Imperial Parliament, is not entitled to enjoy and exercise the powers, privileges and immunities of the Houses of the British Parliament, unless those powers, privileges and immunities have been expressly conferred upon such a body by Imperial statute." The prevailing notion is that while such legislative assemblies can exercise all regulating and self-preserving powers that are necessary for their existence and for the proper exercise of their legislative functions, such powers do not include the power of punishment.

If a member of a colonial Legislative Assembly is guilty of disorderly conduct in the House while it is sitting, he may be removed or excluded for a time or even expelled. The power to suspend a member guilty of obstruction or disorderly conduct, during the continuance of any sitting, was held to be reasonably necessary for the proper exercise of the functions of any Legislative Assembly. It was also held that the same doctrine of reasonable necessity would authorize a suspension until submission or apology by the offending member, but that such legislative bodies had no power to order the imprisonment of disorderly members or of other persons guilty of breach of privilege and contempt. ("The Annotated Constitution of the Australian Commonwealth" by Quick and Garran.)

India, having passed beyond the colonial stage, is of course no longer under a disability such as perhaps inhibited the framers of the 1935 Act; she has indubitably acquired the right to invest its Legislatures with whatever powers she likes, including judicial and punitive powers. But the question for consideration is whether it is wise to do so, particularly in view of the experience of Britain herself that the almost unlimited and illimitable privilege of Parliament often comes into conflict with and infringes upon the legitimate rights of ordinary citizens and particularly freedom of the Press. In that country none too radical a paper like the "Times" suggests as a remedy what amounts to divesting Parliament of its judicial power, which is the pith and marrow of privilege. The American settlers who carried British theories of political science and jurisprudence with them discarded

from the very commencement the concept that a Legislature should have the power to punish for contempt when they founded the Republic and have not found this power necessary for the effective discharge by Congress of its proper legislative functions. There is no reason, it appears to us, why in this instance we should follow the example of the United Kingdom in preference to that of the United States.

A Curb on the Filibuster

As a Means of Promoting Civil Rights Legislation

As the diehards in the United States have been using the peculiar Senate rule which permits almost limitless debate on the part of a determined minority to block all significant civil rights legislation, the attempt made last month by liberal advocates of civil liberties to undertake a fundamental overhaul of this rule should interest those everywhere who feel a concern about equal civil rights for all without distinction of race or colour. In every democratic country it has been found necessary to adopt procedures which would enable legislative bodies to shut off debate and bring a measure to vote over the opposition of an entrenched minority which resorts to filibustering and protracts debate by obstructive dilatory tactics to prevent an issue from coming to a vote. In Britain the Irish Home Rule party began the policy of putting a stop to all legislation on English subjects until all Irish demands had been granted by talking against time, raising points of order, making irrelevant motions, calling for divisions on every motion, etc., and the House of Commons had to adopt a *clôture* rule in 1882, so that after adequate discussion the legislative time-table could be adhered to. This rule subsequently underwent modifications, and the House devised "closure by compartments," "guillotine" and the "kangaroo."

But in the American Senate it is most difficult to halt even obstructive debate, which can almost be terminated only by the physical collapse of those who engage in it, and this has made the Senate a fortress of wreckers and a graveyard of all significant civil rights legislation. Because in 1917 isolationist forces used filibustering tactics for the purpose of preventing President Wilson from arming American merchant ships against German submarines, the Senate adopted a rule (Rule XXII) which was intended to permit the majority to limit debate so as to get on with the country's business. Under this rule *clôture* could be applied, i. e., debate could be suspended and an immediate vote on the measure could be taken, if two-thirds of the Senators present desired it.

The rule did not in fact give much relief, for between 1917 and 1949 eighteen attempts were made to overcome the filibuster, but they proved unsuccessful. But in 1949 it was modified so as to give even greater power to obstructionists. It substituted for two-thirds of

the Senators present and voting two-thirds of the entire membership of the Senate. Moreover, this stiffer requirement of an absolute two-thirds majority applies only to legislative proposals. So far as proposals for a change of rules is concerned, Rule XXII exempts them from *clôture* altogether. Sec. 3 of the rule provides that no *clôture* may be had on a motion to "take up" a change in the rules. No majority, however large, can impose closure on debate on a "motion, resolution, or proposal" to make any change in any Senate rule. This total ban in Rule XXII on limitation of debate on proposals for changes in rules is the provision which preserves the two-thirds-of-total-membership requirement for any closure at all, and hence is the chief protection of the filibuster. This curious rule providing that any move to change the rules may be filibustered endlessly derives from the concept that the Senate (because it is not wholly renewed at any time like the House of Representatives and because two-thirds of the old members are always in office) is a "continuing body," and that, therefore, all Senate rules carry over from one Congress to the next.

It is clear that if the filibuster is to be broken, a frontal attack must be made on this concept of the Senate being a "continuing body" so far as rules are concerned. And those liberals who at the beginning of the new session of Congress wanted to make a crusade for putting down the filibuster took this line. The focus of their drive was the establishment of the right of the Senate—a right set forth in the Constitution—in each new Congress to determine its rules unfettered by the past. Accordingly, Senator Clinton Anderson on 8th January moved a resolution proposing that the Senate proceed to consider the adoption of new rules, implying that the Senate is not a "continuing body" but is, like the House, without any rules at the opening of a new Congress, and that it may change its rules by a majority vote at the start of a Congress session. To counter this Senator Lindon Johnson, leader of the Southern Democrats, moved in at once: he made a motion to "table" the Anderson resolution. According to the U. S. practice, such a motion is not debatable, and if it wins majority support it puts the measure under consideration out of circulation. The motion was carried by a vote of 60 to 36, which meant that the Senate refused to accept the principle that it can adopt a new set of rules. A fundamental rules change will thus be dead for the session because the old rules will govern, among them Rule XXII.

The liberals then proceeded to make a motion for the amendment of Rule XXII. Senator Paul Douglas proposed a new Rule XXII on the lines of a proposal made by the Rules Committee of the last Congress, which, however, had never been acted upon because of the threat of a filibuster. "This provides for closing debate by a vote of two-thirds of the Senators present and voting two days after the filing of a *clôture* petition and by a majority of the entire Senators (i. e. by 50 Senators) fifteen days after

the filing of the petition." The proposal was rejected by a vote of 67 to 28. Senator Johnson then made a compromise proposal to amend Rule XXII. It had three provisions :

One would enable the Senate to strike down a filibuster with two-thirds of the Senators who appear and vote, instead of two-thirds of the full membership (or 66 Senators) as now required.

Another would enable the Senate to break a filibuster over rules changes by two-thirds of the members present and voting, instead of continuing the present unbreakable filibuster.

And a third wrote into the rules a statement of the principle that the Senate is a "continuing body," and that Senate rules shall henceforth "continue from one Congress to the next Congress" unless

they are changed in accordance with the other rules including the requirement for a two-thirds vote to close debate on rules changes.

The Senate adopted the proposal on 12th January by a vote of 72 to 22. It no doubt secures a mild easing of the present rule, which is the bulwark of the filibuster and so of Southern opposition to any significant civil rights legislation. But it is far from coming up to what the advocates of civil rights desired. Whether the lowering of the barriers to closure will be of any material advantage the future alone can tell, but the compromise was accepted by the diehards only because they felt, as their leader Senator Richard Russell declared, that "as a practical matter," the new rule "is not too greatly different from the old rule," which exactly corresponds with the opinion of liberals.

DRASTIC REVISION OF LAND LAWS IN W. PAKISTAN ULTIMATE GOAL OF OWNER-CULTIVATION

General Ayub Khan has redeemed the promise he made on assuming dictatorial power in Pakistan of introducing sweeping land reforms in the western wing, where the need for such reforms was much greater than in the eastern. The reforms, expected to be implemented within a brief period of eight-months, will go a long way in establishing a just order of things in the country-side and facilitating the advent of a real democracy after the present military rule is withdrawn.

The total absence of either an upper or a lower limit on landholding has in the course of years led to extreme inequality in the distribution of land in the whole of West Pakistan, more so in Sind and the North-Western Frontier Province than in the Punjab. While at one end of the scale a few families have come to hold much too large estates in their possession, leading to the evil of absentee landlordism, at the other end a large number of petty landholders have in their occupation small bits of land far below the level of anything like economic holdings. The reforms now announced aim at tackling both these problems of excessive concentration and fragmentation. An idea of how great the inequality of distribution is can be gained if a few figures about landholding are recited.

In West Pakistan as a whole, out of the total area of 486 lakhs acres in the ownership of private individuals 75 lakhs (or 15.4 per cent.) are owned by 6,061 feudal families, each holding 500 acres or more ; they form 0.12 per cent. of the total landholders. On the other hand, nearly as much land in the aggregate is distributed among some 33 lakhs of owners (or 65 per cent. of the total number), each of them holding less than five acres. Indeed the inequality is even greater than these figures suggest. Out of the 6,061 big landlords each owning at least 500 acres, as many as 1,700 own more than 1,000 acres

each and the total area in their possession is 50 lakhs acres. Of this area of 50 lakhs, land measuring nearly 12 lakhs acres (or a little less than one-quarter) is culturable but has not been brought into cultivation. While so much land is lying fallow, there are in the province as many as 24 lakhs of tillers, who have no land of their own and have to depend solely on the favour of landlords, there being no land laws to limit their exactions. A radical change in this vicious system of land tenure was required not merely as a measure of economic reform but as a measure of social justice.

Under the plan now announced, ownership of land will be limited to 500 acres of irrigated land or 1,000 acres of unirrigated land. Land over and above the ceiling will be taken by the Government for redistribution among tenants and others. Compensation for the landlords will be in the form of interest-bearing bonds redeemable in twenty-five years. Tenants cultivating land acquired by the Government will be given the option of buying it in instalments spread over twenty-five years. Occupancy tenants will be given full ownership rights. Adequate facilities will be provided for new owners of land in the shape of ready credits, improved seeds, fertilisers and implements. Existing credit facilities will be strengthened and the Agricultural Development Finance Corporation, an existing organisation, will be expanded to give cheap and easy credit to tenants who might become owners of land.

The proposed ceiling is no doubt high, particularly in view of the fact that the 6,000 families who come within its scope are to be allowed to retain additionally 150 acres as orchard and an unspecified area as live stock farm, and besides any gifts made by landlords to their heirs during the last ten years are to be recognized provided they do not exceed the maximum size of a holding. This much

at least can be said in favour of the scheme that care is taken to insure that the land left to the landlord shall not remain unutilized. If any land remains uncultivated for a period of two years, the owner will be given notice to bring it under cultivation within a reasonable period, and if the direction is not complied with, such land will be requisitioned for utilization and management by the Land Commission to be set up to carry out the proposed reforms. Thus, no one can just sit on the land, as many are doing at present.

Since, even after the breaking up of the estates of big landlords and distribution of their excess land to deserving claimants, many cultivators will be left who do not possess land of their own, the proposed reforms pay particular attention to the safeguarding of the rights of tenants till they come to be owners themselves. Tenants everywhere will have security of tenure. In the event of eviction by law they will be entitled to fair compensation for improvement of the land and disturbance of possession. An embargo will also be placed on the raising of rents. Illegal exactions, such as fees or free labour or services from tenants, will be stopped. All jagirs, given to warrior families by Moghul kings for services rendered, will be resumed without payment of compensation, and other intermediary interests will be abolished. This will release about 15 lakhs acres of land for distribution among tenants and landless people.

As the scheme provides for reducing the size of the present concentrated holdings, thus checking also the concentration of political power in the hands of a few big landlords, it also prevents progressive fragmentation of holdings due to the operation of inheritance laws. Division of holdings below a certain economic or subsistence level will be forbidden by imposing restrictions on alienations. The scheme provides that no person owning areas more than the economic holding shall alienate by sale, mortgage, gift or otherwise any portion of his holding which will reduce the limit of an economic holding, and that no person owning just enough land to constitute an economic holding shall alienate any portion thereof but may alienate it as a whole. The same kind of restrictions are to be imposed on alienations of holdings of a subsistence level, which is lower than an economic level. Furthermore, immediate steps are to be taken to introduce a province-wide scheme for the compulsory consolidation of the already fragmented holdings.

This agrarian reform is universally held as a necessary first step for the introduction of real democracy. Dr. S. M. Akhtar, head of the Economics Department of the Punjab University, says that the proposed reforms are the biggest achievement since Pakistan came into being. They will increase agricultural production, prevent land from lying fallow, exploit individual labour power to the full and, more than anything else, will place the social structure on a more equitable basis. Dr. F. M. Hasan, Principal of the Hailey College of Commerce and former

member of the Punjab Tenancy Inquiry Committee, says that while the ceiling will affect less than 0.1 per cent. of the landlords adversely, it will benefit more than 50 per cent. of the rural population. The reforms will go far to end the feudal system and as such they signify an important stage in the progress of the whole Islamic world towards a just order of society. Mr. Z. H. Lari, a former judge of the West Pakistan High Court and President of the Karachi Bar Association, welcoming the reforms, says: "The President has done what successive Governments signally failed to do during the last eleven years." It is an irony of fate that introduction of these reforms should have become possible only after and because of the military take-over. If what is indispensably necessary for the establishment and proper functioning of a true democracy necessitates the postponement of a formal democracy for a short time, one would hardly regret it.

Collapse of "Mass Resistance"

Racial Barriers Finally Breached

FRACTIONAL INTEGRATION TO BEGIN

Some 13,000 white students have been shut out of Virginia's all-white schools since September last—9,900 from six schools in Norfolk and about 3,000 from Charlottesville and Front Royal. These nine schools were under order by federal courts to enrol a few Negro children who had sought admission into them, and a Virginia law provided for the automatic closing of any integrated school. The Governor had challenged the courts' orders, and on 19th January Virginia's own highest tribunal—the Supreme Court of Appeals—by a 5 to 2 decision invalidated not only the states' school-closing law but the whole bunch of related "massive resistance" laws against racial integration in the public schools by which the Administration had hoped to avoid even token integration. These laws included:

A provision for cutting off state school funds from any community operating an integrated public school.

A statute providing for tuition grants for the private education of pupils assigned to integrated public schools.

The so-called "Little Rock laws," under which the Governor could shut down permanently schools policed by Federal authority or disturbed by such policing in a near-by school.

On the Little Rock law, the Virginia court held that while schools policed by Federal troops could be closed temporarily under the Governor's inherent powers, their control could not be taken permanently away from local school authorities.

The majority ruling said that the other statutes violated sec. 129 of Virginia's Constitution requiring the

state to "maintain an efficient system of public free schools throughout the state."

The Administration had argued that this requirement was made imperative by the United States Supreme Court desegregation decision invalidating sec. 140, which provided that "white and coloured children shall not be taught in the same schools."

The prevailing opinion forbade the Legislature to take the state out of the field of public education and said the state would have to support even those schools where "pupils of both races are compelled to be enrolled and brought together, however unfortunate that situation may be."

A few hours after the Virginia court had struck down laws supporting the state's policy of total segregation, a federal court at Norfolk held unconstitutional the closure law of the state requiring the Governor to close any public school which begins the process of racial integration ordered by a federal judge. The ruling was given in a suit brought by a group of twenty-six parents and children in Norfolk challenging the law. The three judges of this special constitutional court unanimously held that the closing of schools faced with federal orders to undertake integration discriminated against both the white children locked out of their classes and the Negro children seeking admission. It ruled that the relevant state statutes "effectively require a continuance of racial discrimination; they are patently unconstitutional." But the court did not order the closed schools to reopen. "We merely hold," it said, "that Governor Almond's proclamation of September 27, 1958, closing the schools was predicated upon an unconstitutional statute and, hence, is void." It said that since the state had "assumed the responsibility of . . . maintaining public schools" it could not shut a school to avoid integration "and at the same time keep other public schools open on a segregated basis." The court also hit at the Governor's "evasive tactics" taken or proposed to be taken to preserve school segregation. It said:

Schemes or devices looking to the cut-off of funds for schools or grades affected by the mixing of races, or the closing or elimination of special grades in such schools, are evasive tactics which have no standing under the law.

The three-judge federal court returned control of Norfolk schools to the school board and issued a permanent injunction to the Governor and the state and local officials from ever closing a school to prevent integration. It said: They must not engage in any evasive schemes or devices looking to the cut-off of funds for schools or grades affected by the mixing of races or the closing or the elimination of specific grades in such schools."

In September a federal district judge had ruled that four Negro children seeking a transfer from a Negro

school to the Stratford Junior High School in Arlington measured up to the placement criteria of the school board and must be admitted. The school board had appealed against the admission of the children. On 23rd January the Court of Appeals dismissed the appeal and ruled that the children must be admitted to the school on 2nd February, when the next school semester would start. Arlington, a cosmopolitan suburb of Washington, is not so hostile to desegregation as other parts of Virginia, and the school board obeyed the court's ruling and admitted the Negro children. Stratford Junior High School is thus the first integrated school in Virginia.

On 20th January Chief Judge Sobeloff of the Fourth Circuit Court of Appeals granted Charlottesville a delay in school integration till the next fall. A federal district court had ordered twelve Negro children to be admitted at once to two white Charlottesville schools, and though last September Judge Sobeloff had turned down the school board's request for a study of the integration order he agreed to stay the order on this occasion because he was convinced that Charlottesville was now proceeding "in good faith" to meet the conditions laid down by the Supreme Court five years ago. The school board gave him assurances that it was planning a "complete revision" of its past segregated school practices and even undertook to provide "teachers and adequate facilities for the special tutoring of the twelve children with a view to their admission to regular classes (in the two schools) as soon as practicable." "The school board's present attitude," said Judge Sobeloff, "deserves commendation. The board should be afforded a reasonable time to accomplish the administrative adjustments essential to a positive and effective transition from a racially segregated to a non-segregated public school system in Charlottesville."

It is very significant that Governor Almond, finding that the federal and state courts would not enable Virginia to maintain the racially separate system of public education, seems to have reconciled himself to fractional integration to take place in the hitherto all-white schools of the state. In fact he told the segregationists in the General Assembly called to frame new laws to stall desegregation that he would veto their bills aimed to frustrate the start of school integration. He said: "The police power of Virginia cannot be asserted to thwart or override the decree of a court of competent jurisdiction, state or federal." Having exhausted every legal means to maintain intact the state's segregated public school system, the state appears to have made up its mind to yield with dignity and to abide by the Federal Constitution. We may expect that this process of compliance will extend to other countries and localities.

PAKISTAN'S MILITARY COURTS

Summary Court's Jurisdiction

Decisions Subject to Restricted Review by High Court

The West Pakistan High Court on 16th January made an important pronouncement as to its own jurisdiction in reviewing judgments of Summary Military Courts. The occasion was the hearing of a habeas corpus petition of Chaudhary Zahoor Elahi, former President of the now defunct Republican Party. He was arrested by a military officer on 24th October 1958 on a charge that he did not remove till 20th October an unauthorized encroachment on a portion of a road adjacent to his residential house at Gujrat, as required by the Martial Law Administrator of Rawalpindi. He was tried before a Military Court, which after a summary hearing sentenced him on 25th October to six months' rigorous imprisonment. Thereafter a habeas corpus petition was filed on 19th December in the West Pakistan High Court challenging the validity of the conviction and sentence on two grounds of law. When the matter came up for hearing before a division bench comprising Mr. Justice Shabbir Ahmed and Mr. Justice Masud Ahmed, the Advocate-General took up the position that the High Court had no authority to hear any kind of petition against the judgment of a Military Court.

Their Lordships saw no merit in the particular law points urged on behalf of the petitioner and dismissed the petition, but dealt with the contention of the Advocate-General as to the High Court's jurisdiction vis a vis the Military Courts and their ruling on it is of general interest.

Their Lordships held that the jurisdiction of the High Court with regard to the scrutiny of a judgment or order of a Military Court had not been taken away in all cases.

They held that while the Court would have no jurisdiction to determine whether or not a finding, judgment or order of a Military Court was justified, there was no ouster of jurisdiction (in determining) whether the order of the Military Court was without jurisdiction. The judgment held that the High Court was not precluded from hearing arguments on the findings of Military Courts and that the High Court would determine its own jurisdiction in the matter after hearing arguments in such cases. Their Lordships said :

If a Military Court passes a sentence on a person it could not try, or tries an offence it was not given the power to try, or passes a sentence it was not competent to pass, the order will be without jurisdiction and will not enjoy immunity from scrutiny by this Court.

Their Lordships held that the present case was not one of the class of cases in which a writ could be issued by the High Court in regard to orders passed by a Military Court. Their Lordships said :

It is, however, undeniable that if it cannot be found that the order of a Summary Military Court was without jurisdiction, no court of ordinary jurisdiction including this Court will have jurisdiction to declare that order to be incorrect in spite of the fact that the findings given by the Military Court were full of gross and inexplicable errors of any dimension or the sentence was considered to be of a severity which appeared to be uncalled for.

DOCTRINE OF ECLIPSE

U. P. Transport Services Act

UPHELD BY THE SUPREME COURT

On 15th January the Supreme Court upheld the validity of the Uttar Pradesh Transport Services (Development) Act, 1955, and the scheme framed thereunder excluding private stage carriage operators from plying on certain routes.

The Act empowered the State Government to reserve for the exclusive operation of State-owned carriers the routes in the State. Under sec. 3 of the Act the State Government issued a notification that the routes hitherto served by the appellants should be reserved for Government stage carriers and also notified a scheme for these routes.

The appellants, who had been doing stage carrier business on these routes for a considerable number of years, filed petitions in the Allahabad High Court challenging the validity of these notifications and the Act. Having failed before the High Court, they preferred 25 appeals before the Supreme Court, which for the most part raised the same questions of law and were disposed of by a common judgment.

The principal ground of attack by the appellants was that the legislation in question was enacted in 1955 and under the Constitution as it then stood any law for the acquisition of property was void under Art. 31 unless it provided for the payment of adequate compensation. It was submitted that the impugned Act did not comply with this provision and hence it was void. It was also urged that by the passing of the Motor Vehicles Amendment Act, 1956, by Parliament, the State law stood repealed in any case.

On the first issue the Advocate-General of the U. P. invoked the "doctrine of eclipse," which postulates that when a legislation is unenforceable by reason of any constitutional bar, then with the removal of the bar, the law becomes enforceable. He submitted that when the

Act was enacted in U. P. the provisions of Art. 31 might have been relevant but as these provisions had been subsequently amended by Parliament the bar on the Act was removed and provisions became operative.

The Supreme Court stated that the question to be considered on this submission was "whether the amendment of the Constitution removing a constitutional limitation on a legislature to make a particular law has the effect of validating the Act made when its power was subject to that limitation." In the present case the amendment to the Constitution was made on April 27, 1955, shortly after the enactment of the law by the State Legislature.

A majority of the Constitution Bench negated this contention of the Advocate-General. They stated that the power to make laws is circumscribed by the limitations relating to fundamental rights and a law made in derogation of these limitations would be void ab initio and wholly to the extent of the contravention. The "doctrine of eclipse" could be availed of only in cases where the law, when enacted, was valid but some subsequent overriding bar made it unenforceable. In such cases, the Court stated, the removal of the bar would make the law valid again.

On this conclusion the Court rejected the contention of the Advocate-General that the unamended Art. 31 of the Constitution need not be looked into to consider the validity of the legislation.

The Court then considered the objection of the appellants that the impugned Act did not provide for compensation to people who were deprived of their property rights. The Court examined the provisions regarding compensation to the private carriers who had been excluded from the routes and stated that on a liberal interpretation of the provisions of the Act it must be held that it "provides for adequate compensation for the interest acquired within the meaning of Art. 31 (1) of the Constitution."

All the appeals were dismissed.

NOTES

Removal of Racial Barriers in Housing

URGED BY A NON-OFFICIAL COMMISSION IN U. S.

A non-official "Commission on Race and Housing," which carried on for three years a survey of housing problems of racial and ethnic minorities in the United States under a \$400,000 dollar grant from the Fund for the Republic has issued a report recommending a programme for the prompt elimination of racial discrimination in housing. The recommendations are based on the theory that compulsory residential segregation is "the basic inequality which underlies or stimulates other forms of discrimination."

Segregated housing, the report says, has damaged the country as well as minority groups. The policies of federal housing agencies that permit racial discrimination are inconsistent with the basic American ideals. Residential segregation leads directly to segregation in schools, churches, hospitals, places of public recreation, welfare and civic activities. In the country's defence against Communist anti-American propaganda, segregation seriously handicaps American appeals to the "uncommitted" peoples of Asia and Africa, most of whom are non-white.

The Commission calls for enforcement of the federal Civil Rights Act of 1957 and repeal of all state laws requiring segregation. It also urges the adoption of state and city laws prohibiting discrimination in housing built with any form of public aid. The New York laws against housing discrimination are cited as models for other areas.

The commission has also suggestions to make to the housing industry. It asks builders, mortgage lenders and real estate brokers to support a free housing market and to study financially successful inter-racial housing developments.

It urges concerted action by national and local associations in the housing industry towards an industry-wide policy to open all housing developments to qualified buyers or tenants regardless of race, ethnic descent or religion.

The extension of mortgage credit to non-whites in all areas on the same terms as to whites, and declarations by real estate boards that all residential properties be listed on a non-discriminatory basis are also advocated.

According to the report, it would be in the economic interest of the housing industry to remove racial barriers. It says that if all builders in an area acted together against discrimination, none would fear competitive disadvantage if he refused to discriminate. Therefore, the report says, the whole market would expand.

"Freedom to Travel" Report

Due Process in Passport Proceedings

A special committee of the Association of the Bar of New York, appointed for the purpose of studying the passport regulations with a view to liberalising them, has issued a "Freedom to Travel" report, in which it has expressed the opinion that while all restraints on the issuing of passports to American citizens cannot be eliminated, they should be minimized. It has urged that the administrative procedures in passport cases should be revised so as to provide for a "trial type" of hearings, with disclosure to "defendants" of Government evidence

and with confrontation and cross-examination of Government witnesses, thus according due process of law in passport proceedings.

At present the Government exercises the power it claims to have in denying passports to Communist organizations or individuals holding Communist views if in its opinion their travelling abroad is likely to endanger nationalist interest. The committee's recommendation is that the power should be exercised where only national security is clearly imperilled.

It was asserted that travel should not be restrained solely because of membership in the Communist party or any other organization, association with any individual or group, adherence to "unpopular" views or criticism of the country.

Freedom of travel is so closely related to freedom of speech, the press, assembly and religion that it was held it should be denied only when vital national security is endangered. No such peril, it was said, would come from letting citizens travel abroad "with a minimum of restraint."

Passports should not be denied to "paplour pinks," it was held. But persons who incite violent overthrow of the United States Government "should not be permitted to further their mission outside the country beyond the reach of its law enforcement officers."

With respect to restraints on individuals, it was held that passports could validly be denied to citizens if the Secretary of State found "reasonable grounds" that their activities abroad would endanger national security in any of these ways :

Unauthorized transmitting of United States security secrets;

Inciting conflicts that might involve the United States; and

Inciting attacks against the United States by force or by attempts at violent overthrow of its Government.

Religious Freedom

ITALIAN HIGH COURT VOIDS CURBS

The Republican Constitution of Italy, passed eleven years ago, proclaims all religions equally free before the law and grants full liberty to all citizens in professing their faith. Notwithstanding this, laws passed under fascism proscribing state authorization for opening and operating a house of worship have been allowed to remain in force. Under the laws several Protestant missionaries (Protestants number only about 150,000 in this predomi-

nantly Catholic country with a little less than 50 million population) have been brought to trial for failure to take the state's permission to propagate their religion. An elder of a Protestant sect who was accused of acting as a minister of a cult and operating a church without a proper permit appealed to the Constitutional High Court, the country's highest tribunal, challenging the validity of the statutes. The court on 24th November ruled that no authorization was required for opening and operating a house of worship and thus upheld the right of all religious communities to profess and propagate their faith without police authorization.

Undue Delay in Arraignment

ATTEMPT TO REVERSE MALLORY DECISION FOILED

In our issue of November 1958, we gave details of the four important decisions of the Supreme Court, which the Jenner-Butler bill sought to reverse but which have survived because of the defeat of the bill. Similar was the fate in the last Congress of the several bills which were introduced to undo the decision in *Mallory v. United States*, 354 U. S. 449 (1957)—vide p. v : 81 of the BULLETIN. In this case, it will be recalled, the Supreme Court reversed the conviction of Mallory from whom a confession of having committed rape was obtained because there had been undue delay in his arraignment after arrest, in violation of the Criminal Procedure Rule which lays down that the arresting officer "shall take the arrested person without unnecessary delay" before a committing magistrate. The Mallory opinion interpreted the Rule strictly; it said, the provisions of the Rule "contemplate a procedure that does not allow arresting officers more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate." The "procedural requirement" of this Rule, as was said in *McNabb v. United States* 318 U. S. 332 (1943), the first case in which a confession secured in defiance of the Rule was held to be inadmissible in evidence, "checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use."

The bills moved to reverse the opinion would have permitted police officers to arrest people on suspicion and hold them for "a reasonable time" before taking them to a committing magistrate. If enacted, they would have removed an effective safeguard against "third degree" practices.