

The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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PROTECTION OF PERSONAL FREEDOM AS IT LOOKS TO A COMMENTATOR ON THE CONSTITUTION

Of great importance to the public is the preservation of this personal liberty ; for if once it were left in the power of any, even the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, there would soon be an end to all other rights and immunities. — *Blackstone's Commentaries*.

The freedom of the individual implies freedom without risk, that is to say, without fear of arbitrary arrest, detention or prosecution. It is one of the most evident and fundamental of all rights, for without it even the semblance of liberty is lost. It is also the right subject to the greatest threat and the right which involves an unceasing fight, since it typifies the contrast between the individual and the power to coerce, the spread and growth of which characterize the modern State. — *France's Report to the U. N.*

Freedom of Person is the most elementary fundamental freedom. As Mr. Luis Kutner has said in his "World Habeas Corpus for International Man," "it is the original fundamental freedom without which almost all the human rights and freedoms of the (U. N.) Charter are meaningless." The late Mr. Chafee, writing about personal liberty as provided in the United States Constitution, said the same thing in an article, the very caption of which was "The Most Important Human Right in the Constitution." These are trite sayings, but they acquire tremendous importance in India, for India is the only country in the world whose Constitution permits of prolonged detention of persons in gaol without charge and without trial in situations which do not partake of the character of an emergency. And yet, strangely enough, a well-known commentator on the Indian Constitution, Mr. Durga Das Basu, presents a glowing picture of the protection afforded to fundamental rights including those of personal freedom and freedom of expression. The Journal of the International Commission of Jurists carries in its Spring-Summer 1958 number an article by Mr. Basu which bears the title of "Constitutional Protection of Civil Rights in India." He does not content himself with an interpretation of the provisions in the Fundamental Rights Part of the Consti-

tution of India by reference to the various judicial decisions on the subject, but also gives his own assessment of the value of those rights, as of course he has every right to do. But, as we shall try to show, his appraisal, particularly of the two most important fundamental rights named above, is most defective. One may even say that he shows himself in dealing with these rights as an apologist of the Indian authorities, misinterpreting and in some cases suppressing several important factors in his treatment of the subject. It is very unfortunate that such a reputed journal should have been made the medium of a view which will have the effect of misleading international opinion on the status of civil rights in India.

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Mr. Basu, in respect of each of these rights, compares the provisions of the Indian Constitution with those of the U. N. Covenant on Human Rights with the avowed object of showing that the former are no less effective than, if not superior to, the latter, embodying as the Covenant does the collective wisdom of all the countries of the world; and he does this in respect of the Right to Freedom of Person also. He makes much of the fact that our Constitution in sub-sec. (2) of Art. 22 requires an arrested person to be arraigned before a magistrate within twenty-four hours while the Covenant does not specify a maximum period but merely says that he should be arraigned "promptly." Similarly, in sub-sec. (1) of the Article the Indian Constitution guarantees to such a person the right to be defended by counsel, whereas the Covenant is silent about it. These are no doubt "improvements," but it means nothing more than that the framers of the Covenant did not think it necessary to make any detailed provisions in these respects. But it should be remembered that these "improved" provisions are not applicable to "preventive" detention, and preventive detention or detention on mere suspicion and without any judicial remedy is the main problem one has to consider in connexion with detentions in India.

Art. 22(3) declares that the safeguards provided for normal arrests and detentions do not apply to persons detained under the law of preventive detention, and

preventive detention as such is not contemplated by the Covenant. But Mr. Basu still finds a precedent for it in Art. 3 of the Draft Covenant on Civil and Political Rights. However, it can easily be shown that there is no warrant for such a statement. For sub-sec. 1 of this Article says in part :

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties hereto may take measures derogating from their obligations under this Covenant to the extent strictly required by the exigencies of the situation, and the right to freedom of the person is declared in sub-sec. 2 to be liable to such derogation.

It is everywhere recognized that exceptional measures may be necessitated in times of national emergency, and every country permits resort to them, only surrounding the application of such measures with stringent conditions. For instance, Art. 1 (3) (2) of the United States Constitution provides :

The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

But surely Mr. Basu knows that Art. 22 does not even contemplate use of preventive detention in times of emergency and that the law of preventive detention has not been enacted in India for being brought into force to meet an emergency. In a separate Part the Indian Constitution contains emergency provisions, and personal freedom will almost be the first victim when these provisions are put into effect. But in addition to the power which these provisions confer on the Executive, power to detain persons without trial is conferred by Art. 22, and this power is meant to be used in normal times. How unfair therefore is it for Mr. Basu to claim that the provisions of the Indian Constitution permitting detention are in keeping with Art. 3 of the Covenant ?

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The learned author of the article under review pays tribute to " the wisdom and liberality of the framers of the Indian Constitution " in that they had already adopted the principles which were subsequently embodied in the U. N. Covenant. Nowhere is there a clearer exhibition of such " wisdom and liberality " than in Art. 21 of the Indian Constitution, which corresponds so closely to Art. 9 (2) of the Covenant on Human Rights. The former says :

No person shall be deprived of his life or personal liberty except according to procedure established by law.

And the latter says :

No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

It is agreed that the constitutional protection afforded to the right of personal freedom becomes almost nil in the

Covenant on account of Art. 9 (2) — and also in the Indian Constitution on account of Art. 21. And as Art. 9 (2) was inserted in the Covenant at the instance of India herself (a fact to which Mr. Basu has not adverted), she may well take the credit of stultifying the Covenant altogether in respect of this most basic human right.

How the supremacy of a law permitting preventive detention which the Legislature of a State Member may enact nullifies the guarantee of personal freedom has been pointed out by many writers. Mr. Kutner, for instance, in pointing out the danger of limiting the writ of habeas corpus, " a high prerogative writ of right, " too narrowly says in the article referred to above ;

The writ of habeas corpus operates effectively within the limits of unlawful imprisonment. But it is useless against a lawful imprisonment, however unwise or unjust. Much consequently depends upon the location of the line between lawful and unlawful imprisonment. If the area of unlawful imprisonment is made large, the value of habeas corpus is correspondingly lessened. The existence of the writ enables a prisoner to find out from the judges where the line lies, but the writ does not fix the line. This is done by other parts of the law.

Again :

The effectiveness of habeas corpus (esteemed the best and only sufficient defence of personal freedom) is, however, greatly impaired by the lack of any reference as to the content of law authorizing the deprivation of liberty. Against a ruthless, Nazi-like " law " sanctioning such deprivation on any conceivable ground, habeas corpus must fail in its protection. Sanctioning deprivation of liberty on " such grounds and in accordance with such procedure as are established by law, " as is the case in the International Covenant, Art. 9 (2), practically leaves the States a free hand to limit or strangle the right as they see fit. (Emphasis added.)

Precisely the same result follows from Art. 21 of the Indian Constitution.

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The history of Art. 21 of the Indian Constitution and Art. 9 (2) of the U. N. Covenant on Human Rights may be given here once again, as it throws a flood of light on the utter futility of the guarantee supposed to be provided by these charters for the security of the person. Art. 21 of our Constitution originally read as follows :

No person shall be deprived of life or liberty except according to due process of law.

The Constituent Assembly later made two changes in it: the " due process " clause was deleted, and the word " liberty " was qualified by the addition of the word " personal, " to distinguish personal freedom from the right to freedom of movement referred to in Art. 19 (1) (d). Mr. Kutner says: " From these changes adopted by the

Constituent Assembly follow important consequences. The omission of the due process clause from Art. 21 made it impossible for the judges to go into the reasonableness of grounds of preventive detention supplied by the detaining authority. Moreover, in consequence of a separate treatment of personal liberty and freedom of movement, the judges, while allowed to go into the reasonableness of restrictions on freedom of movement [Art. 19 (5)], cannot extend judicial review from Art. 19 to Art. 21. Mr. Basu does not refer to this virtual nullification of personal freedom in Art. 21 as he might have been expected to do because of his reference to *Gopalan v. Madras*, S. C. R. 88 (1950), in which the Supreme Court held Mr. Gopalan's detention lawful mainly on the ground of the changes effected in Art. 21.

The history of Art. 9 in the Covenant relating to freedom of the person is equally interesting. This Article originally started with a declaration: "No person shall be subjected to arbitrary arrest or detention." Then it proceeded to enumerate cases in which alone detention would be lawful: detention after conviction by a competent court for non-compliance with the lawful order of a court; arrest or detention to bring a suspect before a magistrate; detention of minors, detention of persons of unsound mind or suffering from infectious diseases. Preventive detention was never thought of, but India, anxious to save herself from the reproach of being regarded, because of the sanction accorded to preventive detention in the Indian Constitution even in normal times, as a violator of international obligations, proposed a definition of "arbitrary" in the declaration outlawing arbitrary arrest or detention by the insertion of a clause, similar to the watered-down version of Art. 21 of the Indian Constitution. And the clause was consequently added to the effect that "No person shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." India thus succeeded in bringing to naught the international guarantee of personal freedom as she had already done in the case of the national guarantee. Her success in the international field was due, in Mr. Kutner's words, to "the obsolescence in statesmen's thinking for not grasping that the true concept of law is to benefit the individual and in still clinging to the zealous obsession of national sovereignty by competing governments." The blame, or credit as Mr. Basu would have it, for taking the heart out of the protection of personal security in the Covenant belongs chiefly to India.

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Even Mr. Basu could not avoid mentioning the fact that preventive detention "is something not known in the United States of America or the United Kingdom in time of peace." But he has no patience with critics who would denounce the adoption in the Indian Constitution of a provision authorizing preventive detention as a permanent measure. Such critics in his opinion "make much" of this "apparently retrograde" provision only because they

ignore the justification that could be advanced for it. Then he goes on to set forth the justification, "Firstly, the Constitution itself provides definite *safeguards against any abuse of this power*" (one fails to see how effective safeguards can be provided when the subjective satisfaction of the detaining authority as to the sufficiency of grounds of detention is not justiciable); "and, secondly, the right of habeas corpus has been held available even to persons detained under a law of preventive detention;" and, in fact, "there have been a number of cases in which the Supreme Court and the High Courts have nullified orders of detention." This last statement is thoroughly misleading. It is true that a detainee can prefer a petition for the writ of habeas corpus challenging his detention as illegal; but all that the court can do on such a petition is to inquire whether the provisions of the law have been violated or not. It has been repeatedly held by the courts, e. g., by the Supreme Court in *Shibban Lal Saxena v. the State of Uttar Pradesh and others*, S. C. R. 418 (1954) that "the sufficiency of the grounds upon which the satisfaction (of the detaining authority is based), provided they . . . are not extraneous to the scope or purpose of the legislative provision, cannot be challenged in a court of law, except on the ground of mala fides. A court of law is not even competent to inquire into the truth or otherwise of the facts which are mentioned as grounds of detention." In face of this it is difficult to understand how a commentator of Mr. Basu's standing can make the assertions that he has made. The position in effect is that persons suspected of prejudicial activity can be thrown into prison on the say-so of a district officer or a Cabinet Minister.

Suspension of habeas corpus is the very essence of preventive detention. Because of the defective provision in the Covenant relating to personal freedom, borrowed from the Indian Constitution, U. N. circles are themselves greatly worried about the utter inadequacy of protection which this fundamental human right will receive. At a seminar held under the U. N. auspices in 1957 the question was discussed. The seminar was held in the Philippines, where the privilege of the writ of habeas corpus had been suspended from 1950 to 1953 as a measure deemed necessary to cope with the communist rebellion (the Filipino Constitution permits suspension only in cases of invasion, insurrection or rebellion) and the main question under consideration was whether even in an emergency proclaimed by a Government according to constitutional provisions access to the courts to test the legality of the exercise of emergency powers could not be preserved. There was agreement that such access to the courts should never be denied. The account of the seminar is thus given:

All members recognized that in times of emergency it might be necessary to restrict temporarily the freedom of the individual, but they were firmly of the view that whatever restrictive measures might be necessary, recourse to the courts through the writ

of habeas corpus or other similar remedy should never be suspended. Rather the Legislature could, if necessary, subject to well defined procedure for safeguarding human dignity, authorize the temporary detention of persons for reasons specified in the law. By that means the Executive can act as emergency may require, but the ultimate judicial protection of ultimate individual liberty is preserved.

Surely, Mr. Basu does not mean that detainees in India can have recourse to habeas corpus in this sense.

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After all, the detentions in the Philippines which caused such profound concern to the seminar were ordered after a proclamation of emergency because the persons arrested and detained were suspected of being engaged in an armed conspiracy to overthrow the constituted government of the country. In such an emergency the Government in India also has been fully armed with power to suspend freedom of person, but, as said before, the Indian Constitution authorizes adoption of legislation permitting detention even when there is no emergency, as envisaged in the Constitution or the U. N. Covenant. One can even understand detentions being permitted in non-emergency situations, which, however, are fraught with danger to the security of the State. But what justification could there be for detentions being ordered, as our Constitution allows, when public order in the State is likely to be slightly disturbed. Nor is detention resorted to only for the purpose of preserving the security of the State or the maintenance of public order, as Mr. Basu seems to think, but also for putting a stop to, say, black-marketing and similar anti-social activities. Who has ever heard of the weapon of preventive detention being used for such a purpose? Mr. Basu has said detention without trial is resorted to in Great Britain only in time of war. The more important thing to note is that persons held in detention in Britain under a law of temporary duration during the pendency of war were suspected of nothing short of treasonable activities.

Lastly, Mr. Basu pleads that the Preventive Detention Act is being sparingly employed at least latterly, and that there cannot be more than "a handful of men" now in gaol because of this law. Only "a handful of men"! One who acquiesces so easily in preventive detention and takes such a light-hearted view of the deprivation of personal liberty has no business to deal with civil liberty questions at all, however vast one's legal learning may be. No one who is so insensitive to the most fundamental of all fundamental freedoms can possibly appreciate the position that all civil liberties unions take up everywhere in respect to personal freedom; viz., that even if one man is arbitrarily deprived of freedom then all men are liable to be so deprived of their freedom; or, to borrow the words of John Liburne's statement in 1653, "what is done unto any one, may be done unto every one." "If the propriety of a measure

is to be judged by the use made of it," then Mr. Basu would think that the preventive detention law and the constitutional provision therefor are justified. But the propriety of such a measure is not to be judged merely by the use made of it. Even if no single detention took place under the Constitution permitting arbitrary detention, civil liberties bodies would still consider it their duty to protest against it as a perpetual threat capable of being executed at any time, for they believe that if one man's freedom is unsafe then the security of all men is called into question.

India and the U. N.

While India has always shown great keenness in invoking the United Nations machinery for righting the wrongs committed by Western powers, she is consistently prepared to resign herself to the naked aggression of Soviet Russia and Communist China. Point is lent to this reflection by the fact that she has given notice of raising several questions involving the Western bloc in the U. N. General Assembly, due to open on 15th September, while not only refusing to have do anything with a motion to refer the far graver question of the ruthless suppression of Tibet's national sovereignty by the Peking Government but showing every sign that she is inclined to treat the suppression as a fait accompli and that she would like the world to forget all about it.

Mr. Nehru asks: What would be the good of raising a discussion on the Tibetan issue in the U. N., so far as the practical outcome of such a discussion is concerned? True, the U. N. would be unable to restore independence to Tibet. But what has been the result so far of India regularly going through the motion of bringing the rights of the Indian settlers in South Africa to the U. N., and what will be the result, Mr. Nehru expects, of India raising the issue again this year as she is going to do, except that international opinion will be mobilised against the ill-treatment to which Indians are subjected in the Union of South Africa? If world opinion is an asset prized by India, why should Tibet be denied this asset if nothing more effective could be immediately achieved for her? In any case, why should India encourage the notion that Communist countries can get away with aggression without having to meet either retribution or even moral condemnation?

India is among the twenty-five Asian and African States which have asked for a full-scale debate in the U. N. Assembly on the 4½-year-old conflict in Algeria. Besides pleading that the military operation in that country poses a threat to international peace, these States say that French authorities were reported to have removed a million Algerian civilians from their homes and "regrouped" them in other areas where they are "undergoing severe hardship." A resolution recognizing the Algerians' right to independence won majority support in 1958, and the sponsoring States expect that

this year such a resolution will muster the two-thirds majority needed for its adoption. Whatever that may be, one may well ask: Why does India think the Algerian question to be a fit subject for discussion in the U. N. while she resists the suggestion of the Tibetan question being similarly submitted to the Assembly for its consideration? Does India really expect that the U. N. will be able to free the Algerian Moslems from French rule, though it is not able to give the Tibetan Buddhists freedom from Chinese sovereignty? Has the U. N. a greater right to interfere in Algeria than in Tibet? Speaking strictly from the legal point of view, it has less. For France has always insisted that Algeria is an integral part of France and under the Government's domestic jurisdiction and that therefore the U. N. is not competent to take up a matter which, under the Charter, falls within France's national sovereignty. China, on the other hand, has admitted to Mr. Nehru himself that Tibet is not a province of the Chinese Empire, and that in any case she claims to have the rights of suzerainty, not sovereignty, over Tibet and is pledged to give the rights of full internal autonomy to the Tibetan Government. Yet Mr. Nehru somehow persuades himself that a different standard must be applied to Tibet from Algeria.

India has also asked this year, as in the past eight years successively, for the admission of Communist China to the United Nations, and it is believed that this will be the first item that will come up for discussion in the forthcoming General Assembly session. The underlying idea behind such a proposal is that a State should be admitted as a member if it is clearly in control of its territory, irrespective of its likely behaviour in the matter of showing proper respect for international rights. Such a realistic view has the support of many Western powers, the United Kingdom, for instance. But when the State to be admitted commits aggression, to prevent which was the main purpose of calling the U. N. into existence, the question naturally wears a somewhat different aspect. The people naturally ask themselves: Will the State not sabotage the establishment of international peace, which is the objective of the world organization? Will not its admission be an act of rewarding the aggressor and inciting other would-be aggressors to follow the bad example?

Curiously enough, India's memorandum on the proposal to seat Red China on the U. N. bodies, puts forward the plea that no major measures for peace and security could be undertaken without the co-operation of Communist China. This immediately raises the question of the Chinese Government's past record and compels the answer that Red China's membership will in all likelihood lead to a breach of international peace and to the disturbance of international security. The Communist Government of Peking went so far as to fight U. N.'s own troops in Korea, and this caused second thoughts in the Governments of many States, of which Britain was one, though previously they were all in principle agreed on the admission of Red China. Britain demurred thereafter

to the immediate admission of Communist China. Later even this Korean aggression was winked at. But on top of it now comes China's brutal aggression in Tibet. In face of it, will there be any country which will not own to profound misgivings in allowing China "to shoot its way into the U. N."? It will of course be utterly childish to assume, in the words of the "Statesman," that Red China's admission will "convert what many regard as an ogre into a friendly, benign giant."

The Devlin Report and The Central African Federation

It was inevitable that the adverse findings of the Commission of Inquiry appointed under the chairmanship of Sir Patrick Devlin, a High Court Judge, to inquire into the disturbances that broke out in Nyasaland in February last and the stern measures of repression adopted by the Government to quell them, should severely damage the prospects of a dispassionate review of the future of the Central African Federation that is to take place towards the end of next year. But it now seems that such a review will not altogether be impossible. Since the constitutionally hybrid framework of a Federation represents an essay in the building up of a multi-racial society in a part of Africa where the non-indigenous people, though in a minority, are in a strong position, politically and economically, it is all to the good that this experiment has a chance of being properly assessed, since it is very difficult to imagine any alternative solution that would be both just and feasible.

The commission discounted the "murder plot" that was made so much of when an emergency was declared in Nyasaland on 3rd March and the Nyasaland African Congress leaders were imprisoned. But it says that although there is no evidence for "any detailed plan for massacre and assassination," there was certainly talk, at the emergency meeting of the Congress leaders in the bush on 25th January, of "beating and killing Europeans, though not cold-blooded assassination or massacre"—a distinction much too fine for practical administrators. The commission says that by the beginning of 1959 the more extreme leaders of the Congress had "made up their minds that they would get the Congress to adopt a policy of violence and at the bush meeting a policy of violence *was* adopted." It dismisses the suggestion widely made later that the Governor of Nyasaland had acted under pressure from Sir Roy Welensky's Federal Government in Salisbury and says that "in the situation which existed on 3rd March, however it was caused, the Nyasaland Government had either to act or abdicate, and since with the forces at its disposal the maintenance of order could not be achieved within the ordinary framework of the law, it had to resort to emergency powers." Publicity given to the "murder plot," the commission says, had distracted attention from the real strength of the Government's case against the Congress.

The commission is scathing in its remarks on the excessive force used by the Nyasaland Government in dealing with the disturbances. It says that the Africans were subjected to "a great deal of aggressive and bullying behaviour;" they were hit with rifle butts; they were "herded around" like cattle. Even the property of some was looted. It says:

It is quite clear that these were not expeditions in which the military was simply acting in aid of the police to assist the apprehension of wanted men. They were punitive expeditions intended to make it plain that siding with the Congress would lead to very unpleasant consequences.

Further it says:

Nyasaland is—no doubt only temporarily—a police state, where it is not safe for anyone to express approval of the policies of the Congress party, to which before 3rd March the vast majority of politically minded Africans belonged, and where it is unwise to express any but the most restrained criticism of Government policy.

The commission clears Dr. Hastings Banda, leader of the proscribed Congress, of complicity in the murder plot. The commission says that an attempt to involve him in assassination is generally thought by those who have seen or heard him to be ridiculous. It further says that Dr. Banda, who was not present at the bush meeting, "would never have approved of murder, and that he would have intervened decisively if he had thought that it was so much as being discussed." However, according to the commission, he had come to regard some degree of violence as inevitable and never condemned it categorically. In the opinion of the commission, it was Dr. Banda's inaction which made the bush meeting possible. The Government, however, is not prepared to acquit Dr. Banda of responsibility for the policies of violence adopted at the conference. In the Commons, the Attorney-General pointed to the fact that Dr. Banda, who had been elected president general of the Congress in 1958 and given sole power to appoint other officers, had appointed three extremists. "It was not easy to believe," he said, "that Dr. Banda could have been ignorant of the intentions of the extremists who wanted a policy of violence to be adopted."

The atmosphere would become much clearer if the Government released Dr. Banda whom the commission had exculpated after something akin to a judicial inquiry and also other leaders in a like position, that is, those similarly cleared of suspicion. The only ray of hope in this connexion is that the Attorney-General has stated: "It is our hope that now that the policy of violence has been frustrated, conditions in Nyasaland will soon so far improve that it will be possible to release those now detained without risk to law and order and security." It is obvious that a calm consideration of the future status of the federation and the constitutional development

of Nyasaland itself will become impossible as long as Congress leaders are held in detention.

But behind this Nyasaland tragedy lies the larger constitutional question of determining the future of the Central African Federation now heavily clouded by the unhappy incidents in Nyasaland. To resolve this question, the British Government has appointed a commission which is to lay the ground work for a review of the Constitution of the Federation. The commission is not to consist exclusively of members of the British Parliament, which is the final deciding authority. This was the suggestion of the Labour Party, but it was turned down by Government mainly because of Sir Roy Welensky's insistence that the Federation should have some representatives on the commission. Now it has been decided that the commission will consist of 26 members, only six of whom will be members of Parliament drawn from all political parties. Thirteen will come from the Rhodesias and Nyasaland, and five of them will be Africans. The usefulness of the commission will largely depend, it is obvious, on the character of the African representation on the body, if its membership is not to be confined to membership of Parliament. Mr. Gaitskell expressed the fear that the Africans chosen for the commission might be "simply the stooges" of the Federal Government. One can only hope with all one's heart that this will be far from the case and that the representatives selected will be the real leaders of African opinion.

The commission will be charged with recommending the constitutional framework "best suited to the achievement of the objects contained in the Constitution of 1958, including the preamble." These last three words are important, because though the Constitution envisages closer association, the preamble specifically recognizes the protectorate status of the two northern territories and says that they would continue to have separate governments as long as their people desired. While preferring complete independence, many African political leaders in Northern Rhodesia and Nyasaland would rather continue to be under the Colonial Office rule than have the Federation strengthened, which they fear will subject them to the domination of the white settlers. And Mr. Macmillan did well to emphasize that the protectorate status of the northern territories would be preserved until the people of the territories felt confident that they could hold their own against these settlers. He said:

The British Government will not withdraw its protection from Nyasaland and Northern Rhodesia in the short run. In the long run, our object is to advance these territories to full responsible government. Then they will be able to dispense with our protection and stand on their own feet as components of the Federation.

There will be three alternatives for the Government: (1) to amalgamate the three segments of the Federation

fully, with all power concentrated in a central government: (2) to continue the present rather loose governmental arrangements under which the Governments of the two northern territories have certain rights that are not subject to the control of the Federal Government; and (3) to dissolve the Federation. The British Government, Mr. Macmillan declared, was anxious for constitutional advances, but such an advance at the centre would be possible only if Northern Rhodesia and Nyasaland would also desire it. The British Government had made it clear, he said, that if there were proposals at any time involving the two northern territories' ceasing to be under its protection, it would be necessary to ascertain that the peoples of those territories desired the change. It might be, he said, that as a result of the constitutional review that would take place the best decision would be to maintain the status quo for a few more years, but in such a case it would also be status quo "on federal powers and on the protecting functions of the United Kingdom Government" in respect of Northern Rhodesia and Nyasaland. He said when all the units in the Federation were in a position to agree, and when they did agree, that protection was no longer necessary, then and then only would the whole Federation go forward to full independent membership of the Commonwealth. For the British Government had only one goal, both in the territories and the Federation: partnership; not supremacy of one race over another, but co-operation of all. There is another fear in the minds of Africans which the British Government tried to remove in the debate, viz., that the Federal Government would grab the African's land. It was pointed out in order to dispel this fear that under the Constitution this would be impossible. The Colonial Secretary said that European-owned land in Nyasaland was a little over three per cent. of the total area and that this had actually halved in extent since federation.

In the meantime, the British Government was going ahead, though not as fast as one would like, with the constitutional progress of the northern territories. "I want to make it abundantly clear," said Mr. Macmillan, "that the purpose of our policy is, as soon as possible and as rapidly as possible, to move towards self-government in Northern Rhodesia and Nyasaland. Therefore, in both territories we hope to see a broadening of the electorate and the functioning of self-government exercised on normal party-political lines." In the Nyasaland legislature there were only two nominated Africans and one European to represent African interests at the end of 1951. Since then the number has increased to five side by side with the European six. The disturbances in that territory prevented a survey of the situation that was to take place with a view to a further advance. But the Government has now announced its intention to increase the number of African seats in the Legislative Council as an interim measure. It also proposes to appoint two African members to the Executive Council from the Legislative Council, and the Govern-

ment intends that all unofficial members of the Executive Council, African and European, will be associated with one Government department or another. It is expected that these plans will begin to be implemented in August. "The choice in Central Africa," said Mr. Macmillan, lies between partnership and chaos. The Colonial Secretary also said that unless the Federation was made into a living partnership, the area would be given over to African racialism or to South Africa's apartheid.

Writing of the constitutional review at the 1960 conference, the "Statesman" says:

The recommendation of that conference must inevitably be continuation of the Federation, but postponement of Dominion status. The penalties of federation perhaps receive overmuch emphasis on occasions such as this; the penalties of secession are overlooked. The proud African likes to think of Nyasaland as an African State; the practical African fears that its lack of resources will reduce it to a rural slum. [The Devlin Commission has said: "The immediate result of federation to Nyasaland economically has been markedly beneficial, with a cash subsidy from the two Rhodesias of £3 million a year, which is over one-third of its annual expenditure. Without the resources of federation, the Nyasaland Government would not be able to provide the services in health and education it believes to be essential to the advancement of the African."] And against the "liberation" of the five million Africans in Nyasaland and Northern Rhodesia must be set the bondage of two million Africans in a Southern Rhodesia when it becomes a province of South Africa.

COMMENTS

"Legal Inquiry Committee on Tibet"

OF THE INTERNATIONAL COMMISSION OF JURISTS

Having already found that there is enough prima facie evidence to sustain the charge that the Chinese have committed acts of genocide in an attempt to destroy the Tibetan nation and the Buddhist religion in Tibet, the International Commission of Jurists, which has the support of more than 30,000 lawyers in fifty countries, has made a call upon the jurists of the world to express their solidarity in this case and to "help the Tibetan people in their struggle for freedom and justice." And it has itself constituted a "Legal Inquiry Committee on Tibet" to continue the work that it has started, collecting further documents and statements to establish the charge, so that if the United Nations so finds it can take action under the Genocide Convention of 1948. With the number of known dead in Tibet already placed at 65,000, the commission expresses its apprehension lest the destruction of the Tibetan people and their way of life by the Red Chinese be made complete. This is called "the

full act of genocide." The commission therefore pleads for action before it is too late.

Mr. Purshottam Trikamdas, who started collecting evidence and submitted a preliminary report, will be the chairman of the inquiry committee, and Britain's former Attorney-General, Lord Shawcross, will be a member. Among other members two are Indian, Mr. N. C. Chatterji, Working President of the All-India Civil Liberties Council, and Mr. R. P. Mookerji, Dean of the Law Faculty at Calcutta University, and the other four members are drawn from four Asiatic or African countries — Ghana, Malaya, Thailand and the Philippines.

Mr. Mahes Chandra, a special contributor of the "Statesman" writes as follows about the recent developments in Tibet:

Reports from Tibet indicate that the Chinese there are engaged in a massive effort to exterminate the Tibetan way of life and religion. The country is being communized and large-scale indoctrination of the people is in progress.

There is ruthlessness and cruelty and venerable Lamas are being singled out for attack. One diabolical method is to contrive to make these religious leaders lose their prestige among their flock. Junior Lamas are set up to insult their seniors. Publicly humiliated, some of them have even committed suicide.

Obscenity

In its editorial comments on the Delhi magistrate's judgment in the Khajuraho case, reported below in this issue, the "Times of India" points out how under the obscenity law the decision as to what is obscene is left to the caprice of an individual. For sec. 292 of the I. P. C., under which in this case the pictures in a book on Khajuraho were held obscene, merely provides for penalties for "whosoever sells, or distributes, imports or prints for sale or hire, or wilfully exhibits to public view, any obscene book, pamphlet, drawing, painting, reproduction or figure." But it does not define what is obscene, and the test that is applied is the faulty Hicklin test which characterizes any matter which has a tendency "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of the sort may fall" as obscene.

The judge decides as to what is obscene, and he "may be ill-informed on art or literature. The best plan therefore would be, the "Times" suggests, to leave the determination to the judgment of experts. And it adds: "It would not be enough to make it incumbent on the court to admit expert evidence in every case on an allegedly obscene book or work of art which comes before it: it must also be made obligatory on its part to be guided by such evidence." In India, the paper suggests, "The best course would be to set up sub-committees of the Sahitya

Akademi and the Lalit Kala Akademi and refer every book or work of art which any public authority considers to be obscene to one of these committees. Indeed, no prosecution should be launched unless one of these sub-committees has pronounced the book or the piece of art in question to be obscene."

THE LAW OF OBSCENITY

Pictures of Sculptures at Khajuraho Temple

Held Obscene by a Delhi Magistrate

Four persons connected with the publication of a book entitled "Khajuraho" — the press owner, the press manager, a bookseller and a Government servant—were prosecuted before the resident magistrate at Delhi for publishing the book on the ground that it contained obscene pictures. The accused claimed that the illustrations in the book were a reproduction of sculptures or paintings at the Khajuraho temple and were not obscene.

The magistrate rejected the plea of the accused but released them after admonition (21st July). He said:

I am of the opinion that the pictures are obscene and they conform to the definition of obscene.

In my view these pictures are detrimental to public morals and calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands they may come. The result is that I hold each of the accused guilty under sec. 292, I. P. C.

Considering the fact that these very pictures are being sold by the Archaeological Department and a film on Khajuraho has also been shown by the Films Division of the Government of India, I think the ends of justice will be met by releasing the accused after admonition.

NOTES

A Federal Court Lifts Ban

on Publication of Lawrence's "Lady Chatterley's Lover"
 "Lady Chatterley's Lover," a novel of the renowned British novelist D. H. Lawrence, which has caused such a great sensation, was the subject of two decisions in recent months in the United States courts. The Post Office's ban on the publication of the book in the United States was upset by a federal district court in mid-July, and the board of censor's ban on the showing of a film based thereon was set aside by the Supreme Court towards the end of June.

Lawrence wrote his third and final version of "Lady Chatterley's Lover" in 1928 and delivered it to a printer in Italy. It gives a detailed account of Constance Chatterley's adultery with a gamekeeper. After the publication of the book in Italy, the United States customs barred its importation on the ground that it was pornographic, that is, written for the purpose of exploiting obscenity. Since

then until recently no publisher had been willing to run the financial risk of publishing the book in the U. S. under the threat of censoring. But in May last a publishing firm, Grove Press, took the risk and published the novel in unexpurgated form. Immediately it became popular. As to the quality of the book the "New York Times" book review said: (The novel's) essential innocence should long ago have been quietly accepted. It contended that Lawrence employed Lady Chatterley's affair as a vehicle for "attacking industrial civilization and its mechanization of the living."

However, in June, the Postmaster General by an order barred the novel from the mails as "obscene and non-mailable." He called the book a "filthy work." The postal ban did not prevent the book being sold to book-stores by express and the novel became a best seller, 126,000 copies being sold to date. The publishers and distributors brought suit in the New York federal court, contending that the banning order violated freedom of the press, and the Government sought a summary judgment affirming the ban.

Judge Bryan upset the ban in a lengthy judgment. He noted that it was the first time a book of high standing had been charged with violating the obscenity statutes since the late federal Judge Woolsey had ruled in favour of James Joyce's "Ulysses" in 1933 (vide p. iv : 31 of the BULLETIN). The romance, he said, had great literary merit and its stature made it a significant work of a distinguished novelist. The Post Office must have found parts of it 'offensive', and on this basis condemned it entirely. But such a work should not be judged by excerpts or passages deemed sensational but rather as a whole. Language in the book that shocks some readers is not, except in a few rare instances, inconsistent with character, situation or theme. Fine writing and descriptive passages of beauty leave no doubt of its merit. There is nothing sensational about the book's publication today and it is indeed a major literary event carried out by serious-minded men. The Postmaster General has no special competence, the Judge said, qualifying him to render an informed judgment as to what constitutes obscenity within the meaning of the law. This must be left for the courts. Assuming that he has the power, whatever he does must be reviewed by the courts. "He could take temporary, not final action". The Judge declared:

The record indicates general acceptance of the book throughout the country. In one best-selling novel after another frank descriptions of the sex act and "four-letter" words appear with frequency. These trends appear in all media of public expression. . . . Much of what is now accepted would have shocked the community to the core a generation ago. . . . I hold that . . . this major English novel does not not exceed the outer limits of the tolerance which the community as a whole gives to writing about sex and sex relations.

Citing the first Amendment to the Constitution guaranteeing freedom of the press, the judge observed it is essential that the severest restrictions must be placed upon barriers to the flow of ideas. He said:

To exclude this book from the mails on the ground of obscenity would fashion a rule which could be applied to a substantial portion of the classics of our literature. Such a rule would be inimical to a free society.

The judge ruled that "Lady Chatterley's Lover" was not obscene, and that the mail restriction imposed by the Postmaster General was "illegal and void."

The publishing company welcomed the decision that the novel was not smut "for disavowing the right of the Post Office to censor" and "for protecting the right of a serious publisher to issue books without the threat of confiscation and prosecution." Similarly, the distributing company termed Judge Bryan's action as "historic" for terminating "the role of the Postmaster General as a literary referee." It said: "Book censorship by administrative decree is a great danger."

Supreme Court Voids Ban on Film

The U. S. Supreme Court on 29th June reversed the Court of Appeals of the New York State which had upheld a ban on the film, "Lady Chatterley's Lover," imposed by that state's censor board on the ground that it considered the film "immoral." The Supreme Court declared that it should never have been banned, since it is obviously of such an innocuous nature that it is doubtful, as Justice Frankfurter said, that it would even have offended Victorian sensibilities.

But far more important was the Court's decision, by a 6 to 3 vote, declaring unconstitutional that section of the New York law which prohibits the licensing of a motion picture of which "the dominant purpose or effect is erotic or pornographic" or which "portrays acts of sexual immorality, perversion or lewdness or which expressly or impliedly presents such acts as desirable acceptable or proper patterns of behaviour."

The section was carefully written and made into law in 1954 in an effort to give a clear definition to the term "immorality." But the Court found the section to go too far and thus to violate the guarantee of "free speech." The majority opinion said:

What New York has done [in banning "Lady Chatterley's Lover"] is to prevent the exhibition of a motion picture because that picture advocates an idea — that adultery under circumstances may be proper behaviour. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The state, quite simply, has thus struck at the very heart of constitutionally protected liberties.

The impression that the opinion has produced on the lawyers in general is that censors can take action only when obscenity presents itself in the form of material that is erotic or pornographic per se and not when the material is judged to be obscene just by reference or implication. The ruling has already created a surge of

indignation among a section of the public that the decision means that "the bars will be down, the latches let loose and filth and corruption will flood the screen." A competent observer gives the assurance to such people that no such result will follow. He says:

Actually, the law or the municipal statutes in every community still forbid the showing of motion pictures that are pornographic in content and intent. No theatre or place of exhibition could possibly offer a film that showed people committing obscene acts or engaged in erotic pursuits, even if it wished to, which most theatres definitely would not.

GLEANINGS

Mr. Baldwin's Speech in Delhi

Mr. Roger N. Baldwin, Chairman of the International League for the Rights of Man, with which the All-India Civil Liberties Council is affiliated, recently visited India on a world tour of three months for the purpose of making contacts with civil rights agencies and with Government officials dealing with United Nations affairs. In Bombay, Delhi and Calcutta he delivered a series of lectures. Following is a summary of his speech before the All-India Civil Liberties Council on 30th July on the subject of "Civil Liberties under the United Nations."

Civil Liberties under the U. N.

Even a few days in India (where my long association with the Independence struggle makes me feel quite at home) offer striking evidence of those freedoms of speech, press and association which lie at the base of democracy. As in all great democracies, India obviously needs a constant effort both by government and citizens' associations to preserve and extend its freedoms. I would draw attention, if that be needed, to the increasing role of radio in public opinion, which cannot be adequately informed without equal access to the air of all major points of view. I would think that even under India's government ownership provision could be made for equal rights of political parties and for both sides of important public controversies under fair rules of debate. That would conform to the spirit of India's excellent Bill of Rights and to the principle of freedom of speech so generally accepted and applied, both here and under the Universal Declaration of Human Rights.

It is also generally accepted that no penalties should be imposed on expressions of opinion or advocacy not involving incitement to unlawful acts. But I note that India, like some other inheritors of British colonial rule, still retains the power of preventive detention without the protections of open trial in the courts. Whatever safeguards surround it, the fact remains that a citizen may be detained for a year in prison on charges that may involve only political views or associations. I would think that procedure deserving of my colleagues' attention, along with police activities aimed at interference with expression of opinion of any character.

These are problems common to most democracies. They indicate the need of avenues for citizens' complaints when rights are violated or inadequately protected. I

commend to you the system best worked out in Japan where every department of law, federal and provincial, has a special deputy assigned to receive and investigate all such charges, aided by unpaid commissions of citizens as advisers. In addition, these agencies are obliged to keep up a continuing survey of civil liberties, and to educate both the public and students in all higher schools in the principles and practice of their rights and liberties.

At the United Nations, the efforts for civil liberties, like other human rights, have been slowed up since the adoption of the Universal Declaration both by cold war pre-occupations and by the resistance of most governments to any international jurisdiction over their domestic affairs. Eight countries of Europe have just pointed the way to the future of all countries by adopting a system of appeals to a European Court of Human Rights, with powers above the governments to hear and decide justified complaints by any citizen. Even the incomplete human rights treaties of the United Nations aim at some such role for the International Court of Justice with what we all hope will be the right of private petition by aggrieved individuals and minorities.

I wish I could cite my own country, the United States, as a leader in this effort to build up international protection of civil liberties. On the contrary, it has retreated from early leadership under the pressure of forces which block treaties even for such undebatable purposes as abolishing forced labour, curbing the remaining slave trade and extending political rights to women. The reason lies in the rights claimed by the individual states as against the federal government, recently sharpened by the conflict over racial integration of public schools by federal power. But as international jurisdiction expands, as it surely will when the nations embark on disarmament, the United States will, I think, yield. Once national sovereignty is diminished by an arms agreement, whose only alternative is world suicide, the prospects for moving toward universal civil liberties will vastly improve.

I have been heartened by what I have seen and heard in my two weeks in India of the sense of liberty which I gather runs deep into village life as well as among more widely organized areas of opinion. The task of those lawyers and others devoted to the principles of civil rights should find a response lacking in many countries. With almost half the world under Communist dictatorships where no such effort is possible, and a further large part under other forms of totalitarian rule almost equally oppressive, the future of democratic liberties may seem discouraging. But we have on our side the universal claims for freedom, the proved failure of all dictatorial regimes and the tendencies represented in the United Nations to expand the rule of law and the protection of human rights.

Winston Churchill once observed that democracy is the worst form of government ever decided by man, except for all the others. It is a tough and incessant struggle to make it work, and we who labour for the basic rights of the citizen can take satisfaction, I think, in serving both a principle and those whose rights and liberties are threatened or denied.