

The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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SUPPRESSION OF HORROR COMICS

II.—IMPLICATIONS OF THE HICKLIN JUDGMENT FURTHER CONSIDERED

We hold over to the next issue a detailed comparison between the provisions of the British Horror Comics Act and those of the Indian Bill with a view to showing how our Bill is far wider in scope and more drastic in effect than the British Act and lacks many of the safeguards provided in the latter measure against abuse of the powers conferred thereby. In the meanwhile, we elaborate in this article the mischief of Lord Cockburn's judgment in the Hicklin case to which we referred somewhat briefly last month, for this will in our opinion help the reader to arrive at a proper assessment of the Bill.

Lord Cockburn's interpretation of the British obscenity law in the Hicklin case of 1868 (vide p. iv : 16)—the Indian obscenity law is interpreted in the same way and the Horror Comics Bill when it passes into law will also undoubtedly be interpreted in the same way—contains three vices: (1) it concerns itself with the effect likely to be produced on persons who are unusually susceptible to immoral influences; (2) it does not take into account the motive of the writer; and (3) it treats it as immaterial whether literary or artistic merit is a leading feature of the work.

(1) "Probable Audience" of the Book

It would be useful to consider here two prominent obscenity cases in the courts of the United States to which constant reference is made in dealing with these points. (Obscenity being a local subject, no U. S. Supreme Court decision is available.) On point 1 we shall cite Justice Qua's opinion in the "Strange Fruit" case in the Massachusetts Supreme Judicial Court. "This novel is a frank picture of life among whites and blacks in a small Southern city and its central feature is a liaison between a white man and an intelligent girl of colour. Marriage is impossible under the state law. The couple eventually separate. The man is murdered, and the book ends with the lynching of an innocent Negro." In regard to the probable "audience" of the book, which it is "proper to take into account," Qua J. said (Commonwealth v. Isenstadt, 318 Mas. 543 [1945]):

The statute was designed for the protection of the public as a whole. Putting aside for the moment the reference in the statute itself to that which manifestly tends to corrupt the morals of youth, a book placed in general circulation is not to be condemned merely because it might have an unfortunate effect upon some few members of the community *who might be peculiarly susceptible* [italics ours]. The statute is to be construed reasonably. The fundamental right of the public to read is not to be trimmed down to the point where a few prurient persons can find nothing upon which their hyper-sensitive imaginations may dwell.

The thing to be considered is whether the book will be appreciably injurious to society in the respects previously stated because of its effect upon those who read it, without segregating either the most susceptible or the least susceptible, remembering that many persons who form part of the reading public and who cannot be called abnormal are highly susceptible to influences of the kind in question, and that most persons are susceptible to some degree, and not forgetting youth as an important part of the mass, if the book is likely to be read by youth. [The statute penalized in particular books "tending to corrupt the morals of youth."]

It is clear from the above passage that "even the conservative Massachusetts court" (in the words of Professor Chafee) rejected the test of obscenity laid down in the Hicklin case.

* * *

In the Ulysses case (United States v. One Book Entitled Ulysses, 5 Fed. 182 (N. Y., 1933), Judge Woolsey laid down the following test in the U. S. District Court of New York City :

Whether a particular book would tend to excite such impulses and thoughts [referring to the opinions of other judges that the word "obscene" meant "tending to stir the sex impulses or to lead to sexually impure and lustful thoughts"] must be

tested by the court's opinion as to its effect on a person with average sex instincts — what the French would call *l'homme moyen sensuel* — who plays, in this branch of legal inquiry, the same role of hypothetical reagent as does the "reasonable man" in the law of torts and "the man learned in the art" on questions of invention in patent law.

Professor Chafee himself says about the extreme position taken by Lord Cockburn:

Although this test has had much influence, it is plainly unsatisfactory. It is just as if the law denied a driving license to an automobile owner whenever it was found that he might conceivably run into a careless pedestrian who darted in front of his car. Any painting or statue of an unclothed woman would be condemned by such a test because of its harmful effect upon pathological minds. In other parts of the law, for example, in automobile accidents, enforced standards are based on the conduct of the ordinary reasonable man under like circumstances. It is entirely out of keeping for a legal standard to be derived from abnormal persons.

Professor Chafee thus sums up the position on this point:

Since Qua and Woolsey, able judges from opposite camps, are agreed in refusing to let the reading of many normal citizens be circumscribed by the peculiarities of the ultra-susceptible, we can hope that this group will eventually cease to influence the legal standard.

(2) Intent of the Author

Judge Woolsey in the *Ulysses* case (*supra*) says about the author's intent:

Of course, in any case where a book is claimed to obscene, it must first be determined whether the intent with which it was written was what is called, according to the usual phrase, pornographic, that is, written for the purpose of exploiting obscenity.

Stressing the author's (Joyce's) "sincerity and his honest effort to show exactly how the minds of his characters operate," the Judge said:

The words which are criticised as dirty... are such words as would be naturally and habitually used. I believe, by the types of folk whose life, physical and mental, Joyce is seeking to describe... In many places ("*Ulysses*") seems to me to be disgusting, but although it contains, as I have mentioned above, many words usually considered dirty, I have not found anything that I consider to be dirt for dirt's sake. Each word of the book contributes like a bit of mosaic to the detail of the picture which Joyce is seeking to construct for his readers.

One may not wish to read "*Ulysses*"; that is quite understandable. But when such a great artist in words, as Joyce undoubtedly is, seeks to draw a

true picture of the lower middle class in a European city, ought it to be impossible for the American public legally to see that picture?

It is clear from the above, in the words of Professor Chafee, that "Judge Woolsey attached great importance to the issue of the author's sincerity. In other words, the actual text of the book should be viewed in the light of the author's intent." Holding that there is not in the book "the leer of the sensualist," Judge Woolsey sanctioned the importation of "*Ulysses*," which customs officials had banned on the ground of its obscenity, and his ruling was affirmed in the Appeals Court by Judges A. N. Hand and Learned Hand, Judge Manton dissenting.

In this connection it may be stated that in *United States v. Kennedy*, 209 Fed. 119 (1913), Judge Learned Hand said:

I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses.

In *United States v. Levina*, 83 F. and 156 (1936), this Judge in speaking for the court, overruled *Regina v. Hicklin*.

(3) Literary or Artistic Merit

Judge Woolsey in the "*Ulysses*" case expressed the opinion that if a book is characterized by literary art joined to sincerity of purpose and if these are more prominent features of the book than obscenity, it should not be condemned. This view appeared to Justice Qua in the "*Strange Fruit*" case to go too far, though he agreed that artistic merit and integrity must be taken into account by the court. He said:

We do not go so far as to say that sincerity of purpose and literary merit are to be entirely ignored. These elements may be considered insofar as they bear upon the question whether the book, considered as a whole, is or is not obscene, indecent, or impure. It is possible that, even in the mind of the general reader, overpowering sincerity and beauty may sometimes entirely obscure or efface the evil effect of occasional questionable passages, especially with respect to the classics of literature that have gained recognized place as part of the great heritage of humanity. The question will commonly be one of fact in each case, and, if looking at the book as a whole, the bad is found to persist in substantial degree alongside the good, as the law now stands the book will fall within the statute.

Judge Woolsey too made the effect produced by a book "in the result" the criterion of its obscene character, and thus there is not much substantial difference between the two views. But to the extent that there is any difference, Professor Chafee declared himself to be on the side of Judge Woolsey. He said: "Whenever the work in question

possesses obvious literary or artistic merits, the 'Ulysses' decision is the best guide we have." (It may be stated in this connection that Mr. Huntington Cairns, the U.S. Treasury censor of imported books, proposed that, in determining which books should be admitted into the country, classics and works of recognized literary or scientific merit should with certain qualifications be admitted, though a strict application of the law would ban them as obscene.)

* * *

It is of course not maintained by anyone that if the author is motivated by serious and innocent intent and if his work is characterized by notable literary merit, this by itself should condone any salacious appeal the book may make. Such a claim would be preposterous. For, as Justice Qua said, "There is no room for the pleasing fancy that sincerity and art necessarily dispel obscenity." All that is contended is that these points should also be considered along with others in judging books from the point of obscenity and that expert evidence on these points should be admitted in the trial as relevant to the issue before the court. But the trouble is that under Lord Cockburn's judgment in the Hicklin case this is barred, and this applies also to the Horror Comics Act of Britain. As the "Economist" said (2nd April): "The intention of those responsible and any evidence of literary or artistic merit are irrelevant to the question of guilt." It was chiefly in order to cure these defects inherent in the Hicklin decision that the Society of Authors promoted a Bill for the amendment of the law of obscenity (including in it provisions for dealing with horror comics). Under this Bill the courts would be required to consider the intention (and even the general character) of persons accused of publishing an obscene libel, and they would have to consider expert evidence, if any, about its literary or artistic or technical merits. All that this means is that intent and literary quality should be regarded as factors to be taken into consideration in determining guilt.

(4) Is the Book Intended for Children?

An elaboration of the first point — the "probable audience" of the book — is here necessary because we are dealing mainly with books intended to corrupt children. The question assumes great importance as to whether any work brought under the Horror Comics Act was ever intended for children or would normally reach their hands at all to exert a baneful influence. In the "Strange Fruit" case Justice Lummus, in dissenting from the majority view that the book might corrupt the youth, said:

The record contains no evidence to warrant the assertion or to show that any adolescent ever read the book or would read it under normal conditions...

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

Professor Chafee, while agreeing that publications deliberately designed to be sold to youngsters and to exploit their ignorance deserve to be suppressed, is unable to agree to condemnation of books written for adult reading because they may happen to fall into the hands of immature persons and be harmful to them. Judges and legislators, he says, are often unduly apprehensive on this score. He believes that such books are apt to be condemned on assumptions "that young people will read the books at all, that they will read them with eager enjoyment, and that they will have the same understanding of their poisonous implications as a sophisticated adult and yet lack the adult's ability to reject what is bad." He says:

The validity of all these assumptions is doubtful; they seem to me to underrate grossly the immunity of healthy young people and their powers of discrimination... We ought to have considerable confidence in the ability of maturing boys and girls to assimilate what is good for them and to ignore the rest or throw it away. Judges would do well to keep in mind this passage (in "Essays of Elia"), remembering that the books this girl read must have included Elizabethan dramas, Restoration plays and 18th century novels, many of which would surely be banned to-day if they were now published for the first time: "She was tumbled early, by accident or design, into a spacious closet of good old English reading without much selection or prohibition, and browsed at will upon that fair and wholesome pasturage. Had I twenty girls, they should be brought up exactly in this fashion."

A safeguard that the powers of the British Horror Comics Act will not be employed against books not likely to fall into the hands of young persons was introduced in the Bill on the motion of Government. Such a safeguard is lacking in our Bill. We shall deal with the amendment then adopted in the next issue when we shall institute a comparison between the British Act and the Indian Bill.

FREE INTERCHANGE OF IDEAS, PERSONS AND GOODS

NO AGREEMENTS REACHED AT GENEVA CONFERENCE

The "spirit of Geneva" created at the summit conference was not much in evidence when the Foreign Ministers of the Big Four met last month to give practical shape to the spirit. On the crucial question of German reunification there was a complete stalemate, and the issue of disarmament had to be remitted to the U. N. Sub-Committee without any specific agreement being arrived at the Ministers' conference. Even so, the Western powers pressed their proposals on Soviet Russia for a reduction, if not elimination, of the barriers which now cut off all exchange of ideas, persons and goods between the East and the West. On such a non-controversial subject it appeared to the Western powers that their proposals for gradually letting down the barriers would evoke a sympathetic response, but even on this matter no progress was made and there is no early prospect of the present isolation being removed. These proposals were made not only because it seemed easier to reach agreements on this subject than on the complicated political questions that were before the conference, but because it was felt that development of contacts between East and West is, in the long-range perspective, at the root of all other problems and that it is the final key to peace, which must remain precarious as long as there is a complete gulf between the ordinary peoples of the respective countries. However, the new hope aroused by the summit conference has vanished into thin air, and what is most disconcerting is that, if the negative approach which the Soviet Foreign Minister adopted at the conference represents the approach of his Government, the Iron Curtain which shuts off the Soviet Union and the vast regions which it controls is going to stay indefinitely.

Exchange of Goods and Persons

The directive issued by the heads of government at the summit conference in relation to commerce was limited to East-West trade in peaceful goods, and this limitation was emphasized at the outset by the Western powers at the Foreign Ministers' conference, and yet, while the Western powers made a number of concrete proposals intended to develop a high level of trade between East and West, Soviet Russia made no positive response but seemed bent upon persisting in an autarchic policy of self-sufficiency which it has been following for so long. On the other hand, Mr. Molotov, the Russian Foreign Minister, continued to make an openly political attack on strategic trade controls operated by the Western powers as a matter of security, though this subject was clearly outside the jurisdiction of the conference. Mr. Molotov began by saying that improved trade was the only basis on which broader contacts could be established, but soon it became evident that by trade he meant commerce in goods whose shipment to the

Soviet Union is at present barred because of their strategic importance. The Western powers repeated what they had said at the beginning that strategic trade controls are a consequence, not a cause, of tensions and that in any case they were beyond the purview of the conference. As to trade in peaceful goods, they pointed out that no barriers were imposed by them. Mr. Dulles, the American Secretary of State, said: "The only restrictions which exist are those on strategic goods, touching only a very small percentage of normal international commerce." He added: "Unless goods are made available from the Soviet Union and unless the Soviet Union takes concrete steps to open its market, unilateral willingness to trade on the part of the Western countries cannot convert itself into two-way trade." Mr. Macmillan, the British Foreign Secretary, said: "The short answer to the Soviet delegation is that if they want more trade, they should trade more."

On the item of free travel, Soviet Russia agreed in general to the desirability of exchanges of official delegations, and it showed interest in the acquisition from abroad of technical know-how. Such official missions were welcomed by the Western powers as desirable and worthy of being promoted on a basis of reciprocal advantage, but they thought that more than visits of such officially sponsored delegations was required. What they wanted to bring about was a free movement of individuals on their private account. Mr. Dulles said: "All travel abroad by Soviet citizens is carefully controlled by the Soviet Government and is undertaken only by carefully selected groups. Travel abroad, therefore, on the part of Soviet citizens is not what we would call ordinary travel by persons on business or pleasure," which chiefly it was intended to promote. To this there was no response.

Exchange of Ideas and Information

The Western powers laid the utmost emphasis on free exchange of ideas and information as the basis of everything else. Mr. Dulles said:

The free democracies believe that human beings were given minds with which to think and consciences with which to judge right and wrong, and that human dignity requires freedom of thought and freedom of conscience. We also believe that the peoples of the world are essentially a single family, the members of which are naturally sympathetic with each other. Therefore, we believe that peace and human dignity are best served by allowing ideas, knowledge and news to be freely exchanged.

He realized that the Soviet Union could not remove the existing barriers all at once and therefore Western powers made concrete proposals for a progressive

elimination of the barriers including the lifting of Soviet censorship on foreign press; discontinuation of Soviet jamming of Western broadcasts; establishment in one another's countries of freely accessible information centres, publication and unhampered distribution of official periodicals; free exchange of books, newspapers and magazines; a monthly exchange of uncensored broadcasts on world developments, etc. But the Soviet delegation refused even to consider the proposals on the ground that they involve interference with internal affairs and therefore not "a subject of discussion at this meeting." It regarded such proposals as an anti-Soviet drive for freedom for reactionary propaganda and subversion. Mr. Molotov said: "We cannot agree to such a freedom as would lead to the unleashing of subversive activities of all kinds of scum of society." And he added: "The Soviet Union did not grant and will not grant in the future such freedom of the exchange of ideas as would mean freedom of propaganda for war or propaganda imbued with a hatred of mankind."

The Western powers countered by pleading that free circulation of ideas necessarily involves the letting in of ideas that may not be acceptable to the rulers and that if such ideas are allowed to come in, no interference in internal affairs is involved. Speaking about Soviet jamming of Western broadcasts, Mr. Macmillan said:

Let me say that we are not claiming to force our opinions on the Soviet people. We want them to be able to listen to our broadcasts in the way that our people can listen to Soviet broadcasts.

The Soviet delegation's first comment on this was that their people should be protected against subversion and corruption. My answer is that our broadcasts are jammed not on what they contain but they are systematically jammed.

A statement which the B. B. C. recorded here in Geneva by Marshal Bulganin and Mr. Khrushchev was jammed when broadcast by the B. B. C. Why, that is not even censorship. It's *lèse majesté*. Now while this is going on on the one side, on the other side the Soviet Union broadcasts, without the slightest impediment, 103 hours a week in the English language.

On the subject of the Soviet's censorship of foreign press, Mr. Macmillan said:

The Soviet delegation replied, that this subject was not within the purview of the conference. They repeated the claim that their people must be protected against subversion and corruption in all its forms.

What are we really proposing? We are proposing that the Soviet citizen, the ordinary citizen, should have freely available our books, periodicals and newspapers. Is this a claim to corrupt and subvert? If so, the Soviet Union practises it towards us; for its literature is available in the United Kingdom to all who seek it.

Mr. Dulles's conclusion was:

It (the Soviet's attitude) is confirmation of the fact that the Soviet bloc system is based upon artificial conditions which cannot withstand free contact with the outer world.

The Soviet rulers seem to fear lest their system would be endangered if the Soviet people had the kind of information which is available elsewhere; if they were free to join the many millions who constantly travel back and forth to get acquainted with each other; and if trade in consumers' goods should bring to the Russian people knowledge of the immense quantity and superb quality of goods which are produced by societies where labour is free.

We do not believe that peace will have a solid foundation until there comes about free communication and peaceful trade between the Soviet bloc and the free Western people.

Mr. Aneurin Bevan's Comment

That the Foreign Ministers' conference should be locked in stalemate even on such a simple question as intellectual intercourse between nations would cause profound disappointment everywhere, and Mr. Aneurin Bevan, who is the last to be accused of any hostility to the Soviet Union, says about this deadlock: "The Soviet Union must accept its share of blame (for the "barrenness" of the conference). It would be a disservice to leave her under any illusions about that. She should not have encouraged so many expectations if all along she did not intend them to be taken seriously." One possible explanation of this reversion to isolation on the part of Russia, which he says "would be even more disastrous" to her than to the Western powers, is, according to him:

The friendlier Soviet tone has achieved its intended objective in causing the West to relax its tense poise and military preparedness. The character of Western society, so it is argued, makes it impossible to rectify this without tremendous political effort accompanied by artificial stimulation of fresh fears of war and all apparatus of hate with which we are so sickeningly familiar.

This is a danger to which the tighter social disciplines of Communist countries are not exposed because they can change their diplomatic tone without paying any price either in reduced arms production or reduced vigilance.

If there is the slightest truth in this, then it discloses that frivolity is gravely at variance with the sombre issues involved.

What is required is evidence that the statesmen are anxious for deeper understanding following closer communication between their peoples in order to prepare for a more hopeful approach to greater difficulties.

Single-List Election System

Proposed by E. Germany and Endorsed by Russia

A point of interest to political scientists in general and to those working for the preservation of civil liberties as an essential of democracy which arose in the discussions of the Big Four Foreign Ministers' conference at Geneva last month may be noticed here: one-list ballot as a method of insuring "free elections." At the summit conference of the heads of the four States reunification of Germany by means of free elections was decided upon, and the Foreign Ministers' conference was charged with the task of working out the details. Accordingly, the Western powers put forward a proposal to the effect that "free and secret elections shall be held throughout Germany during September, 1956, for the selection of representatives for an all-German national assembly to draft a Constitution and to form a government thereunder for a reunified Germany;" and that a Four Power commission be constituted "to prepare the electoral law for such elections, including effective provisions for safeguards and supervision to insure the freedom of such elections." The proposal came to nought, but the reason for it was wider than the election procedure we are considering here: it was that while in the directive of the heads of government to their Foreign Ministers the question of unification of Germany was closely linked to the question of European security, the Foreign Minister of Russia insisted on keeping these questions separate, giving first place to European security and treating the related question of German unity as one "of subordinate nature." He also insisted that if East and West Germany were ever to come together once again, it should be left to the two countries to arrive at such a solution by mutual agreement, implying that the Big Four should not meddle with it. Thus the positions taken by the two sides on German unification, which the Western powers regarded as a key to success of the conference, were wholly non-negotiable. But with this political problem we need not concern ourselves here.

However, the question of free elections was discussed at the conference. East Germany circulated to the conference a proposal, which was supported by Soviet Russia, involving single-list elections. The basis of East Germany's plan was the formation of a council from members of the East German and West German Parliaments to be composed of "representatives of all democratic parties and organizations," implying inclusion in the West German delegation of representatives of Communist organizations in the Federal Republic. It was stipulated in the plan that the decisions even of such a council would have to be unanimous; that is, any further step taken towards unification would be subject to East Germany's veto. The plan was interpreted by the Western powers as a return to the Lublin Committee formula in Poland. This formula has been thus described:

Under the "Lublin plan" Stalin imposed his hand-picked "Lublin Committee" of Polish Communist renegades as the Government of "liberated" Poland. He did yield to Western appeals to the agreement and the "spirit" of Yalta, but only to the extent of admitting five democratic members from the free Polish Government to a twenty-one-man "Government of National Unity," which remained under Communists' control. This Government in turn controlled the army, the police, the press and the radio, and with that power in hand unleashed a campaign of terrorism which soon liquidated all opposition and forced the democratic leaders to flee for their lives.

The French Foreign Minister denounced the proposal as a plan to "communize" all of Germany. (The population of West Germany is 50 million and that of East Germany about 18 million.) The British Foreign Secretary said:

The brutal fact is that, for the Soviet Government, the only acceptable guarantee for the reunification of Germany is the bolshevization of the whole country. This is the only contribution which the Soviet delegation could find to add to what was agreed by our heads of government in the summer.

However, this again is a political issue with which we have no desire to deal. We are concerned with the single-list electoral system which was suggested by East Germany. When the Western Foreign Ministers attacked the system as a fraud on free elections, the Soviet Foreign Minister spoke strongly in its praise. He asserted that the system of election on a single slate of candidates had resulted in a truly representative government in the Soviet Union and attributed to it "the strength and unity that had enabled the Soviet people to take an honourable place among the nations in the world." He said: "The Soviet Government is one of the most solidly based in the world as far as the support of the people is concerned." Thus he lectured his Western counterparts on the superiority of the single-slate election system, prevailing in Soviet Russia and all countries under its influence which contain more than half of the world's population, over the "mechanical" free elections that take place in Britain, America and elsewhere. This defence roused the Western Foreign Ministers. The French Minister asked:

Does the Soviet delegation mean to tell us that since the beginning of time a better method has ever been found for letting men express their opinions than to let them go to the polls, in liberty and security, to designate those who will speak for them?

If the elections held in the Western countries are "mechanical," what could be more "pitilessly mechanical" than elections that have taken place elsewhere in Europe under Soviet direction, which gave 99 per cent. of the votes to Mr. Otto Grotewohl, Premier of East Germany, to the Communist Party leaders in Soviet Russia itself and to Hitler in pre-war Germany? Mr. Macmillan,

British Foreign Secretary, said that on the basis of his own considerable experience with elections, anyone polling such a vote was no mere man but a "walking miracle."

M. Pinay remarked that the East German Government with the support of the Soviet Government was willing to permit only a typical Communist single-slate election because Mr. Grotewohl was afraid of "free" elections. And if East Germany had become an earthly paradise on account of this electoral system, why (he asked) have about three million people fled from it since 1945 and more than 175,000 crossed the frontier in the first nine months of this year? Because this electoral procedure is a concealed instrument for communizing Germany, he said, "the Soviet Union will accept election in that country only after having been assured beforehand that they will take place under such conditions that they would merely confirm the Sovietization of the whole country." Mr. Dulles, the U. S. Secretary of State, said that the Soviet delegation had taken the position "that it would not permit the so-called German Democratic Republic, the regime which the Soviet Government has installed in East Germany, to the test of free elections." Mr. Macmillan said:

The real problem is our radically different approach to German reunification. We believe that individuals and nations should be free, free to choose their own form of government and free to choose their own future. We also believe they should be free to choose their own friends.

The Soviet Government, however, continues to believe in its right, nay its duty, to impose when it can political and economic systems on other nations and to withhold from them the right to choose their own future.

Once more it is clear, he said, that men use the same words — 'peace-loving,' 'democratic,' 'freedom' — to mean different things. Those who are devoted to civil liberty as an essential ingredient of democracy should make up their minds as to what these words mean to them.

Internal Censorship and Thought Control

—in Soviet Russia

While the West is very much exercised by the Soviet Foreign Minister's refusal to allow a free exchange of ideas and information between his country and the outside world and to abolish or reduce censorship of foreign press, the question arises whether in the Soviet Union itself newspapers are free to say what they like to their readers in their own country or whether the Government clamps censorship on them. Such a query was made at a press conference in Cleveland last month to a delegation of seven Soviet journalists visiting the U. S. A., and the head of the delegation, Mr. Boris Kempov-Polevoy, replied: "The editors make their own decisions," implying that the Government does not inter-

fere with them. On this point, Mr. Mikhail Koriakov, writes in the "New York Times" that the statement that there is no censorship in Soviet Russia is verbally true, but only because such censorship is not necessary there, as only papers voicing the views of the ruling party are allowed to exist in the U. S. S. R. He says:

At first glance, everything Boris Kampov-Polevoy says appears to be the truth. He represents "Pravda," whose editor-in-chief, Mr. Shepilov, of course, does not need any censor because he himself is a member of the Central Committee of the Communist party, knows the party line well, and knows how to carry it out in the newspaper. Neither Shepilov nor other Soviet editors need a party censor because they themselves are party censors. Every editor of a provincial newspaper is a member of the provincial committee of the party; the editor of a local newspaper is a member of the local committee of the party.

The trouble is that in Russia today the press is entirely in the hands of one party. Under the one-party system there is also a one-party press. That is why there is such a stereotype in the newspapers and magazines of to-day's Russia. Even the magazine "Kommunist" has been compelled to admit that. Just a few months ago "Kommunist" carried an article saying that the magazines and newspapers in the U. S. S. R. "depress with their monotony," that "one newspaper, like a drop of water, resembles another."

It is a well-known fact that before the October Revolution the Russian press was becoming more and more free. In November, 1905, preliminary censorship was abolished. In February, 1917, the last vestiges of censorship were wiped out. But the Communist dictatorship has taken freedom of the press from the Russian people. In July, 1918, the Soviet Government introduced censorship and imposed restrictions on the press, allegedly as a "temporary measure." The decree of July 28, 1918, said that all newspapers which did not belong to the Communist party were suspended "until full establishment of Soviet power." More than thirty-seven years have since passed. But no newspapers which do not belong to the Communist party have yet been permitted in Russia.

— In South Africa

If censorship in Soviet Russia is an inevitable result of a one-party press, it has to be imposed in South Africa where opinions differing from those of the ruling party are normally allowed to be ventilated; but the censorship in that country is pretty drastic. The situation in this respect is thus described by a Johannesburg correspondent of the "New York Times":

The present South African Government has banned more than 1,500 publications since it came to power in 1948.

These have included a comic book version of the life of Davy Crockett, all issues of the Soviet Union's newspaper "Pravda" and works by such American authors as Erskine Caldwell, James T. Farrell, Zane Grey and Mickey Spillane.

Reasons are seldom given for the banning of a publication or book. Customs officials merely confiscate the copies at ports under a South African law that provides for such action if a publication is found to be indecent, obscene or objectionable. A wide latitude is given for halting the importation of many kinds of printed matter for political reasons.

South Africa's 9,000,000 Negroes are especially interested in activities and achievements of Negroes in the United States. However, they have been prevented by censorship from reading comic-book biographies of American Negro athletes. All issues of American Negro magazines are banned.

The Africans also enjoy Western stories, but many of these are prohibited. Among more serious United States authors such books as Lillian Smith's "Strange Fruit," Richard Wright's "Native Son" and Shirley Jackson's "The Lottery" are banned.

Severe penalties are provided for possession of any proscribed book. The maximum fine is 12,800 dollars or five years' imprisonment.

Nearly all works about the Soviet Union, Communist China and communism are banned. The

United Nations Educational, Scientific and Cultural Organization's pamphlets on South Africa's racial situation are on the black-list. Issues of "Time" and "Life" magazines have frequently been delayed for days and sometimes weeks at customs when they have contained articles critical of South Africa.

Advance copies of books to be imported must be submitted to an eleven-member Board of Censors that functions in Capetown. A study of objectionable literature also is being conducted by a Government commission of inquiry.

"Censorship cuts at the Roots of Moral Life"

A controversy over censorship has developed between South Africa's Minister of the Interior and the Anglican Bishop of Johannesburg.

The Right Rev. Ambrose Reeves has complained that censorship of literature, the press and radio by the State cuts at the roots of moral life because it destroys one of the essential foundations of all morality—the sense of and respect for truth. He expressed fear that abuses of censorship by South Africa's Nationalist Government could lead to the silencing of critics, book-burning and systematic destruction of the cultural life of the community.

Dr. Theophilus E. Donges, the Interior Minister, replied that the main goal of censorship was to prevent the flow of indecent literature into South Africa. He said he was arranging an exhibition of banned books and pictures to show the type of material being confiscated by customs officials.

DUE PROCESS AND SECRET INFORMERS

A FEDERAL DISTRICT COURT'S RULING

In June last the Federal Court of Appeals in its judgments in the Nathan and Shachtman cases (vide pp. iii: 245-6 of the BULLETIN) sharply circumscribed the exercise by the Secretary of State of his discretionary power in the matter of issuance of passports, the rules in that behalf providing that "the Secretary of State is authorized in his discretion to refuse to issue a passport." A Federal District Court on 22nd November cut down the Secretary's power still further.

Facts of the Case

This case concerned Mr. Leonard B. Boudin, a lawyer who represented Dr. Nathan in the earlier case. Mr. Boudin obtained a passport in 1954. It limited his travels to specified European countries for a period of four months. At that time he made an affidavit that he was not then a member of the Communist Party. After his return from that trip he asked that the limitation be removed, declining however to give an affidavit relating to membership in the party. The State Department maintained that it had evidence that he had been and con-

tinues to be a supporter of the Communist movement and subject to party discipline. On that ground Mr. Boudin was informed on 24th February this year that he was not eligible for a passport under the State Department regulations. The Department refused to disclose all of the sources or the full content of the evidence on its files against him. Thereupon Mr. Boudin sued the State Department to give him a passport.

The Judgment

Federal Judge Youngdahl in the District of Columbia in his judgment refused that request of Mr. Boudin but instead ordered the State Department to give Mr. Boudin a hearing within twenty days, at which hearing the Department was required to put in the record all evidence upon which it had based its decision. It was not enough, according to the Judge, for the State Department merely to tell the applicant that there is evidence in its files that he is a Communist sympathiser and that therefore his passport will be restricted or denied. It is up to the Department to State what the evidence is, "so that the applicant may

have the opportunity to meet it and the court to review it." The Judge recognized that the Secretary might withhold passports for good reason; but "fair play requires that one have the opportunity to challenge the basis of and reasons for a denial . . . directly and specifically." Confidential information, he said, "is of unquestionable importance," but its use should be confined to obtaining factual data that could be put in the record. Denial of a passport on the basis of inferences drawn from material on the files of the Department conferred upon the State Department's board of passport appeals "limitless authority," and that could not be construed as a "reasonable regulation." The Judge said:

The right to a quasi-judicial hearing must mean more than the right to permit an applicant to testify and present evidence. It must include the right to know that the decision will be reached upon evidence of which he is aware and which he can refute directly. When the basis of action by any branch of the Government remains hidden from scrutiny and beyond practical review, the seeds of arbitrary and irresponsible government are sown. More and more the courts have become aware of the irreparable damage which may be, has been, and is wrought by the secret informer and the faceless tale-bearer whose identity and testimony remains locked in confidential files.

The Judge observed that travel abroad by American citizens was a right that might not be infringed without "full compliance with due process of law." The Fourteenth Amendment to the Constitution provides that no person shall be deprived of life, liberty or property without due process of law.

A Step Forward Taken

The judgment in the instant case cuts even more deeply into the Secretary of State's discretionary power in the matter of passports than the decisions in the Nathan and Shachtman cases of five months earlier. In the Nathan case the Court of Appeals required the State

Department to grant a quasi-judicial hearing to Dr. Otto Nathan before denying him a passport. Thus the court asserted the power of the judiciary to instruct the Secretary on the type of hearing he must hold and to review whether in fact he had conformed to the instruction. In the Shachtman case the court held that a U. S. citizen had an inherent right to foreign travel and that a passport could be withheld from a citizen only through due process and not by the "arbitrary exercise" of departmental power. In effect the decision meant that no one could be denied a passport without, as a minimum, a quasi-judicial hearing on the merits of his case.

In the instant case the Judge spelled out what a quasi-judicial hearing must be and what due process means in passport cases. He ruled that the State Department could not cite "confidential information" as a reason for withholding a passport. Such a procedure, he said, did not conform with due process. The factual data acquired as a result of confidential information should be placed on the record, and the Department should support its denial of a passport with "evidence contained in the record."

In the earlier cases the Department did not go to the Supreme Court in appeal but granted passports to Dr. Nathan and Shachtman, although the Court of Appeal had not ordered it to grant them. This implies that the Department no longer insists upon its absolute discretion to grant or withhold a passport. In the case at issue too the Department will probably not go to the Supreme Court. It seems already to have decided to ease the passport procedure. But this case raises issues wider in scope than that of issuing passports. One of these issues is the constitutional one of the degree to which the Executive files are confidential and the Executive's prerogative is open to judicial determination. Use of confidential informants is now in vogue in many spheres, in security cases, for instance, and it remains to be seen what bearing Judge Youngdahl's decision will have on such cases.

SEGREGATION IN PLACES OF PUBLIC RESORT OUTLAWED BY THE U. S. SUPREME COURT

In unanimous rulings in two cases the Supreme Court on 7th November outlawed racial segregation in public parks, playgrounds, and golf courses, applying to public recreational facilities its historic decision of last year that pupils in public schools could not be segregated on the basis of race or colour. The judgments are particularly noteworthy as in these cases the recreational facilities available for Negroes had become substantially equal to those available for whites, thus striking down once again the "separate but equal" facilities doctrine for all races.

The city authorities of Baltimore refused to permit Robert M. Dawson and other Negroes to use bathing and recreational facilities at Fort Smallwood Park. After the Negroes sued, a Federal District Court ordered that they be admitted because no separate facilities were available for Negroes. Subsequently separate bathing and beach facilities were established for Negroes physically equal to those provided for white persons. The lawyers for the Negroes argued, however, that the "separate but equal" doctrine denied them constitutional rights and was

in conflict with the Supreme Court's decision in the school cases.

Another case from the same state (Maryland) concerned Milton Lonesome and other Negroes who were barred from South Beach in the Sandy Point State Park reserved for whites and who were told to use East Beach which was set aside for Negroes. The suit first brought by the Negroes complained that South Beach facilities were not equal. After the East Beach facilities were improved, the Negroes maintained their suit on the ground that enforcement of racial segregation, albeit the facilities provided for the two races be equal, violated their constitutional rights. A Federal District Court sustained the "separate but equal" doctrine as applied to recreational facilities. The Court of Appeals, however, rejected this interpretation. It ruled that Baltimore and the state of Maryland could not impose segregation at state or municipally operated public beaches and bath houses.

In another state, Atlanta, Dr. M. M. Holmes, a Negro, and his two sons were not permitted to use a public golf course because of their colour. A federal District Court held that unless equal facilities were provided, there was "discrimination" and ordered the state to provide substantially equal facilities "while preserving segregation." The Court of Appeals at New Orleans, unlike the Appeals Court in Maryland cases, sustained the ruling, upholding the right of Atlanta to segregate whites and Negroes on municipal golf courses, provided that the facilities available to both races were equal.

The Supreme Court did not think it necessary to issue formal opinions; its decisions were brief per curiam, or by the court as a whole, rulings. It affirmed the decision of the lower courts in the Maryland cases and vacated that in the Atlanta case.

In the above-mentioned cases the Supreme Court did not issue instructions to the states of Maryland and Atlanta as to how and when segregation in public parks and playgrounds should be ended. Presumably the question of procedure will be left to the lower Federal Courts as was done in the school segregation cases. This means that enforcement of the ruling will take some time, but it can be hoped that enforcement will not be delayed long. Anyhow one may confidently assume that, as other cases come up before the Supreme Court, the decision now limited to equality of recreational facilities will be extended to other spheres and equal access to all places of public accommodation and amusement will be guaranteed, including hotels, restaurants, theatres, public conveyances, etc.

Equal Access to Places of Public Accommodation

THE PRESENT STATE OF THE LAW

At this point a glance at the previous history of the question will be useful. In 1875 Congress enacted a Civil Rights Act, the purpose of which was to declare that in the enjoyment of the services and privileges

of inns, public conveyances, theatres, and other places of accommodation no distinction should be made between citizens differing in race or colour. The Act was directed against action by private individuals. Eight years later, in the Civil Rights Cases, 109 U. S. 3 (1883), the U. S. Supreme Court held this statute unconstitutional. It declared that the statute could not be justified under the Equal Protection Clause of the Fourteenth Amendment, for that clause forbids undue racial discrimination only when practised by the state itself, and that, in enforcing the provisions of the clause, Congress could not penalize race discrimination directed against the Negro by private persons. Nor, the Court said, could the statute be justified by the Thirteenth Amendment ["Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction"], for the denial of equality of access to public accommodation is not subjection of a person to slavery or involuntary servitude. In this connection it may be noted that in *Plessy v. Ferguson*, 163 U. S. 570 (1896), which condoned enforced racial segregation under the "separate but equal" formula, Justice Harlan in his dissenting judgment "denounced his colleagues for the manner in which they interpreted away the substance of the Thirteenth and Fourteenth Amendments." He said :

Our Constitution is colour blind, and neither knows nor tolerates classes among citizens. . . . We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of equal accommodations . . . will not mislead anyone, or atone for the wrong this day done.

The decision in the Civil Rights cases was interpreted as meaning that the protection of the rights of persons to equality of treatment in hotels, restaurants, common carriers and other places of public accommodation was a matter that rested with the states exclusively; that the states might outlaw segregation or might as well compel it; or they might leave it to the managers of private establishments to make whatever distinction they wished in selecting their patrons.

Legislation on the matter being thus left entirely to the states, 18 states have enacted statutes prohibiting discrimination in places of public accommodation, like restaurants and other eating places, public conveyances of all types, theatres and barber shops. On the other hand 20 states by law compel segregation, usually in hotels, restaurants and places of amusement, and in all forms of public transportation. Fourteen states require railroads to separate the races, except in interstate transportation, segregation in such transportation being forbidden under the Supreme Court decision in *Morgan v. Virginia*, 328

U. S. 373 (1946); eight states require separate waiting rooms; 11 require separation in buses, ten in street cars, three in steamships and ferries. The remaining 10 states have neither segregation laws nor civil rights laws to forbid or ensure equality of access to places of public accommodation.

Effect of The Ruling

The Supreme Court ruling in the instant cases means that, whatever be the state legislation in respect thereof, no state shall hereafter be permitted to practise racial segregation in recreational facilities provided by the state or municipalities under its jurisdiction, and when the ruling comes to be extended, as it is bound to be, to other facilities, Negroes will be guaranteed equal access to all these facilities, though this equality of access will take time to be fully realized. It will not be possible hereafter to separate the races in the enjoyment of those facilities on the ground that they are equal. For the "separate but equal" doctrine has been definitively overthrown. As the President's Committee on Civil Rights said in its report in 1947, "the degree of equality will never be complete, and never certain." Moreover, "Not even the most mathematically precise equality of segregated institutions can properly be considered equality under the law. No argument or rationalization can alter this basic fact: a law which forbids a group of American citizens to associate with other citizens in the ordinary

course of daily living creates inequality by imposing a caste status on the minority group."

Discrimination by Private Agencies Not Covered

It should be remembered that the Supreme Court's ruling guarantees to Negroes an equal share of tax-supported services and facilities. It does not ensure that public services supplied by private business will reach all persons, irrespective of race or colour, on an equality of access basis. The desirability of bringing this about was emphasized by the President's Committee. It said: "Many privately-owned and operated enterprises should recognize a responsibility to sell to all who wish to buy their services. They cannot be permitted to confine their benefits to a selected clientele." In order to put a complete stop to segregation, discriminatory rendering of service by private agencies must also be stopped. In the memorandum, "The Main Types and Causes of Discrimination," submitted by the Secretary General of the United Nations to the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, it is stated:

The enjoyment of human rights without discrimination as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, can be guaranteed to all persons within the jurisdiction of a particular state by the enactment and enforcement of legislation which (a) abrogates all laws which permit or entail any discrimination, and (b) prohibits and penalizes discrimination by both official and private persons.

SEGREGATION ON TRAINS AND BUSES OUTLAWED

INTERSTATE COMMERCE COMMISSION'S DECISION

A few days after the Supreme Court barred racial discrimination in public parks, beaches and playgrounds came an order by the Interstate Commerce Commission to end by 20th January 1956 all racial segregation on trains and buses that cross state lines. The decision also applies to public waiting rooms in railways and bus terminals.

Ever since its establishment in 1887 the Commission, which under the Interstate Commerce Act holds broad authority over interstate transportation, had often to hear complaints against racial segregation on public conveyances. The Act itself forbids common carriers to subject individuals "to any undue or unreasonable prejudice or disadvantage in any respect whatever," and the Commission, acting under the Act, naturally considered it as its duty to save the travelling public from such prejudice or disadvantage. But after the Supreme Court by a majority enunciated in 1896 the famous "separate but equal" doctrine and upheld a law of the state of Louisiana enforcing segregation on railway trains in the case of *Plessy v. Ferguson*, 163 U. S. 537, the Commission has consistently ruled that as long as equal facilities were provided, though on a segregated basis, it would not intervene.

However, the situation changed after the Supreme Court's decision in the school segregation cases, in which the Court rejected the 1896 doctrine in the field of education. The Commission thought that it ought hereafter to re-orientate its policy and interpret the words in the statute "undue or unreasonable prejudice or disadvantage," in the spirit of that decision. So in the two cases that came before it, it adopted on 29th November two basic tenets of the school decision. These were that the "separate but equal" doctrine no longer could prevail and that segregation subjected Negroes to prejudice and disadvantage harmful to their sociological development.

One of these cases was brought by the National Association for the Advancement of Coloured People (the same body which fought segregation in schools before the Supreme Court) against 13 railway companies operating in the Southern states. A principal charge in the complaint against the railroads was that segregation subjected Negroes to "an undue and unreasonable prejudice, disadvantage and discrimination, solely because of race or colour." Lawyers for the Negro side emphasized that the

basic issue was the legality of segregation on trains and buses. The Commission ruled in this case that segregation was against the Act, saying :

The disadvantages to a traveller who is assigned accommodations or facilities so designated as to imply his inherent inferiority solely because of his race must be regarded under present conditions as unreasonable. Also, he is entitled to be free of annoyances which almost inevitably accompany segregation, even though the rail carriers... sincerely try to provide both races with equally convenient and comfortable cars and waiting rooms.

The other case was in the form of a suit by Miss Sarah Keys, a New York Negro, against the Carolina Coach Company, a bus line. The company has a rule that

white passengers should be seated in front and Negroes in the rear. When, in conformity with that rule, the bus driver in 1952 asked Miss Keys to give up her seat to a white passenger seated in the rear of the bus, she refused. After some wrangling she was arrested and convicted of disorderly conduct. She filed a complaint with the Interstate Commerce Commission. The Commission ruled in this case that separating the races in interstate travel "subjects passengers to unjust discrimination, and undue and unreasonable prejudice and disadvantage" in violation of the Interstate Commerce Act.

One of the members of the Commission dissented, saying that "the Commission should not undertake to anticipate the court and itself become a pioneer in the sociological field." The Commission's ruling does not apply to persons travelling solely within a state.

PACKING OF S. AFRICAN SENATE COMPLETED

WAY PAVED FOR REMOVAL OF CONSTITUTIONAL SAFEGUARDS

The law adopted by the Strydom Government of the South African Union for enlarging the Senate membership from 48 to 89 and changing the mode of election of new members (vide p. iii: 252) has now been put into effect. The election has taken place, and now the Nationalist Party will have 77 members in the new Senate.

This will have a most serious effect in altering the Constitution, and it will be even more serious because the alteration has been effected without seeking the means provided by the Constitution to alter it. In order to appreciate the gravity of the situation, it should be remembered that this packing of the Senate was preceded by a packing of the supreme tribunal of South Africa: the Appeal Court's membership has been increased from five to 11 judges, and all the six judges added by packing hold Nationalist views. There is no possibility now of the Court holding, as the previous Court did, a statute removing the Coloureds or persons of mixed blood from the common voting roll to be unconstitutional because it was not passed by a two-thirds majority of both Houses of Parliament, as the Constitution provides. But the Government has now further strengthened its position by the packing of the Senate since now it commands the two-thirds majority required by the Constitution for passing such a statute, if the Government thought adoption of such a course desirable.

The selection of new Senators by electoral colleges composed of members of Parliament and of provincial councils took place in the capitals of the country's four provinces. In the three of the provinces—the Transvaal, Orange Free State and the Cape—minorities were not permitted to elect a Senator. They are supposed to be represented by three out of eight Senators elected in the Natal Province where the Opposition Party is dominant. In the result the election gives the Nationalists a clear two-thirds majority in a joint

session of the Assembly and the Senate, which will enable the Government to make whatever changes it likes in South Africa's Constitution. The changes on which the Government has set its heart are two: (1) the establishment of Parliament (as the Malan Government previously attempted) as the sovereign governing body unanswerable to the courts; and (2) the removal of the entrenched clauses from the Constitution. One of these clauses guarantees common voting rights to the Coloured community. The Government will now surely deprive them of these rights without fear of having its action declared unconstitutional by the courts. The other clause makes both English and Afrikaans, a Dutch derivative, official national languages of equal status. The Government can abolish this guarantee also if it so chooses.

The Senate, composed as it now is, in effect subverts the Constitution and abolishes the safeguards which were deliberately introduced at the time of the Union in 1909 to keep the different elements in the Union's population from warring with one another. The "Rand Daily Mail," realizing that the Constitution is overturned by the Government's action, remarks that the Union has now become a one-party State. It says:

The head committee of the Nationalist party now rules the country. It has the two-thirds majority which no single party has ever achieved before. Why, in its new-found arrogance, it worries to go through the formality of voting, only a lawyer could explain.

Even in the Nationalist Party there are some who dislike the enlargement of the Senate as a step towards altering South Africa's Constitution by gaining a two-thirds majority of Parliament. Thirteen professors at Pretoria University have publicly deplored the change in the structure of the Senate. And the United Party, which

forms the Opposition party, is threatening a court test of the Act expanding the Senate. The next general election in South Africa is scheduled to be held in 1958.

Previous History

The previous history of this question may be given here in the words of a South African correspondent of a journal. He says:

After winning a Parliamentary majority in the election of 1948, the Nationalists moved to restrict the Cape Coloureds' voting rights. The Nationalist Prime Minister, then Daniel F. Malan, introduced a bill to strike the Cape Coloureds from regular voting rolls and put them on a separate list.

The Nationalists did not have the necessary two-thirds majority in Parliament to repeal the entrenched clause. But they pushed the bill through by simple majorities in 1951 and declared it law.

In March, 1952, the Appeal Court—South Africa's highest—unanimously struck down the Nationalist law. The Court found it unconstitutional.

Dr. Malan responded by proposing that the High Court's power to review legislation be taken over by Parliament itself.

The Court of Appeal again said no. In November, 1952, and again unanimously, it found the new Malan measure unconstitutional.

This year Dr. Malan's successor as Nationalist leader and Prime Minister, Johannes G. Strydom, launched a twin attack on the constitutional obstacles.

First, he pushed through a bill increasing the Appeal Court's membership from five to eleven judges.

Second, he got Parliamentary approval for a change in the method of electing the Senate.

COMMENT

Religious Conversions

A private member's bill seeking to regulate religious conversions was rejected by an overwhelming majority in the Lok Sabha on 2nd December. The bill, while preserving the right, guaranteed in the Constitution, to proselytisation by persuasive methods, was intended to stop coercion and fraud occasionally practised when converting people to other faiths. The general consensus of opinion was that ordinary law was sufficient to check the use of force or deception and that the bill would not only prove infructuous in supplementing the provisions of the penal code but might become an engine of oppression in the hands of the police. The Prime Minister said that the bill was apparently directed against Christian missions, as in fact it had aroused widespread apprehensions in the minds of the Christian community, but Christianity being an important religion of India established in the country centuries ago, nothing ought to be done which might create a feeling of suppression

in the minds of the votaries of that religion. He confirmed the truth of a report which had been circulated before that in a small place in Bihar a crowd of people entered a Christian Church while mass was being celebrated and, without any provocation, it belaboured the priest and the congregation and desecrated the Church. This shows how religious feelings are likely to be aroused, and how one must guard, in trying to check one evil, against creating other more serious evils.

HABEAS CORPUS PETITIONS

Detention of a Political Worker in Kashmir WRIT APPLICATION DISMISSED

Mr. Prem Nath Bazaz, a political worker of Kashmir, who since his externment from Kashmir State was residing in Delhi, was arrested on 8th September and placed under detention by an order of the Government of India under sec. 3 of the Preventive Detention Act. He filed a habeas corpus petition with the Punjab High Court and on 2nd December Mr. Justice Kapur, who heard the petition as a Circuit Bench, dismissed the petition and vacated the rule issued earlier against the Union Government.

The petitioner claimed to be connected with the freedom movement in Kashmir State for over 20 years. He was elected President of the S. D. Yuvak Sabha in 1931 and was a non-official member of the Grievances Inquiry Commission set up by the State Government under the chairmanship of Sir Bertrand Glancy. He started an Urdu weekly, the "Hamdard," in collaboration with Sheikh Abdullah. It subsequently became a daily and was edited by him up to 1947, when he was arrested by the Kashmir Government and released in 1950 and then externed from the State. He was also a founder-member of the executive of the Kashmir National Conference, with which he severed his connexion in 1941 owing to ideological differences. In 1954 he started an English monthly called the "Voice of Kashmir" in Delhi.

The grounds of detention furnished indicated that the charge against him was the publication of certain articles by him, the combined effect of which, it was stated, was prejudicial to the security of India. Extracts of three articles published in the "Voice of Kashmir" were attached to the grounds of detention.

The second ground of detention was that the petitioner was in "constant communication with certain persons in Pakistan and in the Pakistan-occupied part of Jammu and Kashmir State and assisting these persons in their activities which are prejudicial to the security of India." The order said that the names of the persons, the nature of their activities and the assistance given them by the petitioner could not be disclosed in public interest.

The petitioner challenged the order of detention because the grounds supplied to him were, according to him, vague, indefinite, unintelligible and incomplete, and they did not enable him to make any effective representa-

tion to the Advisory Board constituted under the Preventive Detention Act. It was admitted that the authorities could not be compelled under the Act to furnish all the facts, but at the same time, it was argued, they could not, under the cloak of public interest, make the grounds vague. It was also contended that the grounds did not indicate any illegality in respect of the articles published in the "Voice of Kashmir." The petitioner maintained that he had merely exercised his fundamental rights and had neither preached violence, subversiveness, nor incitement to criminal action.

Counsel for the petitioner argued that the passages of the articles published in the "Voice of Kashmir," which were alleged to endanger the security of India, and his statements published in papers quoted by the Government to prove that he was an agent of Pakistan, had been taken out of their context by the detaining authority. If the articles from which passages were quoted were read in full, it was stated, they would present an entirely different picture. Further, it was pointed out that those passages related to Kashmir, and not to India. There was no relation between the object of detention stated in the detention order and the grounds furnished to the detenu.

Referring to defence counsel's argument that a definite illegality should be shown, the Solicitor-General, Mr. Daphtary, submitted that the grounds, disclosed an actual offence. He said it was necessary to detain a person to prevent commission of an offence as past conduct would be normally the only criterion in determining a man's future conduct. The Press (Objectionable Matter) Act was not sufficient to warrant that the detenu would not do it again. He also said that mere vagueness of the grounds was not a justiciable issue in a court of law. The vagueness must amount to mala fides, he submitted. Referring to the "sufficiency of the grounds," he claimed absolute privilege for the Government, not the court, to look into the matter.

Mr. Justice Kuper in his judgment observed that it was not challenged that sufficiency of grounds was not justiciable but it was urged that sufficiency of grounds to make a proper representation was justiciable. He then referred to *Ramakrishna Bharadwaj v. State of Delhi* (A.I.R., 1953 S. C. 318) which the petitioner's counsel had cited. In this case, after stating that the Supreme Court in *State of Bombay v. Atma Ram Shridhar Vaidya* held that sufficiency of the particulars conveyed to the detenu was a justiciable issue, the test being whether it is sufficient to enable the detained person to make a representation "which, on being considered, may give relief to the detained person," the Supreme Court ruled that if even one of the grounds given was vague while the others were clear and definite, it would infringe the constitutional safeguard provided in Art. 22 (5). On this point Patanjali Sastri, C. J., speaking for the Supreme Court, said in the Bharadwaj case:

Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the

Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court. In this case the petitioner has the right, under Art. 22 (5) as interpreted by this Court by a majority, to be furnished with particulars of the grounds of his detention "sufficient to enable him to make a representation which, on being considered, may give relief to him." We are of opinion that this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under cl. (6) of Art. 22 [saying that cl. (5) relating to the communication of grounds does not require the detaining authority "to disclose facts which such authority considers to be against the public interest to disclose"]. That not having been done in regard to [one] ground, the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of Art. 21.

Mr. Justice Kapur said that Mr. Patanjali Sastri's observation in that case did not help petitioner's counsel. He added: "In my view they (the grounds) are neither vague nor insufficient to enable the petitioner to make a proper representation." He remarked that the order of the Government made it clear that the articles in the "Voice of Kashmir" had the combined effect of being prejudicial to the security of India.

Mr. Justice Kapur referred to the argument that the action of the Government was mala fide and that the Government could have proceeded under the ordinary law of the land and that the use of the Preventive Detention Act was for an ulterior motive, and said that he found no proof of this and therefore the various authorities cited by counsel had no application to the facts of the case. Nor could it be said that the vagueness had so occurred as to amount to mala fides.

The Judge observed that he had already held that the grounds "are not vague, and in view of the decision of the Supreme Court in *Bhim Sen's case* it is not illegal to look at the past conduct of a person because it may give rise to the subjective satisfaction of the Government." [In the case of *Bhim Sen v. State of Punjab* (A.I.R. 1952 S. C. 481), Kania C. J., speaking for the Supreme Court, said: "Instances of past activities are relevant to be considered in giving rise to the subjective mental conviction of the district magistrate that the appellants were likely to indulge in objectionable activities."]

In dismissing the petition Mr Justice Kuper said:

It is true that preventive detention is a serious invasion of personal liberty and even the most meagre safeguards provided by the Constitution against the improper exercise of the power must be enforced by this court, but in the present case I find no grounds for holding that there has been a contravention of the Constitution or the constitutional safeguards of the petitioner.

"Facts Can be Withheld from a Detenu"

RULING OF THE BOMBAY HIGH COURT

The detaining authority under the Preventive Detention Act can claim under clause 6 of Article 22 of the Constitution the privilege of withholding facts if he feels that their disclosure was against public interest, even if he has not informed the detenu of such withholding at the time of communicating the grounds of detention.

Mr. Justice Chainani and Mr. Justice Gokhale gave a ruling to this effect at the Bombay High Court on 22nd March while dismissing the applications made by four detenues challenging the detention order passed on them by the District Magistrate of Belgaum.

Irapa Ningapa alias Mallapa Dival and six others of Hosur were detained under the Act under orders issued by the District Magistrate on March 13 last year and the grounds given two days later alleged that they were members of a gang and referred to various criminal activities, including murder, dacoity and extortion, alleged to be committed by them or under their direction in Hosur and nearby villages. The orders were subsequently considered by the Advisory Board and confirmed by the Government.

The detenues challenged the orders stating that their detention was the result of collaboration with the police by some members of Hagoyavar family. Some members of the family, who were sentenced to various terms of imprisonment in connection with the murder of Gangapa Doti, had settled down in the village and had been intimidating members of the Doti family.

Their Lordships did not pass any order on the applications of three of them as they had already been released.

Taking up the other four applications, Their Lordships said that the orders had been challenged on the plea that grounds of detention were vague. On scrutiny, Their Lordships found that they were sufficient to enable the applicants to give their defence in respect of them.

"Even if we are of the view that the grounds supplied are vague, we do not think that we can say that the orders are illegal because the Magistrate says in his affidavit that it was not in public interest" to disclose further facts, Their Lordships said.

ARMS ACT

Accused Convicted because he Belonged to a
"Communist Family"

MAGISTRATE CENSURED FOR "PERVERSE AND
DISHONEST ATTITUDE OF MIND"

One Mr. Avadesh Misra, found to be carrying a pistol and some ammunition in a railway compartment on 28th March 1952, was convicted of an offence under sec. 19 (f) of the Arms Act and sentenced to pay a fine of Rs. 50 by Mr. S. K. Sahi, railway magistrate (first class) of Deoria. The State of U. P., dissatisfied with the sentence passed by the magistrate, filed a revision before the district magistrate who, agreeing with the

submission that the sentence passed was inadequate, made a reference to the Allahabad High Court. The State Government drew the attention of the High Court to sec. 20 of the Arms Act under which possession of arms and ammunition in a railway compartment would constitute an offence punishable with seven years' imprisonment or with fine or both.

The High Court called for an explanation from the magistrate, who pleaded that he had convicted the accused though the prosecution had not proved the guilt beyond a shadow of doubt because he (the accused) came from a "Communist family." Mr. Justice Beg and Mr. Justice Chowdhary, who disposed of the reference, censured the magistrate in their judgment (31st October).

Referring to the magistrate's explanation, Their Lordships said that if the magistrate really felt that the prosecution case suffered from any inherent weakness resulting from the glaring contradictions which he felt were staring him in the face and he was assailed with serious doubts and suspicions in the matter, it was his bounden duty to give the accused the benefit of doubt and allow him to have an honourable acquittal, which was his right. It was certainly not the duty of the magistrate to convict him in spite of such doubts and suspicions on the ground, as he wrote, of the accused coming of a "communist family." In view of the fact that it was difficult to reconcile the findings of the magistrate in his judgment with the views expressed by him in his own explanation, it was strongly asserted on behalf of the State before them that the explanation in question disclosed not only a perverse but also a dishonest attitude of mind on the part of the court concerned. After giving their serious consideration to this matter, they had no doubt in their mind that the explanation of the magistrate laid him open to the serious charge made on behalf of the State.

Proceeding to consider the question of the adequacy of the sentence, Their Lordships said that the circumstances of the case appeared to them to be serious. The opposite party was caught travelling in a railway compartment. He had concealed a country-made pistol, which was a dangerous weapon in a bag, which contained also a spare pistol barrel and other ammunition in the form of six packets of gunpowder. He was found in a public place carrying these dangerous weapons with him. The purpose of a person who behaved in such manner must obviously be sinister. The weapons themselves were of a dangerous character. The accused's own evidence was that he had been involved in dacoity cases, although according to him the cases were false. They were not, however, concerned with the truth or falsity of those cases. The fact remained that the mere possession of such dangerous weapons gave ground for the suspicion that the purpose of their possession must be equally dangerous.

The Court sentenced the accused to one year's rigorous imprisonment in addition to the sentence of fine passed by the magistrate.

NOTES

Military Trial Barred by Supreme Court for Persons
NO LONGER IN MILITARY SERVICE

The U. S. Supreme Court on 7th November ruled, in a 6 to 3 opinion, that civilians could not be tried by

court-martial for crimes committed while in military service.

Mr. Robert W. Toth, a former Air Force sergeant, was arrested at a Pittsburgh steel mill on 13th May 1953 on a charge of participating in the murder of a civilian while serving in Korea. It was alleged that he and another airman, Kinder, apprehended a South Korean on 27th May 1952 near the air base where they were on guard. They were said to have taken him before Lieut. Shreiber, the officer in charge. This officer was alleged to have told them to "take him out and shoot him." In the Air Force trial that followed testimony was given to the effect that Kinder and Toth had taken the Korean to a secluded spot where Kinder shot him. Lt. Schreiber and Airman Kinder were court-martialled, found guilty and sentenced to life imprisonment, and Toth received an honourable discharge, whereupon he returned to civilian life.

The arrest of Toth while he was at work as a civilian in a steel mill was made by the Air Force under sec. 3 (A) of the Uniform Code of Military Justice, revised by Congress in 1950. The section authorized military trial of former servicemen for certain crimes committed while in uniform, which are punishable by imprisonment for five years or more and for which such persons cannot be tried in the courts of the United States or its territories. After Toth was flown to Korea for court-martial, his sister applied for a writ of habeas corpus challenging the constitutionality of the 1950 Code. A Federal Judge ordered the Air Force to return Toth to the United States and after the latter's return released him on bail. The Government took the case to the Federal Court of Appeals, which, by a 2 to 1 vote, upheld the right of the armed forces to try former soldiers for major crimes committed during military service. It sustained the constitutionality of the Code.

This ruling was upset by the Supreme Court, which declared sec. 3 (A) of the Code unconstitutional. The Government had taken the position that there was no civilian court in which Toth could be tried, and that it was just to meet such cases that Congress had enacted the law saying that persons in military service shall not be relieved of amenability to trial by court-martial for acts committed while in service which are beyond the jurisdiction of the civil courts. The Court rejected this argument; it observed that Congress could have provided, and might provide, for trial of discharged soldiers in the ordinary civil courts for crimes committed in the service, pointing out that the Judge Advocate General of the Army had proposed that Congress "confer jurisdiction upon Federal courts to try any person for an offence denounced by the [Military] Code if he is no longer subject thereto." The Court recognized that in upholding Toth it might be allowing a murderer to go unpunished. But Justice Black who spoke for the Court, warned of dangers in military trials that the Constitution and the Bill of Rights sought to avoid and said:

We hold that Congress cannot subject civilians like Toth to trial by court-martial. They, like other civilians, are entitled to . . . safeguards afforded those

tried in the regular courts authorized by the Constitution.

He pointed out that Art. III of the Constitution vested the "judicial power of the United States" in the Supreme Court and lesser Federal tribunals, and noted that this Article specified that trial of all crimes, except in impeachment cases, shall be by jury.

Provisions in Amendments comprising the Bill of Rights protect other rights of citizens, the Justice pointed out. This is especially true of the provision of the Fifth Amendment that no person shall be deprived of life, liberty or property without due process of law.

Justice Black said that the majority had found nothing "in the history or constitutional treatment of military tribunals" that ranked them with civilian courts "as adjudicators of the guilt or innocence of people charged with offences for which they can be deprived of their life, liberty or property."

He held that Congress had invaded the constitutional powers of the Federal judiciary in adopting sec. 3 (A) of the Code.

Justices Reed, Burton and Minton dissented. They said that the judgment "turns loose, without trial or possibility of trial, a man accused of murder," that the requirements for civil trials were inapplicable to "cases arising in the land and naval forces," and that the choice of trial "is for Congress, not the court," to decide.

Application of the Decision to Another Case

A Federal District Judge applied the Toth decision to another case. Mrs. Clarice B. Covert was charged with murdering her husband, a master sergeant in the United States Air force in England. She was court-martialled and held in jail in Washington. Later, however, the Court of Military Appeals reversed her conviction on a technical point and ordered a re-hearing. But Judge Tamm ruled on 22nd November that military courts might not try civilians accompanying the armed forces for crimes committed overseas and thus freed Mrs. Covert from a second court-martial.

Judge Tamm said that if a former soldier who was charged with murder committed in the service could not be tried by a military court under the Supreme Court's judgment, the doctrine must be extended to persons who were civilians all the time. A section in the Military Code provides that "all persons serving with, employed by, or accompanying" the armed forces abroad are subject to military courts. The judge held this section unconstitutional. He acknowledged that his decision might cause major difficulties for the armed services. This could not be avoided, however, in the light of the Toth case ruling. He said:

The teaching of the Toth case is that civilians have certain constitutional rights that Congress could not take away.

He explained, however, that Congress could enact a law giving civilian courts jurisdiction over such cases. It is agreed that under the present state of the law there is no civil court in the United States that has jurisdiction.