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[A MONTHLY REVIEW]

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I. P. I.'S REPORT ON FREEDOM OF THE PRESS

COMPLETE VINDICATION OF A.-I. C. L. C.'S POSITION

We are very gratified to find that the position taken up by the All-India Civil Liberties Council in its memorandum before the Press Commission (which we reproduced *in extenso* in these columns in the issue of March 1953) has been completely vindicated in the report of the International Press Institute established at Zurich in 1951 on the laws, both constitutional and statutory, adopted by democratic countries to limit the freedom of the press. We may state here that after the amendment of Art. 19 (2) of our Constitution permitting legislatures to impose sweeping restrictions on the liberty of the press in India, the Secretary of the A.-I. C. L. C. requested the Institute to examine the amendment with a view to finding out what potentialities it contains for abridging what, after freedom of person, constituties the most basic of all freedoms. But the Intitute at that time did not accede to the request, thinking probably that an inquiry into the constitutional law of just one country would not be worth its while. However, when in the third session of its General Assembly leading editors from several countries severely criticised their national Governments for curbing the freedom of the press in various ways, the Institute felt it necessary to conduct a comprehensive inquiry into the state of the press in most of the free countries, and the report it is now published is of the utmost value to those interested in maintaining press freedom as the best means of preserving democracy. Through its report the Institute issues a grave warning to the authorities in all free countries "against any attempt to undermine the freedom of the press since that would destroy the basis of their own existence—freedom and justice." It declares "that the limitation of the press at any time and anywhere paves the way to the establishment of the rule of despotism and injustice even if restrictions were imposed for worthy reasons."

India was in need of such a warning, and she receives prominent mention in the report among countries which have adopted "dangerous constitutional clauses, stringent penal code provisions and restrictive special laws" to put a curb on the press. In respect of all these methods the Institute has fully confirmed the A.-I. C. L. C.'s position. On the general question of how constitutional provisions guaranteeing the freedom of the press should best be formulated, the report says:

> The shortest statements, those which merely establish the freedom of the press as a principle, are generally considered the most satisfactory. Such a one is the First Amendment to the Constitution of the United States of America: "Congress shall make no law . . . abridging the freedom of speech, or of the press," or Art. 55 of the Swiss Federal Constitution: "The freedom of the press is guaranteed." As soon as States start elaborating the conditions under which the freedom of the press is recognized, then the principle itself is liable to be watered down.

This is just what the A.-I. C. L. C. said in its memorandum. Since the liberty of the press cannot be absolute but has to be qualified, the qualifications to which it might be subjected should be left, the memorandum pleaded, to the judgment of the judiciary who could judge each case on its own facts and thus prepare case law that would serve as a guidepost for the future. The memorandum pointed out that the seemingly unqualified right to freedom of expression which the United States Constitution guarantees is interpreted by the Supreme Court in a judicious manner and that in course of interpretation the Court has evolved a body of principles like the "clear and present danger" test which strike a proper balance between the liberty of the individual and the security of the nation. The memorandum urged that the same method should be adopted in India.

In fact this method was employed in Art. 19 (2) until in 1951 the Government of India promoted an amendment to the Article which put the whole process of guaranteeing the freedom of the press in reverse gear. It thought that several matters which must be under Government control were left immune in the Constitution originally adopted. Art. 19 (2) as it stood then had already authorized restrictions in the interests of the security of the State. But that was not enough for the Government. It thought that it ought to be competent for legislatures to adopt

legislation "in the interests of public order" and also to prevent "incitement to violence," and that these qualifications must be incorporated in the Article, as if to the extent to which they could be properly applied they were not inherent in the Article even before it was amended. A handy excuse came to the Government in the majority judgment of the Patna High Court in the case of in re Bharati Press (A. I. R. 1951 Pat. 12). Even the majority of the members of the Court were unsure about their interpretation of the Article, that incitement to violence fell outside the scope of restrictions which could be validly imposed under it, and they suggested to the Government to obtain an authoritative interpretation from the Supreme Court. But, without waiting for it, the Government of India proceeded to amend the Article, and after it had been amended it found that, according to the Supreme Court's ruling (vide A. I. R. 1952 S C. 321), incitement to violence was covered even by the unamended Article and that the Patna High Court was in error in interpreting the Article in the way it did!

Not only were restrictions added for which there was no need but they were couched in extremely vague and imprecise language. When the critics pointed this out while the Amendment was under consideration in Parliament, the Government admitted that the wording was too wide but pleaded that when legislation was adopted, the scope of the restrictions would be narrowed, which meant in effect that if the legislation was in equally wide terms, the Constitution could not be invoked to correct the injustice. That is to say, our constitutional provision in regard to the freedom of the press became like that of countries in the Middle East. About these countries the I. P. I. report says:

> In several countries, particularly in the Middle East the Constitution specifies that the freedom of the press is guaranteed "within the limits of the law." The implications of such a formula, when the law is restrictive of freedom, are obvious. It is for the law to obey the principle inscribed in the basic charter, and not vice versa.

Our basic charter in the amended Art. 19 (2) follows this topsy-turvy method, and by authorizing restrictions in language admittedly too broad the Government made itself open to the kind of criticism which Lord Macdonald as Britain's delegate levelled against the relevant provisions in the draft Covenant on Human Rights, viz.,

> The stipulated limitations were so broad and vague that they could be construed as *permitting the imposition of almost any restriction* on the right to which they referred and, in fact, *completely nullified* the effect of the Articles to which they applied.

The amended Art. 19 (2) had precisely this effect, that is to say, it completely nullified the guarantee for freedom of expression that the framers of the Constitution had intended to provide. This point was particularly emphasised in the A.-I. C. L. C.'s. memorandum. We take the liberty of quoting an extract therefrom to refresh the memory of the reader.

> When Government admit, as they have done, that the constitutional provisions by themselves are too wide but plead that governments will in actual practice keep well inside the limits set by the constitutional provisions, they in effect admit that the constitutional barriers are down, that the fundamental right to freedom of expression has been abolished, and that the people must be content to have only as much liberty of speech and liberty of the press as the legislatures will be pleased to allow. If the liberty that people enjoy, whether large or small, is to be on legislative sufferance, they are deprived of all liberty as a matter of right, and Freedom of Expression comes practically to be scored out from our charter of fundamental rights. A right which is protected only by statutory provisions but is left unprotected by constitutional limitations cannot properly be called a fundamental right. The free trade in ideas which the Constituent Assembly desired to establish in India by means of Art. 19 (1)(a) visually disappears when the legislative branch of the Government is given power to regulate the right of free speech and free press. The amended Art. 19 (2), which permits restrictions that it is desired the legislatures should *not* impose, "puts free speech under the legislative thumb," in the expressive phrase of Justice Douglas, making the legislative judgment supreme. When this happens, free speech in the constitutional sense disappears. For the essence of the guaranteed right of free expression is that the right should not be under legislative control; that it should not be left to the legislature to determine its meets and bounds.
>
> (Mere repeal of restrictive laws, if that comes about, is not enough.) If the constitutional provisions remain unsatisfactory, as they have become after the passing of the Constitution Amendment Act, then there will remain the constant danger of the laws being again made repressive even if as a result of the Press Commission's recommendation they come to be excised of all their objectionable features. The blanketing effect of the restrictions which the amended Art. 19 (2) authorizes is destructive virtually of all freedom of expression. As long as this Article remains the constitutional law of India, the threat of restriction of this most basic of rights will hang over all speeches and publications, even if the statutes be good for the time being. For the mere existence of such a constitutional provision permitting restrictions of the widest scope must necessarily result, in the words employed by Justice Murphy of the Supreme Court of the U. S. A. in a similar situation in Thornhill v. Alabama 310 U. S. 88 (1940), in "a continuous and pervasive restraint on all freedom ot discussion that may reasonably be regarded as within its purview."

The Press Commission, that is to say, a majority of that body, paid no heed to this plea, that the looseness of the wording in Art. 19 (2) which authorizes imposition of additional restrictions is destructive of the freedom of the press. On the contrary, it was of the view (very extraordinary for jurists to entertain) that the business of a Constitution in permitting restrictions on any right is merely to indicate the categories of restrictions without defining their precise ambit; it did not recognize the need of specifiying the limits of restrictions, if restrictions were at all to be specifically mentioned. Its reasoning was this " 'Public order' " was not categorically included in Art. 19 (2) in the form in which this Article was first adopted as a basis of restrictions, but it was surely conceivable that situations might arise in which in the interests of public order restrictions will have to be imposed. This gap has been filled by the amended Article, and thus no objection could be taken to it." But what if laws are passed which exceed proper limits? The Commission's answer was hat legislatures would observe due self-restraint in adopting restrictive legislation, which means in effect that if this should not happen to be the case, the Constitution would be of no avail in restraining the legislatures. It was pointed out that if public order was to be specially mentioned as a basis of restriction, something like the " clear and present danger " doctrine evolved by the U. S. Supreme Court should also be laid down so as to insure that the Government will not suppress freedom of expression in other situations. On this point the I. P. I. report says;

> For the freedom of the press to be safeguarded the law must limit intervention by authority to clearly defined situations. In the United States, for instance, for proccedings to be possible there must be "*clear and* present danger," and this criterion is final.

The Commission's approach to this criterion is exceedingly dubious. In one place it recognizes the possibility of our courts adopting the test, but elsewhere it has done its best, in a reasoning which borders on the ludicrous, to discredit the theory, with the result that there will be no check on the legislatures, a check which can be depended upon to safeguard the right to free expression from attacks by governmental agencies.

The addition of a clause enabling the imposition of restrictions in the interest of maintaining "friendly relations with foreign states" had not even the plausible justification which the Government found in respect to other clauses in a High Court ruling. This was a purely wanton addition, and it is again couched in such loose language as to be capable of being used to prevent all discussion of the Government's foreign policy. The additional limitation has not so far been used for that purpose, it may be candidly admitted. But the fact remains that it can be so used, and it therefore presents a latent threat to freedom of expression which, if the Government chooses to convert it into actuality, honest citizens can meet successfully by resort to courts. There can be but little doubt that the Government added the clause in order to befriend the bloc of Arab-Asian countries. Egypt, Saudi Arabia and some other countries made repeated attempts in the United Nations to insert a clause in similar terms in the convention on Freedom of Information. It was resisted by all progressive countries and was decisively defeated every time it was brought forward. Apparently the Indian Government thought it politic to incorporate such a clause in our Constitution hoping thereby to influence the course of international politics in favour of countries whom it regards as its allies. The A.-I. C. L. C. had a shrewd comment to make in its memorandum on this point:

> One wonders whether a necessary consequence of the much vaunted aloofness of India from the Anglo-American bloc in international affairs is that it should so tie itself in with the Arab-Asian bloc as to feel constrained to give undiscriminating support to any proposal, however reactionary, that the bloc may make itself responsible for. If this is so, all one can say is that India is reduced in the field of civil rights, to giving up the company of progressive countries in favour of an alliance with a group of countries which have yet not been able to shake themselves free from their age-long anti-democratic traditions.

The I. P. I. report itself shows how deplorable the attitude of these countries is in respect to the freedom of the press and how they abuse the concepts of " national security, " " national prestige " and " national interests " in order to muzzle the press. And what is the Convention on Freedom of Information which they did their very best to whittle away? Even, without the addition of the clause they vainly pressed for, Sweden was constrained to exclaim; "It might be better to have no convention at all than to have one which would be used as a pretext for even more far-reaching restrictions." Agreeing with this sentiment about the futility of the Convention in that form, the United States declared that the proposed convention "provided freedom *from* information, not freedom *of* information." While the Government of India's attitude was so unsatisfactory in the matter of adding this new unnecessary restriction, the Press Commission took the position that some limitation was called for under the head of good relations with foreign powers and was willing to support the clause, however wide-reaching it was in scope because of its loose phrasing.

The constitutional amendment passed by the provisional Parliament in 1951 was not a mere potential threat to freedom of expression; it showed its teeth immediately, For, as the I. P. I report says: " the amendment, once passed, made possible the adoption of a law (the Press Act of that very year) with powers to restrict this freedom pretty seriously." It is unnecessary to deal here with the provisions of that Act; it is enough to say that the I. P. I. condemns it roundly. The Act,

intended to be temporary but kept alive indefinitely, has not been used against the Press, it is true, as often as it might have been, but it offers a serious potential threat which cannot be countered by any constitutional means, the amended Art. 19 (2) having already made that impossible.

Having described the severity of restrictions imposed on the freedom of the press even in democratic countries, the I. P. I. calls on the press to defend its freedom with the greatest vigilance. The U. N. International Covenant on Human Rights is so unsatisfactory that it cannot be relied upon for any effective protection. (To our Press Commission the fact that any restriction finds a place in the draft of the Covenant was enough to lead it to conclude that the proposed restriction was fair and reasonable!) The I. P. I. report says:

> When the problem of freedom of information—how it should be protected and how far limited—came before the United Nations, no solution was reached. As the Uuited Nations is an inter-governmental institution, no positive result could very well be expected. It is for the press itself to fashion its own future. It alone can apply the brake to pressures it is subjected to on the part of the public authorities, on the one hand by establishing its true status and demanding from its members a high sense of responsibility, and on the other by jealously defending its independence.

In this respect we are afraid Indian journalism has slackened How virile the All-India Newspaper Editors' Conference under the presidentship of the late Shri Deshabandhu Gupta was in attacking the restrictive clauses added to Art. 19 (2)! This attitude of bitter opposition and persistent resistance has now given place to what looks to outsiders like a feeling of complaisance. The attitude has not really changed, but the kind of passivity that has come over the Indian journalistic world is the result partly of the feeling that nothing that they can do will succeed in persuading an all-poweful Government to change its policy, but mainly of a switching off of the interest of Indian newspaper men as a body from preservation of the liberty of the press to securing an improvement in their own working conditions. This is unfortunate, for though the latter is a worthy cause, the former is of far greater consequence ultimately.

Pakistan's Draft Constitution

Owing to provincial, party and personal jealousies and rivalries, the Constitution of Pakistan has been delayed for an unconscionably long period, the country being administered for as many as seven years under an adapted Government of India Act, which has naturally caused serious difficulties both in administration and interpretation. The draft now presented to a new Constituent Assembly, however, stands a good chance of being passed; it is also a much better draft than the one the previous Constituent Assembly had prepared. First, greater unity has been established; the new Constituent Assembly is more representative; the provinces of Western Pakistan have been amalgamated, which has curbed if not eliminated the rivalries of the separate provinces into which it was divided, whatever other drawbacks this move may have. Establishment of a parity between East and West Pakistan, which is now being attempted, will reduce strife between the two units. The Government at the centre represents a coalition of both the units and of the majority and minorities. In East Pakistan too a more stable Government is in power than before. From all this it would appear that the Constitution would command greater good-will among all sections of the people than was thought possible previously, and therefore the claim made that the Constitution "will safeguard the unity, integrity and solidarity of the country" seems to have a good promise of being realized.

The accent in the Constitution is still on Islam; that was perhaps inevitable, considering the circumstances in which Pakistan was born. The country will be known as the Islamic Republic of Pakistan; the head of the State will always be a Muslim; no law will be regarded as valid which is not in conformity with Islamic injunctions; the State, while promoting international peace and good-will, will make special endeavour "to strengthen the bonds of unity among Muslim countries." This emphasis on religion cannot commend itself to any of us who are bred up in principles of secularism and it greatly irks Hindus in Pakistan who number one crore. But much will depend upon the way in which the Constitution will actually be worked. In any case there is less insistence on Islamic principles in the present draft than in the previous one. There is a constitutional bar on a non-Moslem being appointed President, but there is no such bar in the case of Governors, who may be drawn from outside the ranks of Moslems. That the head of State will have to be a Moslem was defended by the Law Minister on the ground that this dignitary would wield little real power; the administration would be carried on in his name, but actual power would rest in the hands of the Cabinet functioning under the control of Parliament, and there being no bar against the admission of non-Muslims either to the Cabinet or to Parliament, the provision would not deny to the latter their due share of power and influence. He said: "In England the sovereign must belong to the Church of England; so is the case in other Western countries like Norway, Sweden, Spain, Greece, Argentine and Paraguay," and assured his critics that minority communities would have a square deal in things that really mattered. In this respect he drew attention to the provision in the Constitution which safeguards the personal laws of non-Muslims, and to the express guarantee that "the State shall protect all legitimate interests of non-Muslim communities in Pakistan." The Constitution also provides fundamental rights

it says: "All citizens shall be equal before the law and shall have freedom of speech, of assembly, of association, and of religion." But it does not become clear from the draft that is available whether these will be justiciable rights, as they must be if they are to give satisfaction to minority communities. Whether the electorates are to be joint or separate has not yet been decided, but Dr. Khan Saheb, Chief Minister for West Pakistan, strongly favours joint electorates on which the minority communities insist as being essential for the protection of their interests.

In regard to Islamic injunctions to which all laws have to conform in order to be valid, the draft Constitution says:

> No law shall be enacted which is repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah, hereinafter referred to as the injunctions of Islam, and the existing laws shall be brought into conformity with such injunctions.
>
> Effect shall be given to this provision only in the following manner. Within a year of Constitution Day, the President shall appoint a commission (a) to compile in a suitable form, for the guidance of the National and provincial Assemblies, such injunctions of Islam as can be given legislative effect and (b) to make recommendations (1) as to the steps and stages by which the injunctions of Islam should be given effect and (2) as to the bringing of existing laws into conformity with the said injunctions.

What will be regarded as Muslim injunctions which are to override legislation is to be determined, not by Mullahs as in the previous draft, but on the report of a body of learned men to be appointed for the purpose. The provision in this respect is as follows:

> The President shall set up an organization to be called "the Institute of Islamic Research and Instruction in Advanced Studies" to assist in the reconstruction of Muslim society on a truly Islamic basis.
>
> Parliament may by law provide for a special levy to be imposed upon Muslims to defray the expenses of this organization.
>
> The Commission shall submit its final report within five years of its appointment. Nothing in this Article shall affect the personal laws of non-Muslims the status of non-Muslims as citizens of Pakistan, or any provision of the Constitution. In the application of this Article to the personal law of any Muslim sect, the expression "the Quran and Sunnah" shall mean the Quran and Sunnah as interpreted by that sect.

There is here an attempt, it appears to us, not only to reduce the rigour that was before apprehended in the application of Islamic principles but to lessen its brunt on both non-Muslim communities and dissident Muslim sects. Parenthetically it may be stated that in the event of a breakdown of the constitutional machinery in the provinces, the Constitution provides for imposition of Governor's rule for a maximum period of six months, whereas the Indian Constitution in a similar contingency provides for the provincial administration being taken over by the centre for a maximum period of three years.

PROGRESS OF CIVIL RIGHTS IN U. S.

EISENHOWER'S STATE OF THE UNION MESSAGE

In obedience to the command of the Constitution that the President "shall from time to time" give Congress "information on the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient," the custom has been established in the United States ever since the time of George Washington, the first president, of sending a Presidential report to Congress on the "State of the Union," in which the President sets out what achievements he has to his credit and delineates the legislative and other measures required to quicken the pace of progress. In the State of the Union Message which President Eisenhower sent to Congress at the opening of its session this year, a prominent place was given to civil rights and liberties, particularly with reference to the status of the Negroes in that country. President Eisenhower spoke with legitimate pride about the improvement that has recently been effected in this direction, and to him personally goes not a small portion of the credit for the improvement that has been brought about in this respect by his vigorous programme for ridding the federal government of all traces of racial segregation. The suggestion made by him in the Message for the appointment of a bi-party committee to recommend practical steps for the removal of the unjust pressures still exerted to the detriment of Negroes is calculated to yield valuable results. This part of his Message deserves to be quoted in extenso.

> We are proud of the progress our people have made in the field of civil rights. In Executive Branch operations throughout the nation, elimination of discrimination and segregation is all but completed. Progress is also being made among contractors engaged in furnishing Government services and requirements. Every citizen now has the opportunity to fit himself for and to hold a position of responsibility in the service of his country. In the District of Columbia, through the voluntary cooperation of the people, discrimination and segregation are disappearing from hotels, theatres restaurants and other facilities.

It is disturbing that in some localities allegations persist that Negro citizens are being deprived of their right to vote and are likewise being subjected to unwarranted economic pressures. I recommend that the substance of these charges be thoroughly examined by a bi-partisan commission created by the Congress. It is hoped that such a commission will be established promptly so that it may arrive at findings which can receive early consideration.

The stature of our leadership in the free world has increased through the past three years because we have made more progress than ever before in a similar period to assure our citizens equality in justice, in opportunity and in civil rights. We must expand this effort on every front. We must strive to have every person judged and measured by what he is, rather than by his colour, race or religion. There will soon be recommended to the Congress a programme further to advance the efforts of the Government, within the area of Federal responsibility, to accomplish these objectives.

(Progress in the material field,) however, will be realized only as it is more than matched by a continuing growth in the spiritual strength of the nation. Our dedication to moral values must be complete in our dealings abroad and in our relationships among ourselves. We have single-minded devotion to the common good of America. Never must we forget that this means the well-being, the prosperity, the security of all Americans in every walk of life.

Virginia's Move-to Maintain Segregation

But what tremendous obstacles have to be faced in removing all vestiges of segregation in the Southern states is illustrated by two recent events. One is the move initiated by Virginia to maintain segregated schools in spite of the Supreme Court's decision of 17th May 1954 outlawing racial segregation in all public schools. In this state the ratio of whites to Negroes is higher ($3\frac{1}{2}$ to 1) than in the South as a whole (where it is 2 to 1). But in one-fourth of its counties Negroes are heavily concentrated, and there the public sentiment runs very high against the Supreme Court's ruling. In order to assuage this feeling, Virginia has adopted a plan under which, while integrated schools would come into existence in counties where the Negro population is small, it would be possible to continue segregated schools in counties where the Negro population is particularly large. In these latter areas public schools would be abolished as such and maintained as private schools (to which the ruling of the Supreme Court does not apply) by means of grants out of state funds. But it is not possible under the state Constitution as it stands to-day to make such grants; for sec. 141 of the Virginia Constitution provides: "No appropriation of public funds shall be made to any school . . . not owned or exclusively controlled by the state or some political subdivision thereof". In order to get over this constitutional barrier, Virginia on 10th January adopted by a 3 to 2 vote in a referendum a resolution calling a convention to amend the Constitution, authorizing legislation to permit tuition grants from public funds to parents in areas which elect to close their public schools and run them as segregated private schools for white children.

There can be no doubt but that such employment of taxpayers' money for the avowed purpose of circumventing the highest tribunal's decree will itself be declared to be an obvious evasion of that command and will thus be held unconstitutional. The specious argument that tuition grants will be made to parents and not to schools will surely be rejected by the Court. The Supreme Court, taking account of the deep-seated sentiment in the South, has already in its judgment allowed the Southern states time that would be required for making necessary adjustments in their outlook. But it cannot possibly allow a state, which does not honestly try to make such adjustments, to devise means by a subterfuge to preserve its segregated schools. However, even if the ultimate issue may not be in doubt, Virginia's move shows how extremely difficult it is to bring about equality in the position of whites and Negroes in the face of the stubborn opposition which the South's tradition offers. And Virginia is known as a law-abiding state, noted also "for enlightened interracial conditions and for the equitable administration of justice," unlike many other Southern states. This state played a leading part in the Philadelphia convention which drafted the federal Constitution and in countering the opposition that made itself visible later in some other states to the ratification of that Constitution by them. If Virginia now leads the revolt one can well imagine what other Southern states will do—or will try to do.

Move to "Nullify" Anti-Segregation Decision

The other event demonstrating the obstructionism of the Southern states in a dramatic manner is the formation by twelve southern States of an organization to fight racial integration. The organization calls itself the Federation for Constitutional Government, the idea of its sponsors being that the Supreme Court's anti-segregation decision destroys the Constitution and that to have it rescinded would restore the Constitution to its original meaning and purpose. Soon after the Court's decision was announced declaring school segregation unconstitutional, groups were formed in several Southern states, Georgia, Virginia and Mississippi, for instance, to rally public opinion against the acceptance of the Court's decree and to explore means of thwarting its implementation. Mississippi's White Men's Council was the most militant of them; it went so far as to bring economic pressure to bear upon those who advocated compliance with the law. These various state organizations were working independently till now, and the new body now formed seeks to co-ordinate the efforts of all of them

The strategy contemplated by the so-called Federation for Constitutional Government is very ingenious. It is this. The Southern states would themselves propose an amendment to the Federal Constitution barring racial segregation not only in schools but in respect to all public services. Having proposed the amendment, they would then strive to have it rejected. They are fully conscious that they would be able to defeat it, for the U. S. Constitution provides in Art. V that a proposal for a constitutional amendment shall be deemed as passed only when it is ratified by three-fourths of the states, and since the twelve states which the Federation itself represents form one-fourth of the states, and all of them would be under a mandate to cast an adverse vote, the amendment would be defeated, if only one other state joined them. In fact, there would be some other states also to vote against the amendment. The Southern states would vote for a tactical reason, while the vote of other states would be genuine. But anyhow all these states would combine to throw out the proposal. Having thus secured the defeat of the amendment, they could go to the country and say: "A proposal was made for enlarging the content of the Bill of Rights by means of an amendment which called for racial integration in all public facilities, and that proposal has not found favour with the nation; it has been decisively rejected. How then can the Supreme Cout's decision calling for integration in one of these facilities, namely public schools, stand up? This is a case of judicial legislation, the judiciary appropriating to itself the power of other branches of government; it must therefore be deemed to have been declared void by the people in whom the final authority to determine constitutional issues lies."

The strategy, subtle as it is, cannot however succeed. For, easy as it is to muster sufficient voting strength to defeat a proposal for barring all segregation, it would not at all be easy to get a sufficient number of states to put forward a proposal to this effect which, under the Constitution, could be treated as a proposal for constitutional amendment. For Art. V provides that such a proposal must either be made by two-thirds of both Houses of Congress or by a requisition from two-thirds of the entire states. And it is impossible to believe that either two-thirds of Congress or the states could be persuaded to make the proposal. It may well be that 32 states would be found which would desire to have a ban imposed by the Constitution on racial segregation. But knowing that one-fourth of the states have banded themselves together to defeat it in advance, they would not be so foolish as to make themselves responsible for a proposal which is certain to be turned down. Moreover, why would they seek an express provision to be added to the Constitution for outlawing segregation, when the Constitution, as it stands, has been interpreted by the highest tribunal to outlaw segregation in public schools and will in all likelihood be interpreted to outlaw segregation in other services in the near future? The Southern states will thus not be able to initiate a proposal for amendment which is so necessary in order that their strategy may succeed. The move is bound to fail, but it shows how strong the emotional opposition to desegregation is in the Southern States

"Nullification" Doctrine of Calhoun

The Southern states' manoeuvre in effect amounts to an application of the Nullification Doctrine elaborated by John Caldwell Calhoun in the early thirties. It asserts that the states have power to suspend within their territorial jurisdiction any law of the Federal Union which it cannot be conclusively proved is within the latter's authority. The doctrine rests on the basic idea that the Union is compact between the states. Its advocates pleaded that historically. The states came into being first; they created the Union, granting to it certain enumerated powers and retaining for themselves all the rest. Indeed, the Tenth Amendment to the Federal Constitution lays down that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." It follows from this as a natural consequence (the supporters of nullification argued) that where the Union encroaches on the residuary powers of the states, the compact is at an end. The doctrine went further. Where the apportionment of power is not clear on the face of the Constitution, the authority to decide disputed claims cannot be the Central Government (or even the Supreme Court which is an organ of that Government), but the states themselves. The Central Government is but an agent of the states, the original bearer of all power; and therefore the final arbiter in determining the amount of power granted to the agent could not be the agent, but the creator of the agent and the grantor of power to it, viz., the states. Thus, should the Union exceed the authority delegated to it and pass laws that encroached on the reserved rights of any state, it would be legally competent for that state to declare such laws void within its territorial jurisdiction. The nullification doctrine in effect came to mean that states of a region have power to veto within their borders the enforcement of central laws or policies which they considered to be detrimental to their interest.

The compact theory of the United States Constitution was not new; both schools of thought — the one which favoured broad national powers and the other which sought severe restrictions thereon — supported the theory in principle. Madison, the leading exponent of the former school, frequently described the Union in the "Federalist" as a "Confederate Republic" and called the Federal Constitution "a compact." The Virginia resolutions drawn up by him and the Kentucky resolutions drawn up by Jefferson, the spokesmen of the other school, equally gave expression to this theory. Only Calhoun so developed the theory that he deduced from it the right of intervention by the states to prevent infringment of states' sovereignty on the part of the national government. Drastic as this development was,

he described " nullification " as " the great conservative principle of Union," in the sense that nullification would only mean that a particular national law does not apply in a particular state, but the state remains in the Union instead of seceding from it. He thus thought that nullification was a good defence mechanism for the states, which would, by affording a peaceable remedy against usurpation of power by Congress and making secession unnecessary, enable them to keep the Union intact.

The two questions which led the Southern states to espouse the nullification doctrine were slavery and protection tariffs. Although slavery was at the bottom of the whole affair, the immediate cause for propounding and applying the doctrine was the tariff policy of the national Government. There was a strong feeling in the Southern states that the policy of protective tariffs was prejudicial to the interests of their agricultural economy and a demand was made in 1816 that the tariff should be lowered and eventually reduced to the revenue standard. But in 1824 and 1828 the tariffs were revised upwards rather than downwards and opposition to the tariff of 1828 became so strong that it was popularly characterized as "the tariff of abomination." To protest agaist this tariff Calhoun drew up a paper called the South Carolina Exposition, in which he declared that "the United States is not a union of the people, but a league or compact between sovereign states, any of which has the right to judge when the compact is broken and to pronounce any law to be null and void which violates its conditions." Calhoun at that time did not press for the application of the nullification doctrine he had propounded. But when in1832 the tariff was again placed on a protective basis and further that principle was affirmed to have been adopted as a permanent one, South Carolina issued a formal ordinance of nulification. The tariff Acts of 1828 and 1832 were declared null and void because beyond the power delegated to the United States; and laws were passed to prevent the collection of the tariff within the State of South Carolina, to give to the Governor power to call out the state militia, and to give the state court full control of all cases involved under the tariff laws. The Union Government propared to resist; but the conflict was settled by a compromise. The national Government offered to reduce the tariff duties gradually, until by 1842 the duty would be on a revenue basis. In the meantime the great debate between Webster and Calhoun took place in the Senate on the nature of the Union and the powers of the States. That was the last time when nullification as a constitutional remedy available to the states against oppression by the federal Government was asserted in the United States.

" Interposition " Doctrine Invoked

Southern states are now engaged in passing resolutions in their legislatures declaring that they would decline to enforce the Supreme Court's decision in the public school segregation cases on the ground that the decision invades the states' constitutional province. The resolutions invoke Calhoun's theory of " nullification " in fighting integration, but the states give it a milder name; they call it " interposition. " On 24th January the Governors of four Southern states—Mississippi, South Carolina, Virginia and Georgia — met at Richmond and made a call upon all Southern states that:

> There be adopted a resolution of interposition or protest in appropriate language against the encroachment of the Central Government upon the sovereignty of the several states and their people.

The states are called upon to " interpose " their sovereign authority between the Federal Government and the people and declare the Supreme Court's desegregation ruling void within their territorial limits. Alabama has already passed such an interposition resolution, saying that the ruling is " null, void and of no effect in Alabama. " This resolution however is yet to be signed by the Governor, who apparently does not favour it. He said, the resolution is " just a piece of paper — there's no legal ground to it ; " for a state legislature to declare Supreme Court's decision null and void was " like a dog baying at the moon and claiming it's treed. "

The interposition doctrine is essentially not different from the nullification doctrine: it asserts the right of states to resist Federal action which they may hold to be in violation of the Federal Constitution as they understand it. In 1814 three Southern states said in proclamations protesting against the conduct of the War of 1812:

> In cases of deliberate, dangerous and palpable infractions of the Constitution, affecting the sovereignity of a state and the liberties of the people, it is not only the right, but the duty, of such state to interpose its authority for their protection.

This shows that the idea is an old one ; in fact it goes farther back. And the Southern states are now propounding the doctrine of state interposition rather than of nullification or secession, because the word " interposition " occurs in Madison's Virginia resolutions of 1798, though, to be sure, : he did not mean by it what the states' rights people interpret it to mean, viz., when any act of the Federal Government is deemed by a state to have exceeded its constitutional powers and encroached on those reserved to the states, that state may decline to enforce it, whether the act be of Congress or the Executive or the Supre ne Court.

COMMENTS

Turkish Press Less Unfree

REPEAL OF THE PRESS ACT DEMANDED

In the survey of the International Press Institute referred to in a leading article in this issue the Turkish Press Law of 1954 was prominently mentioned, along with our own Press Act passed in 1951 and renewed ever since, as one severely restricting freedom of the Press. It is heartening to note, however, that though the Turkish law

itself is not altered for the better, its provisions have been administered by the new Government that came into office two months ago in such a way as to cause little hardship to the Press. There are other pressures still exercised as, for instance, unfair allocation of official advertisements among newspapers, a kind of pressure we are subjected to in some States in our own country, but on the whole there are much fewer restraints based on law that are now imposed upon the Turkish Press, and newspapers are allowed to express their views more freely than before.

But the point that we in India should note is that the Turkish Press is not content to have this freedom on sufferance as it were but demands it as a right, and for this purpose they insist upon repeal or suitable modification of the Press Act, which now gives the Government power to curtail their freedom if it chooses to exercise the power. We have often heard a plea in our own country that our Press Act may as well be retained on the statute book since our Government does not put it to harsh uses. Turkish journalists are not deceived by such an argument. "They point out," says the Istanbul correspondent of the "Times" of London, "that while the present Press legislation remains in force the Turkish Press will always be at the mercy of the executive and journalists may again find themselves the object of systematic persecution. The conclusion is that the freedom of the Turkish Press will be preserved only if the existing legislation is amended" so as to be brought into line with the law of 1950 which "is certainly one of the most liberal ever known in Turkey." If a latent danger can be turned into an actual danger by the Government at its own sweet will, it is a danger that must be squarely faced.

East-West Contacts

FREE INTERCHANGE OF IDEAS

In rejecting the Soviet Premier's proposal for the conclusion of a treaty of friendship of twenty years' duration between the Soviet Union and the United States, President Eisenhower pointed out that "both the countries were already bound to each other by a solemn treaty—the Charter of the United Nations," which already covers the three matters like non-interference in internal affairs which are to be incorporated in the proposed treaty. What was of far greater consequence, he observed, than any specific provisions in a treaty was the spirit of mutual good-will animating the Governments, and this spirit which was created at the summit conference of heads of States in Geneva but which now appeared to be vanishing would best be restored by positive action on subjects like development of contacts between East and West. Mr. Eisenhower reminded Mr. Bulganin that at the Foreign Ministers' conference "the Western Ministers proposed many concrete measures to bring about closer relations and better understanding, none of which was accepted by your Government," the plea of the Soviet Foreign Minister, Mr. Molotov, being that such measures would constitute interference in the internal affairs of the Eastern countries. "Consider the mountian of distrust and misunderstanding", said President Eisenhower, "that would disappear if our peoples freely exchanged news, information, visas and ideas." The sentiment to which Mr. Molotov gave expression at Prague, just when negotiations were being carried on between the U. S. President and the Russian Premier, that "any contact between the two countries is likely to improve the situation," may perhaps be interpreted as some approach to a positive response on the part of U. S. S. R. to the Western proposal that the Iron Curtain would be lowered and something like a free exchange of ideas, peoples and goods be established between East and West.

ARBITRARY TAXATION

Cess Under U. P. Sugar Factories Control Act

DECLARED ULTRA VIRES BY HIGH COURT

Giving judgment in three revision petitions, a division bench of the Allahabad High Court consisting of Mr. Justice Desai and Mr. Justice Sahai on 19th January declared the provisions of sec. 29 (1), (2) and (3) of the U. P. Sugar Factories Control Act of 1938 unconstitutional as violative of the guarantee of equality before the law contained in Art. 14 of the Constitution and set aside the conviction and sentence passed on Mr. Bimal Prasad, occupier of Lord Krishna Sugar Mills Ltd., Saharanpur, for failure to pay the cess imposed by the Act on sugarcane.

In exercise of the powers conferred by sec. 29 (2) of the Act, the Governor issued a notification dated December 6, 1951, imposing a cess at the rate of three annas per maund on the entry of sugarcane into the "local areas" consisting of the premises of all the 67 sugar factories in the State during the crushing season of 1951-52. The State Government in exercise of the powers conferred by sec. 30 issued Sugar Factories Control Rules.

The prosecution case against the applicant was that he infringed the provisions of Rule 25-A (2) by failing to deposit the cess imposed upon the entry into the local area comprising the premises of his sugar factory in the months of November 1951 to July 1952. The cess for these nine months, which amounted to Rs. 12 lakhs, was paid after December, 1952.

A magistrate found the appellant guilty of three offences each of infringing the provisions of Rule 25-A (2) and sentenced him to a fine of Rs. 1,000 for each offence. The conviction was upheld by the sessions judge, though not on identical grounds.

The main question in the case was that of the constitutionality of the provisions of sec. 29. On this Their Lord-

ships said this section not only conferred vast powers upon the Governor and the State Government, but also had laid down no principles for their guidance and did not control their discretion in any manner. It was true that under sec. 30 (4) the rules made by the State Government under sec. 29 (3) were required to be laid before both chambers of the legislature and to be amended in accordance with any amendment made by them in both chambers. This only meant that the legislature had retained some control over the rules made by the State Government, but no such control was retained over the orders passed by the Governor under sec. 29 (1) and (2).

Their Lordships said that under sec. 29 of the Act the public was divided into as many classes as there were discretionary powers conferred upon the Governor and the State Government. The Governor undoubtedly divided sugarcane into classes and this division could not possibly be said to be against the provision of Art. 14 under which discrimination against persons and not against property was forbidden. But the real discrimination came in the State Government's being allowed to select persons from whom the tax or the cess was to be realised. The Act itself had done nothing, but it had conferred powers upon the Governor and the State Government to do certain acts and there could be no difference between what it itself did and what it got done through the Governor and the State Government. If what they were permitted to do amounted to denial of equality before the law, sec. 29 must itself be deemed to deny equality before the law.

Their Lordships said that the division of the public permitted by sec. 29 to be carried out by the Governor and the State Government into classes of persons liable to pay a cess, of persons liable to pay a tax or a cess at one rate and of others paying the tax or the cess at another rate was all arbitrary and at the absolute discretion of the Governor and the State Government. Whether a person should pay a tax, whether a person should pay a cess, whether a person was exempted from payment of cess or tax, and at what rate the tax or cess should be paid, depended upon nothing but the caprice of the Governor and the State Government. There was no rational connection between the liability of a person to pay cess or a tax or the rate at which he should pay it and the Governor's and the State Government's putting him in one class or the other. The provisions of sec. 29 (1), (2) and (3) offended against the guarantee of equality before the law. Arbitrary taxation had been allowed by the section.

Their Lordships said since the provisions of sec. 29 (1) (2) (3) of the Act had been found to be unconstitutional, the notification issued by the State Government directing the applicant to pay a certain amount of a cess in monthly instalments and providing for punishment for his failure to do so was null and void.

RIGHTS OF GOVERNMENTS SERVANTS

"Inquiry Not Conducted Fairly"

DISMISSED OFFICIAL ORDERED TO BE REINSTATED

Mr. T. R. Varma, who was officiating as Assistant Controller of Exports, was involved in an alleged attempt to bribe Mr. Twaklay, an assistant in the Ministry of Commerce and Industry. He was suspended on 26th March 1953 and an inquiry was made against him by Mr. Burn, Joint Chief Controller of Exports and Imports under Rule 5 of the Civil Service Rules. Mr. Burn reported that the charges had been established against Mr. Varma, whereupon the Ministry asked him to show cause why he should not be dismissed. Mr. Varma submitted detailed criticisms of the inquiry report. The matter was then referred to the Union Public Service Commission, which recommended Mr. Varma's dismissal. Accordingly, he was dismissed on 16th September 1954.

Mr. Varma challenged the legality of the order of dismissal on the ground, among others, that no opportunity had been given him to cross-examine witnesses. The Circuit Bench of the Punjab High Court in Delhi on 1st February allowed the petition, holding that "the inquiry was not conducted fairly or in accordance with the rules and the proper representation of the petitioner's defence" and directed the Union of India to reinstate Mr. Varma in service.

Mr. Burn, denying the allegations of Mr. Varma, had stated that he did inquire from the officer if he wanted to cross-examine the witnesses, though he admitted that he had not made any note of this on the record of the proceedings. Mr. Justice Falshaw, speaking for the Court, said in his judgment:

> In spite of the statement of Mr. Burn, I find it difficult to believe that the petitioner who was fighting for his career should not have been anxious to test the evidence of the witnesses by questions in cross-examination.
>
> The prevailing impression left by a perusal of the record is that the prosecution witnesses have only been examined by a prosecuting counsel and further than that by a prosecuting counsel who was allowed the latitude of putting leading questions to his witnessess.
>
> When we come to the examination of the petitioner, it is significant to find that it is headed "Cross-examination of Mr. T. R. Varma" and that is clearly all that his examination amounts to, though admittedly the replies to a few questions are quite long.
>
> This seems to make it quite clear that he was not allowed to make a statement in his own way.
>
> The impression left by the record of the evidence as a whole is that, consciously or unconsciously, the

Inquiry Officer allowed himself to slip into the role of a prosecuting counsel and that whether there is any merit in the defence of the petitioner or not, he was not allowed to present his case fairly or even according to the rules governing the conduct of the inquiry.

HABEAS CORPUS PETITIONS

Detentions in Kashmir State

THE STATE LAW "HARSH" COMPARED TO THE LAW IN OTHER STATES

Hissam ud Din Bandey and three other persons made applications for a writ of habeas corpus in the High Court of Jammu and Kashmir against their detention under the Preventive Detention Act and a full bench of the High Court disposed of these applications on 14th January 1955. All the four persons were detained "for reasons of security of State," and the State's detention law provides that although, as under the Indian law, detenus have to be supplied with grounds of detention "as soon as may be" after their detention and afforded "the earliest opportunity of making a representation to the Government against the order of detention" if the detention is *not for reasons of security of State*, no grounds need be supplied to the detenus if they are detained for security of State reasons and *if the Government thinks that* the communication of grounds will be against public interest. In the case of the latter category of detenus, all that the law requires is that the Government make a declaration that they are not going to supply any grounds to the detenus.

The Kashmir Government made a declaration to this effect to the detenus; only made it very late, some four months after the orders of detention were passed against them, and in fact after they had submitted applications of habeas corpus to the High Court. It was contended on behalf of the detenus that, on the analogy of the provision in the Preventive Detention Act requiring the Government to supply grounds of detention to non-security detenus "as soon as may be," security detenus must be told that they are not to be supplied with such rounds and a declaration denying the supply of grounds" gmust be made by the Government "as soon as may be after they have been detained, and the fact that they were being kept in suspense for a long time vitiated the legality of their detention. Further, it was argued, the fact that the declaration was made some time after they had moved the High Court proved that their detention was mala fide.

The Court sympathised with the applicants but could give them no relief. It is "abundantly clear," said the Court, "that it would have been much wiser on behalf of the Government if they had made the declaration at an earlier date;" "it is highly undesirable that a detenu should remain in suspence if the making of declaration with regard to the supply or non-supply of the grounds is delayed." But since the Act did not set a time-limit for making such a declaration, the Court was unable to force the Government "to act in a manner which may be more desirable but which the law does not make upon it obligatory." The Court had no power to reject a declaration even if made late. It said:

> It is greatly desirable that such a declaration is made as soon after the detention order as the circumstances permit. We cannot deny that some time may be required by the Government to make up its mind as to whether the grounds have or have not to be supplied, but in any case the period so required should not be unreasonably long. But we cannot equally deny that what is desirable is not necessarily obligatory or binding upon the Government.

In the result the applications were dismissed — on this ground.

However, one of the four applicants, viz., Mir Maqbool Gilani, further complained that no order of detention was served on him, nor was a copy thereof given to him, although it was specifically laid down in the order of detention that this should be done.

It was stated in the Court by the Acting Advocate General that a copy was delivered to the detenu which he refused to take. "But," the Court said, "this statement is not borne out by the record." It appears that after about 21 days of his detention, a copy of the order was actually delivered to him in the jail, and the detenu executed a receipt for it. "The specification of the Kathua Jail in the receipt," the Court observed, "would reveal that no such copy was given to him previously. The person who delivered the notice to him in Kathua Jail should have—if it was a fact that Gilani had refused previously to take delivery of the notice—made an endorsement on the record to this effect. Nothing of the sort has been done. In our opinion this is enough to make the detention of Mr. Maqbool Gilani improper." The Court added:

> It may be stated here that it has been held in a number of rulings of the Supreme Court and other Indian High Courts that when directions as to the execution of an order of detention are given in the order of detention itself, those directions have to be meticulously followed. We have no desire to find fault with any Government in arming itself by law with some extraordinary powers to deal with abnormal situations or unsocial elements, such as black-marketers, smugglers, etc., who on account of the exigency of the hour or regard for public interest or safety cannot be dealt with under ordinary law. But, at the same time, we cannot and will not lose sight of the fact that preventive detention is a serious inroad on civil liberties and as such any law which in

any way curtails civil liberties has to be very strictly construed. Not only that. We have to see if the law, as it is, has or has not been meticulously followed, and if we find even a hair's-breadth deviation made from the express provisions of law or a slight disregard of any direction given according to law, we shall have no hesitation in declaring a detention under such circumstances quite illegal. This shall apply with greater force here as the law here is somewhat different and even a bit harsh when compared to the law in force in the other Indian States. Applying this test to the case of Mir Maqbool Gilani, we find that his detention is bad in law.

Holding the detention both improper and invalid, the Court ordered that Gilani be set at liberty forthwith.

Duration of Detention so Fixed

AS TO LAST AFTER THE ACT WAS TO EXPIRE

Six petitions for writs of habeas corpus were filed by Ram Prosad Saw and others in the Calcutta High Court, which were decided by a divisional bench of the Court consisting of J.P. Mitter and Guha Ray JJ. on 7th January 1955. All the petitioners were detained under the Preventive Detention Act as amended by the Second Amendment Act of 1952, and after consideration of their cases by the Advisory Board, the West Bengal Government confirmed the detention order and directed that the detenus be detained for twelve months (the maximum period allowed under the Act) from the date of detention. But the Detention Act, under which the order of detention was passed, was itself to expire before the expiration of a period of 12 months for which they were to remain under detention according to the confirmation order (though by a later Amendment the life of the Act was extended for three years more). The common point of law involved in the petitions was: "whether the order confirming the order of detention and fixing the duration of detention at 12 months from the date of commencement of the detention, as a result of which the detention is to end on a date subsequent to the expiry of the Act, is illegal."

Both the Judges came to the conclusion that the applications should be dismissed, but for different reasons. Dealing with the application of Sanat Hazra, Mitter J. said:

> It seems to me clear . . . that an order of detention for a period beyond the life of the temporary Act under which it is made is illegal. To continue the detention of a person beyond the life of the Act under which it is made would be contrary to the provisions of Art. 22 (4).
>
> It is also clear to me that an order of detention beyond the life of the temporary Act concerned cannot be made in anticipation of the life of the Act being extended by an amending Act. Therefore such an order can be successfully impugned before the life of the temporary Act is extended by subsequent legislation. Once, however, a fresh life is given to the temporary Act by subsequent lagislation, the original order of detention, on the score that it was for a period beyond the life of the temporary Act under which it was made, cannot be challenged, for then the order as well as the consequent detention must be deemed to have been under the original Act, as amended.

In support of this reasoning Sham Rao *v.* District Magistrate, Thana, A. I. R. 1952 S. C. 324 was cited, and as in the instant case the detention was challenged after the 1952 Act had been replaced by the 1954 Act, the Judge held that the detention was not illegal.

Guha Ray J. also held that the detention of the five other applicants, whose applications he considered in particular, was not illegal, but he arrived at the conclusion by a different route. He did not agree with the dicta of the Supreme Court in the three cases cited before him that "the over-all time-limit for an order of detention is fixed by the life of the Act and that an order of detention would automatically come to an end with the expiry of the Act itself," because of sec. 1 (3) of the Act "which the Supreme Court did not consider it necessary to take into account." (The section declares that the Act shall cease to have effect on a certain date "save as respects things done or omitted to be done before that date.") In giving an additional reason for his conclusion, Guha J. said:

> Where the authority acts in excess of its powers, it acts not without jurisdiction but beyond the limits of its powers, and therefore illegally, in exercise of its jurisdiction, and therfore only what is in excess of its legal powers becomes illegal and not the whole of the order. . . . In other words, the illegality in such a case attaches not to the whole order but only to that part of the order which is in excess of the powers. . . . (Therefore) the entire order of detention, the duration of which is fixed for a period going beyond the expiry of the Act, cannot be held to be void ab initio, but only that part of the order which goes beyond the expiry of the Act becomes illegal on the actual expiry of the Act, but as the Act did not in fact expire, no part of the detention in any of these cases has become illegal.

All the petitions were thus dismissed.

Detenu's Right to a Hearing

COULD BE HEARD PERSONALLY AND NOT THROUGH COUNSEL

Jawrilal and three other persons were detained by an order of the district magistrate of Pali in Rajasthan on 4th August 1954. Their cases were placed before the Advisory Board and on this body advising continued detention of the detenus, the order of detention was

confirmed by the State Government. Thereafter the detenus filed habeas corpus petitions with the Rajasthan High Court challenging the order mainly on the ground that the Advisory Board gave them no opportunity of being heard, to which they were entitled under sec. 10 (1) of the Preventive Detention Act, 1950.

In the petitions it was stated that the petitioners wanted to be heard themselves or through their counsel, but it came out in the hearing of the petitions that the petitioners had engaged counsel to plead their case before the Advisory Board and they wanted the Board to hear their counsel. Sec. 10 (1) provides that the detenu be heard if the Board itself considers it essential to hear him or if the detenu himself desires to be heard, and sec. 10 (3) provides that the detenu is not entitled to be heard through counsel. It was contended on behalf of the petitioners that though their prayer was only that their counsel be heard, it amounted to a desire on their part to be heard personally if not by counsel, particularly because the words in sec. 10 (1) were very general : " if the person concerned desires to be heard " As after these words the word " personally " does not occur, it was argued that if a detenu expressed a desire to be heard through counsel even if he did not express a desire to be heard personally, the prayer that his counsel be heard must amount to a desire on the part of the detenu to be heard and, therefore, the Board must give him a hearing.

Wanchoo C. J. and Modi J. rejected this contention and dismissed the petitions on 7th April last. Their Lordships said :

> To say that these words [in sec. 10 (1)] mean a desire to be heard either in person or through counsel would be to overlook sub-sec. (3), on account of which a detenu can never claim to be heard through counsel. We see no reason why the Advisory Board in a case like the present where the prayer was only that counsel be heard should presume that the detenus desired to be heard themselves and should be sent for. Reading sub-secs. (1) and (3) together, there can be no doubt in our mind that the intention behind the use of the words appearing in sub-sec. (1) was that the detenu, if he desired to be heard personally, would be entitled to be heard by the Board. . . . In the circumstances if the Board rejected the prayer (that their counsel be heard), it cannot be said that it failed in carrying out its statutory duty of hearing the detenus in person on their parts.

CRIMINAL PROCEDURE, SEC 144

Freemdom of Speech and Assembly

Prohibition Order Served on Dr. Ram Manohar Lohia

ORDER DECLARED ILLEGAL AND INVALID

When, on 11th April last year, Dr. Ram Manohar Lohia, the well-known Socialist leader, was addressing a public meeting on the polo grounds in Imphal (Manipur State), the district magistrate appeared on the scene, told him that an order under sec. 144, Cr. P. C., prohibiting public meetings was in force in that area, and asked him to stop his speech. Dr. Lohia, however, refused to do so. Thereupon the district magistrate declared the assembly unlawful and commanded it to disperse. Dr. Lohia and six other persons persisted in holding the meeting. They were consequently placed under arrest under secs. 143, 145 and 188, I. P. C. They then applied for a writ of habeas corpus, alleging that they were wrongfully and illegally arrested.

In the first information report it was stated that " seven persons held a public meeting, " that wihtin about 50 yards from the place where they were holding the meeting there was nobody except two or three persons who also hurriedly left the place at the sight of the inspector general of police and district magistrate coming near them. " In his judgment (26th April 1955), Brij Narain J. C. said that from this document it could be inferred that " the meeting which was being addressed by Dr. Lohia thus appears to have been attended only by the seven petitioners. "

The object of the meeting was implementation of the rights conferred by the Manipur State Constitution Act, 1947, under which " the Maharaja agreed to become a constitutional ruler. " After merger, the State Assembly was dissolved and the Council of Ministers ceased to function, but the Constitution Act itself was not repealed but " kept intact. " It meant therefore that the Assembly and the Ministry were " temporarily disbanded, " and " requests for their restoration would not be deemed to be illegal. " This being the object of the meeting and of the general agitation of which the meeting formed a part, the meeting could not be said to have been held for an unlawful purpose.

Could the meeting then be dispersed, considering the circumstances in which it was held ? On the general principles, His Lordship said :

> There is no doubt that magistrates are empowered under sec. 144 (3), Cr. P. C , to temporarily override private rights for the preservation of the public tranquillity as the preservation of public peace is a paramount function of the Government. The main question which therefore arises for determination in this connection is whether there was any apprehension of a breach of public peace, if one man were to address a gathering of seven persons only, and whether any restriction could be legally imposed, even under sec. 144, Cr. P. C , on fundamental rights allowed to the citizens of the Indian Union under Art. 19 (1) (a) and (b) under such circumstances.
>
> There is no doubt that ordinarily the question whether there exists sufficient ground for apprehension of a breach of peace is to be decided by the magistrate who promulgates an order under sec. 144,

Cr. P. C. But it is settled law that where there is no apprehension of a breach of peace, a magistrate should not restrain the liberty of private individuals by means of an order under this section, vide. Thakin Aung Bala *v.* District Magistrate, Rangoon (1939), in which it has been laid down that, "The magistrates should bear in mind that every citizen has a right to ventilate his grievances, either in the public or in private and ask for redress, and this right cannot be curtailed so long as it is exercised in a lawful manner, and it is illegal assumption of power to issue an order under sec. 144, Cr. P. C., on a pretended apprehension of danger of the breach of public peace." . . . In *In re* Srikanta Iyer (A. I. R. 1937 Mad. 311) it was held that where interference with the right to speak is expected, opponents should be prohibited from interfering under sec. 144, Cr. P. C., and not the other persons from speaking.

Turning to the meeting addressed by Dr. Lohia, which was declared an unlawful assembly, His Lordship said:

In the present case, as has been pointed out, there were only seven persons present at the meeting and the number of persons going on the road does not appear to be appreciable, and so it cannot be said that there was any apprehension of a breach of peace or danger to public tranquillity on this occasion.

The present petitioners numbering seven were trying to get the provisions of law (Manipur State Constitution Act 1947) acted upon and they were not using any criminal force and so their assembly could not possibly be deemed to be an unlawful assembly, and their right to freedom of speech and right of assemblage could not legally be curtailed as was done in this case. As the order under sec. 144, Cr. P. C., issued in this case was not a legal and valid order, no prosecution under sec. 188, I. P. C., could legally ensue for disobedience of this order.

The result is that the present petition must be allowed and the petitioners are set at liberty and the commitment order under secs. 143, 145 and 188, I. P. C., against them is quashed.

BOMBAY INDUSTRIAL RELATIONS ACT

Labour Court Judge's Order Upheld

A Division Bench of the Madhya Bharat High Court consisting of Justice Mr. V. R. Nivaskar and Justice Mr. S. M. Samvatsar dismissed on 18th January a writ petition made by two employees, Janardan and Dalchand of Hukumchand Mills, Indore, challenging the validity of the order of the Labour Court of 19th March 1954, that when a representative union was appearing in the case as representing the employees, no individual worker could be allowed to appear and to conduct the proceedings.

The principal contention raised by the counsel for the petitioners was that the provisions of secs. 27 A, 30 and 33 of the Bombay Industrial Relations Act were void as being in conflict with the fundamental right guaranteed by the Constitution. [sec. 27 A of the Bombay Industrial Relations Act, 1946, an "Act to regulate the relations of employers and employees," etc. says: "Save as provided in secs. 32 and 33, no employee shall be allowed to appear or act in any proceeding under this Act except through the representative of employees" Sec. 30, in stating who shall be allowed to appear or act as the representative of employees in an industry in any local area, gives first preference to "a representative union for such industry," and sec. 33, which specifies the proceedings in which employees can appear "through any person" contains a proviso in the following terms: ". . . *no employee shall be entitled to appear through any* person in any proceeding under this Act in which a representative union has appeared as the representative of employees." Sec. 32, which gives power to an Industrial Court etc. to "permit an individual, whether an employee or not, *to appear in any proceedings* " before it, also contains a proviso to the effect that "no such individual shall be permitted to appear in any proceeding in which a representative union has appeared as the representative of employees."] On these grounds it was prayed that the order of the Labour Court Judge be quashed and set aside as being arbitrary and against natural justice.

In giving their judgment Their Lordships, after dealing with the facts of the case, said that in the present case there was no such conflict between sec. 27 of the Bombay Industrial Relations Act which relates to "illegal strikes" and secs. 23 and 24 of the central Industrial Disputes Act of 1947, an "Act to make provision for the investigation and settlement of industrial disputes," etc., which relate respectively to "general prohibition of strikes and lock-outs" and "illegal strikes and lock-outs." The preambles of those two enactments showed that the Bombay Industrial Relations Act was wider in scope and sought to regulate relations of employers and workers and to consolidate the law relating to industrial disputes, while the Industrial Disputes Act was mainly enacted to provide settlement of industrial disputes only.

Dismissing the petition, Their Lordships observed that under the provisions of the law, labour was represented by a representative union and it could not be argued that when such a union was representing it and the individuals were not permited to appear, the proceedings were vitiated on the ground that they were opposed to the principle of natural justice. "Though the individual is not allowed to appear as an individual, he is represented in fact by a representative union and an order passed in a proceeding in which the union had in fact participated and appeared on behalf of the employee cannot be held to be void and against the principle of natural justice."

BOMBAY LAND REQUISITION ACT

Accommodation for Officers of Public Utility Concerns

"A PUBLIC PURPOSE" UNDER THE ACT

The Supreme Court on 17th January upheld a Bombay Government's order requisitioning accommodation for housing an officer of the State Road Transport Corporation by quashing the decision of the Bombay High Court thereon.

In May 1952, the Bombay Government had requisitioned the accommodation by an order under sec. 5 of the Bombay Land Requisition Act of 1948 for a "public purpose," namely, "for housing an officer of the State Road Transport Corporation, which is a public utility service."

The respondent, Mr. R. S. Nanjee, filed a writ application under Art. 226 of the Constitution in the Bombay High Court for setting aside the Bombay Government's order. A Judge of the Bombay High Court set aside the order and later a Division Bench affirmed this decision in an appeal preferred by the Bombay Government. The order was set aside by the High Court on the principal ground that the requisition was not for a public purpose and, therefore, could not have been made under the Land Requisition Act.

The present appeal to the Supreme Court was preferred by the Bombay Government against the High Court decision. Allowing the appeal, Mr. Justice Imam, who delivered the the judgment, observed that the only point argued before them was whether the requisition was for a public purpose or not. It was not disputed before them that the Road Transport Corporation was a public utility concern and was governed by the provisions of the Act. The activities of the Corporation were so interlinked with its successful functioning as a Road Transport Corporation that requisitioning or acquisitioning of property to advance and ensure those activities must be regarded as for a public purpose. It would not be sufficient merely to establish the Corporation. It had to have an adequate and efficient staff, living accommodation for whom would be an absolute need of the Corporation.

Mr. Justice Imam further observed that in the present case the Corporation was a public utility concern and the general interests of the community were directly and vitally concerned with its activities and its undertaking. Providing living accommodation for its employees was a statutory activity of the Corporation and it should, therefore, be held that the impugned order was validly passed under the Land Requisition Act.

HYDERABAD SALES TAX ACT

Imposition of Tax Disallowed

A Division Bench of the Hyderabad High Court consisting of Mr. Justice M. A. Ansari and Mr. Justice P. J. Reddy on 20th January held that the Hyderabad legislature "cannot, by enacting the Sales Tax Act," tax transactions of sale or purchase in other States.

Their Lordships were disposing of a writ petition filed on behalf of the Bajrang Jute Mills at Guntur (Andhra State) against the assessments made on them by the Sales Tax Officer, Hyderabad, amounting to over Rs. 25,000 for the period April 1, 1953, to September 30, 1954.

The assessment was in respect of supply of gunny bags to the cement factory at Shahabad run by the Associated Cement Companies of Bombay.

The contention of the petitioner was that the sale of gunny bags was effected outside Hyderabad and the transaction being between the petitioner at Guntur and the Associated Cement Companies in Bombay, it could not be subjected to sales tax in Hyderabad.

Allowing the petition, Their Lordships observed that the facts of the case showed that the sale was effected at Guntur and purchase was made in Bombay and, therefore, the Hyderabad Legislature could not, by enacting the Sales Tax Act, tax transactions of sale or purchase in other States.

They, therefore, quashed the order of the Sales Tax Officer, Hyderabad, and issued a writ of mandamus directing that the tax should not be collected for any further transactions which the Bajrang Jute Mills might enter into with the Associated Cement Companies in Bombay, the purchase and sale taking place outside Hyderabad.

SEARCH FOR INCRIMINATING DOCUMENTS

"Testimonial Compulsion" in an Indirect Way

Mr. Swarnalingam Chattiar was in the first instance ordered by the sub-inspector of Karaikudi to produce certain documents but he made a petition to the Madras High Court asking for the quashing of that order on the ground that it offended Art. 20 (3) of the Constitution, which says that "no person accused of any offence shall be compelled to be a witness against himself." The Court allowed the application, following a decision of the Supreme Court in M. P. Sharma *v.* Satischandra (A.I.R., 1954 S. C. 300). The Court observed that the guarantee under Art. 20 (3) would extend to any compulsory process of production of evidentiary documents which are reasonably likely to support a prosecution against the accused.

After this happened, the sub-inspector filed a petition in the court of sub-magistrate of Karaikudi asking for a search warrant, so that the premises of Karaikudi Railway Out Agency may be searched and the documents mentioned in a list may be seized and produced before the court. On this petition the court ordered notice to the

petitioner to show cause why the premises in question should not be searched. Against issue of the notice the petitioner came in revision to the High Court.

Mr. Justice Somasundaram, in his judgment (A. I. R., 1955 Mad. 716), said :

> The notice to the petitioner to show cause why his premises should not be searched practically amounts to stating that either he produces the documents or else the premises will be searched. To avoid the search the petitioner is likely to come forward with the production of the documents himself. Instead of directly compelling him to produce by means of a summons, this notice to show cause will practically have the same effect in an indirect manner. This notice, therefore, will amount to a testimonial compulsion and will stand on the same footing as the summons to produce the same documents.
>
> The notice, therefore, issued to the petitioner to show cause why his premises should not be searched is unsustainable and is hereby quashed.

WRIT OF MANDAMUS

When a Writ can be Issued

Mr. Rabindra Kumar Purkayastha of Imphal was given a lease for carrying on teak operations in a part of the Burma Border Forest by the forest officer of the Government of Manipur. He deposited Rs. 1,000 as security for payment of royalty and monopoly fee, and began teak operations in that area and actually felled a number of trees. But later the forest officer, without levelling any charges against the contractor, prohibited him and his men from entering the forest and carrying on teak operations on the ground that the Government had decided to settle the forest by calling tenders. Thereupon Mr. Purkayastha moved the High Court for a writ of mandamus asking that he be allowed to carry on the teak operations as provided in the lease. He contended that otherwise he would suffer big financial loss on account of not getting the profit to be earned by the contract, on account of investment on labour utilised for the operation and on account of the risk of failure to keep up his contracts with timber merchants of other places.

Mr. Justice Brij Narain J. C. on 20th June 1955 ruled that " this is a fit case in which a writ of mandamus should be issued " and made the rule nisi absolute. He held that the rights acquired by the petitioner by the lease deed constituted property, and that in being completely ousted from the forest he had suffered deprivation of property forbidden by Art. 31 (2) of the Constitution.

It was urged on behalf of the respondents that the petition for a writ of mandamus should not be allowed as the petitioner could obtain relief by enforcing his alleged contract in a court of law. But His Lordship did not accept the contention, holding that " the petitioner is likely to be ruined if he is forced to follow the remedy of a suit." In Buddhu *v.* Municipal Board, Allahabad (A. I. R , 1952 All. 755) it was held that where a speedy decision is desirable, a petition (for a writ of mandamus) can be entertained even though there is another remedy by way of a suit. In Rakhaldas Mukherjee *v.* S. P. Ghosh (A. I. R., 1952 Cal. 171) it was held that where an alternative remedy is too costly or ineffective or entails such delay that the applicant would be irreparably damaged or the remedy might prove valueless, a writ of mandamus should be issued. In Sobhagmal *v.* The State (A. I. R., 1954 Raj. 207) it was held that where the facts were not in dispute and the remedy by way of a suit could not have been equally beneficial, effective and convenient, the application for a writ of mandamus was maintainable. His Lordship said :

> As the action of the respondents in ousting the petitioner from the contracted forest deprives him of his valuable property without any compensation, it becomes clear that the petitioner's fundamental rights under the aforesaid Articles of the Constitution [Art. 19 (1) (f) and Art. 31 (1) and (2)] have been infringed.
>
> In cases of invasion of fundamental rights it is not merely a power but a duty of the High Court to grant relief by the issue of prerogative writs under Art. 226 of the Constitution. The High Court will exercise the utmost restraint in interfering with the acts of the executive. But where the High Court is satisfied that the fundamental rights guaranteed by the Constitution have been violated by any act or order of the executive it is the sacred duty of the High Court to set it aside. The High Court has power to do this under Art. 225 by issuing a writ or any appropriate order so that a wrong done by the order of the Government may be remedied

NOTE

South Africa's Group Areas Act

RIGHTS OF INDIAN SETTLERS

In a memorandum submitted to the Government of the Union of South Africa, the South African Institute of Race Relations, a very influential body, makes a strong plea for the preservation of the rights of Indian settlers, with particular reference to the Group Areas Act. It says :

> Much of the present law affecting Indians will have to be changed, and discrimination on racial grounds will have to be abandoned, if the rights to which South African Indians are entitled can be exercised. Indians must be regarded and treated as members of the multi-racial community of South Africa, and their political rights and representation in central, provincial and local governments ought to be officially recognised. The Indian community is likely to suffer more severely than any other racial group from the effects of the Group Areas Act. Disregard of Indian rights may drive the Indians, and other non-Europeans, to make a common cause against the White group.
>
> The only ultimate remedy for this dangerous situation is the general acceptance of the idea of a common multi-racial society, the granting of common rights, and the building up of inter-racial solidarity.

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