CIVIL LIBERTY

UNDER THE NEW CONSTITUTION

Freedom of Association
Freedom of Speech and Press
Freedom of Person

Being Papers submitted to the Indian Civil Liberties Conference held in Madras on 16th and 17th July 1949

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PRICE : RS. 2

[*Copies can be had of the Madras Civil Liberties Union, Tambaram, Madras.*]

Freedom of Association

By S. G. VAZE

Since the establishment of free India, no fundamental right (save that of personal liberty) is more widely and more persistently under assault at the hands of governments, central and provincial, than the right to freedom of association. Soon after the assassination of Mahatma Gandhi, the Government of India, in a press communique of February 2, 1948, announced its determination " to root out the forces of hate and violence, " and, two days thereafter, it declared, " in pursuance of this policy, " the Rashtriya Swayamsevak Sangh to be an unlawful association. The government charged that " in several parts of the country individual members of the R. S. S. have indulged in acts of violence involving arson, robbery, dacoity and murder and have collected illicit arms and ammunition; have been found circulating leaflets exhorting the people to terrorist methods to create disaffection against the government and suborn the police and the military. " Thereupon followed, throughout the country, the detention of thousands of R. S. S. workers in custody without trial, and when this continued for several months, a protest movement was carried on by the R. S. S. on a very large scale, demanding that the ban on the Sangh be lifted and that those who were suffering imprisonment without any charge being proved against them be either released or put on their trial for specific charges. About a lakh of persons who joined the protest movement found themselves in gaol on a charge of defiance of law. Like the R. S. S., the Communist party was also declared an unlawful association in West Bengal, and it is reported that the Central Government is considering the question of banning the party throughout India. Although in provinces other than West Bengal the party as such is not under a ban, this has not prevented the governments in these provinces from depriving communists of their personal liberty and detaining them in prison for an indefinite period under various extraordinary laws. It is obvious that communists have escaped being declared members of an unlawful association only because of the power conferred by these laws upon the executive to impose what restraints it chooses upon their personal freedom.

Status of the Right in England

2. Freedom of association is in reality nothing else than freedom to do in combination what one is entitled to do as an individual. In this sense it is a sum total of all the fundamental rights of individuals, and as such, strictly speaking, it is unnecessary to provide separately for it in the constitution as a fundamental right. If other rights are constitutionally guaranteed, this right also will by implication and by necessary consequence receive a similar constitutional guarantee. No separate provision is required for it. England, of course, recognises no constitutional civil rights; there all rights are statutory. In that country citizens enjoy only such rights as the law allows. If a law deprives a person of, say, the right of free speech, it is a valid law, and there is no appeal from it to any basic principles of the constitution. No right enjoys any special constitutional sanctity in England. No constitutional guarantee can be invoked in defence of a right which Parliament chooses to take away on any particular occasion. But normally Englishmen enjoy as much civil liberty without constitutional guarantees as the people of other countries providing such guarantees enjoy. And freedom of association is one of the ingredients of this civil liberty. Just as individuals are free to hold and propagate what views they please, however divergent such views may be from those generally held in the community, so are groups of individuals free to hold and propagate even extremely unpopular views. A combination to promote such purposes is entirely lawful. No legal bar exists to the formation of an association for promoting these purposes. Formerly the government used to prosecute under the common law of conspiracy, but it has long since ceased to do so, and consequently no obstacles to free association now remain in England.

In the United States

3. Unlike England, the United States recognises certain fundamental rights. These rights are above all restrictive statutes. If any of them is curtailed by a law passed by Congress, the judiciary will invalidate the law itself. Freedom of speech, for instance, is one of such rights. It is guaranteed by a specific constitutional provision. But even in the United States, where such a procedure for the protection of fundamental rights is followed, there is no special constitutional provision for the guaranteeing of the right to freedom of association. However, the absence of a specific constitutional guarantee for this right only

results from the fact that a general freedom to combine is recognised to exist. The right to free speech which individuals possess extends also to groups of individuals. Other rights of individual liberty similarly extend to combinations of individuals. What one person can do individually, a number of persons can also do collectively. There is no bar to a combination to do things which in themselves are legal and constitutionally protected. Collective action in respect of matters falling within the purview of fundamental rights thus is, even in the absence of a separate constitutional guarantee therefor, fully protected as if there was such a guarantee in the constitution. The right of individuals to enjoy any of the elements of civil liberty in association with others cannot be so controlled as to infringe upon the individuals' right to enjoy all those elements of civil liberty.

In Weimar Germany

4. In countries where the right to form political associations was formerly subject to governmental regulation, the need has been felt, while conferring fundamental rights on the people, for incorporating in the constitution an express provision denying the executive any such power of regulation. Thus in the Weimar constitution freedom of association was specially guaranteed. The constitution provides in art. 124 that—

> All Germans have the right to form associations or societies for purposes not contrary to the criminal law. This right cannot be limited by preventive measures.

Further clarification of this right of association was thought to be required in order to close some of the loopholes that were found to exist in the Civil Code in force at the time. Hitherto the regulations provided by the Code "gave administrative authorities the right to oppose the acquisition of legal status by associations of a political, social or religious character. This opposition resulted in the associations in question being kept from the register of associations, and thereby prevented them from acquiring legal standing. This restriction is abolished by the constitution as contrary to modern principles, according to which liberty of association must be kept intact."[1] Thus the same article goes on to declare :

1. Brunet, René, *The German Constitution*, p. 218.

> Every association has the right of incorporation in accordance with the civil law. No association may be denied this right on the ground that it pursues a political, social-political, or religious object.

Political associations cannot hereafter be discriminated against. While freedom of association is thus guaranteed, it remains true nevertheless that "the regulation of the constitutional right is left to the Reichstag to implement by suitable legislation. In Holland a general right of association was established by the constitution of 1848 with, however, the proviso that the law might regulate and limit its exercise in the interest of the public peace. Most modern written constitutions contain similar provisions." [2]

Theory of the Matter

5. If, in guaranteeing freedom of association, the right is made subject to limitations imposed by the executive in view of the requirements of the public peace as it conceives those requirements, the guarantee will be of no practical value. But proper constitutional provisions do not leave any such limitations to the unfettered discretion of the executive. On this point Professor Laski observes, in the article from which a quotation is given in the preceding paragraph :

> As a matter of social philosophy it is clear that no state charged with the maintenance of social order can admit an unlimited right to freedom of association ; for that would be to tolerate the existence of bodies actively engaged in an effort to seek its own overthrow by violence. It seems therefore that the legal limit of free association should not be held to be exceeded until the body concerned ceases to promote its ends peacefully. This is the implication of Mr. Justice Holmes' well-known dissent in *Abrams v. United States* (1919) 250 U. S. 616.[3] To illustrate : a government could hardly do otherwise

2. Laski, Harold J., *Encyclopaedia of the Social Sciences*, Vol. 6, p. 448.

3. "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command (of the constitution), 'Congress shall make no law abridging the freedom of speech.'"

> than interfere with such a body as the Ulster Volunteers, who in 1913-14 announced their intention of resisting the application of the Home Rule Bill of that year by force of arms; who also engaged in military training and the purchase of military equipment to enable them to carry out their purpose. *It is of course important that the government should have no power to judge the validity of their case; to confuse executive and judiciary in these crucial matters is to destroy the possibility of freedom.*[4]

From these observations in regard to the theory of the subject it will be seen that a constitutional guarantee of the right to free association can be effective only if the necessary limitations of this right are enforced in conditions of imminent danger to the security of the state and when the determination of the question as to whether such a danger does in fact exist or not is left to the judiciary instead of to the executive. In the United States, as remarked above, there is no separate guarantee of this right as the right is covered by all the other basic rights of individuals, each of which is adequately guaranteed. The result is that freedom of association is secure in that country although no such specific guarantee exists in the constitution. On the other hand, in some other countries where the constitution purports to guarantee this right by an express provision, the phrasing of the provision makes the right extremely insecure, leaving it to the executive to make inroads upon it at its own sweet will.

Present Practice in India

6. In India, at present, the executive and legislative power is subject to no constitutional limitations whatever; provided that the legislature does not wholly disapprove, the executive can take what restrictive action it pleases. An overwhelmingly one-party legislature, controlled to the smallest detail by a party caucus, produces the most favourable atmosphere for a totally unrestrained use of its power by the executive. Minority groups can have no kind of protection in such a situation even for their most elementary rights. In an executively proclaimed emergency almost unlimited powers of detention without trial are taken, and the so-called emergency never seems to come to an end. The powers are extensively used too to crush all opposition. These powers are also supplemented by the power, which too is without limit, to declare any association unlawful. The communists outside Bengal

4. *Ibid.*, p. 449.

are dealt with only under Public Safety Acts, but members of the R. S. S. have to bear the brunt of both these kinds of power, which are equally arbitrary. All the drastic repression that is going on is of course sedulously kept outside the purview of judicial scrutiny. Neither the supposed emergency, nor the amount of discretionary power said to be called forth by the emergency, nor the manner of exercising it, can ever come by any chance under the investigation of an impartial judiciary. The executive, backed as it is by the legislature, is supreme in every respect. Nothing is more striking to the observer of recent events than the persistent appeal made by the leader of the R. S. S. when, some six months after the body was declared unlawful (during which period the leader, taking the ban coolly, very considerately ordered the normal activities of the organisation to be suspended so that the tense atmosphere resulting from the murder of Mahatma Gandhi might become clearer), he carried on negotiations with the government for the lifting of the ban, for some evidence to support the grave charges of spreading communal hatred and committing acts of violence, and the persistent refusal of the government to produce the slightest evidence. The Prime Minister and the Home Minister kept on reiterating that they had a mass of evidence in their possession which would substantiate these charges, but when challenged to bring at least a little of it into the open they consistently backed out. On the other hand, the leader characterized a pamphlet by the Parliamentary Secretary to the Premier in the United Provinces, which was being privately circulated but which even after a challenge was never made public, as "pure fabrication and a libel." He added :

> If really the central and provincial governments are in possession of incriminating evidence against the R. S. S. or certain of its members, is it not right to expect at least a few successful prosecutions against the alleged wrong-doers? So far as I know, all down these many months the various governments have taken recourse to the extraordinary special legislation and not proceeded against any person or group of persons under the substantive penal law. The one case much boosted, known as the Kandhla case in District Muzaffarnagar—upon which the superstructure of the so-called charge-sheet of the U. P. government seems to have rested—has been decided only in the last week. A look at the learned and well balanced judgment is sufficient to prove the falsity of the "great deal of evidence" against "certain members of the R. S. S."

This rejoinder would have stung any government amenable to reason into quickly producing the necessary evidence. But the Government of India would not let itself be so provoked. To a request for a personal interview to clear away possible misunderstandings, Pandit Jawaharlal Nehru's only reaction was to assert once again that the activities of the R. S. S. were "subversive and violent" and that mere assertions on the part of the R. S. S. leader about the unexceptionable motives of that organisation did not help much. The R. S. S. leader's retort was crushing. "Let it be appreciated by both of us," he said, "that mere assertions do not help much." The charge levelled against the R. S. S. is a grave one and does not deserve to be made lightly, he pleaded.

> It calls for proof, weighty and substantial. Mere feelings and opinions have no value in this behalf. Reiterating that the government have information in their possession, without allowing those against whom the charges are made to test it, to subject it to searching scrutiny, means nothing. So long as the government continue to make assertions and allegations without discharging their onus of supporting the same with unrebuttable evidence, we can only continue to assert, and with justification, that the charges are untrue and that injustice is being perpetrated against us.

When it was found that the government would neither seek to prove their charges nor lift the ban, nearly a lakh of R. S. S. workers courted arrest, and whatever may be the truth about acts of violence secretly planned and committed by them before, it must be said about this protest movement that it was carried on with such rigid adherence to non-violence in the most trying circumstances that it might well be regarded as exemplary by the Congress, which, though pledged in theory to absolute non-violence, had never been able to conduct even much less extensive movements of civil disobedience without outbreaks of violence, and very serious ones at that on many occasions. The government, however, was relentless. When even this movement was suspended, the government only gave the provocative reply : the R. S. S. had no roots in the country, though no such widespread movement had been witnessed before ! All this is mentioned here at such length only in order to show how the government studiously keeps away from the law courts in imposing or maintaining a ban on public associations and how violently for that reason it departs from those established canons of right policy in this behalf to which Professor Laski has adverted.

Public Order Act in England

7. Perhaps the government's objection to the R. S. S. is that it regards this organisation as a quasi-military body, consisting of uniformed and disciplined men owning allegiance primarily not to the state but to the leader of their organisation and committing on occasion acts of violence against those whose ideology is different. If the organisation is guilty of suppressing the liberty of others, the government is certainly entitled to suppress the organisation itself in the interest of the general community. But before any such action is taken the government must prove its charges. Governments in other countries have occasionally found it necessary to stop such organisations. But there is a recognised way in which alone action of this kind can be taken. For instance, when in England the Blackshirts of Sir Oswald Mosley became a source of public danger, the government passed a law, the Public Order Act of 1936, to prohibit this Fascist organisation and similar other organisations. It was made a criminal offence for any person to manage an association organised and trained or equipped for the purpose of enabling its members or adherents "to be employed for the use or display of physical force in promoting any political object." But the law could be set in motion against any individual only after giving proof to the court that he is managing an organisation whose purpose it is to employ physical force. Mere suspicion that physical force is being employed or is intended to be employed would have given no power to the government to take action either against the Blackshirts or against any other organisation of potential danger to the state. The suspicion must be borne out by evidence which must be sufficient to prove the guilt. The onus of producing such evidence was thrown even by this exceptional legislation on the government. And, in order to make sure that only the guilty would be punished, a clause was inserted in the Act to provide that a person could not be punished who could show that though he took part in the management of an organisation, he personally neither consented to nor connived at the misdeeds committed by its members or adherents. For the executive to by-pass the courts and suppress organisations which it considers to be dangerous is a proceeding which will be condemned in all democratic countries.

Provision in the New Constitution

8. It is not my main purpose, however, to point out how the existing constitution affords to the executive full scope to adopt

a policy of suppressing the right to free association condemned by the opinion of political scientists or how the executive in fact adopts such a policy. The purpose is to examine the provision in the new constitution adopted by the Constituent Assembly in regard to freedom of association with a view to seeing whether it is defective in any respect. In this connection it must first be stated that this constitution has made a distinct provision in art. 13 (1) (c) concerning freedom of association. It is as follows :

> All citizens shall have the right to form associations or unions.

But this right is qualified by art. 13 (4) in the following terms :

> Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the state from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

It has been argued before that if constitutional limitations on the power of the state to interfere with freedom of speech and such other rights are satisfactory, no constitutional limitations on the state's power to interfere with freedom of association are really required. Conversely, and by the same token, if the former limitations are defective, the defects inhering in them will also affect the latter limitations also. The defects in the guarantees of free speech, etc., have been pointed out elsewhere and do not need to be repeated in this Note. It is necessary to state here, however, that to the extent to which rights like those of free speech are left insecure in the new constitution, the right to freedom of asssociation is also bound to be insecure, whatever may be the formal provision made for it in the constitution. Emphasising that all the criticism which can legitimately be urged against the inadequacy of the guarantees of free speech applies with equal force to the guarantee of free association, it may nevertheless be admitted that this guarantee may to some extent prove to be of practical value inasmuch as the restrictions to which this right is capable of being subjected in the interests of public order must be " reasonable " as interpreted by the judiciary. It is at least clear that the judiciary will have a look-in in this matter. How far this judicial control will go and how in fact it will be exercised time alone will show. But that the era of unlimited executive discretion is at last to disappear is a matter of satisfac-

tion, and a word of congratulation need not be withheld from the constitution-makers because in other respects the provision is less than satisfactory. It is agreed by all that the right of association within the armed forces of the state and within that part of the civil service which is engaged in the performance of important functions and which must for that reason remain neutral has to be limited. And if these or such other limitations alone are interpreted by our judiciary to come within the ambit of the "reasonable restrictions" contemplated by our constitution, the provision will have a good effect, subject always to the qualification (and it is a very large qualification) that, other safeguards being weak, this safeguard also will of necessity be correspondingly weak.

Guilt must be Personal

9. If the right to freedom of association has any meaning, it must mean that no one should be liable to be condemned on the mere ground of "association." The government may come to the conclusion from the evidence in its possession that a certain group of persons or a certain political party indulges in unlawful or subversive activities; and this conclusion may be in accordance with the facts of the situation. Even so, while the government would of course be entitled to proceed at law against any member of the group or party for any unlawful or subversive acts he may have committed, it is not entitled to take action *en bloc* against the whole group or party. For guilt must be regarded as individual; it cannot be held to attach to any person only because of his political or other affiliations. This principle is now universally recognised, and unless it is recognised and given effect to it is obvious that the right to free association will be devoid of any content. In the United States an idea has been broached that government employees should be subjected to a loyalty test and that all those who are found not to satisfy the test should be weeded out of the service. In this matter, while it is recognised that every government must possess the right to have in its service only such employees as are known to give an undivided loyalty to the state, it is also recognised that the kind of loyalty probe contemplated in the United States may lead to "red hunting" which would be wholly unjustifiable. The President's Committee on Civil Rights, pointing out the danger in such a proceeding, says:

> The standards by which the loyalty of an individual or an organisation is to be determined may not be clearly defined. This is particularly true of any standard which permits con-

> demnation of persons or groups by "association." The character, the policies and the leadership of many organisations change. Individuals too change their opinions. The greatest care must be taken to avoid the misinterpretation of affiliation. Individuals may be members of suspect organisations out of ignorance. Before such affiliations may even be considered as relevant, the motive of the individual should be clearly established. The determination of the suspect character of organisations is complex and must be handled with the greatest care. For the individual the ultimate test must always be his own trustworthiness. Affiliation with a dubious organisation is, by itself, not necessarily proof of untrustworthiness.[5]

If this is true of public servants over whom the government must have control, how much more true it must be of citizens who are not in public employ and who thus by definition must be free of all government control! (It may be noted in passing that the Government of India have now taken power to call for the resignation of any of their employees whom they may suspect of disloyalty, without reference to the Public Service Commission, who, under the present rules, have to be consulted in all disciplinary measures. This is contrary to all notions of dealing justly with government employees.)

'Guilt by Association' Not Allowable

10. In regard to private citizens, reference may here be made to a case which attained great celebrity in the United States in recent years, the case of *Bridges v. Wixon* (1945) 326 U. S. 135. A labour leader of the name of Harry Bridges was ordered to be deported on the ground that he was a member of or affiliated with the Communist party which advocated the overthrow by force of the government of the United States. Bridges, surrendering to the immigration officers, attacked the legality of his detention by seeking *habeas corpus*. The District Court, and later the Circuit Court of Appeals, sustained the deportation order, but when the Supreme Court took the case on certiorari, it held the deportation order void. There was not enough evidence to prove that Bridges was a member of the Communist party, and the question was whether he was "affiliated" with it, implying less than membership but more than sympathy. Generally speaking, a man who worked with and helped finance the Communist party would be affiliated with it, the Court said; but it made a reservation of controlling importance.

> He who co-operates with such an organisation only in its wholly lawful activities cannot by that fact be said as a matter of law to be "affiliated" with it. ... Alliances for limited objectives are well-known. Certainly those who joined forces with Russia to defeat the Nazis may not be said to have made an alliance to spread the cause of communism. .... A different result is not necessarily indicated if aid is given to or received from a proscribed organisation in order to win a legitimate objective (improvement of the conditions of labour) in a domestic controversy.

The Supreme Court set aside the deportation order on a comparatively narrow issue, viz., that Bridges was not "affiliated" with the Communist party in the sense that it was not proved that he co-operated with the party in its unlawful activities. But Mr. Justice Murphy, in his concurring opinion, took wider ground. He "asserted that 'the constitution has been more than a silent, anaemic witness to this proceeding,' and vigorously argued that the deportation statute (permitting deportation of communists) is unconstitutional, (among other grounds) because it denies due process by *imposing punishment based on 'guilt by association' rather than personal guilt.*"[6]

Suppression not Expedient either

11. As to the expediency at any time of outlawing an organisation, the considerations to be kept in mind are clear. About the suggestion of banning and suppressing the Communist party in India, Mr. Nanda, Bombay's Labour Minister, said on May 10, 1949, that such a course might prove futile, and that if, after imposing a ban on the communists, they went underground, the ban would defeat its purpose. This indeed is the usual experience. Professor Laski sums it up in the following words in the article referred to above :

> It is difficult in the light of history to see that anything has been gained in the long run by multiplying prohibitions upon the right of association. When men feel passionately upon some object they will combine to promote it; and any prohibition upon their effort to do so only serves to drive their activities into secret channels where their discovery is more difficult. It may well be argued, for example, that much of the violence of French and Russian history in the 19th century

6. Cushman, R. E., *The American Political Science Review*, vol. 40, p. 241.

was due to exaggerated suppression of the right to form political associations; for men who cannot persuade a government to accept their view will seek sooner or later to impose it upon that government. Prohibitions do not seem to have any long-run effect save that of exacerbating the temper of the disputants. For while it may be true that more cautious spirits will be driven by fear of the law to accept its prohibitions, that only leaves the association outlawed in the possession of more daring and desperate minds. The history of the revolutionary movement in Russia is a sufficient commentary upon this thesis.[7]

Trial of the Reds in U. S.

12. What procedure a government should adopt if it desires to outlaw any political party may be best illustrated by the action that the United States government is taking at present against the Communist party. The government is prosecuting the members of what may be called the Politbureau of that party in the United States. It is seeking to prove that the party is engaged in subversive activities and must therefore be placed outside the pale of law. Because the chief leaders of the Communist party, who have the power of both shaping and enforcing its policy, are on trial in this case, it is held that through these leaders the party itself is in effect on trial, and if the charges are proved the result will be that the party as a whole will be outlawed. What the decision of the Federal District Court in New York, where the case is now being heard for the last four months, will be cannot be foretold. Nor can this decision be regarded as final, for if the accused are adjudged guilty they are sure to prefer an appeal to the Supreme Court. But the point to be emphasised in this matter is that the government does not proscribe the American Communist party by executive fiat (as is happening in this country) just because it considers the party to be of potential or actual danger, but it seeks the sanction of the judiciary for the suppression of the party before the suppression takes effect. It undertakes to prove before the jury in a regular court of law that the party is an unlawful association and can declare it so only if it succeeds in this undertaking. It does not follow that even if the government is successful in its prosecution and is thereby able to put an end to the legal existence of the Communist party as such, it will be empowered by such proscription to treat every individual communist as a person who, by reason of his belonging to the party, has forfeited his right to the normal

7. P. 449.

processes of law, and who can, for instance, be detained indefinitely in prison without being able to have recourse to a writ of *habeas corpus*. The rule of personal guilt will apply in each case. What the practical effect of the proscription will be is thus uncertain. All that it is desired to point out here is that proscription, if it takes place, will not come into effect by arbitrary executive action, but by action based on evidence produced in open court and pronounced by the judiciary to be sufficient to prove the guilt. What the United States government is now doing, it will be seen, satisfies the test laid down by Professor Laski.

13. Some details of this case may be given in order to clarify the issue. A dozen topmost leaders of the Communist party in the United States are being tried under sec. 2 of what is popularly called the Smith Act of 1940.[8] They are charged with conspiring to organise, as the American Communist party, a body of persons who "teach and advocate the overthrow and destruction of the government of the United States by force and violence" and with similar other things. Sec. 2 of the Act makes it unlawful for any person

> (1) to knowingly or wilfully advocate, abet, advise or teach the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any government;
>
> (2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;
>
> (3) to organise or help to organise any society, or group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or to become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

The section was enacted to deal with sabotage in the interest of a foreign country, and it will be noticed that it is drawn in very

8. Sec. 2 of this Act is now sec. 10 of Title 18, United States Code (1944 Supplement).

wide terms. It does not require evidence of commission of an overt act to overthrow government by force but mere advocacy of such overthrow. In this respect it resembles the New York Criminal Anarchy Act of 1902, under which arose the famous case of *Gitlow v. New York* (1925) 268 U. S. 652. In this case Gitlow was convited of violating the New York Act by circulating communist literature urging the workers of the country to engage in mass action to bring about a revolutionary dictatorship of the proletariat. " There was no evidence that the circulation of the literature produced any results. .... The Court pointed out, however, that the statute did not forbid mererly the overthrow of government, but the 'advocacy' of such overthrow."[9]

Issues in the Trial

14. The more important issues arising in the Red trial now proceeding in New York City may be stated. One is whether the Communist party in the United States stands for and advocates violent overthrow of the government. The defence position in this case is that the party never preached revolt or revolution; it aims only at peaceful social reforms. What is meant in Stalin's "History of the Communist Party in the Soviet Union" and such other literature taught by the party is that assumption of power by the working class could be either peaceful or violent, and that it becomes violent only when the ruling class attempts to thwart the will of the majority by force and violence, so that the workers use force and violence in self-defence. Revolution, peaceful if the capitalists yield power without demur but violent if they initiate or provoke violence, would seem to be the position that the defendants take up. The question of the Communist party's real attitude came up before the Supreme Court only indirectly in two cases in recent years, but in neither case did the Court pass upon it. In the late thirties the United States government attempted to revoke the citizenship of William Schneiderman, secretary of the Communist party of California, on the ground that he had concealed membership of a Communist youth organisation and had thus acted fraudulently. In this case, the case of *Schneiderman v. U. S.* (1943) 320 U. S. 118, Associate Justice Frank Murphy, speaking for the Court, upheld Schneiderman, saying that it was a " tenable conclusion " that the Communist party " desired to achieve its purpose

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9 Cushman, R, E., *Leading Constitutional Decisions*, p. 111.

by peaceful and democratic means, and, as a theoretical matter, justified the use of force and violence only as a method of preventing an attempted counter-overthrow once the party had obtained control in a peaceful manner." The other case is that of *Bridges v. Wixon* already referred to. In this case the Supreme Court ruled that Bridges was not a communist and cancelled the deportation order against him. But no ruling was given on what the accepted policy of the Communist party was. (It may be stated that Bridges has just now been indicted by a Federal grand jury on a charge of perjury, the charge being that he has been a member of the Communist party in the United States for a dozen years up to the time of his naturalisation in 1945, contrary to his own statement at the deportation hearing and at the naturalisation hearing. A complaint in equity has also been filed seeking cancellation of his citizenship. If this action proves successful, the government would be in a position to make another move to deport Bridges to his native land of Australia.)

15. Another issue arising in the trial is whether under the limitations of the "clear and present danger" doctrine, which has now been almost accepted as the law of the land, the accused are guilty; that is to say, the question would be whether, assuming that conspiracy existed for the advocacy of forcible overthrow of government, there was any real and imminent danger of the advocacy leading to results justifying abridgment of the right of free speech. A third issue is whether the Smith Act itself, penalising mere advocacy of an idea, is not unconstitutional on the ground which has been urged by the American Civil Liberties Union, viz., that the Act fails to make a distinction between mere advocacy and actual incitement, which former Supreme Court decisions have always insisted upon making, implying that failure to do so violates the First Amendment. In regard to the latter issue it must be stated that the prosecution's plea is that mere ideas and beliefs are not on trial as philosophical dogmas in this case, but that forcible overthrow of the government was advocated by the defendants as a guide to action, not remote but proximate, and further that such advocacy proceeded from a monolithic party binding its members to duties and obligations far beyond any demanded by normal political parties. There is no question that if only a right to preach doctrines, however revolutionary, was involved, the right would be conceded without reservation. But here something more is involved. As Mr. Morris Ernst (an outstanding Liberal lawyer and a member of

the board of the American Civil Liberties Union, "famous for decades for his unceasing fight for the right of all points of view to be presented fully and fairly in the market-place of ideas") puts it: "The Smith Act, under which the communists are being tried, as applied to secret conspiracy leading towards illegal acts, is in accordance with American principles, and the evil which it seeks to combat is a serious one." But he prefaces this conclusion with the observation:

> Let me say at once that I believe communists have a right to advocate publicly the overthrow of the United States. I further believe they even have the right to say publicly that if all else failed, they would advocate the ultimate use of violence to change the form of our government. ... But we are confronted to-day with a situation where arguments about public statements have no relevance. The question is one. not of public statements but of secret acts, in the course of secret conspiracy, which might never become public until it was too late, until democracy no longer had time or the chance to defend itself.[10]

The charges brought by the United States government against the communist leaders are that, on orders from Moscow in 1945, they reconstituted their party on conspiratorial and totalitarian lines and organised a conspiracy on a nation wide scale to train professional revolutionaries with fake names how to carry out a violent revolution in secret schools in the Communist underground, using the 1917 Russian Bolshevik revolution as a blueprint to overthrow the government of the United States and seize power. It would be wrong to discuss any further the merits of the issues arising out of a case which is still under judicial investigation. But the point I wish to stress here is that if the Communist party in the United States comes to be banned as an illegal body, it will be so banned not by the use on the part of the executive of any arbitrary power, but as the result of an indictment brought before the courts of law and decided there in the normal course of events.

Chief Justice Hughes' Wise Words

16. Attacks upon the right of free association sometimes take the form, as is now threatened in the United States, of barring communists from the vote. This would be equally unjustifiable. In this connection reference may be made to the expulsion, twenty-

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10. *New Republic*, January 31, 1949.

nine years ago, of five Socialist representatives from the New York legislature on the ground that they were pledged to the "forcible and violent overthrow of all government now existing." At that time former Chief Juistice Hughes issued a warning in a letter to the Assembly Speaker that to outlaw a political party merely on the basis of its beliefs was unwise, unconstitutional and un-American. Some of the words he used in this letter are worth quoting as embodying fundamental principles. He said:

> I understand that it is said that the Socialists constitute a combination to overthrow the government. The answer is plain. If public officers or private citizens have any evidence that any individuals, or group of individuals, are plotting revolution, and seeking by violent measures to change our government, let the evidence be laid before the proper authorities and swift action be taken for the protection of the community.
>
> Let every resource of inquiry, of pursuit, of prosecution, be employed to ferret out and punish the guilty according to our laws. But I count it a most serious mistake to proceed, not against individuals charged with violation of law, but against masses of our citizens combined for political action, by denying them the only resource of peaceful government—that is, action by the ballot box and through duly elected representatives in legislative bodies.
>
> Nothing, in my judgment, is a more serious mistake at this critical time than to deprive Socialists or radicals of their opportunities for peaceful discussion and thus to convince them that the Reds are right and that violence and revolution are the only available means at their command.

The Bar Association of the City of New York also took the same line. It attacked the concept of guilt by association as foreign to the democratic traditions of the United States. It said:

> It is of the essence of the institutions of liberty that guilt is personal and cannot be attributed to the holding of an opinion or to mere interest in the absence of overt acts.
>
> We deem it important that this vital issue (expulsion from the legislature), the proper decision of which is essential to the security of the Republic, should not be obscured by the reception of testimony, statements or declarations as to matters

> here or abroad, in the attempt to indict a political party or organisation, without first laying proper charges with proper specifications directly connecting the members accused with personal and guilty participation in illegal acts.

It is obvious that the arguments here urged against the exclusion of the communists from the ballot are equally apposite when, by declaring the Communist or any other party illegal, that party is kept out of all political activity. Personal guilt is the rule that must be rigidly observed in all cases and it must be guilt proved to the satisfaction of the judiciary.

31st May 1949.

Aryabhushan Press, Poona 4.]

Freedom of Speech and Press

"Bad Tendency" Test Sanctified

By S. G. VAZE

Freedom of speech and press is sought to be assured in the new constitution by article 13 (1) (a), which is qualified by article 13 (2). These articles are couched in the following terms:

(1) All citizens shall have the right (a) to freedom of speech and expression.

(2) Nothing in sub-clause (a) of clause (1) of this article shall affect the operation of any existing law in so far as it relates to, or prevent the state from making any law relating to, libel, slander, defamation or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the state.

Qualifications

2. The first criticism that falls to be urged against this article is that the constitution itself itemises the qualifications to which the right of free speech and a free press is to be subject instead of leaving it to the judiciary to determine in a given case to what qualifications, if any, the exercise of the right should be held to be subject, in the light of the facts brought before the court. The latter method is followed in the United States, which is the only country in the world so far that has withdrawn the area of essential human rights from the control of the executive and the legislature and confided it to the protection of the constitution. In following the procedure adopted in that country for safeguarding civil liberty we should have followed also the method which that country has successfully worked out for the achievement of the desired result. The right of free speech and free press, as of peaceful assemblage and free exercise of religion is provided in the United States constitution in absolute terms: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances" (First Amendment). It must not of course be

supposed that because the guarantee of free speech and free press is expressed in absolute language, the Supreme Court applies the guarantee with absolute literalness. It recognises every time the need, while giving protection to the individual, for giving protection also to social interests so as to secure public safety and order, to speak of only one of the reservations mentioned in art. 13 (2) of our constitution. The experience which the United States has had of this method for a century and three quarters can only lead to the conclusion that it is quite safe to leave it to the judiciary in the last resort to strike a balance which, though necessary, is in many cases very fine, between the right of the individual to protect himself from undue interference of the state and the right of the state representing society to protect itself from violent overthrow by an abuse of the individual's right. When in Australia the right of free speech and free press was sought to be embodied in the constitution as a fundamental right in 1944, the example of the United States was followed. The right was expressed thus: "Neither the Commonwealth nor a state may make any law for abridging the freedom of speech or expression." It was decided to leave it to the High Court, independent both of official and popular control, to interpret the right in a discerning manner. Dr. Evatt, who moved the amending bill, cited a number of cases from the United States Supreme Court to show that the judicial interpretation of the rights concerned can always be depended upon to supply any necessary qualifications. Here "we have a clear guide," he said, "to their probable interpretation" by the Australian High Court. Not only is it safe to put trust in a judicial interpretation of the rights as to the way in which they can be properly exercised, but in dealing with a matter like this which abounds in border-line cases the only fair and practicable way is to let the judges decide, after consideration of each case on the basis of its own facts and all the surrounding circumstances, whether the right intended to be guaranteed has been infringed or not. The Supreme Court of the United States has within the last thirty years evolved what may almost be called a code of rules in interpreting constitutional limitations concerning freedom of speech and press (to this a brief reference will be made later), the advantage of which we are in danger of losing by following the method of specifying qualifications to these rights in our constitution. This, it appears to me, is a very serious loss.

Two Tests Applicable

3. The chief objection to the provision concerning freedom of speech and press is that the savings mentioned in clause (2) are

drawn too widely, even assuming that the constitution itself should set forth the savings. I would confine myself here to a consideration of the savings concerning the security of the state. Laws relating to a matter "which undermines the security of the state" do not deserve to be protected by the guarantee, and no objection can be taken to this exception. But even laws "relating to any matter which tends to overthrow the state" have been excepted from the guarantee in this clause. The phraseology used gives rise to the apprehension that a test which after a long experience has been definitely discarded in the United States as destructive of the right of free speech and press will come to be applied in this country and the courts will be compelled to give it sanction, with the result that the right will be practically non-existent. An account of what this test is and how it came to be superseded by another test in the United States may now be given. "Free speech and press cases present to the courts difficult questions of degree, questions involving the balancing of public and private interests. Are there standards or rules to guide the courts in striking this balance? The Supreme Court has evolved two such rules: one known as the 'clear and present danger' test, the other as the 'bad tendency' test."[1]

"Clear and Present Danger" Test

4. The first test, the "clear and present danger" test was first enunciated by Mr. Justice Holmes in *Schenck v. United States* (1919) 249 U. S. 47. In this case two persons, Schenck and another, were charged with obstructing the operation of the Selective Draft or Conscription Act. The accused had sent out to men who had been called up for military service a circular attacking the law in most vehement terms as despotism of the worst type. Opposition to conscription as such would have been protected by the guarantee in the First Amendment in ordinary times, but in time of war such attempts to obstruct recruiting could not be tolerated, and the Supreme Court sustained the conviction in an appeal, holding that the Espionage Act, 1917, under which the accused were prosecuted did not abridge the freedom of speech within the meaning of the constitution. Mr. Justice Holmes, speaking for the Court, however, laid down the "clear and present danger" rule which has now become the established rule of interpretation in deciding cases of freedom of speech and press, and it is a rule which was accepted by all the judges unanimously. Mr. Justice Holmes said:

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1. Cushman, R. E., *Leading Constitutional Decisions*, p. 111.

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it was done. * * * The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right.

This famous and now universally accepted test of the restrictions which the constitutional guarantees allow legislatures to place on freedom of speech was not, however, accepted by the Supreme Court as a whole for some years after its formulation, and it found expression during this interval only in dissents of individual judges, notably Mr. Justice Holmes and Mr. Justice Brandeis. Thus, in *Abrams v. United States* (1919) 250 U. S. 616, in which the Supreme Court sustained a conviction under the same Espionage Act for the publishing of two leaflets protesting against the American military expedition to Siberia in 1918, the accused having been sentenced to twenty years' imprisonment, Mr. Justice Holmes reiterated the above test in a dissenting opinion, Mr. Justice Brandeis concurring, which ha become a classic. " He there put the view with a philosophic candour which has never been improved," as Dr. Evatt said in the Commonwealth House of Representatives. The ultimate good desired is best reached, it was said in the dissenting opinion, by freedom in ideas, and the best test of truth is the power of thought to get itself accepted in the competition of the market.

> That, at any rate, is the theory of our constitution. It is an experiment. * * * While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. * * * Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech." I regret that I cannot put into more impressive words my belief

> that in their conviction upon this indictment the defendants were deprived of their rights under the constitution of the United States.

In this opinion the meaning of "present" in the "clear and present danger" test was explained.

"Bad Tendency" Test

5. The doctrine that a clear and present danger could alone justify restrictions on freedom of speech took some time in achieving universal recognition, and in the meanwhile the older rule of "bad tendency" held sway. The last occasion on which this rule was applied in the United States was in the case of *Gitlow v. New York* (1925) 268 U. S. 652, in which a member of the Communist party was under prosecution for violation of a statutory crime of criminal anarchy under the Criminal Anarchy Act, 1902, of the New York State. "Criminal anarchy" was defined as "the doctrine that organised government should be overthrown by force or violence * * * or by any unlawful means." The advocacy of any such doctrine, either by word of mouth or writing, was declared to be a felony. The statute did not merely forbid overt acts to overthrow. Benjamin Gitlow, as the business manager of the Communist party, arranged for the publication of a manifesto which, in lurid and fervent language, urged the workers of the country to engage in revolutionary mass action to overthrow the established political system of the United States and to bring about "a revolutionary dictatorship of the proletariat." He was convicted and sentenced to imprisonment under the statute When the case came up on appeal to the Supreme Court of the United States, that Court had to consider the question whether mere utterances advocating the forcible overthrow of government, unaccompanied as they were by any acts creating a present danger, were an infringement of the right of free speech.

6. On this question the Supreme Court held that the New York statute did not unduly restrict freedom of speech. Under its police power a state may validly forbid speeches and publications which have a "tendency" to produce results dangerous to the public security, even though actually they may not have produced or may not in the prevailing circumstances have been capable of producing such results. The "bad tendency" test was applied. Mr. Justice Sanford, in expressing the opinion of the Court, said:

By enacting the present statute the state has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favour of the validity of the statute.

And the case is to be considered " in the light of the principle that the state is primarily the judge of regulations required in the interest of public safety and welfare " ; and that its police " statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the state in the public interest." * * * That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances by their very nature involve danger to the public peace and to the security of the state. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweller's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into conflagration.

It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual distrubances of the public peace or imminent and immediate danger of its own destruction ; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency.

Mr. Justice Holmes, in a dissenting opinion, in which Mr. Justice Brandeis concurred, said :

If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the

> government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us [referring to phrases in the majority opinion like smouldering fire being kindled and bursting ultimately into a destructive conflagration], it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletariat dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

Anita Whitney Case

7. The case of *Whitney v. California* (1927) 274 U.S. 357 was very similar. Mr. Justice Sanford, again speaking for the Supreme Court, held that the police power of the state justified an act forbidding the advocating or teaching of the doctrine of resorting to violence as a means of changing industrial and political conditions, even if the advocating or teaching led to no consequences. But the case is noted for the dissenting opinion filed by Mr. Justice Brandeis, in which he stressed the necessity for the existence of a clear and present danger in order to justify abridgment of freedom of speech and of the press. In this opinion in the Anita Whitney case Mr. Brandeis expanded the idea of "present danger." He said:

> To justify suppression of free speech there must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy

and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom Such, in my opinion, is the command of the constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Compare the words of Thomas Jefferson in his first Inaugural Address : " If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." Compare also the words of Lord Justice Strutton in *Rex v. Secretary for Home Affairs*, ex parte *O'Brien* [1923] 2 K. B. 361 : " You really believe in freedom of speech if you are willing to allow it to men whose opinions seem to you wrong and even dangerous."

Holmes' Rule Wins Recognition

8. The " clear and present danger " rule, after its application in the Schenck case, was expressed for some time only in dissenting opinions of Supreme Court justices, but it has now been acknowledged as the rule to be applied in all cases, and the " bad tendency " rule " has not been applied in any case since *Gitlow v. New York*."[2] For instance, in *Fiske v. Kansas* (1927) 274 U. S. 380 the Supreme Court upset a conviction under the Criminal Syndicalism Act on the ground that liberty of speech was impaired without any clear and present

2. *Ibid.*, p. 112.

danger of violence and revolution. A striking case in which the Supreme Court applied Holmes' rule was that of *Herndon v. Lowry* (1937) 301 U. S. 242, in which Angelo Herndon, a negro organiser for the Communist party, was sentenced by a Georgia court to twenty years in prison for violating a pre-Civil War statute forbidding " incitement to insurrection by violence. " He was shown to have held three meetings, and to have had in his room some communistic literature. His booklets proposed the setting up of a Black Belt Free State across the Solid South. The Court held that none of Herndon's activities constituted any " clear and present danger " of incitement to insurrection or any threat to the public security. (If there was any clear and present danger, it was only that " he might persuade many coloured citizens to demand the vote which is guaranteed them by the Fifteenth Amendment. "[3]) The Court held therefore that to punish him for holding meetings, making speeches, and distributing literature deprived him of his liberty without due process of law. Mr. Justice Roberts, as spokesman of the Supreme Court, remarked :

> The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule, and the penalising even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organised government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the constitution.

The decision meant that "for a person to be validly held under such an act his inflammatory words must have come near to inciting to actual violence." [4]

Bridges v. California

9. The " clear and present danger " doctrine reappeared in the Supreme Court's opinion in *Bridges v. California* (1941) 314 U. S. 252 on the issue of freedom of the press. When litigation was pending in a dispute between labour unions, Harry Bridges, an officer of one of the unions, sent to the Secretary of Labour a telegram describing the lower court's decision as " outrageous " and suggesting the possibility of a strike in the event of the enforcement of the decision. The telegram was thought to be an attempt to interfere by threats with the administration of

3. Chafee, Z., Jr, *Government and Mass Communications*, p. 380.

4. Corwin, E. S., *The Constitution and What It Means To-day*, p. 195.

justice, and contempt of court proceedings were started against Bridges. The Supreme Court held that Bridges had not gone beyond the proper limits on freedom of press. His telegram did not constitute a " clear and present danger" of obstruction of justice in the appellate court; it was, in fact, " negligible " in so far as any coercive influence on the court was concerned. It threatened no illegal action upon the part of Bridges, and in predicting a strike in the event of an unfavourable decision it told the judge nothing he already did not know. The contempt action therefore abridged freedom of press and denied due process of law. The Court, speaking through Mr. Justice Black, said:

> What finally emerges from the 'clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognise a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law " abridging the freedom of speech or of the press." It must be taken as a command of the broadest scope that explicit language read in the context of a liberty-loving society will allow.

In pointing out the wide scope of the guarantee afforded by the First Amendment Mr. Black " refused to put publications which tend to obstruct the orderly administration of justice in a special category, to which this test of constitutional immunity from punishment [the "clear and present danger" test] would not be applicable. Comments on a pending case are as much entitled to the benefit of this 'clear and present danger' test as other utterances about government action and public questions. The court should consider how much, as a practical matter, the particular contempt proceedings would affect liberty of expression."[5] Mr. Justice Black said:

> As a practical result * * * anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted.

" Indeed, a judge-made threat is more serious because it is not sharply expressed like a statute in an authoritative guide to the

5. Chaffee, Z., Jr., *Government and Mass Communications*, p. 406.

permissible scope of comment. The editor has to write at the peril that judges will find him violating the vague standard of 'reasonable tendency' to obstruct justice."[6] Instead of the "bad tendency" test the "clear and present danger" test must be applied.

Terminiello Case

10. Reference may also be made to the most recent case decided by the Supreme Court on May 16, 1949. A Roman Catholic priest, Terminiello, was convicted in an Illinois Court of disorderly conduct in breaking the peace through an inflammatory speech in Chicago and sentenced to a fine of $100. There was rioting inside and outside the hall, and there was no question that Terminiello's speech stimulated that disorder. But the federal Supreme Court quashed the conviction and remitted the fine. The ground on which it reversed the lower court's decision was a narrow one. The Chicago ordinance under which the accused was tried says that a person committing a breach of the peace is guilty of the offence of disorderly conduct, and the trial judge in his charge to the jury said an offence is committed by making a speech "if it stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance." This construction of the ordinance the Supreme Court rejected. The Court, through Mr. Justice Douglas, squarely challenging the ordinance as thus construed, said :

> A function of free speech under our system is to invite dispute. It may indeed serve its highest purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.
>
> Speech is often provocative and challenging. It may strike at prejudices and pre-conceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.
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> There is no room under our constitution for a more restrictive view. For the alternative could lead to standardisation of ideas either by legislatures, courts, or dominant political or community groups.

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6. *Ibid.*, p. 407.

Preferred Status of Civil Liberty

11. The last case that will be cited here in which a state law was declared invalid as an unreasonable interference with freedom of speech is *Thomas v. Collins* (1945) 323 U. S. 516. The decision in this case also was based on the " clear and present danger " doctrine, but it serves at the same time another purpose, viz., that of showing that rights like freedom of speech enjoy a preferred status in the United States. A statute passed by the state of Texas required every labour union organiser operating in the state, for the purpose of identification, to secure from the Secretary of State an organiser's card before soliciting any members for his organisation. In order to secure the card he was obliged to give his name, his union affiliations, and his credentials. The Secretary of State had no discretion to refuse to register such an organiser if his application was properly made. Yet, in order to protest against the requirements of registration, etc., R. J. Thomas, President of the United Automobile Workers and a Vice-President of the C. I. O., went to Texas and, without applying for registration, addressed a meeting of union men and invited non-union persons to join the union, defying in so doing a restraining order which had been served on him. Thereupon he was cited for contempt for a deliberate and wilful violation of the order. The Supreme Court held that even the simple requirement of previous identification cannot validly be imposed upon any one who wishes to exercise his right under the First Amendment.

12. The opinion of the Supreme Court in this case was written by Mr. Justice Rutledge. " The Rutledge opinion is significant for the clear and unequivocal statement which it contains that the guarantees of the First Amendment—freedom of speech, press, religion, and assembly—occupy preferred status in our scheme of constitutional values. Since this is true, no presumption of validity attaches to any legislation which on its face appears to infringe any of these guarantees. "[7] The " police power " of the states, i. e., their power to provide for " the public health, safety, morals, and general welfare " sometimes conflicts with the " due process of law," which to-day means " reasonable " law as interpreted by the courts. In judging of the " reasonableness " of a challenged legislative measure two approaches are possible. " One approach is furnished by the proposition that a legislative act is presumed to be valid, and deduces from this the further one that if facts *could* exist which would render the legislation before it ' reasonable, ' it must be presumed by the Court that they did exist. *Munn v. Illinois* (1876) 94 U. S. 113. The other,

7. Cushman, R. E., *American Political Science Review*, vol. 40, p. 249.

on the contrary, invokes the idea that 'liberty is the rule and restraint is the exception'."[8] Formerly, legislative acts of states were presumed in all doubtful cases to be valid. Mr. Justice Washington stated in *Ogden v. Saunders* (1827) 12 Wheat. 213 : "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt," and the whole burden of proof lies on him who denies its constitutionality, cf. *Brown v. Maryland* (1827) 12 Wheat. 419. This principle is being followed consistently in recent years in all due process of law cases concerning property, and was followed till recently in all due process of law cases concerning civil liberty. The statement in the Supreme Court's majority opinion in the Gitlow case, cited above, that " every presumption is to be indulged in favour of the validity of the statute" restricting the right of free speech is a case in point. This is an illustration of the line which was followed by the Supreme Court in earlier years. The Court however took a different line in 1937 in the *Herndon v Lowry* case, also cited above, when it stated : "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule," meaning that where fundamental liberties are concerned, presumption would lie against legislation restricting such liberties and that a case for the necessity of restriction would have to be made out by the government. In the *Thomas v. Collins* case the Court announced in unequivocal language the doctrine " that when a statute appears on its face to invade the basic guarantees of civil liberty in the First Amendment, the presumption is against the validity of the law, and the burden of proof will rest upon those who defend it to show that the invasion of civil liberty is amply justified by some 'clear and present danger' to the public security. Thus the rights protected by the First Amendment have preferred status in our scheme of constitutional values."[9]

Enunciation of the Priority Rule

13. Mr. Justice Rutledge, delivering the opinion of the Court, said :

> The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the state's power begins. Choice on that border, now as always

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8. Corwin, E. S., *The Constitution and What It Means To-day*, p. 173.

9. Cushman, R. E., *Leading Constitutional Dicisions*, p. 113.

> delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.
>
> For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guarantee with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, and therefore are united in the First Article's assurance.

The same principle is stated in the Report of the President's Committee on Civil Rights, 1947 :

> Through the years, the Supreme Court has followed the rule that any statute, federal or state, which is challenged as to constitutionality, shall be presumed to be valid unless its violation of the constitution is proved beyond all reasonable doubt. In the last decade, however, the Court has announced a new doctrine that when a law appears to encroach upon a civil right—in particular, freedom of press, religion and assembly—the presumption is that the law is invalid, unless its advocates can show that the interference is justified because of the existence of a 'clear and present danger' to the public security.[10]

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10. Report, p. 113.

Dr. Ambedkar's Plea

14. From a perusal of these quotations it will be apparent how different will be the position of the right to freedom of speech and press in our constitution from that in the United States constitution as it has now developed. The exceptions provided in clause (2) of article 13 in our constitution would make it impossible for the courts to intervene for the purpose of protecting the right in a large number of cases in which its protection would be required. In particular, the saving contained in that clause of "any law relating to any matter which tends to overthrow the state" sanctions and in fact sanctifies the "bad tendency" test which was last applied in the United States nearly twenty-five years ago and has since been consistently rejected. It thus would make infringements of the right to free expression possible in just those cases where it must be jealously preserved. The Law Minister, Dr. Ambedkar, in his introductory speech in the Constituent Assembly on November 4, 1948, by a curious irony of fate, invoked, in defending the method of giving to the legislature itself power to impose restrictions, incapable of being challenged in the courts, the Gitlow case in which the states' police power was exalted at the cost of the Supreme Court's undoubted power, asserted in numberless later cases, to give to fundamental liberties the place in the constitution which the First Amendment (and the due process clause of the Fourteenth Amendment) had always intended to give it. Dr. Ambedkar says:

> What the Draft Constitution has done is that instead of formulating fundamental rights in absolute terms and depending upon our Supreme Court to come to the rescue of Parliament by inventing the doctrine of police power, it permits the state directly to impose limitations upon the fundamental rights. There is really no difference in the result. What one does directly the other does indirectly. In both cases, fundamental rights are not absolute.

There would have been no difference if the supremacy claimed in the Gitlow case for the police power of the states had been allowed subsequently. But it has not been so allowed. Ever since 1925 the police power has not only been called in question but has been overridden whenever its exercise was considered to infringe upon fundamental liberties, Moreover, fundamental liberties have been given priority over the states' right to restrict those liberties, the burden being thrown decisively on those who would restrict them to prove the necessity of such restriction. This is not to say that even in the United States fundamental rights like the right to free speech or a

free press are absolute; they can never be so. But it means that the Supreme Court examines every case of restriction that comes up before it and negatives all restrictions for allowing which no overwhelming justification can be adduced.

Unofficial Commission's Support

15. For this method of protecting civil liberty there is clear ground in reason. The unofficial Commission on Freedom of the Press created by the University of Chicago has come to the same conclusion. The Commission rejects the absolutist or libertarian view that there should be no restrictions at all on the freedom of speech as on other freedoms. But it adds:

> The principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. Every reasonable attempt should be made to maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperilled, and not, as most men believe, when it is barely conceivable that it may be slightly affected.[11]

Public safety must be balanced against free speech, "but freedom of speech ought to weigh very heavily in the scale. The First Amendment [as now interpreted] gives binding force to this principle of political wisdom."[12] While the Commission rejects the absolutist view, it also rejects the "remote tendency" theory. It is willing to accept in principle justification for certain minimal governmental restrictions in order to prevent words from ripening into dangerous acts. However, it says:

> The mere tendency of the publication to produce such acts is sometimes made the reason for suppression, but this is going much too far. Such a test of remote tendency would stamp out many valuable presentations of facts or opinion For example, the desire to nip revolution in the bud would justify censorship of Jefferson's "I hold a little rebellion now and then is a good thing" and Lincoln's First Inaugural: "Whenever they [the people] shall grow weary of the existing government, they can

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11. Chafee, Z., Jr., *Free Speech in the United States*, p. 35,

12. *Ibid.*, p. 31,

> exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it."[13]

The Commission thus lends full support to the Supreme Court's latter-day method of dealing with restrictions on fundamental liberties when the Court, rejecting the "bad tendency" test, applied the "clear and present danger" test in all cases concerning political and economic matters. Thus it recommends the repeal of all legislation prohibiting expressions in favour of revolutionary changes [like the overthrowing of the government] "where there is no 'clear and present danger' that violence will result from the expressions,"[14] following in this respect the reasoning of the Supreme Court which has held that "expressions urging the overthrow of the government by force are within the protection of the First Amendment unless there is clear and present danger that these expressions will lead to violence."[15] Recent confirmation of the manner in which the Supreme Court has since 1925 handled free speech situations is contained in Mr. Justice Reed's statement in *Pennekamp v. Florida* (1946) 66 U. S 1029:

> A theoretical determinant of the limit for open discussion was adopted from experience with other adjustments of the conflict between freedom of expression and maintenance of order. This was the "clear and present danger" rule. The evil consequence of comment must be "extremely serious and the degree of imminence extremely high before utterances can be punished."

Conclusion

16. But the bad old rule of "bad tendency" is enshrined in our constitution itself which gives free rein to the legislature to make "any law relating to any matter which *tends* to overthrow the state." With such a provision in the constitution it would be difficult for our Supreme Court to follow what is now the settled practice of the United States Supreme Court, viz., to apply even to expressions tending to overthrow the government by force the test of a "clear and present danger." Nor does it leave much scope for our Supreme Court to evolve, as the United States Supreme Court has done, a position of priority for fundamental liberties over rights of every other description. It is these two principles, preferred status of civil

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13. Chafee, Z., Jr., *Government and Mass Communications*, p. 48.

14. *Ibid.*, p. 801.

15. *A Free and Responsible Press* (the General Report of the Commission on Freedom of the Press), p. 88.

liberty and the "clear and present danger" rule, which have made the First Amendment of the United States constitution, as Professor Zechariah Chafee calls it, in counselling resistance to deleterious governmental restrictions on freedom of expression, "a gun behind the door which must never be allowed to rust"[16] We can hardly say that article 13 (1) (a) in our constitution, qualified as it is by article 13 (2), is quite such a gun capable of preserving for us our right to free speech and a free press in its full amplitude.

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16. *Government and Mass Communications*, p. 29.

Freedom of Person

By S. G. VAZE

The Public Safety Acts which are in force in all the provinces are being extensively employed by all governments to detain persons without trial for an indefinite period. The nature of the Acts and the manner in which they are enforced at the present time is a subject which is going to be treated in another paper offered to this Conference. I shall therefore not deal with it here. In this paper I will confine myself to an examination of the provisions in the new constitution in regard to the protection of the freedom of person, with a view to arriving at an appraisal of how far these provisions assure such protection. The constitution contains one specific article, article 15, on personal liberty. It is as follows:

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

This can only mean that no individual shall be deprived of his life or liberty by arbitrary acts of the executive, unsupported by existing law. The article prohibits executive officers from proceeding against the individual, except in conformity with the procedural requirements laid down in the law for the exercise of their powers in this behalf. But the law itself, assuming that it does not curtail personal liberty unduly, will be subject to change at the will of the legislatures, and the personal liberty of the individual will thus be subject to the plenary legislative powers of the central Parliament and of the local legislatures. The article will therefore operate only as a restraint upon the executive organ, but not upon the legislative. Since, however, a Bill of Rights is intended to restrain the legislature as well as the executive, it follows that in our constitution personal liberty is not in reality a fundamental right at all. To be a fundamental right, constitutionally protected in the proper way, personal liberty should be incapable of arbitrary interference, not only at the hands of the executive, but also at the hands of the legislature. The article relating to personal liberty, if it is to be satisfactory, must operate to nullify legislative acts which provide for the taking of life or liberty without good cause just as much as, in its present form, it will operate to nullify executive action not sanctioned by legislative acts.

Due Process

2. It is painful to contemplate that art. 15 was framed in the way it has been with (as it must be inferred) the deliberate object of freeing the legislature from all restraints in matters concerning personal liberty and thus in effect denying a constitutional guarantee to this right, the most fundamental of all fundamental rights, for it is only if a person is guaranteed freedom from arbitrary arrest and imprisonment that any question of guaranteeing to him freedom of speech and all the other rights will at all arise. As the Constituent Assembly's advisory committee worded this article and as the Constituent Assembly passed it at a preliminary stage on April 30, 1947, it stood as follows : " No person shall be deprived of his life or liberty without due process of law," the words " due process of law " being borrowed from the Fifth and Fourteenth Amendments of the constitution of the United States. The substitution in this article of the words " procedure established by law " for the words " due process of law " is not just a matter of diction, choosing one kind of phraseology rather than another when both mean about the same thing. Here the choice was obviously dictated by the feeling that retention of the American phrase would import into the article the principal notion which it conveys in the United States, and the article would then curb the legislative power in India as the two Amendments have done in the United States. The note of the Drafting Committee of the Constituent Assembly on art. 15 would make it appear as if it regarded the whole question as a mere matter of words and no more, whereas in fact its choice of the phraseology transforms the whole character of the article inasmuch as with that phraseology personal liberty will cease to be a fundamental right altogether. In support of its choice it cites art. 31 of the Japanese constitution which has also adopted the same phraseology. But in this the Committee is, it would not be too much to say, almost disingenuous, for by omitting to refer to articles 32 and 34 of the constitution of Japan, it creates the impression, not borne out by facts, that the Indian scheme for the protection of personal freedom is no worse than the Japanese scheme. The Committee also says, giving this as an additional reason, that " due process of law " would not be a specific enough requirement, which is also far from correct. Our distinguished President, Mr. P. R. Das, has laid bare the truth in this respect in an article in the *Indian Law Journal*, and I need not dilate on it.

Palladium of Civil Rights

3. In the United States, too, for a short time the " due process " clauses of the Fifth and Fourteenth Amendments were interpreted to

confer only procedural rights, i. e., rights relating merely to the methods by which freedom in respect of certain matters is protected. So long as the forms of law appropriate to the particular case were observed, the judiciary did not go into the merits of the law itself. For instance, in *Hagar v. Reclamation District* (1884) 111 U. S. 701 the Supreme Court said:

> The clause, therefore, means that there can be no proceeding against life, liberty, or property which may result in deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights.

In *Missiouri Pacific Railway Co. v. Hume* (1885) 115 U. S. 512, it said:

> If the laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law.

But soon the clauses came to be applied so as to secure substantive rights to the individual. The courts do not now concern themselves merely with modes of procedure, but insist upon looking into the substantive content of the laws in question, however correct in form these may be, and satisfying themselves that the laws are not, as to this content, arbitrary or unfair. Ever since this new mode of interpretation was adopted, some time before the close of the last century, the principle of due process has acquired an importance it did not possess before and has gained in scope to a degree which could not have been foreseen earlier. Because the courts assert their right, under the due process clause in either Amendment, to examine the legislation passed either by Congress or the state legislatures and set aside all such as may appear to them unreasonable, the clause has become and remained for a long time "a palladium of individual and corporate rights as against all governmental authority in the country." [1] To the observer of contemporary events there can be no manner of doubt that rejection by the Constituent Assembly of the phrase "due process of law," a phrase which has worked nothing short of a revolution in the United States, is due to the well-

1. Ogg, F. A., and Ray, P. O., *Introduction to American Government*, p. 169.

grounded fear lest it should enable our courts to sit in judgment over legislative acts depriving individuals of freedom of person and to declare them invalid. The fear was that a so-called fundamental right would be turned by judicial interpretation into a real fundamental right.

Dr. Ambedkar's Admission

4. Indeed, it is no longer a matter of inference that the words "due process of law," which it was at first intended to introduce, were ultimately rejected by our constitution-makers because they desired to insure that the judiciary would not have it within its power to interfere with and invalidate statutes depriving suspected individuals of their personal liberty, even if the judiciary thought any such statutes to be unnecessary, arbitrary, or unreasonable, and to make the legislatures supreme in this respect, although making the legislatures supreme in this way would in effect make personal liberty a statutory right and not a constitutional or fundamental right. It is not a matter of inference because Dr. Ambedkar, Law Minister of the Government of India and Chairman of the Drafting Committee, himself made it all clear. When, on December 14, 1948, the question as to the choice to be made between "due process of law" and "procedure established by law" arose in the Constituent Assembly, he explained the implications of the adoption of the "due process" phraseology. He said:

> The "due process" clause, in my judgment, would give the judiciary the power to question the law made by the legislature [on the ground] whether that law is in keeping with certain fundamental principles relating to the rights of the individual. In other words, the judiciary would be endowed with the authority to question the law not merely on the ground whether it was in excess of the authority of the legislature, but also on the ground whether the law was a good law apart from the question of the powers of the legislature making the law. The law may be perfectly good and valid so far as the authority of the legislature is concerned. But it may not be a good law, that is to say, it violates certain fundamental principles, and the judiciary would have that additional power of declaring the law invalid. The question which arises in considering the matter is this. We have no doubt given the judiciary the power to examine the laws made by different legislative bodies on the ground whether the laws are in accordance with powers given to them. The question now raised by the introduction of the phrase "due pro-

cess" is whether the judiciary should be given the additional power to question the laws made by the state on the ground that they violate certain fundamental principles.

Dr. Ambedkar expressed no personal preference; it is very difficult to come to any definite conclusion on this point, he said, and left it to the Constituent Assembly to decide the question how it liked. From the way in which he ended his speech, it was thought by many that the Congress High command had made it an open question in so far as the Congress members, who are in an overwhelming majority in the Assembly, were concerned. But one read in the morning papers the following day that before the voting took place a whip was promptly sent round to Congress members directing them to reject the "due process" phrase, and whatever voices were raised for it in speeches among Congress members, there was unanimity against it among them in the voting! However that may be, it is clear that art. 15, as finally adopted with the phrase " the procedure established by law," does nothing to assure personal liberty. For all the good it is capable of doing, it might as well not be in the constitution. It only means that no one shall do anything contrary to law. Surely no constitutional provision is required to enjoin observance of legal requirements, either in regard to personal liberty or anything else.

5. In earlier years, when " due process of law " was interpreted in the United States as giving only procedural rights, " 'liberty' meant at the common law little more than the right not to be physically restrained except for good cause. Whether the cause was good or not would be inquired into by a court, in connection with an application for a writ of habeas corpus, or in connection with an action for damages for false imprisonment." [2] But the clause now operates principally to restrain, and on occasion rigorously to restrain, the exercise of the legislative power in the matter of social and economic policy. No one now thinks in the United States of invoking the clause in defence of personal liberty. The constitution affords a complete remedy for the defence of freedom of person in other ways, viz., by means of the provision for a writ of habeas corpus, often termed " the writ of liberty." But in India we could have used art. 15 if it had contained the "due process of law" rule to protect personal freedom from possible inroads of the legislature. As it is, we have no means of protecting ourselves from such inroads. The article in its present form is absolutely valueless.

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2. Corwin, E. S., *The Constitution and What it Means To-day*, p. 168.

Habeas Corpus and Its Suspension

6. It is true that our new constitution too provides in art. 25 (2) for a writ of habeas corpus, " the most important single safeguard of personal liberty known to Anglo-American law," apart from the provision for the writ contained in the Criminal Procedure Code. Because of the constitutional provision it may be claimed that the writ can no longer be taken away by Parliament unless Parliament by a constitutional amendment deletes art. 25 (2). From this point of view it may well be conceded that habeas corpus will hereafter have a better constitutional footing than before. But while acknowledging this, it must also be stated that, under art. 280, it is proposed that when an emergency is proclaimed by the President all the remedies provided for the enforcement of fundamental rights are liable to remain suspended for the period during which the proclamation of emergency remains in operation and for six months thereafter. Along with other remedies that of habeas corpus also will remain suspended in an emergency. Such suspension may of course be necessary on occasion and has to be provided for. But the conditions in which suspension of habeas corpus may be permitted have to be considered. An attempt was made in the Constituent Assembly, by means of an amendment to art. 25, to bring these conditions into line with those in the United States by the introduction of the words " in cases of rebellion or invasion." However, the Assembly rejected the amendment, Dr. Ambedkar's plea being that, under the provisions of art. 275 in our constitution, an emergency could be declared in circumstances almost identical with the circumstances in which in the United States habeas corpus could be suspended. But this plea cannot hold water. In the United States habeas corpus can be suspended only " when in cases of rebellion or invasion the public safety may require it " (Art. I. 9. 2). " In order to meet the constitutional requirement [of this provision] actual and not simply constructive necessity by a declaration of the legislature is necessary; and the courts will be the judge." [3] The object of the amendment moved in the Constituent Assembly for the introduction of the words " in cases of rebellion or invasion " was not merely to secure that the suspension of habeas corpus should be possible only when a rebellion or invasion actually breaks out and not when it is only threatened, but to bring the circumstances surrounding the suspension, whatever they be, under judicial appraisal. However, our constitution keeps the judiciary entirely out of this matter.

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3. Willoughby, W. W., and Rogers, L., *Problem of Government*, p. 104.

7. The President proclaims an emergency; he then lays the proclamation before Parliament, no limit of time being prescribed within which he shall do so. Even if Parliament, when it gets a chance of expressing an opinion, disapproves it, the proclamation will still be in operation initially for six months at the least. That is to say during this period, if not during a longer one (the upper limit not being fixed), all emergency measures will remain in operation. One of the emergency measures that will, on the President's order, come into force in an emergency proclaimed by the President will be the suspension of habeas corpus. For six months at any rate the privilege of the writ will then remain suspended. For a longer suspension Parliament's approval will be necessary. But it is clear that in no case will the disapproval of any body except Parliament matter at any time. Of the circumstances justifying the suspension of habeas corpus the President, advised by his ministry, will alone be the judge initially. Then Parliament will be allowed to judge of the circumstances if the suspension is to last longer than six months. But the function of judging of these circumstances will not at any time extend beyond the President and Parliament. The judiciary will not be allowed to come in into this matter at any stage. But the United States constitution affords many safeguards against a panicky suspension of habeas corpus. One is that the right of suspension belongs to Congress; it does not belong to the President, according to the most authoritative interpretation of the constitution. The second is that the constitution lays down most stringent conditions for bringing suspension of the writ into effect. But the most effective safeguard is that even of these conditions the courts are the ultimate judge. (It may be stated in passing that "some of the states, within their own spheres, have forbidden the writ's suspension altogether." [4]) Suspension does not come into force by the order of the President as in India, when an emergency is declared; but even when sanctioned by Congress it remains all the time under the control of the judiciary who may bring it to an end if thought desirable. One other consequence of the writ being first suspended and then restored, either by Congress or by the judiciary, may be noted. " If, after the privilege of the writ has been restored, it is shown that the arrest or the imprisonment was without legal justification, the persons ordering or participating therein can be held civilly and criminally responsible." [5] Under our constitution it does not appear that this will be the position.

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4. Ogg, F. A., and Ray, P. O., *Introduction to American Government*, p. 168.

5. Willoughby, W. W., and Rogers, L., *Problem of Government*, p. 104.

A Martial Law Regime

8. From the foregoing observations it will be clear that habeas corpus will in our country be nothing like the shield of personal liberty that it is in the United States. But one further fact about the consequences of a declaration of an emergency deserves to be considered. In the event of such a declaration all rights mentioned in art. 13 like free speech will be suspended, in virtue of art. 279. And the remedies for the enforcement not only of these rights, but of all the other fundamental rights as well, will be liable to be suspended under art. 280 when an emergency is declared. This would in effect mean that, if the President so decides, all the fundamental rights will remain suspended for the duration of the emergency, which will be six months or more, and for some time thereafter (six months is proposed in art. 280 which, however, is yet to be passed). For, as Dr. Ambedkar himself rightly observed in the Constituent Assembly on December 9, 1948, while discussing art. 25, "It is the remedy that makes a right real. If there is no remedy, there is no right at all." A state of things in which not merely the privilege of the writ of habeas corpus but all civil rights are suspended is little short of the establishment of martial law, and this may well be the consequence of an executive proclamation of emergency in our country. In the United States public necessity alone, as interpreted in the last instance by the judiciary, can justify the enforcement of martial law, and those in authority are held accountable, after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts and by civil action at the instance of the parties aggrieved. While martial law is being enforced, the officers in control may have to infringe upon private rights of person and property, such infringements being demanded by necessity. But the principle still holds good that "when so-called martial law is in force, no new powers are given to the executive, no extension of arbitrary authority is recognised, no civil rights of the individual are suspended."[6] We cannot be certain that these principles will be respected in India in regard to emergency measures. In any case there being no provision for a judicial inquiry there would be no means of enforcing them.

Military Tribunal Cases in U. S.

9. Speaking about martial law, the subordination of military to civil authority that is insisted upon in the United States in all

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6. Willoughby, W. W., *The Constitutional Law of the United States*, p. 1235.

conditions except where military government obtains may be noted with reference to the military tribunal cases that came up in the Supreme Court during World War II. In July, 1942, seven Nazi saboteurs, apprehended after entering the country surreptitiously, and being, by presidential direction, brought to trial before a special military commission, appealed to the federal Supreme Court for a ruling entitling them to writs of habeas corpus opening the way for substitution of civilian trials. The Court denied the appeal, holding that the offences charged were offences against the laws of war. But " the most important point about the case [*ex parte Quirin* (1942) 317 U. S. 1] is that the Supreme Court did examine the right of the military authorities to try the saboteurs. It upheld the military tribunal, but not until it satisfied itself that the tribunal had jurisdiction and was proceeding according to law."[7] Similarly, when Japanese General Yamashita was tried by an American military commission in the Philippines for failure to restrain his troops from committing atrocities against Americans and Filipinos the General applied for a writ of habeas corpus, and the Supreme Court held [*in re Yamashita*, 194 6] that the military commission had been properly set up, but here, again, the point is that it scrutinised the commission's authority and recognised the General's right to challenge the military proceeding by a petition for a writ of habeas corpus. These cases concerned enemy combatants, but another case arose concerning two German-American citizens who had been interned by summary military action when, after the attack on Pearl Harbour, the Territory of Hawaii was subjected to military government, and the supersession of civil by military courts and the total suppression of civil government was continued even after an active danger of invasion of the islands had seemed to have disappeared. Between the military and civil authorities disputes arose. In the course of the dispute a federal district judge issued a writ of habeas corpus for the interned persons, but the commanding general replied with an order forbidding any judge in the territory to issue such a writ. The judge countered by fining the general $5000 in contempt of court! The President at last broke this deadlock. When the case came up before the Supreme Court, the Court, applying the principle of the famous Milligan case that martial law is not allowable in the presence of merely "threatened invasion. The necessity must be actual and present; the invasion real," held that " the President had had no constitutional power to institute military government in the Territory of Hawaii following the Japanese assault on Pearl Harbour, or to continue it

7. Cushman, R. E., *Leading Constitutional Decisions*, p. 72.

after that date."[8] Excerpts from the concurring opinion of Mr. Justice Murphy in this case [*Duncan v. Kahanamoku* (1946) 327 U. S. 304] are given below :

> The Court's opinion, in which I join, makes clear that the military trials in these cases were unjustified by the martial law provisions of the Hawaiian Organic Act. Equally obvious, as I see it, is the fact that these trials were forbidden by the Bill of Rights of the constitution of the United States, which applies in both spirit and letter to Hawaii. Indeed, the unconstitutionality of the usurpation of civil power by the military is so great in this instance as to warrant this Court's complete and outright repudiation of the action.
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> From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised. The right to jury trial and the other constitutional rights of an accused individual are too fundamental to be sacrificed merely through a reasonable fear of military assault. There must be some overpowering factor that makes a recognition of those rights incompatible with the public safety before we should consent to their temporary suspension. If those rights may safely be respected in the face of a threatened invasion, no valid reason exists for disregarding them. In other words, the civil courts must be utterly incapable of trying criminals or of dispensing justice in their usual manner before the Bill of Rights may be temporarily suspended.

What is said above relating to martial law and military tribunals may seem to be somewhat remote from the subject being dealt with, but the point sought to be enforced is that while in an emergency proclaimed by the President a regime akin to martial law is capable of being established in our country, there will be no safeguards either in law or convention which can be relied upon to protect the personal liberty of our citizens.

Crisis Legis lation in England

10. There is no guarantee in our constitution that in an emergency the right to personal liberty will not be taken away with-

8. Corwin, E. S., *The Constitution and What It Means To-day*, p. 96.

out compelling circumstances justifying such action. "In Britain it has been recognised that measures for safeguarding the survival of the state have to be accompanied by measures for safeguarding the rights of the citizen if the survival of the state is to appear justifiable to its citizens."[9] In India the legislature has no particularly keen appreciation of civil liberty, and the judiciary has no power of appraising the soundness of any emergency legislation. This is a most unsatisfactory condition. For it is only in an emergency, real or supposed, that deprivation of civil liberty will take place. The government will always plead emergency when adopting exceptional measures of coercion. And if, as soon as an emergency is declared, the constitution itself says "hands off" to the judiciary, civil liberty will be preserved only to the extent to which the legislature thinks it expedient to concede it, and when the legislature shows far greater concern for protection of the state than for protection of civil liberty the odds are that there will be a wholesale deprivation of the personal liberty of citizens. A long tradition of respect for civil liberty has ingrained into the executive in England the habit of acting with restraint even in an emergency of a very serious character. In World War II the Emergency Power (Defence) Act was passed authorising the issuance by an order-in-council of Regulation 18 B (c), under which the Home Secretary was allowed to detain without trial anyone suspected to be of "hostile origin or associations" or to have been "recently concerned" in acts prejudicial to the public safety. To deprive a person of the right to a public trial in a regular court of law was recognised to be wholly opposed to English notions of justice, but in view of the grave peril to the life of the state itself, the taking of the power of detention had become an odious necessity. Even so, the power could be used only against persons who fell into either of the two categories mentioned above and could be used against none else Moreover, two safeguards were provided. The first was that a person detained could lodge objections before an advisory committee who saw to it that all the facts known against the detainee were put to him as explicitly as possible; that he was put in possession of all the detailed evidence upon which he was being held in detention. The detainee could call witnesses, and a solicitor could help him in presenting his case. The second safeguard was that the Home Secretary was required to make a monthly report to Parliament showing both the numbers of detained persons and of instances in which he had not followed the committee's advice. A report to Parliament, which is known to care greatly for civil liberty, was in this case something of a

9. Warrick, W. H., in *Foreign Governments*, p. 107.

real safeguard. Thus, although the final decision still rested with the government, quite a long step was taken in mitigating its essentially arbitrary nature. In the Province of Bombay something resembling this is now being done: a retired judge of the High Court has been appointed to look into the cases of those detained under the province's Public Security Measures Act. But it is only a pale reflexion of the provisions of the English legislation. For it does not appear that in Bombay detainees would be supplied with all the evidence against them, or that they could call witnesses, or that they would be afforded legal help in presenting their cases to the inquiring authority. But the fatal defect in this inquiry is that, since Bombay's legislation permits detention of persons under a blanket suspicion of their being "likely to act" in a manner prejudicial to the public safety, it is in the nature of things impossible for any inquiring authority, however high-placed and however independent, to judge whether any detainee is or is not likely to act in a prejudicial manner and therefore whether he should be kept in detention or released. Whereas in Bombay the emergency, if it exists at all, cannot be anything so awsome as the war emergency which faced the British government during the last war, the powers taken to deal with it are vastly more extensive, not being confined for use against persons who would naturally arouse suspicion, and are devoid of the safeguards which law afforded in England, in addition to the great safeguard which public opinion alone always provides there[10] Provinces other than Bombay do not care to have even the

10. How great a safeguard public opinion and the tradition of liberty in England is may be illustrated by the action which the government was compelled to take in 1939, on the eve of the outbreak of World War II, against the terrorist activities of the Irish Republican Army by the enactment of the Prevention of Violence Act, limited to two years' duration. The act was passed only after numerous outrages had taken place and at least 66 terrorists had been brought to trial and convicted by the ordinary processes of law. Special legislation was still required because of many persons who, the government was convinced, were engaged in the plot but against whom no sufficient evidence could be produced to obtain conviction in a law court. While taking special measures, two that would first occur to anyone were rejected. One was the proscription of the I. R. A as an unlawful organisation and making it criminal for anyone to be a member of it. The reason given was that no authoritative list of members was available and that it would not be possible in one case out of a hundred to prove that a particular suspect was a member of the I. R. A. It was not contemplated that, even if the organisation were proscribed, anyone could be arrested and detained without at least proving that he belonged to it. The second alternative that was turned down was the rough and ready method of internment. To the question, why not intern these suspects as foreign suspects were interned during World War I? Sir Samuel Hoare, the then Home Secretary, gave the following reply: "I am opposed to the method of internment. I think it looks, and is, too much like the system of concentration camps. Further, I say this. When I was Secretary of State for India I had a great deal to do with the problem of internment, and I say that one of the difficulties of internment is that to intern a man may be comparatively easy, but it is a much more difficult problem to know when and how to release him." Indefinite internment is a thing which English public opinion and even responsible official opinion cannot contemplate with equanimity.

form of an inquiry. And such repressive legislation will not necessarily cease in future. At any rate there is nothing in the constitution to forbid its enactment.

M. C. Setalvad's Suggestions

11. In the preceding paragraph a comparison is made between the safeguards that were devised in England in war time and those that have been latterly adopted in the Bombay Province in respect of persons detained under emergency legislation, and the conclusion is reached that a quasi-judicial inquiry that is proposed to be set on foot in Bombay is almost futile. But Mr. M. C Setalvad, former Advocate General in Bombay, is not satisfied even with safeguards such as were provided in England. He insists that, in order to prevent unjust encroachments of the executive on personal freedom, far more stringent restraints upon the power of the executive are necessary. He makes four suggestions in this respect: 1. the executive should be made to consult independent persons before anyone is deprived of liberty; 2. where immediate action is demanded such action should be allowed to be taken only by the highest authorities; 3. a tribunal should be constituted to examine the cases of all who are deprived of their personal freedom and the tribunal should be endowed not merely with advisory power but with the power of final decision; and 4. persons detained for a certain length of time should thereafter be put on their trial before the ordinary courts. One can only say that the safeguards proposed by Mr. Setalvad are almost wholly watertight. It is best to give them in his own words:

> It has to be remembered that in a time of emergency the executive is naturally wholly prepossessed in favour of the need of taking immediate and drastic action, so that it is difficult for it to appreciate and appraise the citizen's point of view on many matters on which it thinks immediate action imperative and essential. It is therefore necessary that the legislature should make it obligatory on the executive to act in consultation with other persons who may not have that bias so that action may be taken after careful and balanced consideration. The freedom of the person is the right which has naturally been the most valued right of the citizen; and restrictions on it ranging from detention to minor restrictions on his movements have rightly evoked bitter comment and criticism. The greatest care is therefore necessary in the enactment of legislation giving the executive powers restricting the liberty of the person.
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> It is recognised that in a time of emergency it may be necessary forthwith to detain a person or impose restrictions on his move-

ments. This necessity of immediate action itself makes it necessary that such power should be entrusted to the highest and most responsible officers. If it is essential to give such officers power to delegate their authority, it must be strictly circumscribed and restricted again to responsible and trusted subordinate officers.

Provision should be made for the examination of the decision of the executive by some authority of judicial experience in whom the public has confidence. Such an authority may be a judge of the superior courts or a committee or tribunal consisting of such judges. This tribunal should be entitled to have all the information submitted to it and should further have power to inform the person detained of the allegations against him and give him an opportunity of being heard after he has been furnished with such information. The functions of this tribunal should not be merely advisory, but its decision should be made binding on the executive.

The legislature should also provide that persons detained for a certain length of time should be brought up for trial before the ordinary courts, except in cases when a judicial tribunal considers this course undesirable in the public interest.[11]

These are suggestions for legislative enactments. So far as the constitution is concerned, it is wholly devoid of any kind of safeguard. In providing for fundamental rights, that on which the enjoyment of any of the remaining rights depends is left totally unprotected in the constitution. We shall remain thoroughly defenceless, constitutionally speaking, even if the legislatures choose to black out personal liberty altogether.

"Freedom is Not Free"

12. I have attempted to show that freedom of person remains wholly insecure, under our constitution, in an emergency, and it is in just such situations that adequate guarantees of personal liberty are required. I have also ventured to express my belief elsewhere that there is a serious danger that freedom of speech and press will not be effectively protected under the new constitution. But to Civil Liberty Unions such as ours I would humbly address a word of advice which, if trite, we must always keep on reminding each other about, even in respect of those rights for the protection of which the

11. Setalvad M. C., *War and Civil Liberties*, pp. 81–82.

constitution provides complete guarantees, viz., that eternal vigilance is the price of liberty. Only on June 18, 1949, Mr. James F. Byrns, former Secretary of State in the United States, said, when receiving an honorary degree of doctor of laws at the bicentennial convocation of Washington and Lee University :

> Freedom is not free ; it must be purchased with blood, brains and brawn. It can only be preserved by eternal vigilance.

Aryabhushan Press, Poona 4.]