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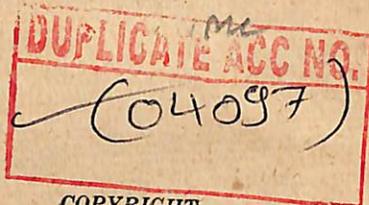
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CIVIL LIBERTIES

*"THE PRICE OF LIBERTY IS ETERNAL
VIGILANCE"*

THE OBJECT

The object of this pamphlet is to explain in a simple way so that it can be understood by the vast number of men and women in this country, who are ignorant of their fundamental rights, what these rights are, so that they may be placed on their guard against any encroachment on them. The explanation is the more necessary today when the civil liberties of the people have been so wantonly attacked by the government in power. During the last two years—since August 1942—we are officially told that eighteen thousand men and women from all over India were detained without any trial, and nearly two thousand are still in jail without trial as can be gathered from the statement made by the Home Member in the Assembly, in reply to Mr. Kailash Beharilal. It says that the number of persons detained on September 1944, is:—Madras 288; Bombay 290; Bengal 53; United Provinces 617; Punjab 79; Behar 271; Central Provinces 136; N. W. Frontier Province 44; Orissa 127; Sind 26; Delhi 21; Ajmer-Merwara 7; and four persons are detained under orders of the Central Government. There is no record of the private property confiscated or destroyed by the States and for which no compensation is given. Then the Press is heavily censored, public meetings are prohibited or allowed to be held

only with the permission of the police authorities. There is a feeling of insecurity in the land. People are not able to speak out their mind freely. This state of things is possible because people are not aware of their civil rights or liberties and allow themselves to be treated in a way no civilised people would allow except under compulsion of sheer brute force. "The price of liberty is eternal vigilance," and people have to be more vigilant when the government in power is not responsible to the people and is likely to usurp more power than necessary. But the people cannot be vigilant unless they know what liberty means which they are called upon to guard as a precious treasure. It is the object of this pamphlet to explain its meaning and I shall attempt to do so without going into the Science of Politics.

THE MEANING OF CIVILISED SOCIETY

In the above paragraph I have used the word "civilised people." What exactly is the meaning we wish to convey by these words? The word "civilised" is used in an antithesis to the word "savage." By savage we mean one who lives in a state of nature, i.e., one who is concerned with his primary functions of life, viz., to satisfy hunger, to propagate and to protect himself from danger. He has no thought beyond securing these his primary rights. He fights for them and kills for them. He does not care where he gets his food or how he gets it. He has no respect for any other life but his own. He has no respect for what belongs to another except what is his. If savages live together in groups called clans or tribes out of their instinct of self-preservation, they are in constant warfare with another group. A civilised man on the other

hand has grown out of his purely physical existence. He has learned to appreciate the higher things of life. He has respect for his fellow-beings as much as for himself. He does not covet what belongs to his neighbour. In short he adjusts himself to live in peace with his fellowmen because he knows that he can thrive and prosper and rise to his highest stature in a society which is peaceful, well ordered and well regulated, i.e., civilised. It is, however, after years of self-discipline imposed from within and without that the individual man comes to that realisation. Similarly Society has to pass through many changes, evolutionary and revolutionary, before it reaches a stage of perfection if ever it can reach that stage. Today we have come to the stage when we would consider a society to be really civilised which is based on the principles of freedom, justice, equality and tolerance. "Liberty, equality and fraternity" was the great slogan of the French revolution. Mahatma Gandhi would like the society to be based on Truth and Non-violence. The question here arises, who regulates the society? Since all the individuals who make the society are not alike and not on the same level of civilisation, an authority is necessary to keep them together and to keep order among them. That is the function of the State.

WHAT IS A STATE?

A State is thus constituted for the purpose of establishing a well ordered, well regulated society. It is defined as a repository of collective power of the individuals or citizens who constitute the State, and this collective power, the State must exercise for the common good of its citizens. Its primary function is two-fold. It has to protect its citizens from an outside

enemy and it has to protect them within the state from one another. It fulfils its former function with the aid of the military force it keeps at its disposal and the latter by a police force aided by laws enacted for the purpose. These laws must be just, i.e., they must be for the good of the people. Secondly they must be justly administered. Who makes these laws? Who administers them? and who sees that they are justly administered? These are the three-fold functions of the State on the civil side as apart from the military, viz., (1) law-making—legislative; (2) administering the laws—executive; and (3) seeing that the laws are justly administered—judiciary. Whether these three functions are entrusted to one authority or to several depends on the nature of the state. In a well organised state the Executive and Judiciary powers are kept separate since those entrusted with judiciary powers have to see that the laws are administered justly, i.e., sit on judgment on those who execute them. Similarly those who execute the laws are not entrusted with the task of making them as there would be a danger of the executive making laws to suit their own purpose which may be contrary to the interest of the citizens of the state.

The state, however, is a collective term, an abstract term, it must entrust these functions to a concrete authority or authorities. This concrete authority is the government. The nature or constitution of government is very important as it affects the well being of the citizens who constitute the state.

NATURE OF GOVERNMENT

A government which is not responsible to the people for its action and therefore cannot be removed,

and holds absolute sway over the people is an autocratic government whether it is in the hands of one individual or a group of individuals. A government on the other hand which is representative of the people and is responsible to them, i.e., which can be removed for abuse of power or inefficiency, is a democratic government. In an autocratic government the person or persons in power are likely to abuse their power and tyrannise over the rest of the people. The great autocrat King, Louis XIV of France had the audacity to identify the state with himself. *L'Etat c'est moi*—"I am the state" he boasted. His great grandson Louis XVI had to suffer for the sins of his ancestor. He was guillotined by the people who revolted against the autocratic rule of the French King. History ancient and modern gives us many examples of such tyrants who wielded absolute power over the state, i.e., over the lives and property of the citizens of that state. They made and unmade laws as it suited their purpose. The princes in Indian States provide us today with good examples of what autocracy means. They have absolute power over the lives of their people. They can make and unmake laws and even consider themselves as above the very laws they make. They look upon the state as their property with which they can do what they like! They look upon the state servants as their personal servants instead of the public servants they are! If individual tyranny is bad, tyranny of a group in power is worse still. The Fascists, the Nazis and even the Communists have used the State for their own purpose.

A democratic government on the other hand aims at the common good of the people. It is, to use the famous words of Abraham Lincoln,—“government of

the people, for the people and by the people." It is, therefore, in a democratic state only that the individual is likely to enjoy the greatest amount of freedom.

INDIVIDUAL VERSUS THE STATE

What does individual freedom mean? The state has to keep order within it and has to make laws to regulate the life and conduct of its citizens. This means that the individual cannot have absolute freedom to do what he likes, but has to surrender a certain amount of freedom to the state. For instance, no individual can be allowed to hurt, rob or kill his neighbour who has done nothing to deserve such treatment, and a person who does so has done an anti-social act for which he has to be punished by the state. But would a man be liable to be punished if he expresses his opinion against unjust laws of government or against unjust ways in which laws are administered? Would he be liable to be punished if he raised a cry against government officers who are the servants of the state, and therefore, of the people, if they were abusing their powers? He is actually serving society in giving free expression to his views, and therefore, ought not to be punished. This means that he is free to do so. In an autocratic state, however, he would not be allowed to express his views freely. In such a state he may be required to surrender his entire freedom, and thus be reduced to a state of slavery. The very purpose of the state which is the good of the people would then be frustrated. To go to the other extreme, a state which exercises no control is likely to be reduced to anarchy. Such an anarchic state could be an ideal state if all who constitute it are so highly civilised that they understand their duties and responsibilities and are able to live in

harmony with each other without the intervention of governmental control. This would be expecting too much from human nature. Some control is obviously necessary, but how much is the important question. A good state, one can say, would be one where there is the minimum of control and the maximum of liberty. The individual's freedom in no case, however, should be in conflict with the common good. Whatever degree of freedom an individual enjoys according to the nature of the state, there is certain essential freedom which the state must guarantee to every citizen if at all it means to fulfil its purpose which is the good of the people. This essential freedom known as the fundamental rights of man is guaranteed in the constitution of the modern democratic states. These fundamental rights may vary in number but in essence are the same. President Roosevelt calls them the four freedoms in his Atlantic Charter. They are (1) Freedom from fear; (2) freedom from want; (3) freedom of worship; and (4) freedom of speech or expression.

CIVIL LIBERTIES

These fundamental rights, known as liberties or civil liberties in Constitutional Law, are five in number, viz., (1) the right to personal security; (2) the right of freedom of speech and discussion which includes the freedom of the Press; (3) the right of public meeting; (4) the right of association; and (5) the right to the security of property. These rights are self-evident and require no explanation. Life would be meaningless if these liberties did not exist for the individual. The purpose of the state would be frustrated if those who are entrusted with the power of the state deprive its citizens of these fundamental rights. The

only time when the state, however, is empowered to encroach upon the liberties of its citizens, is during a crisis or in times of emergency. Such occurrences are, however, rare, and the state would have to prove the emergency before it can take any drastic measures, and even when measures have to be taken, it has to be seen that safeguards are also provided so that the wide powers assumed by the government are not abused. I shall try to show how these emergency powers work in England today when it is passing through the great crisis caused by the War and how they work in this country. I am making this comparison because we are told that the Defence of India Act is based more or less on the Emergency Powers Act in England.

EMERGENCY MEASURES IN ENGLAND

Under the Emergency Powers Act in England, H. M. the King makes such regulations as are necessary and expedient for the purposes mentioned in the Act by an Order in Council. This order, however, has to be placed within a short period of its promulgation before Parliament and any member of either House can ask for its annulment. If a person is detained, reasons are given to him for his detention, and he can challenge these reasons and object to his detention. His objections are then examined by an advisory committee who can recommend his release. The Secretary of State, however, is not bound to accept the recommendations. But whenever he does not accept, he has to explain his reasons for not doing so to Parliament. The measures taken are really meant to protect the country from aliens or from persons of hostile origin. During the last war the conscientious objectors were imprisoned under such Emergency Act but we do not

hear much about such detentions this time. Where the interests of the government do not clash with those of the people governed, there is very little likelihood of these powers being abused.

HOW EMERGENCY MEASURES WORK IN INDIA

In India, the Government assumed emergency powers long before the real emergency arose. No sooner England declared war against Germany, His Excellency the Viceroy also declared war against Germany without so much as consulting the legislatures, who felt that it was not necessary for India to be precipitated in a European struggle. India thus became a belligerent country against the wishes of the people. Whether this haste on the part of His Excellency the Viceroy was justified is a question best left to the impartial judgment of some future historians. The largest political party in the Central Assembly considered this action an insult and decided to remain absent from this future sessions by way of protest. The Governors of the seven provinces assumed absolute control of the Government under section 93 of the India Act of 1935, instead of dissolving the legislatures and calling for fresh elections. Soon after, the Defence of India Act was passed which armed the Executive with very wide powers. The Rules under this Act are made by the Governor-General in Council. They are promulgated as ordinances. The legislatures have no say in the matter. They can neither annul them nor modify them, nor have they got powers to repeal the Act under which these Rules are made. At first, persons detained under the ordinance were not informed of any ground or reasons for their arrest. Later, due to public agitation, another ordinance was

passed which corrected this lacuna, and now every person detained is served with a notice which gives ground for his detention. But as Mahatma Gandhi has pointed out in his correspondence with H. E. the Viceroy, these grounds are very vague. The detenu cannot consult any one—not even a lawyer—as to what reply he should make to the charges made against him as given in the notice served on him. The text of the notice and the reply given by the detenu to the government cannot be made known to a third party but must remain a secret between him and the government. Even if the person objects to his detention there is no advisory committee to examine his objections in an impartial way. The judge and the accuser in the case, are therefore the same, viz., the Home Department or the Home Member.

Though it is the central or the provincial government that is invested with the power of detaining a person, under the Act, this power, under the Rules, can be delegated to a person or persons. The result is that the petty officials who were entrusted with the power have used it as they liked. It gave them an opportunity to carry out their personal vendetta. Armed with such powers Inspectors or Sub-inspectors of Police have terrorised the people. Corruption has been rampant as people have actually paid money for fear of being arrested.

The ordinary courts of law are deprived of their jurisdiction over offences committed under this Act. For trying such offences the Act provides for special tribunals and lays down a special procedure by which the rights of revision and appeal contained in the ordinary law are rigorously cut down. As Mr. Motilal Setalvad, the ex-Advocate-General, Bombay, put it in

his brilliant presidential address before the Civil Liberties Conference: "The courts of Justice alone had so far been able to afford protection to the citizen against the rising tide of restriction and abrogation of civil liberties. The publicity of trial in a court of law, the right to be tried by assessors or a jury in certain cases, the right of appeal and the right of revision, the right to have the charges tried by courts of a particular status were all valuable rights of the citizen which enabled him to resist through the machinery of the courts the encroachments of the Executives. The enactment of this ordinance deprived the citizen of the protection afforded by these valuable rights." A full Bench of the Calcutta High Court declared the Special Courts Ordinance invalid and this decision was referred to the Federal Court which upheld the decision of the Calcutta High Court. The acting Chief Justice of the Federal Court giving his judgment stated as follows:

"It has no doubt been always recognised that some authority in the state should be in a position to enact necessary measures to meet extraordinary contingencies. Section 72 of Schedule 9 makes ample provision for it; the question is about the manner of exercising that power. Before applying the analogy based on the English practice as to emergency legislation, certain differentiating circumstances must be borne in mind. In England even emergency legislation is Parliamentary legislation or Order in Council passed under the authority of Parliamentary Statute and it is always subject to Parliamentary control, including in the last resort, the right to insist on the annulment or modification of the Order in Council or even the repeal or modification of the Statute itself. In the Indian constitution, the legislature has no share in or control over the making of an Ordinance by the exercise of the powers there under nor has it any

voice in asking for its repeal or modification. Again, anything like a serious excess in the use of special emergency power will, under the English practice, be a matter which Parliament can take a note of, when the time comes for passing the usual Indemnity Act on determination of the emergency. That is not the position here, as the Indemnity can be provided by an Ordinance, as against all this the only safeguard provided in the Indian constitution is that the matter rests entirely upon the responsibility of the Governor-General. . . In the present case it is impossible to deny that the ordinance making authority has wholly evaded the responsibility of laying down any rules or conditions or even enunciating the policy with reference to the cases that are to be assigned to the ordinary criminal courts respectively and left the whole matter to the unguided and uncontrolled actions of the Executive authorities."

As a result of that decision the Special Courts Ordinance was repealed and provision was made for the review in appeal of the sentences passed by the Special Courts, and as Mr. Motilal Setalvad says, "some of the cases tried by these courts which have come in appeal before the ordinary courts leave no room for doubt that a large number of persons tried by these courts did not receive a proper judicial trial. In a number of cases, the convictions made by these Special Courts have been set aside, it being found that the convictions were arrived at on material which was not legal evidence. . . But it can, I think, be safely stated that on the whole the persons tried by these Special Tribunals under their special procedure and convicted by them were denied the right of a satisfactory judicial investigation of the charges against them."

It is not necessary to go on with the duel that is going on between the government on one side and

some of the Judicial Courts on the other. A word of appreciation is necessary for the great work some of these courts as well as some of the advocates of law have done in trying to preserve and protect the rights of the citizens.

An important question that arises in connection with persons detained without trial is their treatment in jail. The question is, are they to be treated as ordinary criminals? Are persons who are not charged with any offence but are detained at the sweet will of the Government on par with those who are convicted for an anti-social act and are therefore criminals? And yet the treatment meted out to the detenus in ordinary jails is not much different from the treatment given to criminals. Another question that arises is what happens to families whose earning members are thus detained by Government? Is not the Government bound to compensate the family for depriving them of their income, their livelihood? There seem to be no rules regarding any allowance to be made to the families of the detenus. In some cases allowances, however meagre, are given but there are a number of cases where the applications from persons affected have been turned down. It is the responsibility of the government to support the families of those whom they have detained without trial.

Where the greatest of liberty, viz., right of personal security is treated with such scant courtesy one cannot expect any respect from the Authorities for other liberties. There is neither freedom of speech nor of meeting. Many restrictions are placed by government on the freedom of the Press, which is virtually gagged in this country. The powers of censorship are exercised not for controlling the news of military

interest which would help the enemy but are used or abused for suppressing news or views of a political nature simply because such news or views may be inconvenient and distasteful to Government. Mrs. Sarojini Naidu was for months not allowed to make a public statement of any kind. That order has been very recently withdrawn.

It must be evident from the above how differently the emergency powers are worked in this country and in England. The Executive has assumed powers in England but safeguards have been provided in the Act to protect the liberties of the people. The reason is that the Government in England is a representative government responsible to the people. As Lord Wright puts it: "In the constitution of this country (i.e., England) there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people in the system of representative and responsible government which has been evolved." In India the Executive has assumed very wide powers and there is no agency to check this lawlessness on the part of the Executive, for the government of the country is neither representative of nor responsible to the people. What is the remedy? ?

THE REMEDY

(1) The first and foremost remedy is to establish a representative and responsible Government at the centre as well as in the provinces. There should, therefore, be a general demand for such a government.

(2) When the Executive and the Judiciary are one there is every likelihood of justice being miscarried. There should, therefore, be a demand for the separation of the Executive and the Judiciary.

(3) Safeguards must be provided in the Defence of India Rules to protect the liberties of the citizens as in England. These safeguards are :

(a) the detenus should be informed of the ground for their detention. These grounds should be definite and not vague and hypothetical;

(b) the detenus should have a right to object to their detention and these objections should be examined by an advisory committee composed of persons who are members of the legislatures. The committee should have a right to recommend the release of the persons detained. Such recommendation must be accepted by the Home Member, and where he cannot accept it, he must explain his reason for not doing so to the legislatures.

(c) The Defence of India Rules should be modified so that petty officials are not delegated the powers of arresting persons or confiscating their property.

(4) Legal Aid Societies should be set up in every district, town to help the victims of the abuse of powers and expose the lawlessness of authorities concerned.

(5) Branches of Civil Liberties Union should be established in every district to educate the people with regard to their civil right so that they can be organised to guard against further encroachment or assault on their liberties.