RIGHTS OF CITIZENS

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BY

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FOREWORD BY

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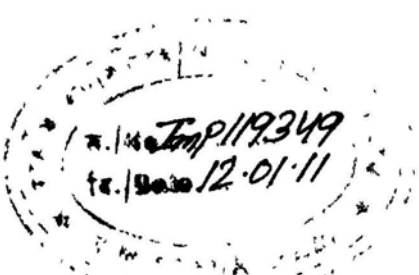

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FOREWORD

THERE is great need for literature in attractive shape and size to point out the disabilities of Indians as regards the fundamental rights of citizenship.

The rights dealt with in this book are of far greater importance than any privileges which may be exercised by the people's representatives in the reformed councils and in transferred departments of the administration. Whatever small instalment of Self-government we may obtain immediately, if these elementary citizen-rights can be secured, we shall have freedom of movement for national development and can work our own progress. Without them, the most attractive schemes of reform cannot take us near to that fulfilment of national life which is our birthright.

The ordinance powers of the Viceroy and permanent enactments like the Bengal Regulation of 1818 and its counterparts in other provinces, the Meetings Act of 1907 and the Press Act of 1910 give powers to the executive authority to put men in prison without proof of any breach of law before the ordinary courts of the land, to punish and suppress newspapers similarly without trial or previous proof, and to prohibit meetings whenever the Executive

apprehend disaffection or sedition. In all these cases the mere declarations of the executive authority as to the guilt or character of the persons concerned, are conclusive. The jurisdiction of courts, even including that of the highest tribunals, is excluded.

Those who support the continuance of such laws and even the enactment of new laws on the same lines, little realise the confession which their attitude is tantamount to. If after a hundred and fifty years of English rule, it is not possible to introduce the fundamental basis of English governance without danger to British rule, British trusteeship of this country must stand condemned.

We think otherwise. We believe that British rule has not been so futile, and that neither the State nor British authority will be in danger if the Rule of Law is made part of the Indian Constitution. Political work for some time to come should be concentrated on the Indian National Congress's Declaration of Rights in August last.

June 7, 1919. C. RAJAGOPALACHAR.

RIGHTS OF CITIZENS

CHAPTER I

INTRODUCTORY

ACCUSTOMED as we are to live under laws and regulations restricting our freedom in various ways, we have, especially in India, come to hold the belief that these laws are part of the scheme of nature and that we have nothing to do with them, but to obey them. Of course, if one is asked and made to think about it, one may see things in a different light. But, ordinarily the average Indian citizen, at least till very recently, took the laws enacted for him as dispensations of Providence. Thanks, however, to the political awakening in the country, a different attitude is beginning to be assumed towards these man-made laws. In order that this attitude should become the normal attitude of the Indian citizen towards the laws, it is necessary

that he should have a clear conception of his rights as an individual citizen of the state.

It is often forgotten that the modern political state is only a voluntary combination of individuals who have agreed to certain restrictions being placed on their freedom for certain specific purposes. It is not necessary to discuss the metaphysical question as to whether man can have any rights in a state of nature, excepting the right of physical force. It must be obvious that, in a modern state, we do consent to our actions being restrained in various ways and that such restrictions are imposed as means to certain ends. In other words, the State is no longer a sovereign power which commands; it is a group of individuals having in their control forces which they must employ to create and to manage public service.

From this it follows that all laws have got to be tested from the point of view of their capacity to secure the ends which the legislators should have in view. Two questions, then, emerge: (1) What are the ends which legislators should keep in view? (2) what are the means by which such ends alone can be secured by the working of those laws? In this connection, it may be as well to define Law as a body of rules intended to control the conduct of members of a political society, for the violation of which penalties may be expected to be inflicted by the

authority of the Government of that society. Again, the laws with which we are now concerned are those defining the primary civil rights of private members of a civilized community. What, then, are the specific ends which such laws ought to be designed to secure? The answer of Professor Sidgwick may be accepted as correct, namely, that the ultimate criterion of the goodness of law and of the actions of government, generally, is their tendency to increase the general happiness. The legislation of modern civilized communities is based largerly on the application of this principle. And an important school of political thinkers is of opinion that the coercive interference of government should be strictly limited to the application of this principle.

This is necessary in the interests of the laws themselves. For, the relation of the citizen to the laws under which he lives should be that of perfect respect and obedience to their commands. In order to enable him to assume this attitude, he must be satisfied that these laws represent the judgment of the majority of his fellow-voters and that they are intended to be just. So far as India is concerned, the first criterion is not satisfied by any of the existing laws. As Mr. C. Vijiaraghavachariar says, "Excluding the common law of India and the few laws of Parliament hardly in use, all our laws are decrees of the bureaucracy under the triple name of

Acts, Regulations and Ordinances. None of these is law as known in civilized countries. None of these is enacted by the people through their representatives ; hardly any of them is a reflection of Indian public opinion. Nor is any of them even the product of bureaucratic legislature distinguished from and independent of the executive and administrative bureaucracy. We have no public law in this country. The triple bundle of Acts, Regulations and Ordinances are the kaleidoscopic product of one and the same bureaucracy. The whole of British India is one Scheduled District,—one backward tract without the name." The first criterion, then, not being available in the case of Indian laws, we have to test and see whether these laws are so framed as to avoid injustice, which, in other words, is the utilitarian doctrine referred to above.

Having thus defined the ends which all legislation should subserve, we now proceed to consider the means which have been devised by civilized countries to see that the laws intended to secure certain ends secure only those ends, and no others The compendious phrase which accurately describes the most effective method evolved by civilized countries especially England, for this purpose, is the Rule of Law. Professor Dicey very acutely examines the implications of this phrase and lays down the following positions.

When we say that the supremacy of the Rule of law is a characteristic of the English constitution, we generally include under one expression at least three distinct, though kindred, conceptions. We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. The Rule of law even in this narrow sense is peculiar to England or to those countries which have inherited English traditions. In every continental (European) community, the Executive exercises far wider discretionary authority in the matter of arrest, of temporary imprisonment, of expulsion from the territory, and the like, than is either legally claimed or in fact exerted by the Government in England. And wherever there is discretion, there is room for arbitrariness, and in a republic no less than under a monarchy, discretionary authority on the part of the Government means insecurity for legal freedom on the part of subjects. This is the besetting sin of all Indian coercive legislation.

In the second place, the Rule of Law means that every man whatever be his rank or condition is subject to the ordinary law of the Realm and amenable to the jurisdiction of the ordinary tribunals. In England, every official from the Prime Minister

down to a Constable or Collector of taxes is under the same responsibility for every act done without legal justification as any other citizen. The reports abound with cases in which officials have been brought before the Courts and made in their personal capacity liable to punishment or to the payment of damages, for acts done in their official character but in excess of their lawful authority. In India, although there is no administrative law, as, for example in France, still officials are in their official capacity, in many cases by statute, protected from the ordinary law of the land and exempted from the jurisdiction of the ordinary tribunals.

There remains yet a third and different sense in which the Rule of Law, or the predominance of the legal spirit may be described as a special attribute of English Institutions. We may say that the constitution is pervaded by the Rule of Law on the ground that the general principles of the constitution, as for example, the right to personal liberty or the right of public meeting are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts: Whereas under many foreign constitutions the security given to the rights of individuals results or appears to result from the general principles of the constitution. Hence flow noteworthy distinctions

between the constitution of England and the constitution of most foreign countries. There is in the English constitution an absence of those declarations or definitions of rights so dear to foreign constitutionalists. On the other hand, in Belgium which may be taken as a type of countries possessing a constitution formed by a deliberate act of legislation, you may say with truth that the rights of individuals to personal liberty flow from, or are secured by, the constitution. Though this merely formal distinction is in itself of no moment, provided always that the rights of individuals are really secured. the question whether the right to personal freedom or the right to freedom of worship is likely to be secured thus depends a good deal upon the answer to the inquiry whether the persons who consciously or unconsciously build up the constitution of their country begin with definitions or declarations of rights or with the contrivance of remedies by which rights may be enforced or secured. Any knowledge of history suffices to show that foreign constitutionalists have, while occupied in defining rights, given insufficient attention to the absolute necessity for the provision of adequate remedies by which the rights they proclaimed might be enforced. The Habeas Corpus Acts declared no principles and defined no rights. But they are for practical

purposes worth a hundred constitutional articles guaranteeing individual liberty. Again, where the right to individual freedom is a result deduced from the principles of the constitution, the idea readily occurs that the right is capable of being suspended or taken away. Where, on the other hand, the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation. Such distinctions are, however, of purely academical interest to us in India, for our liberties are not protected here either by declarations of rights or by provisions for adequate remedies.

For the purposes, however, of testing how far the Coercive laws of India conform, if at all, to the rule of law, we may restate in Professor Dicey's words the three senses in which that phrase is commonly used. In the first place, it means the absolute supremacy or predominance of a regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness or prerogative or even of wide discretionary authority on the part of the government. Englishmen are ruled by the Law and by the Law alone: A man may, in England, be punished for a breach of law, but he can be punished for nothing else.

In the second place, it means equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the rule of law in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.

Thirdly, the rule of law may be used as a formula for expressing the fact that in England the law of the constitution is not the source but the consequence of the rights of individuals as defined and enforced by the courts. In none of these senses has the rule of law any existence in India. In Mr. Vijiaraghavachari's words, "the expressions, majesty of the law, the rule of law have no application in this country."

As Professor Dicey himself recognises, general propositions however as to the nature of the Rule of Law carry us but a very little way. If we want to understand what that principle in all its different aspects and developments really means, we must try to trace its influence throughout some of the main provisions of the constitution. And, the method which the Professor has adopted in his book 'the Law of the Constitution' will be followed here namely, to examine with care the manner in which the law of India deals with the

following topics, namely, the right to personal freedom; the right to freedom of discussion; the right of public meeting; the use of martial law and so on. And as far as possible the law of England on those topics will be considered as contrasted with our law, for comparison is essential to recognition.

There is one other general principle which we have to bear in mind in considering the limits of coercive legislation. Whenever the Executive may invade by physical acts or restrict by commands the ordinary private rights of citizens, it will do this, strictly in accordance with laws that withdraw or limit these rights, in the special case of the persons concerned, either by way of penalty or for some special end of public utility. As Professor Sidgwick says, this condition is generally necessary to realise the security that the laws are designed to give to private persons For the power of interference with ordinary private rights, which for the mere defence of these rights it is needful to vest in the executive, involves,—to use Bentham's phrase, —a formidable sacrifice of security to security; and in order to minimise the sacrifice, it is important to place the exercise of this power under close and carefully planned legal restrictions,—of which the well-known limitations on the power of arresting on suspicion of crime and detaining in prison before trial and on forcible entry into private houses are

familiar examples. We may assume then that normally the coercion of the executive will be exercised under the restraint of laws defining carefully the limits of its interference with the ordinary rights of members of the community. And if this restraint is to be thoroughly effective, the executive that is not to break these laws must not alone have the power to make them: the supreme authority to modify these laws must be vested in a legislative organ, wholly or to an important extent distinct from the executive. We have already seen that this is not the case in India. The very names of our legislative councils and of the members thereof other than the ex-officio members show that they are merely expansions and phases of the executive government. The illustrious authors of the Montagu Chelmsford Report admit this. The despatches between the Government of India and the Secretary of State some of which are quoted in the Report will conclusively prove that the whole structure of the Indian Legislatures was intended to give the appearance of legal expression to the executive will forged in England or India.

In this connection, we have to note another characteristic of Indian coercive legislation, namely, the large amount of discretion vested in the Executive which cannot be justified on any of the foregoing principles. Professor Sidgwick recognises

as indeed all must, that it is expedient that the executive should have some legislative powers on matters requiring regulations that vary from time to time according to circumstances; but that, for the security of the citizens at large such powers should ordinarily be exercised for certain strictly defined ends within limits fixed by the legislature. Professor Sidgwick suggests that it would seem better to give the executive a general power of issuing ordinances having legal force without special authorisation; but subject to the restrictions that it is only to be exercised in case of urgency, that such ordinances are to be communicated as soon as possible to the legislature, and that they cease to be valid if disapproved by that body. He suggests a further safeguard namely, that the executive should be bound to summon the legislature for an extraordinary session at least simultaneously with, if not before, the issue of any ordinance which it has not been specially authorised to issue. It will be seen in the sequel that, without any of these safeguards and apart from the question of the legislature being merely an expansion of the executive in India, the executive has large powers of lawmaking without any reference to the legislature whatever. These are the general considerations which must weigh with us in discussing how far the rights of citizenship are secured by law in

this country. A detailed examination of the laws which affect such rights will follow and will amply support the position taken up above.

CHAPTER II

THE RIGHT TO PERSONAL FREEDOM

AS the security for personal freedom is most effective in England, we may begin by examining the means by which this is done, and the limitation, if any, on that security. We shall then be in a better position to understand the position in India with regard to this matter. The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification. That any body should suffer physical restraint is in England, prima facie, illegal, and can be justified on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the Courts to stand his trial, or because he has been duly convicted of some offence and must suffer punishment for it. Personal freedom in this sense of the term is secured in England by the strict maintenance of the prin-

ciple that no man can be arrested or imprisoned except in the course of law, that is, under some legal warrant or authority, and it is secured by the provision of adequate legal means for the enforcement of this principle. These methods are two fold : namely, redress for unlawful arrest or imprisonment by means of a prosecution or an action, and deliverance from unlawful imprisonment by means of the writ of the Habeas Corpus. (Professor Dicey).

The reason why redress is afforded by the Courts for the damage caused by illegal interference with any one's personal freedom is the adherence of the judges to two constitutional maxims : (1) No wrongdoer can, if the act be unlawful, plead in his defence that he did it under the orders of a master or superior. (2) The Courts give a remedy for the infringement of a right whether the injury done be great or small. But, as Professor Dicey remarks, liberty is not secure unless the law in addition to punishing every kind of interference with a man's lawful freedom provides adequate security that every one, who without legal justification is placed in confinement, shall be able to get free. This security is provided by the celebrated writ of the Habeas Corpus and the Habeas Corpus Acts.

The essence of the writ is that the Court can cause any person who is imprisoned to be actually brought before the Court and obtain knowledge of the

reason why he is imprisoned and then, having him before the Court, either then and there set him free or else see that he is dealt with in whatever way the law requires, as, for example, being brought speedily to trial. The writ can be issued on the application either of the prisoner himself or of any person on his behalf, or of any person who believes him to be unlawfully imprisoned. The writ is granted as a matter of right, that is to say, the Court will always issue it if prima facie ground is shown for supposing that the person on whose behalf it is asked for is unlawfully deprived of his liberty. The writ can be addressed to any person whether he be an official or a private individual. Any disobedience to the writ exposes the offender to summary punishment for contempt of Court and also in many cases to heavy penalties recoverable by the party aggrieved.

At the present day, therefore, the securities for personal freedom are in England as complete as laws can make them The right to its enjoyment is absolutely acknowledged. Any invasion of the right entails either imprisonment or fine upon the wrong doer ; and any person whether charged with crime or not, who is even suspected to be wrongfully imprisoned, has, if there exists a single individual willing to exert himself on the victim's behalf, the certainty of having his case duly investigated, and, if he has been wronged, of recovering his freedom.

Thus does Professor Dicey, with pardonable pride, define the right to personal freedom which exists in England.

A brief reference may be made here to English Statutes popularly called Habeas Corpus Suspension Acts. The sole result of suspending the Habeas Corpus Act is that the ministry may for the period during which the Suspension Act continues in force constantly defer the trial of persons imprisoned on the charge of treasonable practices. But this falls very far short of anything like a general suspension of the right to the writ of the Habeas Corpus; it indeed extends the arbitrary powers of the Government to a far less degree than many so-called Coercion Acts. Finally, every Habeas Corpus Suspension Act affecting England has been an annual Act and must, therefore, if it is to continue in force, be renewed year by year.

The Habeas Corpus Suspension Acts are usually followed by Acts of Indemnity, which protect all persons who have acted, or have intended to act, under the powers given to the government by the Statute. These two Acts do arm the executive, for the time being, with arbitrary powers; but, as Professor Dicey points out, the relief to be obtained from an Act of Indemnity is prospective and uncertain. Any suspicion on the part of the public that officials had grossly abused their powers might

make it difficult to obtain a parliamentary indemnity for things done while the Habeas Corpus Act was suspended. Again, the terms of the Act of Indemnity may be narrow or wide. Such an Act is very different from the proclamation of martial law, the establishment of a state of siege or any other proceeding by which the executive government, at its own will, suspends the law of the land.

Now, let us examine the position in India as to what are the guarantees which the law has provided for the exercise of the right to personal freedom. Reference will be made later to the Regulations and the Statutes which deprive Indians of the right to personal freedom, when they are neither accused of nor convicted of any offence But, here we may notice that neither of the two remedies for illegal arrest which Prof. Dicey mentions is usually available in India. The first is the right of action or prosecution against the man who was responsible for the illegal arrest. But in India most of the Acts, if not all, under which a man is deprived of his freedom other than by a process of law, provide that the statements of the Executive justifying the arrest usually contained in the warrants for arrest shall be conclusive evidence of all matters contained therein, and therefore of the truth of the assertion that the arrested person was reasonably suspected, for example, of treasonable practices, and therefore

liable to arrest. Therefore it follows that no official acting under the Regulation or the Act can by any possibility be made liable to any legal penalty for any arrest, however groundless or malicious it may be, provided it is in due form within the words of the Regulation or the Act. The Indian Government, then, can arrest any person whom the executive authorised to act under the particular Act or Regulation think fit to imprison provided only that the warrant is in the form and contains the allegations required by the Regulation or the Act. Thus the first remedy does not exist in India.

The second remedy, namely, the right to a writ of Habeas Corpus does indeed exist in India, but in an extremely limited form. Section 491, of the Criminal Procedure Code confines the exercise of this right to the limits of the ordinary original civil jurisdiction of the High Courts of Calcutta, Madras and Bombay. This practically makes the writ not available to the very large majority of the people in this country, and is therefore rarely of any use in preventing arbitrary arrest by the executive. Again, this section expressly says in clause 3, "Nothing in this Section applies to persons detained under the Bengal State Prisoners Regulation, 1818, Madras Regulation II. of 1819, or Bombay Regulation XXV of 1827 or the State Prisoners Act, 1850 or the State Prisoners Act, 1858." All these Acts and Regulations give the power

of arbitrary arrest to the executive, and this section, geographically limited as it is, expressly exempts arrest under those Acts and Regulations from its scope.

The second remedy, therefore, which Prof. Dicey mentions, exists in India under very grave limitations and is not available in the cases in which it is most likely to be needed as a protection against the arbitrariness of the executive, so that its existence may legitimately be ignored.

Besides the Defence of India Act and the Rules made thereunder which have given very wide arbitrary powers to the executive and which are sought largely to be perpetuated in the statute book by means of the Rowlatt Bills, the Regulations and the Acts which arm the executive with the power of arbitrary arrest are Bengal Regulation III of 1818, Madras Regulation II of 1819, Bombay Regulation XXV of 1827, the State Prisoners Act of 1850, the State Prisoners Act of 1858 and the State Offences Act of 1857 The first three Regulations form a class by themselves and may be considered together. The Preamble to the Bengal Regulation says "Whereas reasons of state (including thereunder the security of the British Dominions from internal commotion) .....occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any

judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may, for other reasons be inadvisable or improper." The preambles to the other two Regulations are substantially the same. It follows then that proceedings can be taken under these Regulations against three classes of persons, under certain contingencies rendering necessary such action as mentioned in the preambles :—1. Individuals against whom there may not be sufficient ground to institute any judicial proceeding, in other words, an absolutely innocent man may be proceeded against. 2. Individuals whose cases are such that judicial proceedings may not be suitable: this is a very vague statement and will in practice differ little from the first. 3. The all comprehensive class of individuals against whom judicial proceedings may, for other reasons, be inadvisable or improper. Applying the principle of ejusdem generis, we may say that these other reasons are not likely to differ very materially from the first. If we bear in mind the fact that in these matters the executive is made the supreme judge, we can realise what extensive powers of arrest the executive have against which the subject can have no redress.

The three Regulations contain the following clause, "The warrant of commitment shall be sufficient authority for the detention of any state

prisoner in any fortress, jail or other place within the territories subject to the particular Presidency" thus expressly denying any redress to the persons who may be arrested under these Regulations.

These Regulations no doubt contain in one form or another certain provisions which may be said to give some chance of redress to the arrested persons. The words are " that the grounds of the determination of placing any person under personal restraint otherwise than in pursuance of some judicial proceeding should from time to time come under revision, and the person affected thereby should at all times be allowed freely to bring to the notice of the Governor-General in Council all circumstances relating to the supposed grounds of such determination." The utter futility of such ex-parte enquiries by the executive in other than judicial form cannot be put better than in Lord Morley's words, " One thing I do beseech you to avoid—a single case of investigation in the absence of the accused. We may argue as much as we like about it, and there may be no substantial injustice in it, but it has an ugly continental Austrian Russian look about it, which will stir a good deal of doubt or wrath here, quite besides the Radical Ultras. I have considerable confidence, after much experience, in my flair on such a point."

It may be of interest to note in passing that the

Bombay Regulation in clause 1, contained the following proviso. 'Provided always that with reference to the individual the measure shall not be in breach of British Laws' But this was repealed by Act III of 1858, except so far as the said proviso applies to European British subjects.

The state prisoners Acts of 1850 and 1858 merely extend the provisions of these Regulations to the Presidency towns and therefore need no further comment.

We may now see how these Regulations and Acts authorising arbitrary arrest differ from the suspension of the Habeas Corpus Act in England.

1. The executive are made the sole judges here of the need and the reasons for any action, and their judgment is not liable to revision.

2. Proceedings may be taken against persons against whom any charge or no charge may exist.

3. The period of detention is indefinite and depends on the will of the executive.

4. The executive are in no way liable for any action they may purport to take under the Regulations and the Acts. Thus it is clear that there is no right to freedom of person in this country. Our demand is that in this, as in other matters we should be placed on terms of absolute equality with His Majesty's subjects in England. In other words, we demand that no man shall be arrested or kept in

custody in India, except with a view to his being brought speedily to trial for some offence known to law, or after conviction by a Court of Law. If ever the executive feels the need for extraordinary powers during times of crises, they should be compelled to get the sanction of popular Legislatures, which sanction ought to be strictly confined within legal limits and be revisable, from time to time, by the Legislature. Then, and, not till then, can there be said to be freedom of person in the country.

As to the ugliness of the weapon of deportation and as to its unsuitability for modern civilised conditions, no more scathing indictment can be had than that of Lord Morley: "A pretty heavy gale is blowing up in the House of Commons about deportation, and shows every sign of blowing harder, as time goes, for new currents are showing ... .The point taken is the failure to tell the deportee what he is arrested for; to detain him without letting him know, exactly why; to give him no chance of clearing himself. In spite of your Indian environment, you can easily imagine how taking is such a line as that, to our honest Englishmen with their good traditions of legal right; and you will perceive the difficulty of sustaining a position so uncongenial to popular habits of mind, either Whig or Tory."

Again, " this brings me to Deportees. The question between us two upon this matter may, if we don't take care, become what the Americans would call, ugly.....you come by and by upon what you regard as a great anarchist conspiracy for sedition and murder, and you warn me that you may soon apply to me for sanction of further arbitrary arrest and detention on a large scale. I ask whether this process implies that through the nine detenues you have found out a murder-plot contrived, not by them but by other people. You say, ' We admit that, being locked up they can have had no share in these new abominations; but their continued detention will frighten evil doers generally.' That is the Russian argument: by packing off train-loads of suspects to Siberia, we'll terrify the anarchists out of their wits, and all will come out right. That policy did not work out brilliantly in Russia, and did not save the lives of the people nor did it save Russia from a Duma, the very thing that the Trepoffs and the rest of the ' offs ' deprecated and detested."

Finally, testing these regulations and the Acts by the standards for such legislation as defined in the Introductory chapter, we shall see that they do not represent the will of the majority, that they are not 'just laws,' in that they may cause injustice often, by enabling the executive to proceed against innocent men, and that they vest too much discre-

tion in the executive which is uncontrolled by the Legislature. For all these reasons, we demand that these Acts and Regulations should be repealed and that Indians should be enabled to live in their country as free man, without the craven fear now produced in their minds by the consciousness of the possession by the executive of these extra-ordinary and arbitrary powers, in the exercise of which they are accountable to no power on earth.

CHAPTER III

FREEDOM OF JUDICIAL TRIAL

BABU Ambica Charan Muzumdar as the President of the Lucknow Congress said, " The highest claim of British Rule in India is not founded upon its military strength but upon its moral grandeur. Security of life and property is no doubt one of the highest attributes of a settled government, but this attribute is more or less to be found among backward, uncivilized governments anxious for their own existence. A pure form of administration of justice is the bedrock of a civilised government, and it is this administration of justice which more than anything else has laid broad and deep the foundations of British Rule in India, resting upon the affection and confidence of the people. Anything which tends to undermine that foundation is therefore fraught with danger to the superstructure. As men are born free they naturally value their life and liberty infinitely more than their property. For property is a man's accident while liberty is his birthright.....In

fact, the administration of criminal justice in any country is more a political question than a mere settlement of private disputes."

As Leonard Courtney says in the "Working Constitution of the United Kingdom": "Parliament is the last and highest authority in the land from whose laws there is no appeal; but even the action of Parliament is tempered by the existence of institutions subject indeed to its control, but with which it is slow to interfere. Foremost among these is the organisation of the judiciary and the fundamental rules of the administration of the law, civil and criminal. The principle that a man cannot be convicted of a crime except by the unanimous verdict of twelve fellowmen is older than Parliament itself; and though it may be set aside locally or even generally in times of acute crisis, and minor offences with strictly limited punishment may be exempted from its operation, yet as if doubtful of its own power, Parliament hesitates to touch it, and its sanctity is most zealously guarded.'

The following brief description of the judicial system in England will show how the freedom of judicial trial is secured in England. The visitation of every country by the highest judges at least twice a year for the purpose of trying all prisoners in detention under a charge of crime is a safeguard of justice which could never be made less

stringent. The security of judges in their office is very great. And this is due to Parliamentary action. Judges are officers of the crown ; so much so that originally their functions ceased on the death of the king, and they were long removable at the Royal pleasure ; but the great Act of Settlement of 1701 provided that they should be removable upon addresses from both Houses in favour of such removal ; and their salaries are fixed, so that they are not subjected to the annual criticisms incident to votes in supply. At the base of judicial hierarchy in relation to crime are the Justices of the Peace In addition to these there are stipendiary magistrates and the magistrates for the county.

The independence of the judges in England is now absolute and is the result of prolonged Parliamentary struggle. As Professor Dicey points out, " We can now see why it was that the political conflicts of the seventeenth century often raged round the position of judges..... .....Upon the degree of authority and independence to be conceded to the Bench depended the colour and working of our institutions. To supporters, on the one hand, of prerogative, judicial independence appeared to mean the weakness of the executive. The Parliamentary leaders on the other hand saw more or less distinctly that the independence of the Bench was the sole security for the maintenance of the common law and that Coke in

battling for the power of the judges was asserting the rights of the nation; they possibly also saw, though this is uncertain, that the maintenance of rigid legality, inconvenient as it might sometimes prove, was the certain road to Parliamentary sovereignty". It may also be mentioned here that all his Majesty's subjects are equal before the Courts of Law in England and that no one can claim exemption on any ground from the jurisdiction of the Courts

The judicial system prevailing in India may be thus briefly described :—The High Courts exercise jurisdiction, original and appellate, and civil and criminal : Their ordinary original jurisdiction is confined to the Presidency towns. By their extraordinary original jurisdiction and their appellate jurisdiction they control all other courts of justice both civil and criminal within the limits prescribed by their Letters Patent. Below the High Courts there are subordinate courts both civil and criminal. In every province there are a certain number of divisions in each of which a Court of Session is established presided over by a Sessions Judge. Additional joint and assistant Sessions Judges may be appointed. Every sessions division consists of one or more districts to each of which a magistrate called the District Magistrate is attached. Any number of subordinate magistrates that may be

required are appointed in the District subject to the general control of the District Magistrate. In the cities of Calcutta, Madras and Bombay there are magistrates called Presidency Magistrates. Excepting the High Courts established by Letters Patent the judges of which are appointed by the Crown, all the judges and magistrates are appointed by the Provincial governments.

We may now examine the Indian judicial system and see how unfavourably it compares with the judicial system of England. The judges of the High Court are to be appointed by the Crown. That is as it should be. But in practice this means in India that the Local Government concerned has got the predominant voice in the matter. This is due to the absence of any officer in India corresponding to the Lord Chancellor in England, and to the Statute of 1861 which provides that at least one-third of the number of the judges of the High Court should be Barristers-at-law and at least one-third, members of the Indian Civil Service. This evil of vesting the patronage of the highest judicial offices in the country in practice in the local governments is calculated to impair the independence of the judiciary as against the executive. This evil has been accentuated in recent years, especially in Madras, by the appointment of temporary judges of the High Courts for periods of two years in succes-

sion, so that they are practically permanent judges of the High Court : only, they hold their office not at the pleasure of the Crown, but at the pleasure of the Local Government. This constant appointment of temporary judges of the High Court is bound to impair the confidence of the people in the independence of the High Court. It is necessary that judges of the High Courts in India should be made to hold office not at the pleasure of the Crown, but should be removable only on an address from both Houses of Parliament as in England or from the Legislative Councils in India. The Magistrates who administer criminal justice throughout the country are mostly part and parcel of the executive administration of the country and have to look for their appointments and promotions only to the executive. This is an evil which will be dealt with later in more detail.

One other evil under which the administration of justice in this country labours is the very limited extent to which the system of trial by jury has been adopted. In England it is well established that a man cannot be convicted of a crime except by the unanimous verdict of twelve fellowmen. And although earnest attempts have been made in India to extend the system of trial by jury no appreciable progress has been achieved. This system is very necessary in order to induce in the people absolute

confidence in the administration of justice. In spite of occasional adverse opinions on them, Indian Juries have worthily discharged their functions and have proved their fitness to help efficiently in the administration of justice.

The next and perhaps the greatest defect in the administration of criminal justice in this country lies in the fusion and combination of the judicial and executive functions—a system in which the prosecutor and the judge, the man who works up a charge and the man who sits in judgment over that charge are rolled into one. The following indictment of this pernicious system by Babu Ambica Charan Muzumdar is to the point. "For thirty years the Congress has cried hoarse for the separation of this unholy combination, hundreds of cases from unimpeachable and unchallenged records have been cited from year to year to illustrate the baneful results of the system which is calculated more than anything else to shake the confidence of the people in the integrity of the administration of justice. Cases have occurred, and they are not few and far between, where racial considerations have outweighed the demands of justice and the life of an Indian has not received greater consideration than that of a crab or a tortoise.....One complete generation has passed away since the Indian National Congress first drew the attention of Government to the danger

underlying this iniquitous system. One Viceroy considered his duty discharged by calling the proposal of the Congress 'a counsel of perfection.' Two successive Secretaries of State vied with each other in their pious wish to inaugurate this reform; while at least one Indian administrator denounced the existing system as being unworthy of rational beings. But the system still continues and seems to possess a charmed life which defies both a natural and a violent death. Sir Harvey Adamson was reported to have actually gone so far as to submit a scheme for a proposed reform in 1908: and all sorts of speculation have been afloat in recent years; but nobody knows where the proposal sticks and where it now rests .....If this one reform had been carried out, one half of the causes of the present discontent should have vanished and it is just possible that the ugly developments with which the Government is at present confronted might never have appeared."

Unless this merciless grip of the judiciary by the executive is removed, the judiciary in this country cannot discharge its functions satisfactorily. The best system would be one under which the whole administration of criminal justice is placed directly under the High Courts in the sense that they appoint and control all the Magistrates who shall be either stipendiary Magistrates recruited from the

Bar, or Honorary Magistrates recruited from the leading citizens of a locality. Then the Magistrates will feel in their element and the administration of justice will considerably improve.

One other undesirable feature of the system by which criminal justice is administered in this country is the provision for appeals by the government against acquittals. It was originally intended as a protection for Indian complainants who may not get justice at the hands of mofussil magistrates against European accused. It has ceased to fulfil that function, if it ever did. In any case it is unworthy of any system of civilized jurisprudence, and ought to be abolished.

Perhaps the most pernicious feature, because most galling to Indian self-respect, is the differential treatment accorded to European British subjects in the matter of the administration of criminal justice. The following history of this crying evil by Sir John Strachey is interesting. Until 1872 excepting in trivial cases a European British subject could only be tried or punished by one of the High Courts: the result was a complete denial of justice, for prosecutors and witnesses might have to travel for many hundred miles before a case could be heard. This state of things was remedied in 1872, when the Code of Criminal Procedure provided that European British subjects should be liable to be tried for any

offences by Magistrates of the highest class who were also justices of the peace, and by Judges of Sessions Courts; but it was necessary in both cases that the Magistrate or Judge should himself be a European British subject. Cases requiring severe punishment however continued to be referred to the High Courts. Matters remained in this position until 1883, when the Government of India considered that the law in this respect ought to be altered. It was stated that "the Government of India had decided to settle the question of jurisdiction over European British subjects in such a way as to remove from the Code at once and completely every judicial disqualification which is based merely on race distinctions." This declaration provoked a storm of indignation on the part of the European community throughout India, and the controversy ended with the virtual though not avowed abandonment of the measure proposed by the Government. Act III of 1884 cannot be said to have diminished the privileges of European British subjects charged with offences and it left their position as exceptional as before. The Legislature virtually declared that the summary powers of the European District Magistrates over European offenders should be taken away not because this was held to be in itself desirable but because such powers could not be given to a District Magistrate who is an Indian. While this

change was made in the powers of District Magistrates, the law in regard to other magistrates remained unaltered. The law was certainly not changed for the better, but for practical purposes it remained much as it was before Act III of 1884 was passed. Sir John Strachey pessimistically concludes, "It may be feared that the result of all this has been that we must leave to a distant future the hope that the Government of India will be able to place the law regarding jurisdiction over European British subjects on a satisfactory footing." It is to be earnestly hoped that this prophecy is wrong, in the interests of the fair name of the Government of India. Unless this very desirable reform is effected at once, and all His Majesty's subjects in India placed on a footing of equality before the Law, it will be difficult to believe that the Government are anxious to put in practice the principle for which England stands, namely, 'let justice be done, even though the Heavens fall.'

The Goverments in India are usually very loud in their praise of the admirable system by which justice is administered in this country. But when it comes to a question of testing how far they really believe in their professions, we find that their actions and their words do not correspond. For, we see in the Indian Statute Book, especially in recent years, a jealousy, if not distrust, of the ordinary Courts of

the land and an anxiety to set up special tribunals with special rules of procedure and evidence.

The State Offences Act of 1857 is perhaps the earliest example of this kind of legislation. This Act provides that wherever the executive government of any Presidency or place shall proclaim that any district subject to its government is or has been in a state of rebellion, it shall be lawful for such government to issue a commission for the trial of all persons who shall be charged with having committed within such district, . any crime against the state, or murder, arson, robbery, or other heinous crime against person or property. It shall be lawful for the Executive Government by such commission, to direct that any Court held under the commission shall have power, without the assistance of Assessors, to pass upon every person convicted before the Court of any of the aforesaid crimes any sentence warranted by law for such crime; and that the judgment of such Court shall be final and conclusive; and that the said Court shall not be subordinate to the Sudder Court. This act also contains the ugly provision *viz*, "Nothing in this Act shall extend to the trial or punishment of any of Her Majesty's natural-born subjects, born in Europe, or of the children of such subjects."

The latest instances of such legislation are the Indian Criminal Law Amendment Act of 1908, and

the Anarchical and Revolutionary Crimes Act of 1919. Some of the most objectionable provisions of the earlier Act are these: "The accused shall *not* be present during an inquiry under section 3, subsection (1), unless the magistrate so directs, nor shall he be represented by a pleader, during any such inquiry, nor shall any person have any right of access to the Court of the Magistrate, while he is holding such inquiry" "No trial before the Special Bench shall be by Jury." "Notwithstanding anything contained in Section 33 of the Indian Evidence Act, 1872, the evidence of any witness taken by a magistrate in proceedings to which this part applies shall be treated as evidence before the High Court, if the witness is dead or cannot be produced and if the High Court has reason to believe that his death or absence has been caused in the interests of the accused." "The provisions of the Code of Criminal Procedure, 1898 shall not apply to proceedings taken under this part, in so far as they are inconsistent with the special procedure prescribed in this part."

This distrust of the ordinary Courts of the land with their ordinary rules of procedure is explainable only on the basis that while the Government are sometimes lost in admiration over the system which they have established for the administration of justice, they really believe that this system is

not good enough for them, in cases where they consider the interests of the State are directly affected. All these unnatural and unjustifiable distinctions should be abolished and the King's writs must be made to run throughout the land, against the Executive Government or the European, as much as against the Indian. Till that is done, the Indian must continue to feel that, even in the matter of the administration of Justice, he is not treated as an equal citizen of the British Empire.

CHAPTER IV
FREEDOM OF THE PRESS

FOR purposes of comparison, again, we may examine the state of the Law in regard to this matter in England. The following description by Professor Dicey is illuminating. :—

Freedom of discussion is in England little else than the right to write or say anything which a jury consisting of twelve shopkeepers think it expedient should be said or written. Such liberty may vary at different times and seasons from unrestricted license to very severe restraint, and the experience of English history during the last two centuries shows that under the law of libel the amount of latitude conceded to the expression of opinion has in fact differed greatly according to the condition of popular sentiment.

The present position of the English Press is marked by two features: first, "The Liberty of the Press," says Lord Mansfield, "consists in printing without any previous license subject to the conse-

quences of Law." "The Law of England," says Lord Ellenborough "is a Law of Liberty and consistently with this liberty we have not what is called an imprimatur, there is no such preliminary license necessary; but if a man publish a paper he is exposed to the penal consequences, as he is in every other act, if it be illegal."

These dicta show us at once that the so-called Liberty of the Press is a mere application of the general principle that no man is punishable except for a distinct breach of the Law. This principle is radically inconsistent with any scheme of license or censorship, by which a man is hindered from writing or printing anything which he thinks fit and is hard to reconcile even with the right on the part of the courts to restrain the circulation of a libel, until at any rate the publisher has been convicted of publishing it. It is also opposed in spirit to any regulation requiring from the publisher of an intending newspaper a preliminary deposit of a certain sum of money, for the sake either of ensuring that newspapers should be published only by solvent persons or that, if a newspaper should contain libels there shall be a certainty of obtaining damages from the proprietor. Such checks and preventive measures are inconsistent with the pervading principle of English Law, that men are to be interfered with or punished not because they may break the

law, but only when they have committed some definite assignable legal offence.

Secondly, Press offences in so far as the term can be used with reference to English Law are tried and punished only by the ordinary courts of the country, that is by a judge and jury. This has contributed very greatly to free the periodical Press from any control If the criterion whether a publication be libellous is the opinion of the jury, and a man may publish anything which twelve of his countrymen think is not blameable, it is impossible that the Crown or the Ministry should exert any stringent control over writings of the Press, unless the majority of the ordinary citizens are entirely opposed to attacks on the Government The times when persons in power wish to check the excesses of public writers are times at which a large body of opinion or sentiment is hostile to the executive. But under these circumstances, it must from the nature of things be at least an even chance that the jury called upon to find a publisher guilty of printing seditious libels sympathise with the language which the officers of the Crown deem worthy of punishment, and hence may hold censures which are prosecuted as libels to be fair and laudable criticism of official errors.

The Liberty of the Press, then, is in England simply one result of the universal predominance of

the Law of the Land. The terms "liberty of the press," "press offences," "censorship of the press," and the like, are all unknown to English lawyers, simply because any offence which can be committed through the press is some form of libel, and is governed in substance by the ordinary law of defamation.

Now, we may turn to the Indian Law on the subject. The earliest Act is the Press and the Registration of Books Act of 1867. It was expressly enacted for the purpose, among others, of regulating Printing Presses and of periodicals containing news. The most important of the provisions of the Act for our purpose are the following:—No person shall within British India keep in his possession any Press for the printing of books or papers who shall not have made and subscribed a certain declaration before the magistrate within whose local jurisdiction such press may be, namely, that he has a printing Press. Again, no printed periodical work containing public news or comments on public news shall be published in British India except in conformity with certain rules: 1. The Printer and the Publisher of every such periodical work shall appear before the magistrate within whose local jurisdiction such work shall be published and shall make and subscribe in duplicate a declaration that he is the printer of the periodical, etc. 2. As often as

the place of printing or publication is changed a new declaration shall be necessary. 3. As often as the printer or the publisher who shall have made such a declaration shall leave British India, a new declaration from a Printer or Publisher resident within the said territories shall be necessary. The penal clauses of the Act are contained in sections 12-17: the important provisions are as follow: whoever shall print or publish any book or paper without giving particulars about the printer, place of printing etc., shall be punished by fine not exceeding five thousand rupees or by simple imprisonment for a term not exceeding two years, or by both. Whoever shall keep in his possession any Press without making the declaration referred to above shall be punished with the same punishments. This Act required, therefore, that keepers of printing press and publishers of periodicals should conform to certain rules, especially those relating to declarations before magistrates on pain of heavy penalties. This, of course, is inconsistent with the freedom of the Press as it prevails in England. But, in practice, this did not work great harm.

The greatest blow at the freedom of the Indian Press was struck by the Indian Press Act of 1910. The Act took as its basis the Press and Registration of Books Acts referred to above and enacted, among

others, the following important provisions. Keepers of Printing Presses were required to deposit with the Magistrate before whom they made their declaration security to such an amount, not being less than Rs. 500, or more than Rs. 2000, as the magistrate may in each case think fit to require. This provision was made applicable to old presses also at the instance of the Local Government Section 4. of the Act is the most important one, and enacts as follows:—Whenever it appears to the Local Government that any printing press in respect of which any security has been deposited is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations which are likely, or may have a tendency directly or indirectly whether by inference, suggestion, allusion, metaphor, implication, or otherwise (to do various things, the most important of which for our purpose is), to bring into hatred or contempt his majesty or the Government established by Law in British India or the administration of justice in British India, etc, the Local Government may, by notice, declare the security deposited in respect of such Press and all copies of such newspaper, book or other document wherever found to be forfeited to His Majesty. Sections 5 and 6 provide for further penalties where the security given in respect of

one press has been declared forfeited, every person making a fresh declaration in respect of such press shall deposit with the magistrate before whom such declaration is made, security to such amount not being less than one thousand or more than ten thousand rupees as the magistrate may think fit to require. If, after such further security has been deposited the printing press is again used for the purpose of printing any document containing any words, etc., which in the opinion of the Local Government are of the nature described in section 4, the Local Government may, by notice declare the further security so deposited, the Printing Press used and all copies of such documents to be forfeited to His Majesty. Sections 8, 9, 10 and 11 enact more or less the same provisions with regard to publishers of newspapers Secs. 13 and 15 confer upon Customs Officers and Postal Officials powers to detain packages which, they suspect, contain documents of the nature described in section 4; and the Local Government is constituted as the final authority to dispose of all such packages. Sec 14 prohibits the transmission by post of newspapers unless the declaration required by section 5 of the Act of 1867 has been made and the publisher has deposited security when so required under this Act. Section 17 to 21 provide for an application to the High Court to set aside orders of forfeiture: the

ground for such applications is stated to be that the newspaper, book or other document in respect of which the order was made did *not* contain any words, etc. described in section 4. A special Bench of three judges is to hear such applications. And the Special Bench shall set aside the order of forfeiture if it appears to it that the words, etc., contained in the newspaper, etc., in respect of which the order in question was passed were *not* of the nature described in section 4.

Section 26 enacts by way of abundant caution that nothing herein contained shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Act.

This Act has been the subject of judicial construction in two leading cases. The extracts from the leading judgments given as Appendix A will give a clear idea of the nature and scope of the Press Act.

One other statute remains to be noticed in this connection: The Newspapers (Incitements to Offences) Act of 1908 The most important provisions are as follow:—In cases where upon application made by order of, or under authority from the Local Government, a Magistrate is of opinion that a newspaper printed and published within the province contains any incitement to murder or to any offence under the Explosives Substances Act of 1908 or to

any act of violence, such Magistrate may make a conditional order declaring the Printing Press used and all copies of such newspaper forfeited to His Majesty. The Magistrate has powers of attachment and seizure An appeal to the High Court is provided for and the provisions of the Criminal Procedure Code are made applicable to all proceedings under this Act.

It will be obvious that these various restrictions on the keeping of printing presses and the publication of newspapers in India are wholly inconsistent with the freedom of the Press which is characteristic of English Law. I may here quote two scathing indictments of the Act and the way in which it has been worked. Mr. Horniman speaking at the Bombay Congress of 1915, said, "The Press Act is a measure of most extraordinarily drastic provisions, unparalleled, I believe, almost in any civilized country of the world to-day, which was passed to deal with a special state of affairs; and where you have the case of emergency legislation like that it is scandalous that it should be allowed to remain on the Statute Book for a moment more after that special state of affairs has ceased to exist .....I ask any businessman here what it would be to him if it meant as it means to us, that every moment of the day, day after day, week after week, month after month, in exercising his natural right to follow his

calling, he had, hanging over him, a sword of Damocles, not in the shape of a law that would take him to the Courts but in the shape of a law that leaves him at the caprice, at the mercy of the mere opinion of the executive officers – not only that, not for any error that he may commit—perhaps errors that do not fall under the ordinary Criminal law, —not for any error that he may commit, after he has committed it, but that he should pay for his crime, if crime it be before he has committed it..... The executive authority have deliberately belied the undertaking that was given on behalf of the Government of India by the then Law Member of the Council .. . . Sir Herbert Risley after ransacking, after diving and delving among all the repressive measures of the most reactionary countries in Europe, found the chief provisions of this Bill in an enactment which had been passed in Austria by German statesmen in order to muzzle the varied races which those German statesmen in Vienna had to control "

The Hon. Babu Ambica Charan Muzumdar as President of the Lucknow Congress of 1916, was no less emphatic in his condemnation of the Press Act of 1910. He said, " The Press Act of 1910 conceived in a spirit of repression has reduced the Indian Press from its position as an independent critic of the Government to that of an institution entirely

dependent upon sufferance. Within this short period of less than seven years, there had been a regular carnival of Press prosecutions in which newspapers have been suppressed, printing presses confiscated and their securities forfeited to an extent which has bewildered the public and alarmed the journalists. ..... .The liberty of the Indian Press is practically gone and the highest tribunals in the land have declared themselves powerless to protect it. When the Act was passed, the extreme rigour of the measure was admitted But an assurance was given that it would be administered with care and consideration. Whether that assurance has been honoured more in its breach than in its observance may be left to the judgment of the public."

It may be interesting to recall in this connection the views of Lord Morley, the then Secretary of State in sanctioning the Press Act. "We worked hard at your Press Act, and I hope the result has reached you in plenty of time. I dare say it is as sensible in its way as other Press Acts, or as Press Acts can ever be. But nobody will be more ready than you to agree that the forces with which we are contending are far too subtle, deep, and diversified, to be abated by making seditious leading articles expensive. There are important sentences in your official telegram that show how much of the poison is entirely out of our reach. The (veiled innuendo

of which you speak—the talk about Mazzini, Kossuth, etc.,—it is seditious no doubt, and it may point to assassination plainly enough in the minds of excitable readers. But a Lt.-Governor will have to walk warily before putting too strong an interpretation upon the theoretic plausibilities of the newspaper scribe. Neither I nor my Council would have sanctioned it if there had been no appeal in some due form to a Court of Law, and you tell me that you would have had sharp difficulties in your own Council" We have seen what this right of appeal is worth in practice.

We demand that, now that the Press Act has been on the Statute Book for nine years and that it has not only not justified its existence, but has proved an engine of oppression, against which the judiciary are admittedly powerless to give any relief, the government should repeal the Press Act forthwith and rely upon the honesty, patriotism and public spirit of journalists and of keepers of Printing Presses in India. We go further and demand that if the Government in India are anxious to be guided in their actions by genuine public opinion, they ought not to place the Press at the mercy of an unjust and arbitrary measure like the Press Act We ask that the Press should have the same freedom in India as it has in England. In the eloquent words of Mr. Horniman, "We ask

that this Austrian--I was going to say this Hunnish, —excrescence on the Statute Book of British India—shall be removed, and the liberty,—the full liberty,—of the Press in this country restored. Until that is done, it is not only my rights, it is not only our rights—speaking on behalf of the journalists of India—but it is your rights, that are being imperilled, that are being day after day controlled and muzzled by the executive officers. It is a very precious and very vital right that is thus tampered with. It was Milton who wrote 300 years ago, (Give me the liberty to know the Truth and to argue freely according to Conscience above all other liberties.) That liberty, no matter what form of Government we have here,—if the form of Government is less free than it is in England, then, it is all the more important,—no matter what form of Government we possess, that liberty is as essential to our existence as free subjects of His Majesty the King Emperor as it is in any other part of the Empire."

CHAPTER V

THE RIGHT OF PUBLIC MEETING

ENGLISH Law does not recognise any special right of public meeting, either for a political or for any other purpose. The right of assembly is nothing more than the result of the view taken by English Courts of individual liberty of person and individual liberty of speech. As Prof. Dicey says, there is no special law allowing A, B and C to meet together either in the open air or elsewhere for a lawful purpose, but the right of A to go where he pleases so that he does not commit a trespass and to say what he likes to B so that his talk is not libellous or seditious, the right of B to do the like, and the existence of the same rights of C, D, E, and F and so on ad infinitum lead to the consequence that A, B, C, D and a thousand or ten thousand other persons may, as a general rule, meet together in any place where otherwise they each have a right to be for a lawful purpose and in a lawful manner.

This assertion, however, does not mean that it is impossible for persons so to exercise the right of meeting as to break the law. The object of a meeting may be to commit a crime by open force, or in some way or other to break the peace, in which case the meeting itself becomes an unlawful assembly. The mode in which a meeting is held may threaten a breach of the peace on the part of those holding the meeting, and therefore inspire peaceable citizens with reasonable fear; in which case, again, the meeting will be unlawful. In either instance, the meeting may lawfully be broken up, and the members of it expose themselves to all the consequences in the way of arrest, prosecution and punishment which attend the doing of unlawful acts or in other words, the commission of crimes.

But a meeting which is not otherwise illegal does not become an unlawful assembly solely because it will excite violent and unlawful opposition and thus may indirectly lead to a breach of the peace. In the words of an Irish Judge, in R. versus Justices of Londonderry, "The principle seems to me to be that an act innocent in itself done with innocent intent and reasonably incidental to the performance of a duty, to the carrying on of business, to the enjoyment of legitimate recreation, or, generally to the exercise of a legal right, does not become criminal because it may provoke

persons to break the peace, or otherwise to conduct themselves in an illegal way." "If danger arises from the exercise of lawful rights resulting in a breach of the peace, the remedy is the presence of sufficient force to prevent that result, not the legal condemnation of those who exercise those rights."

The principle, then, that a meeting otherwise in every respect lawful and peaceable is not rendered unlawful merely by the possible or probable misconduct of wrong-doers who to prevent the meeting are determined to break the peace, is established, whence it follows that, in general, an otherwise lawful public meeting cannot be forbidden or broken up by the magistrates simply because the meeting may probably or naturally lead to a breach of the peace on the part of wrong-doers

According to Prof Dicey, there exist the following limitations or exceptions to the application of this principle.

1 If there is anything unlawful in the conduct of the persons convening or addressing a meeting, and the illegality is of a kind which naturally provokes opponents to a breach of the peace, the speakers at, and the members of, the meeting may be held to cause the breach of the peace, and the meeting itself may thus become an unlawful meeting.

2. Where a public meeting, though the object of the meeting and the conduct of the members are strictly lawful, provokes a breach of the peace, and it is impossible to preserve or restore the peace by any other means than by dispersing the meeting, then Magistrates, Constables and other persons in authority may call upon the meeting to disperse, and if the meeting does not disperse it becomes an unlawful assembly The limitations or restrictions which arise from the paramount necessity for preserving the King's peace are in reality nothing else than restraint which for the sake of preserving the peace are imposed upon the ordinary freedom of individuals.

No public meeting which would not otherwise be illegal, becomes so in consequence of any proclamation or notice by a Secretary of State, by a magistrate or by any other official It follows that the government has little or no power of preventing meetings which to all appearances are lawful even though they may in fact turn out, when actually convened, to be unlawful because of the mode in which they are conducted This is certainly a singular instance of the way in which adherence to the principle that the proper function of the state is the punishment not the prevention of crimes deprives the executive of discretionary authority. Prof. Dicey with justifiable pride sums up the

matter thus, "Of the policy or of the impolicy of denying to the highest authority in the state very wide power to take in their discretion precautionary measures against the evils which may flow from the injudicious exercise of legal rights it is unnecessary here to say anything. The matter which is worth notice is the way in which the rules as to the right of public meeting illustrate both the legal spirit of our institutions and the process by which the decisions of the courts as to the rights of individuals have in effect made the right of public meeting a part of the law of the constitution"

In India for a long time there was no special law governing public meetings as such But in 1907, the Government of India passed a measure whose purpose is evident from its title 'An Act to make better provision for the prevention of public meetings likely to promote sedition or to cause a disturbance of public tranquillity' The most important provisions of the Act are as follow.— The Act is to have operation in such provinces as the Governor-General in Council may from time to time notify. The definition of Public Meeting in sec. 3. is very wide. The clause enacts:—1. Public Meeting means a meeting which is open to the public or to any class or portion of the public. 2 A meeting may be a public meeting, notwithstanding that it is held in a private place

and notwithstanding that admission thereto may have been restricted by tickets or otherwise. 3. A meeting of more than 20 persons shall be presumed to be a public meeting within the meaning of this Act until the contrary is proved. Sec. 4 enacts that no public meeting for the furtherance or discussion of any subject likely to cause disturbance or public excitement or of any political subject etc., shall be held in any proclaimed area unless written notice is given to the police or their permission is previously obtained. Sec. 5 empowers the District Magistrate or the Commissioner of Police to prohibit any public meeting in a proclaimed area if in his opinion such meeting is likely to provoke sedition or disaffection or to cause disturbance of the public tranquillity Sec. 6 and 7 contain penal clauses Sec. 7 enacts that whoever, in a proclaimed area and except in accordance with the provisions of Sec. 4 and without the permission of the Magistrate or the Commissioner delivers in any public place a lecture etc., likely to cause disturbance or public excitement or on any political subject to persons then present may be arrested without warrant and shall be punished with imprisonment for a term which may extend to six months, or with fine or with both. Sec. 9 enacts that this Act shall continue in force until the expiration of three years next after the passing thereof. However, it has not been

expressly repealed. And it is doubtful whether the Act still continues in force. But it may be taken as a fair specimen of the powers which the Executive Government in India are anxious to possess.

There are, however, provisions in the Criminal Procedure Code and in the various Police Acts of the country purporting to act under which, officials in the exercise of their executive authority restrain in various ways, if not actually prohibit, the exercise of the right of public meeting. Our demand is that as in England, so in this country, in this as in all other allied matters, the executive should have power only to punish crimes and not to take steps which in their opinion will tend to prevent crimes. This rests on the well-known principle of law that the liberty of the subject should not be interfered with by the State, except when he has actually broken the law. We demand the right to meet, wherever and whenever we choose and discuss any subject, provided, the meeting is not an unlawful assembly as defined above

Closely connected with this right of public meeting is the question of the powers and the limitations thereon, possessed by the State to prevent or disperse unlawful assemblies. In other words, what are the limitations under which the State can use martial law, and under what circumstances, so far as internal affairs are concerned ?

Confining ourselves, then, to the use of martial law, only to suppress unlawful assemblies or riots, we may notice the following statement of the law by Lord Justice Bowen, as containing the most accurate definition of the principles governing the matter.

Officers and soldiers are under no special privileges and subject to no special responsibilities as regards this principle of the law. A soldier for the purpose of establishing civil order is only a citizen armed in a particular manner. He cannot, because he is a soldier, excuse himself if without necessity he takes human life The duty of Magistrates and police officers to summon or to abstain from summoning the assistance of the military depends in the main on the necessities of the case A soldier can only act by using his arms. The weapons he carries are deadly. They cannot be employed at all without danger to life and limb, and in these days of improved rifles and perfected ammunition, without some risk of injuring distant and possibly innocent bystanders. To call for assistance against rioters from those who can only interpose under such grave conditions ought, of course, to be the last expedient of the civil authorities. But when the call for help is made, and a necessity for assistance from the military has arisen, to refuse such assistance is in law a misdemeanour... a....

The question whether, on any occasion, the moment has come for firing upon a mob of rioters, depends, as we have said on the necessities of the case. Such firing, to be lawful, must in the case of a riot like the present, be necessary to stop or prevent such serious and violent crime as we have alluded to; and it must be conducted without recklessness or negligence. When the need is clear, the soldiers, duty is to fire with all reasonable caution so as to produce no further injury than what is absolutely wanted for the purpose of protecting person and property. An order from the Magistrate who is present is required by military regulations, and wisdom and discretion are entirely in favour of the observance of such a practice But the order of the magistrate has at law no legal effect. Its presence does not justify the firing if the magistrate is wrong Its absence does not excuse the officer for declining to fire when the necessity exists.

With the above doctrines of English law, the Riot Act does not interfere. Its effect is only to make the failure of a crowd to disperse for a whole hour after the proclamation has been read a felony, and on this ground to afford a statutory justification for dispersing a felonious assemblage, even at the risk of taking life. In the case of the Ackton HallColliery, an hour had not elapsed after what is popularly called the reading of the Riot Act before the military

fired. No justification of their firing can therefore be rested on the provisions of the Riot Act itself, the further consideration of which may indeed be here dismissed from the case. But the fact that an hour had not expired since its reading did not incapacitate the troops from acting when outrage had to be prevented. All their common law duty as citizens and soldiers remained in full force. The jurisdiction of Captain Barker and his men must stand or fall entirely by the common law. Was what they did necessary, and no more than was necessary, to put a stop to or prevent a felonous crime? In doing it, did they exercise all ordinary skill and caution, so as to do no more harm than could be reasonably avoided?

In India too, theoretically, approximately similar rules are made to govern the use of armed force to disperse unlawful assemblies and to suppress riots. But we know from the recent instances of shooting on the crowd in Calcutta, Madura, Ahmedabad, Punjab, Delhi, Amritsar, Lahore and other places that these rules are not always strictly followed. The remedy for this lies as much with the people as with the Government. The injured people must bring all exercises of arbitrary powers by the police or by the executive before the courts of the law in the land, who may be trusted to uphold the rights of the subjects. It must not be forgotten, however, that in

a subject country like India, where there are no popular representative and responsible legislatures, and the Executive are given various statutory exemptions the Government must take scrupulous care to see that their subordinates do not transgress the well-known limitations on the exercise of such extraordinary powers.

CHAPTER VI

FREEDOM TO BEAR ARMS, AND TO SERVE IN THE ARMY AND THE NAVY

WHILE all the civilized world over, ideas in favour of a League of Nations and disarmament and universal peace are being talked of, it may seem strange that in India alone we should be talking of freedom to bear arms and to serve in the army and the navy. There are, however, two reasons why we should. Thanks to a mistaken policy which has held the ground in this country for a long time, the Indians, with certain exceptions called martial races, have been emasculated so much so that the strongest argument urged by those who oppose the grant of responsible government to India is the helplessness of the people of this country against foreign aggression or internal disturbance. Only, these critics forget that the absence of responsible Government in this country is responsible for this state of things and that the best remedy for the same is making the Government responsible to the people, who will then

insist on the Government making it possible for them to defend their country and their homes. Therefore, whatever other advanced nations may or may not do, India must equip herself fully in military and naval matters, before she can afford to talk about universal disarmament.

The second reason is that those nations who talk loudest of the League of Nations are not setting any other example to India. For America has budgeted for the second largest Navy in the world. Hence it is clear that India must make up for lost time and equip herself thoroughly if she is to be treated as a self-respecting nation

Let us now examine the present position in India in such matters As the Hon. Mr M. Ramachandra Rao points out in his book on Indian Polity, "Since the Indian Mutiny in 1857, the military policy of the Government of India had been actuated by a distrust of the people, and every step taken was therefore, in the direction of reducing the military efficiency of the people. On the eve of the Indian Mutiny the Indian troops in India outnumbered the Europeans by nearly 8 to 1. The present proportion is two to one. Many other important changes were also introduced tending in the direction of increasing the military efficiency of the European forces. One of the changes was that the field and other artillery should be exclusively or almost exclusively

manned by Europeans. The two great principles observed since the Mutiny were the retention in the country of a large force of British troops and keeping the artillery in the hands of the Europeans. The organisation and recruitment of the Indian army were also completely changed in various ways.

. . . . . .

The Government pursued a rigorous policy of excluding Indians from all chances of military training. The admission of Indians to the Volunteer Corps was refused. And the Indian Arms Act was worked so rigidly in all parts of the country that the people have been deprived of the means of defending themselves against dacoits, robbers and wild animals."

No more scathing indictment of the present system has been uttered than by Lord (then Sir Satyendra) Sinha of Raipur, Under-Secretary of State for India in his Presidential address at the Bombay Congress of 1915. He said, "There can be, I venture to think, no true sense of citizenship where there is no sense of responsibility for the defence of one's own country. If there is trouble, others will quiet it down. If there is riot, others will subdue it. If there is a danger, others will face it. If our country is in peril, others will defend it. When a people feel like this, it indicates that they have got to a stage when all sense of civic res-

ponsibility has been crushed out of them, and the system which is responsible for this feeling is inconsistent with the self-respect of normal human beings.....I feel, and I feel strongly that hitherto the Government has not only ignored but has put positive obstacles in the way of the people acquiring or retaining a spirit of national self-help in this, the most essential respect.

"For what is the present condition of things? Except certain war-like races like the Sikhs and Rajputs, the people generally are debarred from receiving any kind of military training. Not only are they not allowed enlistment in the ranks of His Majesty's Army, but they are even precluded from joining any volunteer corps. Even with regard to the classes of men—Sikhs and Rajputs, Gurkhas and Pathans, etc,—who are taken into the regular army for the simple reason that the number of English troops is not in itself sufficient to maintain peace and order in this country—even with reference to these classes it is an inflexible rule that though they may now obtain the highest badge of valour, *viz.*, the Victoria Cross, not one of them can receive a commission in His Majesty's Army irrespective of birth or bravery, education or efficiency.

"While the humblest European and Eurasian and even the West Indian Negro have the right to carry

arms, the law of the land denies even to the most law-abiding and respectable Indian the privilege of possessing or carrying arms of any description except as a matter of special concession and indulgence, often depending on the whim and caprice of unsympathetic officials.

"To my mind the mere statement of the present system ought to be sufficient to secure its condemnation."

Another equally scathing indictment is provided by Babu Ambica Charan Muzumdar in his speech at the Lucknow Congress of 1916: "No people can be either self-respecting or respected by others unless they are able to defend themselves. A people always dependent upon Government for the safety of their lives and property must be an intolerable burden on the State and a source of weakness to it. A vast empire like British India without a national army protected by a nominal force of 70,000 European soldiers and 140,000 Indian troops may be a wonderful feat. But it is a most dangerous experiment."

Our demands may be succinctly stated in these words. 1. We ask for the right to enlist in the Regular Army irrespective of race or province of origin, but subject only to prescribed tests of physical fitness. 2. We ask that the commissioned ranks of the Indian Army should be thrown open to all classes

of His Majesty's subjects subject to fair, reasonable and adequate physical and educational tests. 3. We ask that a military college or colleges should be established in India where proper military training can be had. 4. We ask that all classes of His Majesty's subjects should be allowed to join as volunteers subject to such rules and regulations as will ensure proper control and discipline. 5. We ask that the invidious distinctions under the Arms Act shall be removed.

The strongest objection against the right to join the ranks irrespective of race or province of origin is this —The country can afford to keep as a standing army only a certain number of trained soldiers and officers and it must get the best it can for the money it spends; and if certain races are unfit by reason of inherent want of courage for the profession of arms, the state would naturally select its soldiers from other classes. This objection has been answered in a masterly manner by Lord Sinha in the following words :—"Taking it at its full strength, this argument has its limitation. For you cannot govern a state, on exactly the same principles as you manage a shop. You may get better value for your money by getting as your soldier, an Afridi or a Pathan, or any non-British subject, but by excluding the Parsi, or the Madrasi, or the Bengali, you create a feeling of grievance, if not of actual

resentment, which is certain to cause serious embarassment in the work of general administration. You render it impossible for the excluded classes to consider themselves *equal* subjects and citizens responsible for the defence of the country, and you fail to foster that spirit of self-help and that sense of self-respect among those very classes which is essential to attain the goal of Imperial unity."

"I take leave to point out, that it is not correct, at any rate at the present time to assert of any sections of the Indian people that they are wanting in such physical courage, and manly virtues, as to render them incapable of bearing arms But even if it were so, is it not the obvious duty of England so to train them as to remove this incapacity, as they are trying to remove so many others, especially if it be the case, as there is some reason to believe it is, that it is English rule which has brought them to such a pass? England has ruled this country for considerably over 150 years now, and surely it cannot be a matter of pride to her that at the end of this period, the withdrawal of her rule would mean chaos and anarchy and would leave the country an easy prey to any foreign adventurers. There are some of our critics who never fail to remind us that, if the English were to leave the country to-day, we would have to wire to them to come back, before they got as far as Aden. Some

even enjoy the grim joke that, were the English to withdraw now, there would be neither a rupee nor a virgin left in some parts of the country. For my part, I can conceive of no more scathing indictment of the results of British rule. A superman might gloat over the spectacle of the conquest of might over justice and over righteousness, but I am much mistaken if the British nation fighting now as ever for the cause of justice and freedom and liberty, will consider it as other than discreditable to itself in the highest degree that, after nearly two centuries of British rule, India has been brought to-day to the same emasculated condition, as the Britons were in the beginning of the 5th century, when the Roman legions left the English shores in order to defend their own country against the Huns, Goths, and other barbarian hordes "

Again, the resources for defence which India possesses even now do add to the strength of England, as has been so amply proved in the present war. The distinguished and invaluable services rendered by Indian soldiers during this war in the various theatres of war in which they were called to fight have been warmly acknowledged by British statesmen and soldiers and by the British Press. The following quotations will convince even the most sceptical that India's contribution to the winning of

this war by the Allies has been no mean one, and would easily have been much greater, had Great Britain followed in India a policy of courage, wisdom, and statesmanship.

"His Majesty the King-Emperor in a gracious message to the Indian troops at the front said, "British and Indian comrades-in-arms, yours has been a fellowship in toils and hardships, in courage and endurance, often against great odds, in deeds nobly done in days of ever-memorable conflict. In a warfare waged under new conditions, and in peculiarly trying circumstances, you have worthily upheld the honour of the Empire, and the great traditions of my Army in India..... .you leave France with a just pride in honourable deeds already achieved, and with my assured confidence that your proud valour and experience will contribute to further victories in the new fields of action to which you go." The sequel has shown that His Majesty's confidence was well placed.

The Right Hon. Mr. Asquith said, "When we look at the actual achievements of the force so spontaneously despatched, so liberally provided for, so magnificently equipped, the battlefields of France and Flanders bear an undying tribute to their bravery." Sir Francis Younghusband wrote, "Just at the moment when our line, thin to breaking point, had to hold back the incessant and terrific

onslaught of the Germans, this contingent of troops from India came upon the scene, and, in their first serious action, on October 28, carried the village of Neuve Chapelle, since become so famous. That Indians were able to help the French, the Belgians, and ourselves in stopping a blow which the Germans had prepared for years, is a thing of which they may be proud, and for which we should always be grateful to them." Referring to the part played by the Indian troops in 1914 and 1915, Mr. Winston Churchill said "They held positions for the holding of which no other resources were available at the time in the allied armies in the West. They fought with the utmost heroism and effect. They acquitted themselves admirably both in defence and in attack again and again and yet again, against an enemy." And, at the close of the War, His Excellency the Viceroy paid a well-deserved and warm tribute to the magnificent and decisive part played by the Indian troops at the opening and closing stages of the War.

With the example of all this achievement behind their back, it is to be hoped that Indians will have their military demands fully conceded, alike in the interests of India and of the Empire No doubt, at the back of the minds of jingoistic Imperialists, there may still linger the idea that a militarily strong India may turn against England. But the services

of India to the Empire in this war ought to set at rest all such unworthy suspicions. Assuming that there is some such possibility in the remote future, that can be no reason why a whole nation of 315 millions should continue to be emasculated. For, "in asking for the right of military training, we are seeking to regain our lost self-respect, and to strengthen our sense of civic responsibility. We are seeking to retain the right to defend our hearths and homes against possible invaders, should the strong protecting arm of England be ever withdrawn from our country It is no mere sentiment that compels us to demand this inalienable right of all human beings, though sentiment has its undoubted place in the scheme of every government. Some day or other, our right arm may be called upon to defend all that man holds most precious. For who will venture to prophesy that, sooner or later, there may not be another such conflict as is now convulsing the world, when there may be new alliances and fresh combinations, and when England may not have the same allies and advantages as she has now?"

In this connection, it may be noticed that H E. the Viceroy announced the other day that the Regulations under the Arms Act are to be amended so as to abolish all racial distinctions and to make the issue of licenses easier. A few commis-

sions have also been thrown open to the Indians. But these temporary and inadequate remedies betray the mind cowardly. It is to be hoped that this will give place to a bold and courageous policy, by which Indians may be made to realise that they are the free citizens of an Empire and have the right and the duty to defend their country and their Empire not as mercenaries but in the discharge of their civic and imperial obligation.

" The opening of a military career will fire the imagination and stimulate the virility of India in a way that nothing else can do. And is it too much for India to expect to be treated in the same way as Russia treats her subject races—especially after the proof she has given of the prowess of her sons, and their devotion and their loyalty to the Imperial standard ?"

" Reason and convenience, justice and necessity, all support every one of the claims I have ventured to put forward ; and if a definite advance is not made in those respects, it will be difficult to believe that the war has changed the angle of vision of our rulers. It will be impossible to retain faith in what was proclaimed by the late Premier Mr. Asquith " that the Empire rests not upon the predominance, artificial and superficial, of race or class, but upon the loyal affection of free communities built upon the basis of equal rights

Is it too much to hope that this passionate appeal of Lord Sinha will find adequate response in the heart of the powers that be ?

CHAPTER VII

FREEDOM TO ENTER THE PUBLIC SERVICES

IN every civilised country it is acknowledged as beyond question that the public services should be manned by the children of the soil and that foreigners should be imported only in cases of imperious necessity. But in India alone we have the unnatural spectacle of the foreigner monopolising the plums of the service and the children of the soil anxiously waiting for a few crumbs.

If Great Britain had not committed herself to the application of the natural doctrine of the unrestricted employment of Indians in the Public Service, the disappointment may not be as keen as it is. But since at least 1833 distinct and solemn undertakings have been given which have not yet passed beyond the stage of undertakings. The Statute of 1833 lays down that "no native of India nor any natural-born subject of His Majesty resident therein shall by reason only of his religion, place of birth descent, colour or any of them be disabled from holding any place, office or employment under the

said Company." In the despatch of 1834 the Court of Directors explained that " whatever other tests of qualification might be adopted, distinctions of race or religion should not be of the number," and in another part of the same document after protesting against the presumption on which the authorities in India used to act, namely, that the average amount of native qualifications could only rise to a certain limit, they addressed them in these earnest words, " To this rule it may be necessary that you should both in your acts and your language conform." In fact, their instructions required the Government of India to admit natives of India to places of trust as freely and extensively as their individual aptitudes justify. Then they proceed to suggest practical measures by which this policy could be fully carried out. " In every view, it is important that the indigenous people of India, or those among them who by their habits, character or position may be induced to aspire to office should as far as possible be qualified to meet the European competitors. Hence there arises a powerful argument for the promotion of every design tending to the improvement of the natives whether by conferring on them the advantages of education or by diffusing among them the treasures of science, knowledge and moral culture."

The words of the famous Proclamation of Queen

Victoria of 1858 are equally clear and forcible. "And it is our further will that so far as may be, Our subjects of whatever race or creed be freely and impartially admitted to offices in our service the duties of which they may be qualified by their education, ability and integrity duly to discharge." King Edward VII's Proclamation of 1908 after endorsing the general policy enunciated in the Proclamation of 1858, and stating that steps are being taken to give effect to it, adds, "Important classes among you representing ideas that have been fostered and encouraged by British rule claim equality of citizenships and a greater share in the legislation and government The political satisfaction of such a claim will strengthen, and not impair, existing authority and power."

Facts are more eloquent than comments: facts are more eloquent than promises. and as to the way in which performance has lagged behind promise in this matter, let the facts speak for themselves. It will appear from the Report of the Public Services Commission of 1912 that out of the 11064 on Rs. 200 a month and upwards, only 42 per cent. was held by Indians and Burmans of pure Asiatic descent on the 1st April, 1913. Then as we ascend higher up in the scale the position grows much worse. Out of 4894 posts carrying salaries of Rs. 500 a month and upwards, only 19 per cent were filled by them as

against 81 per cent. occupied by Europeans or Anglo-Indians. When we reach the salaries of Rs. 800 a month and upwards, which to a large extent indicate the level of higher appointments of supervision and control only 10 per cent. was held by Indians as against 90 per cent filled by Europeans and Anglo-Indians. Reference is made in that report to the progress made in this respect from 1887 to 1913. In the region of appointments carrying salaries of Rs 200 and upwards the percentage has arisen from 34 to 42 since 1887, and in appointments of Rs. 500 and upwards from 12 to 19 per cent and in those carrying a pay of Rs. 800 and upwards, from 4 to 10 per cent. Well may Mr Justice Abdur Rahim exclaim, "This, during the space of a quarter of a century!"

What Dadhabhai Naoroji wrote in 1880 still remains practically true: "The thousands that are being sent out by the Universities every year find themselves in a most anomalous position There is no place for them in their Motherland. They may beg in the streets or break stones on the roads for ought the rulers seem to care for their natural rights, position and duties in their own country. They may perish or do what they like or can, but scores of Europeans must go from this country to take up what belongs to them, and that in spite of every profession, for year and years past, and up to

the present day, of English statesmen that they must govern India for India's good by solemn Acts and Declarations of Parliament, and, above all, by the words of the august Sovereign himself. For all practical purposes all these high promises have been hitherto almost wholly the purest romance, the reality being quite different."

Every patriotic and thinking Indian will therefore find himself in complete agreement with Mr. Justice Abdur Rahim when he says, "The points of view from which the majority of the Commissioners and myself have approached the question of employment of Indians are substantially different The question they have asked themselves is, what are the means to be adopted for extending the employment of Indians? But the proper standpoint, which alone in my opinion furnishes a satisfactory basis to work upon, is that the importation of officials from Europe should be limited to cases of clear necessity, and the question therefore to be asked is, in which services and to what extent should appointments be made from England. The suggestion involved in the majority's point of view is that special measures are necessary for finding employment for Indians in the administration, and that the practical question, therefore, is how many or how few posts are to be handed over to them. On the other hand the view which, upon a review of the

situation has forced itself on my conviction is that if Indians have not established a footing in the higher rank of administration, it is not through their own fault; it is due to barriers of many sorts that have been raised in their way. It will be sufficient if the disabilities be removed and the doctrine of equal opportunity and fair dealing be established as a practical measure."

It may be as well to state here and examine the validity of the more important objections which are usually urged against the larger employment of Indians in the higher services of the country The first objection is unblushingly stated to be that Indians by their character and traditions are unfitted for the appointments which require energy, initiative and driving power This argument is not worth answering for it is so palpably absurd. But since it is so often urged in one form or in another, let Mr. Justice Abdur Rahim answer —As for the allegation that the Indians are wanting in initiative, driving power, resources and the faculty of control so far as it depends upon a priori assumptions, it could not affect our deliberations. There are facts from which a clear inference can be drawn, the reverse of the allegation. Looking back to past history, India until the disruption of the Moghul Empire always produced men of high administrative talents and at the present day in the more

advanced native states wherever opportunity exists Indians are successfully bearing the burden of the entire administration. Some of them achieved notable distinction such as Sir Salar Jung, and Sir T. Madhava Rao. In professions where success is dominated by free competition and the value of work accomplished is judged under conditions different from what prevails in an Indian official department the merits of the Indian's work cannot be gainsaid.

In the higher services, the number of Indians has been so few that they cannot be said to have been given anything like opportunity for competing in this respect with Europeans As Sir M B. Chaubal says, " At present, the Indians are far and few and every Indian officer whether high or low feels that he is not serving himself or his country but is an individual hired to labour for somebody else He can rarely put his whole heart into the work because he is always conscious of the presence of his task-master and never works but with his eyes upon his superior officer and always thinking of what he will say of the work turned out by him." Even under these distressing and difficult conditions Indians in the services have acquitted themselves so well that only ignorance or prejudice can deny the justice of their employment in very much larger proportions.

The majority of the Public Services Commission

of 1912 unctuously state, "How far the western educated classes reflect the views or represent the interests of the many scores of millions in India are still untouched by western influences is a question upon which opinions differ." Again, let Mr. Justice Abdur Rahim answer: With the educated Indians the knowledge of the people is instinctive and the ties of religion and custom so strong in the East, inevitably make their knowledge and sympathy far more intimate than is to be seen in countries dominated by materialistic conceptions. It is from a wrong and deceptive perspective that we are asked to look at the system of castes among the Hindus more as a dividing force than as a powerful binding factor; and the unifying spirit of Islam so far as it affects the Mohamedans does not stand in need of being explained, while in all communities the new national movement has received considerable accession of impulse from the lessons of such arguments as are hinted at in the Majority Report The representatives of the Sikh Khalsa and the Pathans of the Punjab, the Muslim League along with the spokesmen of the communities more advanced in western education were unanimous in entering their emphatic protest against the suggestion that the presence of Indians in the higher official ranks would be distasteful to the people themselves, and specially in a

province or a community other than that of the Indian official.

Sir M. B. Chaubal is even more impatient of this kind of criticism, "This is rather a shallow pretence —this attempt to take shelter behind the masses: and I think it only fair to state that the class of educated Indians from which only the higher posts can be filled is singularly free from this narrow-mindedness and class or caste bias, for example no instances of complaint on this score as against any of the Indian members of the Indian Civil Service would be available, and I have no hesitation in endorsing the opinion of Sir Narayan Chandavarkar, in his recent contribution on Village life in his Tour to Southern India, that the interests of the masses are likely to be far better understood and taken care of by the educated Indian than by the foreigner. As a matter of fact, all the measures proposed for the regeneration of the lower and depressed classes have emanated from the educated Indians of the higher castes" The third argument against the larger employment of Indians is even more strange, namely, that the European officials understand the wishes of the masses and are likely to protect their interests better than the educated classes. "As for the representation of their (masses) interests, if the claim be that they are better represented by European officials than by educated Indian officials

or non-officials, it is difficult to conceive how such a reckless claim has come to be urged The inability of English officials to master the spoken languages of India and their different religions, habits of life and modes of thought so completely divide them from the general Indian population that only an extremely limited few possessed with extraordinary powers of intuitional insight have ever been able to surmount the barriers . . ..Such knowledge of the people and of the classical literatures as passes current among the European officials is compiled almost entirely from the data furnished to them by the Western educated Indians, and the idea of the European officials having to deal with the people of India without the medium of the Western educated Indian is too wild for serious contemplation. It should be no exaggeration to say that without their co-operation the administration could not be carried on for a single day." This is Mr Justice Abdur Rahim's answer.

Sir Sankaran Nair is equally emphatic "To begin with, an English official knows very little of real India the conditions of his Indian life make him an unfit judge of Indian character. He comes to India from the sea, generally with his character formed, flits from district to district, from province to province, neither seeks to be nor is admitted into any Indian home circle ; does not admit into his own

home the Indian, who, however, it must be said, does not seek that privilege: acquires some knowledge of the criminal and menial classes: quits India after he has earned his pension." And he quotes the Pioneer of 1905 as saying, 'that the Englishmen who has spent years in the country and who has become a comparative master of its dialects is not more but less in touch with the thoughts of the people than the comparative stranger.'

After having disposed of these objections, one may well proceed to state the various grounds on which the Public Services of this country ought to be manned only by Indians subject to very limited exceptions—Justice, expediency, economy, efficiency, political contentment, and the fulfilment to the plighted words, all these alike demand that the present unnatural system should be abolished, and recruitment to the services should be made only in India and that his Majesty's subjects other than Indians who wish to enter the services must be allowed to compete with Indians on no favourable terms, but only on equal terms.

Justice demands that the children of the soil should have an adequate share in the Public Services of their own country. The careers open to an educated Indian are grievously limited. Again expediency demands this. If the Government of

India is here not merely to keep peace and order which is as necessary for its own existence as for the well-being of the people, but as it claims, is here to uplift the general level of the people in their material, intellectual and moral conditions, to spread modern science and culture and to develop the instincts of enlightened citizenship affording at the same time ample and growing opportunities to qualified Indians to manage the affairs of their own country, the time seems to be ripe when a much freer and larger admission of Indians into the higher regions of administration has become necessary if there is to be harmony between the Government and the reawakened life of India

Economy and efficiency alike also demand that very soon Europeans ought to be replaced by Indians in the services. In a poor country like India with its resources undeveloped and the humanising departments of Government kept starving, it is wholly unjustifiable to have the scale of salaries for the services which at present obtains. If this country is to make up for lost time and to be helped to take her place abreast of the modern progressive nations it ought to be made a rule that no public office should carry a salary of more than Rs. 1,200 a year. If at that rate of pay we cannot get the right type of the European official we may well do without him and Indians ought to be content

with that maximum salary. On the question of efficiency, there can be no doubt that other things being equal, an Indian is at least as fitted as an Englishmen to hold public office in India. On this part of the question Mr Justice Abdur Rahim's comment is so apposite that it may be quoted here in full. "I would also point out the obvious fact that an English official is at best a bird of passage in India, his ties and cherished associations lie outside the country, he stands in need of frequent and prolonged absences from his work leading to constant shiftings of official arrangements, his knowledge of the people, their wants and aspirations must always be more or less limited, and when he retires at the age varying between 40 and 55 all his training and ripe experience are entirely lost to the country. He is expensive to train, expensive to employ—two men, roughly speaking, being required to do one man's work and is a dead loss to the country when he retires. Even supposing that he initially brings to his work some superior qualifications, still the balance of advantage must in the nature of things be heavily on the side of the Indian official. Further an efficient Indian administrator has a value to the country far greater than is to be measured by the actual output of his daily routine work. He becomes a centre of further growth."

No doubt the mere filling up of higher offices with

Indians will not fulfil the political aspirations of Indians. But it is dishonest to argue from that basis that the question of the employment of Indians has lost its political importance As the late Mr. Gokhale pointed out, "This question of appointment to high office is to us something more than a mere question of careers. When all the positions of power and of official trust and responsibility are the virtual monopoly of a class, those who are outside that class are constantly weighed down with a sense of their own inferior position, and the tallest of them have no option but to bend in order that the exigencies of the situation may be satisfied Such a state of things, as a temporary arrangement, may be accepted as inevitable As a permanent arrangement, it is impossible This question thus is to us a question of national prestige and self-respect, and we feel that our future growth is bound up with a proper solution of it" The last and most important reason is the fulfilment of the plighted words of royal sovereigns and Imperial Parliament.

Viewed from these standpoints, the recommendations of the last Public Services Commission as also of Mr. Montagu and Lord Chelmsford in their Report have become out of date Indeed, no recommendations can adequately meet the demands of the situation unless the principle is clearly perceived and boldly acted on, that the Indian Services should

be reserved primarily for Indians, and that the importation of foreigners should be limited to cases of clear necessity, which, however, ought to be zealously examined and gradually reduced to the vanishing point.

While such is the demand of India it is regrettable that attempts should have been made to advance extravagant and untenable claims on behalf of the Public Services, especially, of the Indian Civil Service.

The first claim is that owing to various reasons the pay and emoluments of the services should be increased so as to attract the best British talent. Reference has already been made to the fact that a poor country like India cannot afford to pay the extraordinarily high salaries which are now sought to be made even higher. But the Public Services Commission of 1912 has recommended generally increases of pay to all the services, which are wholly unjustifiable. Mr. Justice Abdur Rahim has adversely commented upon this recommendation. He says, "I have already shown that the Indian Civil Servant receives a salary far in excess of any other class of officers of similar qualifications either in India or Great Britain or the colonies that there can be no good ground for complaint. For junior officers the majority have proposed a scale which

entails an increased cost of Rs. 3 lakhs a year..... No attempt is made to show in any way that they are not receiving the emoluments which they are entitled to expect according to the terms of the service. In paragraph 36 of the report it is alleged that nothing less than the terms proposed will suffice to 're-establish the attractiveness of this service,' but apparently it is overlooked that in paragraph 5 they found that 'taken as a whole the personal now recruited has not in any way deteriorated, and that India has been obtaining men who are keeping up the high level and the best traditions of the service.' It is difficult to reconcile the two findings. If the latter conclusion is correct then the fact that some recruits have preferred the Home Service can be of no concern to India. . . . . In paragraph 34 of annexure 10 to the Majority Report . . . . . extra expenditure is proposed of nearly 4½ lakhs. I have been unable to appreciate the necessity for this increase and I do not think it ought to be incurred .." There can be no doubt that retrenchment should be the first plank in the platform of any Government in this country.

The second extravagant claim is that the service as such, especially the Indian Civil Service have got certain interests which ought to be protected. The unnatural system in this country under which the permanent services are practically one has led to

this claim being advanced. The Montagu-Chelmsford Report first encouraged these ideas. In paragraph 324 it says, "On more than one occasion we have declared to protect the interests of the services if necessary..... .our purpose is that any public servant, whatever the government under which he is employed shall be properly supported and protected in the legitimate exercise of his functions; and that any rights and privileges guaranteed or implied in the conditions of his appointment shall be secured to him." This weak-kneed and wholly gratuitous surrender to the claims of the Civil Service has encouraged them to openly raise the standard of revolt against any reform of the existing administration which will affect their position, pay or prestige directly or indirectly. And an obliging Viceroy has thought it fit to assure them that their position will be secure for all time. Without entering into the merits of the opposition of some of the members of the Indian Civil Service to the Montagu-Chelmsford Reforms it must be obvious to the meanest intelligence that under any system of Government the permanent service should have no part or lot in the initiation, direction and ultimate control of the principles and policy. Their function must be strictly confined to the carrying out of order as it is in other countries. That is why Indian reformers have asked that the Indian Civil Servant ought not

to be allowed to become a member of the Government of India or the Provincial Governments.

As for the claim on behalf of the interests of the services, Mr. Gandhi has once for all answered it, "One cannot help noticing an unfortunate suspicion of our intention regarding the purely British as distinguished from the purely Indian interests. Hence there is to be seen in the scheme elaborate reservations on behalf of these interests. I think that more than anything else it is necessary to have an honest, frank and straightforward understanding about these interests and for me personally this is of much greater importance than any legislative feat that British talent alone or a combination of British and Indian talent may be capable of performing. I would certainly in as courteous terms as possible but equally emphatically say that these interests will be held subservient to those of India as a whole and that therefore they are certainly in jeopardy in so far as they may be inconsistent with the general advance of India .. ..I would reduce to a minimum the British element in our services, retaining only those that may be needed for our instruction and guidance. I do not think that they had or have any claim upon our attention save by right of conquest. That claim must clearly go by the board as soon as we have awakened to a consciousness of our national existence and possess

the strength to vindicate our right to the restoration of what we have lost."

Another extravagant claim made with respect to the services is that in some of them the British element should be so large as to retain what is called the British character of the administration. This is the most reactionary recommendation of the last Public Services Commission, and wholly at variance with previous Charters and Proclamations. It is not clear what is meant by the phrase,'British character of the administration' If it is meant that the administration is carried on according to British ideals, namely that the public servant is the servant and not the master of the public, facts tell a different tale. Or, if it is meant that the administration is carried on largely by British officials, this is only formally true for in practice the administration is carried on only by Indians. There can be no doubt therefore, this is merely a piece of camaflouge to cover up the unabashed claim for the retention of as many Britishers as possible in the Public Services of India

CHAPTER VIII

THE ROWLATT BILLS

IT is an irony of fate that while the rights of citizenship as described in the above chapters have yet to be acquired by Indians, the Government of India should be forging two new fetters on the liberty of the subject in India, one of which has been already placed on the Statute Book and the other will be, at the next Session of the Indian Legislative Council.

The bill to make provision in special circumstances to supplement the ordinary criminal law and for the exercise of emergency powers by Government which has now become an Act is highly mischievous, subversive of the fundamental principles of English Criminal jurisprudence and procedure upon which the Indian legal system has been hitherto based, retrograde in character and uncalled for. By means of the provisions of this Act the Government is introducing into this country a system of inquisition having many points of resemblance with the Spanish Inquisition and the methods of the Star Chamber which had become thoroughly discredited in

England even before the beginning of the 17th century, for the alleged purpose of meeting what the Government calls an extraordinary situation of anarchy. The only purpose which this Act will serve is to bring the administration of justice by the High Court into contempt. Even when the Star Chamber was in vogue in England during the times of Elizabeth it was only the wise abstention from exercising the powers that made its existence possible while the exercise by the Stuarts of those powers resulted in the overthrow of Charles I.

It has been well said by an eminent writer, "The world has been made familiar with the great truth that one main condition of the prosperity of a people is that its rulers shall have very little power, that they shall exercise that power very sparingly and that they shall by no means presume to raise themselves into supreme judges of national interests or deem themselves authorised to defeat the wishes of those for whose benefit alone they occupy the post entrusted to them." The true liberty of the subject consists not so much in the gracious behaviour as in the limited power of the Sovereign under any form of Government. This Act offends these principles.

It will introduce into this country the discredited methods of the Star Chamber so wholly at variance with the robust common sense of the common law

of England. The special features of the Star Chamber were:—1. There was no trial by jury. 2. All proceedings were summary. 3. Special procedure of summoning the accused. 4. Examination of accused on oath. 5. Proceedings conducted in camera. 6. The court being the sole judge of fact, law and penalty. Professor Maitland dealing with the Star Chamber in his Constitutional History of England observes. "But that it was a tyrannical court, that it became more and more tyrannical and under Charles I. was guilty of great infamies is still more indutiable. It was a court of politicians enforcing a policy, not a court of judges administering the law" If such was the case in England, it need hardly be said that the introduction of such principles and methods into India where the Executive Government owes no responsibility except to itself in practice would be a dangerous innovation.

This Act has many essential features which remind one of the days of the Star Chamber. Thus: 1. there is only to be information and no magisterial enquiry upon a complaint 2. the place of the sitting of the Court to be other than according to the usual rule. 3. accused to be examined on oath and when examined, compelled to answer incriminating questions. 4. secret trials or trials in camera. 5. strange punishments for no offences and creating offences by proclamations. 6. inquisitorial powers to

be exercised for political purposes 7. conducting investigations in camera while the person proceeded against is to have no professional help. 8 arrests without warrant. 9. special rules of evidence indefinite in themselves, and 10. appointments of special permanent authorities thus overriding the ordinary criminal procedure of the land.

Part II. of this Act confers very wide and arbitrary powers on the Executive, no adequate reasons for such a course having been established. The reference to the investigating authority provided for will in practice prove but an illusory safeguard to persons against whom these restrictive orders may be passed. For 1. The scope of its enquiry is limited. 2. The enquiry is to be in camera. 3. The person in question is not entitled to know what there is against him. 4. The person has no right of being represented by pleader or being present himself at all stages of the enquiry 5 The investigating authority shall not be bound to observe the rules of evidence and 6. The report of the investigating authority is not binding on the Government.

Part III of this Act really enacts Martial Law, in that it authorises on a notification in the Gazette of India, arrest without warrant, confinement and search by the Executive subject to the illusory safeguard of an enquiry by the investigating authority, whose report the Government may reject summarily.

The enactment of this measure even for a temporary period of 3 years is wholly unjustifiable as it violates the well-known rules of evidence and criminal procedure.

Bill No. 1. of 1919 whose enactment has been postponed for the time being has had one of an objectionable feature. namely, the creation of a new offence of possessing seditious documents removed in the Select Committee. But the other provisions of the Bill which remain are equally objectionable. The insertion of the new clause 196B in the Code of Criminal Procedure is inadvisable and dangerous, as the same removes the safeguards provided by the Code before complaints of the offences referred to in sections 196 and 196A. are made and an individual is subjected to the vexation and annoyance of the police.

Clause V. of this Bill which inserts a new section 510A. in the Code of Criminal Procedure is quite contrary to the principles of judicial evidence long established in the English Common Law and in India based on a sense of fairplay To declare the fact that a person committed an offence previously or was associated in an incriminating way with such person is relevant even for the purpose of proving criminal intention is contrary to the wise provisions of the Indian Evidence Act. Apparently social boycott of a person convicted of sedition is

intended to be created. It appears to be a reversion to the now admitted barbarous sentiment of a bygone age.

The proposed new section 565*a* in the Code of Criminal Procedure is unnecessary and confers wide arbitrary powers on the Executive *e.g.* that a person shall abstain from addressing a public meeting for the discussion of any political subject, even for a temporary period. A meeting for the discussion of any Bill before the Legislature of the country may be one for the discussion of a political subject. The mere fact of a person having been once convicted of an offence under Chapter VI of the Indian Penal Code ought not to disqualify him at the discretion of the Executive from exercising his legitimate rights of citizenship including the right of addressing public meetings even on matters which may vitally affect rights of property and although such prohibition may be intended to be temporary

All these and other arguments have been addressed to the Government here and in England with considerable earnestness, with a wealth of argument and with a full sense of responsibility by the people's representatives in the Indian Legislative Council. So far these arguments have fallen on deaf ears, the Government seek to justify their position on three different grounds which are all of them untenable.

The first ground is that, the Rowlatt Committee having recommended legislation of this character, the Government will be failing in their duty if they do not give effect to the committee's recommendations This argument cannot hold water. As regards the personnel of the committee it is enough to state that the President of the Committee from his antecedents could not be presumed to have brought to bear upon this question that amount of impartiality, sense of fairplay and freedom from prejudice which alone would give some value to the recommendations of such a committee.

Again, the committee sat in camera and proceeded only on ex parte evidence Statements were placed before them only by the Governments through their officers; a few non-officials were invited by the Committee at their discretion. Therefore, by their very constitution and procedure it was impossible for the Committee to have produced a report worthy of acceptance by the public.

The very first sentence of the Report is wholly inaccurate " Republican or Parliamentary forms of Government as at present understood were neither desired nor known in India till after the establishment of British rule" Every schoolboy knows otherwise.

The main part of the Report gives a history of various revolutionary movements. the truth of

which it is impossible to judge of unless the evidence on which it is based, which is now largely witheld, is placed before the public. In chapter 15 occur the following significant sentences, "All these plots have been directed towards one and the same objective, the overthrow by force of British Rule in India. Sometimes they have been isolated : sometimes they have been interconnected ; sometimes they have been encouraged and supported by German influence. All have been successfully encountered with the support of Indian loyalty." Here the Committee have given away their whole case in favour of extraordinary legislation.

In Chapter 17. the Committee say, "These difficulties have been circumvented for the time being by special temporary legislation and they have not been in operation at the time of our enquiry. When this legislation lapses circumstances may have altered and the position may be better or worse. We do not think it is for us to speculate nicely on these matters. We must of course keep in view that the present war will have come to an end, but we cannot say with what result, or with what ulterior consequential effects or possibilities of consequential effects upon the situation." The Government cannot surely rely upon this non-committal position and say that they have no option but to give effect to the recommen-

dations of the committee when the committee have not definitely made any recommendations and when the war has ended in the complete triumph of the British Empire and the Allies with the help of conspicious Indian loyalty

Again the committee say, "Nevertheless if we thought it clear that the measures taken against the revolutionary movement under the Defence of India Act had so broken it that the possibility of the conspiracies being revived could be safely disregarded, we should say so. That is not our due and it is on this footing that we report." Here again the committee give away their case. At any rate, the Government cannot rely upon them if they say that this legislation is intended to strike at existing conspiracies. For the committee concede that these conspiracies have been broken down, they only suggest remedies against the revival of such conspiracies. And surely it is too much even for the Government of India to ask the people to consent to extraordinary coercive legislation not for the purpose of meeting an existing situation but for the purpose of coping with future contingencies.

Finally, the committee say, "We must explain that we have not sought to draft legislative proposals. We only suggest lines on which we think they might be formulated." And the Government of India have thrown overboard the recommenda-

tions of this committee at least in one matter, namely, the enactment in a permanent form of Rule 25*a* under the Defence of India Act. If they chose they might have given the goby to the other recommendations of the Rowlatt Committee and the Heavens would not have fallen

The second ground urged by the Government is that anarchy and revolutionary conspiracy do exist in this country and therefore that the Government must possess these extraordinary powers by the exercise of which alone they have been able to successfully cope with anarchy and revolution in recent years. There are three different answers to this argument, any one of which is sufficient to destroy the validity of the same First, the Government seem to have no sense of proportion in the matter. In the period of 12 years extending from 1906 to 1918, 1038 persons committed 311 revolutionary offences in India Any knowledge of contemporary or recent history of such crimes in other countries must make any strong and wise government treat these crimes in India as isolated instances and not get into a panic over them. And as Ditcher truly observes, "Because there was a handful of revolutionaries in Bengal and a potential mob of discontented soldiers in the Punjab, they (the Government) proposed to hand over the liberties of the whole population of British India to the tender

mercies of a police, which has a worse reputation than the Royal Irish constabulary." Secondly, assuming anarchy and revolution do exist, the Rowlatt Act is certainly not the remedy It is a quack who treats the symptoms and ignores the causes, of the disease. It is acknowledged that such crimes are alien to Indian sentiment and the insignificant number of people who take to such crimes can be easily and effectively dealt with if and only if the co-operation of the leaders of public opinion in India is sought in the manner in which it ought to be sought Naked repression never succeeded in rooting out Anarchy and the Rowlatt Act will be no exception As Lord Morley wrote to Lord Minto early in 1910, "That is the Russian argument · by packing off trainloads of suspects to Siberia we will terrify the anarchists out of their wits, and all will come out right That policy did not work out brilliantly in Russia, and did not save the lives of the Trepoffs, nor did it save Russia from a Duma, the very thing that the Trepoffs and the rest of the 'Offs' deprecated and detested. Your mention of Martial Law in your last private letter really makes my flesh creep I have imagination enough and sympathy enough thoroughly to realise the effect on men's minds of the present manifestation of the spirit of murder. But Martial Law which is only a fine name for the suspension of all law

would not snuff out murder clubs in India any more than the same sort of thing snuffed them out in Italy, Russia or Ireland. The gang of Dublin Invincibles was reorganised when Parnell and the rest were locked up, and the Coercion Act in full blast .... .It may be necessary for anything I know some day or other but to-day it would be neither more nor less than a gigantic advertisement of national failure." These wise words of Lord Morley may well be pondered over by his successor in that high office, Mr. Montagu, in dealing with the Rowlatt Act.

Third, the Rowlatt Act will defeat its own purpose. It is an accepted and fundamental maxim of criminal jurisprudence that no punitive law will work successfully in the long run unless it has the moral sanction of public opinion behind it. The Rowlatt Act does not have that sanction and every victim of the Act will be considered and rightly considered a martyr and to that extent the Rowlatt Act will be a failure in coping with such anarchy and revolution as may exist in the country.

The third argument advanced on behalf of the Government is that these extraordinary powers conferred by the Legislature will be carefully and sparingly used by the Executive Government so as not to interfere with legitimate political activity. In theory this is a wholly unsound position. The liberty

of the subject is too sacred to depend on the sufferance of the Executive, and ought to be guaranteed so as to be free from interference by the Executive. Again, the history of the administration of such coercive laws by the Executive in India does not give any encouragement to this idea that they will be administered properly. In spite of repeated declarations to the contrary the Press Act and the Defence of India Act, and the Post Office Act, to name only some instances, have been used for purposes so wholly foreign to the legitimate purposes of the Acts that one may well think twice before accepting the assurances now given in respect of the Rowlatt Act Finally, even assuming that the Executive use the Rowlatt Act for purposes which they consider legitimate, what guarantee is there that their ideas of legitimacy will coincide with our ideas. And so long as the Executive continue responsible to themselves and not to Legislatures representative of the people they ought not to be clothed with such arbitrary powers, or at least, they ought to exercise those powers subject to the control of an independent judiciary

Having thus disposed of the three most powerful arguments addressed by the Government for the enactment of the Rowlatt Act, we may proceed to state the most powerful argument advanced by the people against the enactment. Even taking for grant-

ed that anarchy and revolution exist in the country we are more directly and intimately concerned in rooting them out than the Government of India. And if the people through their representatives express the deliberate and unanimous opinion that this extraordinary legislation is not necessary to cope with anarchy and revolution the Government must yield to that public opinion. The second argument on behalf of the people is that the rights of citizenship guaranteed to the people of this country ought not to be taken away by a Legislature which is so only in name, for it does nothing but register the decrees of the Executive. It is indeed open to question whether a subordinate Legislature like the Indian Legislative Council may enact the Rowlatt Act, which affects parts of the unwritten Law and Constitution of the United Kingdom of Great Britain and Ireland, for example Magna Carta, whereon may depend the allegiance of the subject to the crown. But apart from the legal aspect of it the political argument based on it must weigh with the Government. This piece of legislation is widely regarded by Indians as a slur upon their loyalty and honour. The Government ought therefore not lightly go on with this legislation.

The Government of India may well pause and consider the following admonitions of Lord Morley to Lord Minto, which have not lost any of their

relevancy or force at the present time" .....said to me this morning 'you see, the great executive officers never like or trust lawyers' 'I will tell you why' I said, 'it is because they don't like or trust law: they in their hearts believe before all else the virtues of will and arbitrary power.' That system may have worked in its own way in old days, and in those days, the people may have had no particular objection to arbitrary rule But as you have said to me scores of times, the old days are gone and the new times breathe a new spirit, and we cannot carry on upon the old maxims. This is not to say that we are to watch the evil-doers with folded arms, waiting to see what the Devil will send us .. . ..All I can say is that we have to take every precaution that law and administration can supply us with; and then and meanwhile to face what comes, in the same spirit of energy and stoicism combined, in which good generals face a prolonged and hazardous campaign.' Look on this picture, and that of the Government of India beating themselves into a wild panic and crying out piteously for the Rowlatt Act. One more caution of Lord Morley may be commended to the Government of India. "We must keep order, but excess of severity is not the path to order. On the contrary, it is the path to the bomb."

The further life of the Act now depends on Mr.

Montagu. And is it too much to hope that Mr. Montagu who has been trained among others under Lord Morley will pay some heed to the following wise words of his master. "You cannot expect people here to give a blank cheque to all the officials and Magistrates in India. It is they — people here—who are responsible; it is to them, and not merely the G. of I., to whom the destinies of India have been entrusted. They cannot delegate their imperial duty to their agents wholesale. The British public never have abdicated, and I fervently trust they never will. You speak of our having "too much respect for the doctrines of the Western world quite unsuited to the East." I make bold to ask you, what doctrines? There is no doctrine that I know of involved in regarding, for instance, transportation for life in such a case as Tinnevelly, as a monstrous outrage on common sense. And what are we in India for? Surely in order to implant—slowly, prudently, judiciously—those ideas of justice, law, humanity, which are the foundation of our own civilization? It makes me sick when I am told that—or—would make short work of seditious writers and spouters. I can imagine a certain potentate answering me.....if I were to hint that boiling offenders in oil, cutting their throats like a goat, blowing them from a gun for small peculation, were rather dubious proceedings—that I was a bewildered sentimentalist.

with a brain filled by a pack of nonsense quite unsuited to the East."

The third and the strongest argument urged by the people against the Rowlatt Act is this. Rightly or wrongly all thinking and vocal India is united against this piece of legislation. Such unanimity against a Government measure is unprecedented in the annals of British India. Even the agitation against the Partition of Bengal was not so unanimous because some Muslim opinion in Eastern Bengal was in favour of it If in the face of this unanimous opposition as reflected in the fact that not a single Indian non-official member of the Legislative Council voted with the Government on this matter, the Government persist in this legislation a feeling of helplessness is created in the minds of the people which is hardly conducive to smooth or progressive administration The question reduces itself to this Whether the Government in this country is based on the British bayonet or on the will of the people There can be only one answer to this question, the answer given by Sir John Seeley long ago and given by Mr Gandhi to the Viceroy in his famous interview with him, namely, that British rule in this country rests and can only rest on the will of the people. It is to be hoped that for the sake of Great Britain and India the British Government here will realise the truth of this before

it is too late The first fruits of such wise realisation will be the repeal of this obnoxious Act

The passing of this Act in the teeth of Indian opinion has created a strong and widespread agitation under the inspiring leadership of Mr. Gandhi, to which there can be only one end But it is far more necessary to so shape the coming reforms that it ought not to be possible to the Government in this country any longer to enact such repressive laws practically over the heads of the Legislature. From this point of view the Montagu-Chelmsford Scheme of reforms, in its present form will place us in a worse position than we occupy now

APPENDIX A

SPECIAL BENCH

Extract from the judgment of the Special Bench composed of Sir Lawrence Jenkins, Chief Justice and Judges Mr. Stephen and Mr. Woodroffe. *In re*-Mahomed Ali.

Mr. Jenkins observes :—

The Advocate-General has admitted, and I think very properly, that the pamphlet is not seditious, and does not offend against any provision of the Criminal Law of India. . . . But he has contended, and rightly in my opinion, that the provisions of the Press Act extend far beyond Criminal Law ; and he has argued that the burden of proof is cast on the applicant, so that however meritorious the pamphlet may be still if the applicant cannot establish the negative the Act requires, his application must fail.

And what is this negative? It is not enough for the applicant to show that the words of the pamphlet are not likely to bring into hatred or contempt any class [or section of His Majesty's subjects in British India, or that they have not a tendency in fact to bring about that result. But he must go further, and show that it is impossible for them to have that tendency either directly or indirectly, and

whether by any way of inference, suggestion, allusion, metaphor, or implication. Nor is that all, for we find that the Legislature has added to this the all-embracing phrase "or otherwise." And here I may, not inappropriately, invite attention to section 153A of the Penal Code which has such affinity to the statutory provision governing this case, that it may be regarded as its basis. That section was added to the Penal Code in 1898, and was directed against the promotion and attempts to promote feelings of enmity or hatred between different classes.

It will be noticed that the feeling here described is one of enmity or hatred: no provision is made for contempt. But the more important divergence is that while the Penal Code requires that the enmity or hatred should be not only towards a class but by a class, there is no such limitation in the Press Act as to the source from which these hostile feelings should proceed, it aims against all hatred or contempt regardless of those by whom it is entertained. Nor is this the only direction in which there is a greater stringency in the Press Act. To section 153A there is appended an explanation which declares it not to be an offence to point out without malicious intention and with an honest view to their removal, matters which are producing or have a tendency to produce the feelings of enmity or hatred, indicated in the section. And yet no such qualifying words are to be found in section 4 of the Press Act and this is the more remarkable because the qualifying explanations of section 124A are introduced, though they relate to an even graver offence.

It may be that this omission is by oversight; whether

that be so or not the Government insists on the absence of the explanation though it leads to a curious result.

I think the Government is entitled to stand on the letter of the Law, though it deprives Mr. Mahomed Ali of an opportunity of relying on explanation conceived in the spirit of which of that which forms part of section 153A of the Penal Code.

Had the Press incorporated the explanation to section 153A as it has that section 124A Mr. Mahomed Ali might perhaps have made a very strong case in view of the Advocate-General's admission as to the character of the Pamphlet and the applicant's purpose and intentions.

The applicant, however, contents strenuously that the Pamphlet does not come even within these all embracing terms of the Act and that the Legislature aimed at something wholly different. The incalculable power of forfeiture vested in the Executive are a sure sign that the Act was called into being by urgent Political necessity. And it is of sufficently of recent date to enable us all to remember that the mischief aimed at was the prevalance of Political assassinations and anarchical outrage. Comprehensive words were designedly used to catch crime and the incitement to crime posing in the guise of innocence.

The Act was directed against crime and aims at its prevention. I doubt whether publication with an authorship, a source, a purpose like those of the present Pamphlet we thought of ; and I recognise the force of the argument that the Act is now being applied to a purpose never intended. But be that so or not, if the Legislature has employed language wide enough to cover the Pamphlet this

lac of reserve affords no answer to the forfeiture now attacked.

I have already dealt with one case of the absence of ground in the notification. This defect and the Government's failure to place before us any materials beyond those furnished by the applicant have sensibly added to our difficulties in discharging the peculiar duties cast on us by the Act. The notification does not even specify the classes that might be brought into hatred or contempt or which of these two diverse sentiment is apprehended. And so when Mr. Norton rose to address the court he had to seek this information from the Advocate-General.

The first answer implied that it included Christians, Greeks and Englishmen, but as under the Act the classes are limited to those composed of His Majestey's subjects in India, the Greeks were withdrawn and the first and the last retained. Still the answer in its original form is not without its significance though it was afterwards modified.

The Pamphlet would doubtless bring into hatred the unchristian Christians whose deeds of atrocities are described.

The theory presented is that the reflection of this hatred might fall, not in deed on the Government but on His Majesty's Christian and English subjects in British India. If this be the Government's view without all the information at its disposal, the court no more informed than the man in the streets cannot (in my opinion) affirm this could not be so, and affirm it with a degree of assurance that would entitle it to set aside a measure of safety on which the Government had solemnly resolved. The

Advocate-General has convinced me that the Government view of this piece of legislation is correct and that the High Court's power of intervention is the narrowest; its power to pronounce on the legality of the forfeiture by reason of failure to observe the mandatory conditions of the act is barred: the ability to pronounce on the wisdom of the Executive order is withheld: and its functions are limited to considering whether the applicant to it has discharged the almost hopeless task of establishing that his Pamphlet does not contain words which fall within the all comprehensive provision of the Act. I describe it as an almost hopeless task because the terms of section 4 are so wide that it is scarcely conceivable that any publication would attract the notice of the Government in this connection to which some provision of that section might not directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise apply. I have said that the ability to pronounce on the wisdom or unwisdom of Executive action has been withheld. There was good reason for this. Courts of Law can only move on defined lines and act on information brought before them under limited conditions

It is not so with the Executive authority. It would be paralyzed if it had to observe the restrictions placed on the courts. Its action can be prompted by information derived from sources not opened to the courts, and based on considerations forbidden to them; it can be moved by impressions and personal experiences to which no expression can be given in a court, but which may be a very potent insentive to Executive action. The Government

may be in possession of information which it would be impossible to disclose in a Court of Law and yet obviously requiring immediate action.

Therefore a jurisdiction to pronounce on the wisdom or unwisdom of Executive action has been withheld and rightly withheld. It may be a question whether even the semblance which this act provides should not have been withheld as it was by Act IX of 1878.

Political considerations and reasons of state are the life blood of Executive actions but they have no place in a Court of Law. "The constitution" said Lord Mansfield "does not allow reasons of state to influence our judgments: God forbid it should! we must not regard political consequences, .how formidable so ever they might be. if rebellion was to certain consequence, we are bound to say" *fiat, justitia ruat. cœlum* ' *John Wilke's case.*

The fact is that the Executive and Judicial authorities stand on a wholly different plane for the purposes of arriving at a decision as to the propriety of Executive action And the one cannot sit in judgment on the determinations of the other " *si judicas, cognosce ; si rugnas, jude.* And what then is the conclusion of the whole matter, of the two alleged checks on Executive action, supposed to be furnished by the acts, one, the intervention of the courts, is ineffectual, while the other, for this very reason can be, and in this case has been disregarded without impairing the practical effort of forfeiture purporting to be under the Act.

One word more and that is as to the motive of the present application. The applicant Mr. Mahomed Ali

is by no means unknown in India; he is a journalist of position and repute. Though he is not an accused, he tells us that he regards himself as under the stigma which (he declares) must attach to any journalist who has come under the operation of an act directed, primarily at any rate, against a criminal inducement marked by outrageous which so shocked the public sentiment as to call for this drastic legislation. But even if he has not succeeded in proving the negative that fate and the Law have thrown in his way, at least his application has not been wholly in vain.

The Advocate-General representing the Government has publicly announced, that Mr. Mahomed Ali's forfeited pamphlet is not in his opinion a seditious libel and indeed that he attributes no criminal offence to Mr Mahomed Ali; he was even willing to concede, and I believe he was acting in the highest interest of humanity and civilization. In this, I think the Advocate-General made no admission which it was not proper for him to make.

Mr Mahomed Ali then has lost his book, but he retains his character and he is free from the stigma that he apprehended. And this doubtless will be some consolation to him when we dismiss, as we must, his present application. I think there should be no order as to cost.

APPENDIX A1

Extract from the judgment of the Special Bench composed of Mr. Abdul Rahim officiating Chief Justice, Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

In the matter of Indian Press Act (1 of 1910), sec. 4 (1) and in the matter of the "New India Printing Works."

Justice Abdul Rahim observes

The scope of section 4 was considered by the Calcutta High Court in the matter of a petition of *In re-Mohamed Ali* (1) and the learned Advocate-General has supported the interpretation put upon it by Chief Justice Jenkins and the other learned judges of that court. That, generally speaking, the terms of the section are extremely wide and comprehensive cannot be doubted. They vest the Local Government with a discretion so large and unfettered that the keeping of printing presses and the publication of newspapers become extremely hazardous undertakings in the country. A press may be devoted to the printing of most useful and meritorious literature or other publications of an entirely innocent and non-controversial nature, yet it will be liable to forfeiture if any matters printed in such press are considered by the government to be objectionable within the meaning of the Act. It may be doubted if it is possible for the keeper of any printing press in the country to maintain such an efficient expert supervision over matters that are printed as to detect everything that might

be regarded to fall within the "wide spread net" of section 4.

Similarly a newspaper may be consistently staunch in its loyalty to the Government, its general policy may be above all reproach, the sincerity and *bona fides* of the intentions of the editor may not be liable to question but if any letters or other writings were let in, may be through carelessness, which come within the scope of any of the clauses to section 4, the Government may at once without any trial or even a warning forfeit the security, and in this way ultimately put an end to the newspaper itself. That the influence of a periodical on public life of the country is on the whole decidedly beneficial need be no bar to the Governments' action. The Local Government, it may be assumed, will not indiscriminately excercise the power which it possesses under this enactment, but the vesting of such unlimited power in the Executive Government is undoubtedly a serious encroachment on the freedom which the press in India onjoyed before the passing of the Act.

The Act as is well known was passed in order to counteract the manifold ingenious devices adopted by the anarchists of Bengal for carrying out their propaganda. How far it has been instrumental in accomplishing that object is not a question with which we are concerned; nor are we concerned with the question whether the legislature was justified in applying such drastic press laws to the whole of India, while the evil sought to be met was mainly connected with the activities of a band of young revolutionaries in one part of the country.

APPENDIX A2

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

(Presided by—Viscount Haldane, Viscount Cave, Lord Phillimore, Sir John Edge and Mr Ameer Ali) 1919.

The statute contemplate that in ordinary cases security shall be deposited, and the only duty of the magistrate is to fix the amount, having regard to the two limits, and to receive it. Then follows the proviso :—

Provided that the magistrate may, if he thinks fit, for special reasons to be recorded by him, dispense with the deposit of any security or may from time to time cancel or vary any order under this sub section.

It was contended before their Lordships that to read this proviso as enabling the magistrate to cancel or vary an order of dispensation would be to make a provisio upon a proviso, and to collect a positive enactment out of that which was only a qualifying provision. But it is well settled that there is no magic in words of proviso, and that the plain meaning must be given to the words of the Legislature, and those words enable the magistrate to cancel or vary any order made under the subsection, which should mean, among other orders, orders of dispensation. If the magistrate having fixed the minimum security may vary his order by imposing the maximum,

there is no reason why he should not, as time goes on, think fit to require security when at first he thought fit to require none.

Their Lordships are therefore of opinion that the Magistrate has power under the section to cancel an order of dispensation, the necessary consequence of which will be that security will have to be deposited according to the amount thereupon fixed by him within the limits prescribed, as would be done in normal course on the first making of a declaration.

Their Lordships are in agreement in this respect with the opinion of Mr. Justice Ayling, and in disagreement with the view of Mr. Justice Seshagiri Aiyar. The Officiating Chief Justice (Mr. Justice Abdur Rahim) agreed in principle with Mr. Justice Seshagiri Aiyar, and so expressed himself in a judgment upon the other application.

THE FUNCTIONS OF THE MAGISTRATES

It is next contended on behalf of the appellant that the act of the magistrate in cancelling the dispensation was a judicial order, and was bad because she was given no opportunity of being heard before an adverse order was made against her. To this argument several answers have been given: that the order might be treated as an ex parte order which it would have been open to her to move to discharge instead of complying with it as she did under protest; that as a judicial order it was still one made by the magistrate within the exercise of his jurisdiction, and that the omission to hear her was only an irregularity which could not be reviewed, or at any rate could not be

reviewed by process of certiorari; and, lastly, that the act was not a judicial act, but one done in the exercise of administrative functions. It was on this last ground that all three Judges in the High Court decided the point against the appellant; and without pronouncing any opinion on the other ground their Lordships agree that this one furnishes a sufficient answer.

When it is once established that the normal course is to have a deposit, the action of the magistrate in increasing or diminishing, withdrawing or imposing, is a pure matter of administrative discretion. It is only in one case that he is to record his reasons, and that is when there is a departure from the normal, and the object of recording them is, as the Officiating Chief Justice rightly said, for the information of his superiors in the Government.

The act of the magistrate is after all only the withdrawal of a privilege which need never have been granted. It is not like a condemnation, in which case justice requires that the person to be condemned should first be heard. It would have been, in their Lordships' opinion, more discreet, and it would have removed an occasion for comment and complaint, if the magistrate had given the appellant some opportunity for making her observations before the privilege was withdrawn: it might have been a wiser discharge of his duty as officer. But having said this, their Lordships are unable to go any further. It results, therefore, that if the order of the magistrate was open to examination, either upon process of certiorari or by a way of revision the consequence of an examination would be to leave the order as it stands, and this consequence is not without its

bearing upon the question, which is prior in order of reasoning, whether it was competent to the Court to enter upon any such examination. The appellant based her demand partly upon the Code of Criminal Procedure and partly upon the supposed common law power to grant a writ of certiorari. She did not rely upon the power of revision given by the Code of Civil Procedure. It is not easy to see how these proceedings could be deemed criminal proceedings within the Code of Criminal Procedure. They are not proceedings against the appellant as charged with an offence. They are at the utmost proceedings which rendered the appellant, if she should thereafter commit a criminal or forbidden act, open to a particular form of procedure for a penalty. In any view, as their Lordships have intimated their opinion that the magistrate in withdrawing the order, of dispensation was not acting judicially, it follows that this is not a case for revision under the Code of Criminal Procedure.

THE WRIT OF CERTIORARI

It was contended on behalf of the respondent in the High Court that there is no power in the High Court to issue a writ of certiorari, or alternatively that the provisions of Section 22 forbid recourse to this writ in cases which come under the Press Act. As to the first point, it would seem that at any rate the three High Courts of Calcutta, Madras, and Bombay possessed the power of issuing this writ (see Re the Justices of the Supreme Court of Judicature at Bombay, 1 Knapp, pp. 49, 51, 55; and Nundo Lal Bose v. the Corporation for the Town of Calcutta, I.L.R., 11 Cal., p. 275) Whether any of

the other Courts which are by definition High Courts for the purposes of this Act have the power to issue writs of certiorari is another question. Supposing that this power once existed, has it been taken away by the two codes of procedure ? No doubt these codes provide for most cases a much more convenient remedy. But their Lordships are not disposed to think that the provisions of Section 435 of the Criminal Procedure Code and Section 115 of the Civil Procedure Code of 1908 are exhaustive Their Lordships can imagine cases, though rare ones, which may not fall under either of these Sections. For such cases their Lordships do not think that the powers of the High Courts which have inherited the ordinary or extraordinary jurisdiction of the Supreme Court to issue writs of certiorari, can be said to have been taken away.

But assuming that the power to issue the writ, remains, and that it might be exercised notwithstanding the existence of procedure by way of revision, Section 22 has still to be considered ; –

Every declaration of forfeiture purporting to be made under this Act shall, as against all persons, be conclusive evidence that forfeiture therein referred to, has taken place, and no proceeding purporting to be taken under this Act shall be called in question by any Court, except the High Court on such application as aforesaid, and no civil or criminal proceeding except as provided by this Act shall be instituted against any person for anything done or in good faith intended to be done under this Act.

It was contended on behalf of the appellant that as the writ of certiorari was not in terms said to be taken away

the right to it remained notwithstanding the very express but still general words of this Section. However that might be according to English law, where there is no such revision procedure as in India, their Lordships see no reason for narrowing the express words of the Indian Act. "Certiorari," according to the English rule, is only to be granted where no other suitable remedy exists. If the order of the magistrate were a judicial order it would have been made in the exercise either of his civil or of his criminal jurisdiction and procedure by way of revision would have been open.

APPENDIX B.

INDIA'S PETITION OF RIGHTS.

[*The following is the resolution adopted by the Indian National Congress and the All-India Moslem League at the Special Sessions held at Bombay in August—September*, 1918.]

The Government of India shall have administrative authority on matters directly concerning peace, tranquillity and defence of the country, subject to the following declaration of rights of the people of India.—That the Statute to be passed by the Parliament should include the declaration of the rights of the people of India as British citizens: that all Indian subjects of His Majesty and all the subjects naturalised or resident in India are equal before the law, and there shall be no penal nor administrative law in force in the country, whether substantive or provisional, of a discriminative nature; that no Indian subject of His Majesty shall be liable to suffer in liberty, life, property, or freedom of speech or in the right of association, or in respect of writing except under a sentence by an ordinary Court of justice and as a result of a lawful and open trial; that every Indian subject shall be entitled to bear arms subject to the purchase of a license as in Great Britain, and that the right shall not be taken away, save by a sentence of an ordinary court of justice; that the press shall be free and that no license nor security shall be demanded on the registration of a press or a newspaper; and that corporal punishment shall not be inflicted on any Indian save under conditions applying equally to all other British subjects.