CRIMINAL LAW AMENDING ACT

HELD INVALID BY SUPREME COURT

MADRAS APPEAL DISMISSED

(FROM OUR LEGAL CORRESPONDENT.)

NEW DELHI, March 31.

The Supreme Court unanimously held to-day that Section 15 (2) (B) of the Criminal Law Amendment Act, 1908, which authorised Government to declare an association unlawful was *ultra vires* of the Constitution, as it infringed the right to freedom of association guaranteed by Article 19 (1) (C) of the Constitution.

The judgment embodying this decision of the Constitution Bench of the Supreme Court consisting of the Chief Justice, Mr. Patanjali Sastri and Their Lordships Mehr Chand Mahajan, B. K. Mukherjea, S. R. Das and Chandrasekhara Aiyar, was delivered by the Chief Justice.

The court gave the judgment on the appeal preferred by the State of Madras against the judgment of the High Court holding that Section 15 (2) (B) of the Criminal Law Amendment Act, 1908, as amended by an Act of the Madras Legislature passed in August, 1950, was unconstitutional and void. The court dismissed the appeal of the Government in the People's Education Society case and upheld the decision of the Madras High Court.

It may be recalled that the Communist Party of Madras was declared an unlawful association under the provisions of the Criminal Law Amendment Act and, following the judgment of the High Court in the People's Education Society case, the State Government lifted the ban on the Communist Party in the State.

THE JUDGMENT

The Chief Justice, Mr. Patanjali Sastri, in the course of the judgment, said: The respondent, who was the General Secretary of the Society, which was registered under the Societies' Registration Act, 1860, applied to the High Court on April 10, 1950, under Article 226 of the Constitution complaining that the impugned Act and the order dated March 10, 1950, purporting to be issued thereunder infringed the fundamental right conferred on him by Article 19 (1) (C) of the Constitution to form associations or unions and seeking appropriate reliefs. The High Court, by a Full Bench of three Judges (Rajamannar, C. J., Satyanarayana Rao and Viswanatha Sastri JJ.) allowed the application on September 14, 1950, and granted a certificate under Article 132. The State of Madras has brought this appeal.

The Government order referred to above runs as follows: Whereas in the opinion of the State Government, the Association known as the People's Education Society, Madras, has for its object interference with the administration of the law and the maintenance of law and order, and constitutes a danger to the public peace: now, therefore, His Excellency the Governor of Madras, in exercise of the powers conferred by Section 16 of the Indian Criminal Law Amendment Act, 1908 (Central Act 14 of 1908) hereby declares the said Association to be an unlawful association within the meaning of the said Act.

No copy of this order was served on the respondent or any other office-bearer of the Society, but it was notified in the official Gazette as required by the impugned Act.

The declared objects of the Society as set out in the affidavit of the respondent are: (a) To encourage, promote, diffuse and popularise useful knowledge in all sciences and more specially social science; (b) to encourage, promote, diffuse and popularise political education among people; (c) to encourage, promote and popularise the study and understanding of all social and political problems and bring about social and political reforms and (d) to promote, encourage and popularise art, literature and drama.

It was, however, stated in a counter-affidavit filed on behalf of the appellant by the Deputy Secretary to Government, Public Department, that, according to information received by the Government, the Society was actively helping the Communist Party in Madras which had been declared unlawful in August, 12, 1949, by utilising its funds through its Secretary for carrying on propaganda on behalf of the party, and that the declared objects of the Society were intended to camouflage its real activities.

As the Madras Amendment Act (No. 11 of 1950) was passed on August 12, 1950, during the pendency of the petition, which was taken up for hearing on August 21, 1950, the issues involved had to be determined in the light of the original Act as amended.

RIGHT OF ASSOCIATION

It will be seen that while the old Section 16 expressly conferred on the Provincial Government power to declare associations unlawful if, in its opinion, there existed certain specified grounds in relation to them, those grounds are now incorporated in Section 15 (2) (B) as amended, and the reference to the "opinion" of the Government is dropped. This led to some discussion before us as to whether or not the grounds referred to in Section 15 (2) (B) as amendment are justiciable issues. If the factual existence of those grounds could be made the subject of enquiry in a court of law, the restrictions sought to be imposed on the right of association would not be open to exception, but then the Government would apparently have no use for Section 15 (2) (B). For, it was strenuously contended on its behalf by the Attorney-General that the incorporation of these grounds in a definition clause, which made a declaration by the Government the test of unlawfulness, rendered the insertion of the words "in its opinion" unnecessary and, indeed, inappropriate, and that the omission of those words could not lead to any inference that the grounds on which the declaration was to be based were intended to be any more justiciable than under the old Section 16; more especially as the "opinion" or the "satisfaction" of the Government or of its officers is still the determining factor in notifying a place under Section 17-A (1) and in forfeiting the movables found therein under Section 17-B (1) or the funds of an unlawful association under Section 17-E (1). The provision for an inquiry as to the existence or otherwise of such grounds before an advisory board and for cancellation of the notification in case the board found there was no sufficient cause for declaring the association as unlawful also pointed, it was urged, to the same conclusion. The contention is not without force and the position was not contested for the respondent. It may, accordingly, be taken that the test under Section 15 (2) (B) is, as it was under the old Section 16, a subjective one and the factual existence or otherwise of the ground is not a justiciable issue.

It is on this basis, then, that the question has to be determined as to whether Section 15 (2) (B) as amended falls within the limits of constitutionally permissible legislative abridgement of the fundamental right conferred on the citizen by Article 19 (1) (C). Those limits are defined in clause (4) of the same article which reads: Nothing in sub-clause (C) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

JUDICIAL REVIEW OF LEGISLATION

It was not disputed that the restrictions in question were imposed "in the interests of public order". But, are they "reasonable" restrictions within the meaning of Article 19 (4)? Before proceeding to consider this question, we think it right to point out, what is sometimes overlooked, that our Constitution contains express provisions for judicial review of

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legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative Acts under cover of the widely interpreted "Due process" clause in the Fifth and the Fourteenth Amendments. If, then, the courts in this country face up to such an important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the fundamental rights, as to which this court has been assigned the role of a sentinel on the *qui vive*. While the court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new setup are out to seek clashes with the Legislatures in the country.

RESTRICTIONS

The learned Judges of the High Court unanimously held that the restrictions under Section 15 (2) (B) were not reasonable on the ground of (1) the inadequacy of the publication of the notification, (2) the omission to fix a time limit for the Government sending the papers to the advisory board or for the latter to make its report, no safeguards being provided against the Government enforcing the penalties in the meantime, and (3) the denial to the aggrieved person of the right to appear either in person or by pleader before the advisory board to make good his representation. In addition to these grounds, one of the learned Judges (Satyanarayana Rao J.) held that the impugned Act offended against Article 14 of the Constitution in that there was no reasonable basis for the differentiation in treatment between the two classes of unlawful associations mentioned in Section 15 (2) (A) and (B). The other learned Judges did not, however, agree with this view. Viswanatha Sastri J. further held that the provisions for forfeiture of property contained in the impugned Act were void as they had no reasonable relation to the maintenance of public order. The other two Judges expressed no opinion on this point. While agreeing with the conclusion of the learned Judges that Section 15 (2) (B) is unconstitutional and void, we are of opinion that the decision can be rested on a broader and more fundamental ground.

TEST OF REASONABLENESS

The Court had occasion in Dr. Khare's case to define the scope of the judicial review under Clause (5) of Article 19 where the phrase "Imposing reasonable restrictions on the exercise of the right" also occurs, and four out of the five Judges participating in the decision expressed the view (the other Judge leaving the question open) that both the substantive and the procedural aspects of the (impugned) restrictive law should be examined from the point of view of reasonableness; that is to say, the Court should consider not only faciors such as the duration and the extent of the restrictions, but also the circumstances and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases.

The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable in all the circumstances of a given case, philosophy and the scale of values of the judges participating in the decision should play an important part and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.

JUDICIAL ENQUIRY

Giving due weight to all the considerations indicated above, we have come to the conclusion that Section 15 (2) (B) cannot be upheld as falling within the limits of authorised restrictions on the right conferred by Article 19 (1) (C). The right to form associations or unions has such wide and varied scope for its exercise and its curtailment is fraught with such potential reactions in the religious, political and economic fields, that the vesting of authority in the executive Government to impose restrictions on such right without allowing the grounds of such imposition, both in their factual and legal aspects, to be duly tested in a judicial inquiry, is a strong element which, in our opinion, must be taken into account in judging the reasonableness of the restrictions imposed by Section 15 (2) (B) on the exercise of the fundamental right under Article 19 (1) (C); for, no summary and what is bound to be largely one-sided review by an advisory board, even where its verdict is binding on the executive Government, can be a substitute for a judicial enquiry. The formula of subjective satisfaction of the Government or of its officers, with an advisory board thrown in to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restrictions on fundamental rights. In the case of preventive detention, no doubt, this court upheld in Gopalan's case deprivation of personal liberty by such means, but that was because the Constitution itself sanctions laws providing for preventive detention, as to which no question of reasonableness could arise in view of the language of Article 21. As pointed out by Kania C. J. at page 121, quoting Lord Finlay in Rex v. Halliday, "the court was the least appropriate tribunal to investigate into circumstances of suspicion on which such anticipatory action must be largely based."

RULING IN DR. KHARE'S CASE

The Attorney-General placed strong reliance on the decision in Dr. Khare's case where the subjective satisfaction of the Government regarding the necessity for the externment of a person, coupled with a reference of the matter to an advisory board whose opinion, however, had no binding force, was considered by a majority to be "reasonable" procedure for restricting the right to move freely, conferred by Article 19 (1) (B). The Attorney-General claimed that the reasoning of that decision applied *a fortiori* to the present case, as the impugned Act provided that the advisory board's report was binding on the Government. We cannot agree. We consider that that case is distinguishable in several essential particulars. For one thing, externment of individuals, like preventive detention, is largely precautionary and based on suspicion. In fact, Section 4 (1) of the East Punjab Public Safety Act, which was the subject of consideration in Dr. Khare's case, authorised both preventive detention and externment for the same purpose and on the same ground, namely, "With a view to preventing him from acting in any manner prejudicial to the public safety or the maintenance of public order, it is necessary, etc." Besides, both involve an element of emergency requiring prompt steps to be taken to prevent apprehended danger to public tranquillity and authority has to be vested in the Government and its officers to take appropriate action on their own responsibility. These features are, however, absent in the grounds on which the Government is authorised, under Section 15 (2) (B), to declare associations unlawful. These grounds, taken by themselves, are factual and not anticipatory or based on suspicion. An association is allowed to be declared unlawful because it "constitutes" a danger or "has interfered or interferes" with the maintenance of public order or "has such interference for its object", etc. The factual existence of these grounds is amenable to objective determination by the court, quite as much as the grounds mentioned in clause (A) of sub-section (2) of Section 15, as to which the Attorney-General conceded that it would be incumbent on the Government to establish, as a fact, that the association, which it is alleged to be unlawful, "encouraged" or "aided" persons to commit acts of violence, etc. We are unable to discover any reasonableness in the claim of the Government in seeking, by its mere declaration, to shut out judicial enquiry into the underlying facts under clause (B).

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Secondly, the East Punjab Public Safety Act was a temporary enactment which was to be in force only for a year and any order made thereunder was to expire at the termination of the Act. What may be regarded as a reasonable restriction imposed under such a statute will not necessarily be considered reasonable under the impugned Act, as the latter is a permanent measure, and any declaration made thereunder would continue in operation for an indefinite period until the Government should think fit to cancel it.

Thirdly, while no doubt the advisory board procedure under the impugned Act provides a better safeguard than the one under the East Punjab Public Safety Act, under which the report of such a body is not binding on the Government, the impugned Act suffers from a far more serious defect in the absence of any provision for adequate communication of the Government's notification under Section 15 (2) (B) to the association and its members or office-bearers. The Government has to fix a reasonable period in the notification for the aggrieved person to make a representation to the Government. But, as stated already, no personal service on any office-bearer or member of the association concerned or service by affixture at the office, if any, of such association is prescribed. Nor is any other mode of proclamation of the notification at the place where such association carries on its activities provided for. Publication in the official Gazette, whose publicity value is by no means great, may not reach the members of the association declared unlawful and, if the time fixed expired before they knew of such declaration, their right of making a representation, which is the only opportunity of presenting their case, would be lost. Yet, the consequences to the members which the notification involves are most serious, for, their very membership thereafter is made an offence under Section 17.

IMPOSITION OF RESTRICTIONS

There was some discussion at the Bar as to whether want of knowledge of the notification would be a valid defence in a prosecution under that section. But it is not necessary to enter upon that question, as the very risk of prosecution involved in declaring an association unlawful with penal consequences, without providing for adequate communication of such declaration to the association and its members or office-bearers, may well be considered sufficient to render the imposition of restrictions by such means unreasonable. In this respect, an externment order stands on a different footing, as provision is made for personal or other adequate mode of service on the individual concerned, who is thus assured of an opportunity of putting forward his case. For all these reasons, the decision in Dr. Khare's case is distinguishable and cannot rule the present case, as claimed by the learned Attorney-General. Indeed, as we have observed earlier, a decision dealing with the validity of restrictions imposed on one of the rights conferred by Article 19 (1) cannot have much value as a precedent for adjudging the validity of the restrictions imposed on another right, even when the constitutional criterion is the same, namely, reasonableness, as the conclusion must depend on the cumulative effect of the varying facts and circumstances of each case.

Having given the case our best and most anxious consideration, we have arrived at the conclusion, in agreement with the learned Judges of the High Court, that, having regard to the peculiar features to which reference has been made, Section 15 (2) (B) of the Criminal Law Amendment Act, 1908, as amended by the Criminal Law Amendment (Madras) Act, 1950, falls outside the scope of authorised restrictions under Clause (4) of Article 19 and is, therefore, unconstitutional and void.

The appeal fails and is accordingly dismissed with costs.

Mr. M. C. Setalvad, Attorney-General of India, with Mr. G. N. Joshi, instructed by Mr. P. A. Mehta, Government Solicitor, appeared for the Union of India (Intervenor). Mr. Govind Swaminathan with Mr. R. Ganapathi Aiyar, instructed by Mr. P. A. Mehta, Government Solicitor, appeared for the State of Madras. Mr. T. S. Subramania Aiyar, Advocate-General of Travancore-Cochin, with Mr. M. K. Krishna Pillai, instructed by Mr. P. A. Mehta, Government Solicitor, appeared for the State of Travancore-Cochin (Intervenor). Mr. C. R Pattabhiraman, instructed by Mr. S. Subramaniam, Agent, appeared for the respondent.