SOME REFLECTIONS ON THE ANTI-COMMUNIST ACT

Unlike the American Constitution, neither British nor Australian constitutional law erects any constitutional barriers against legislation limiting freedom of thought, of speech, or association. That constitutional guarantees are of limited value in times of tension and emergency is, however, shown by recent American developments. An anti-Communist law, passed with the necessary two-thirds majority in both Houses over President Truman's veto, stops just short of outlawing the Communist Party, but it provides for registration of all Communists, banning from public employment any persons declared to be Communists or members of a subversive organisation, in time of emergency gives the Attorney-General sweeping powers of detention of potential spies and saboteurs and makes it a crime to "conspire to perform any act which would substantially contribute to the establishment of a Communist dictatorship." It is possible that the law might be declared unconstitutional, but this is unlikely in view of the extensive interpretation which the Supreme Court has recently given to the "clear and present danger" rule.

Constitutional guarantees are thus far less potent than is commonly believed. Every constitution contains qualifications such as emergency powers and police powers, which the pressure of public opinion and changing judicial interpretations can elevate to far greater significance than originally contemplated. Such need does not arise in British or Australian law. Yet there is obviously a point at which the use of unrestrained legislative power would turn democracy into a police state. On the other hand, no modern state can do without an extensive apparatus of protective legislation, designed to safeguard its foundations against attack, from without or within, by unconstitutional means. The borderline between objectionable and unobjectionable legislation must be sought in a consideration of settled constitutional tradition, of the principles of democracy, and of the limits to which protective legislation can go without the establishment of a police state.

The English constitutional tradition, as Dicey pointed out, has been, on the whole, hostile to guaranteed individual rights. The transition from an authoritarian to a liberal and democratic state has come through the gradual elimination of repressive legislation, and even more through the establishment of an independent judiciary, backed by the collective strength of public opinion. There are no Star Chambers, but the still accepted definition of sedition would, in the hands of a subservient judiciary, enable any government to prosecute political dissent without any new legislation.

The growth of liberal thinking, especially in the nineteenth century, gradually removed the vestiges of repressive legislation, and the judiciary, while overwhelmingly blind to the social changes occurring as a result of the Industrial Revolution, was on the whole deeply imbued with the new ideology of individual freedom. The twentieth century, especially since the first World War, has brought a swing-back of the pendulum. State organisation has become more complex, government more ubiquitous, threats to the integrity of the state, through military, political, or economic means, have increased in scope and subtlety. The answer can be seen in the great extension of legislation punishing the betrayal of official secrets, or in the sweeping Australian Crimes Act of 1921, which provides severe sanctions against economic sabotage. Another indirect sanction against economic threats has recently become more prominent. The Commonwealth Court of Arbitration is making more and more use of its power to fine or imprison for contempt of Court, or to deregister associations. It has, in recent decisions, repeatedly regarded defiance of an arbitration award, for example through a strike, as contempt of court, and it punished the responsible officials of the Union.[1] The use of existing legislation for the protection of the state has been reinforced by specific legislation enacted to meet particular emergencies. A recent example is the Act by which the Labour Government crippled the Coal Strike of 1949—started in defiance of arbitration proceedings—by forbidding the use of union funds in support of the strike, and compelling the disclosure by the banks of the use of such funds. The Arbitration Court enforced these provisions by punishing responsible Communist trade union officials for contempt of court, when they refused to disclose the use of their union funds.

It is thus clear that modern democratic governments possess and use a formidable arsenal of legislative weapons to combat attacks on their political, constitutional, and economic foundations. The Anti-Communist Act,[2] however, goes much further than this. It declares certain organisations unlawful and criminal, and it makes certain persons found to fall under the definitions of the Bill incapable of holding public office, or executive posts in trade unions which the Government declares to be essential. The declaration which creates such incapacity is an executive act, but an appeal lies to the Supreme Courts of the States, and ultimately to the High Court, against such declaration. Apparently, however, such an appeal is limited to the definition of a person as a Communist, but does not extend to the opinion of the Government that the person "is engaged or is likely to engage in any activities prejudicial to the security and defence of the Commonwealth, or to the execution or maintenance of the Constitution or the laws of the Commonwealth." It is for the person charged with being a Communist to prove on oath that

[1] See *Metal Trades Employers Association v. Amalgamated Engineering Union and others,* Judgment of 10th July, 1950.
[2] Communist Party Dissolution Act 1950.

the allegation is untrue. Once such an oath has been sworn, the burden of proof shifts to the Crown.[3]

It is not the purpose of this article to discuss the details of the Australian Act, but rather some of the general problems which legislation of this kind creates.

Its main justification has been that Communists internally accept the need and prepare for revolution, and that internationally they act at the behest and in the service of a foreign power, the Soviet Union, and if necessary against their own country.

On the Communist attitude towards revolution as a means of achieving the Communist society, the most authoritative and recent document is probably the Report of Mr. Justice Lowe of the Victorian Supreme Court, in his capacity as Royal Commissioner. The Report, which is very fully documented, gives a most careful and balanced survey of the theory and practice of Communist movements, in the light not only of the authoritative statements of Marx, Stalin, Lenin, and other teachers of Communism, but of the constitution of the Australian Communist Party and its branches, and of the evidence given before the Commission by leading Communists. The conclusion of the Report is one which the overwhelming majority of non-Communists will accept: that the Communist Parties in non-Communist countries do not openly advocate the overthrow of constitutional government by force, but that they are prepared, when opportunity arises, to use unconstitutional means, such as systematic strike action in defiance of arbitration, the violation of oaths of loyalty, and "spontaneous" action by the workers. Admissions of this kind, as they were made by leading Communist witnesses, are usually adorned by observations that this would only be done to defeat the enemies of the working class, or to prevent the growth of Fascism. But such verbal reservations do not alter the fact, amply proved in the experience of many countries, that obedience to the constitution is a matter of tactics, not of principle.

Internationally, the behaviour of Communist Parties everywhere, especially in the last twenty years, has shown abundantly that they will in fact accept whatever is the foreign policy of the Soviet Union of the moment, and that they will if necessary reverse their attitude overnight, to keep in step. Any Communist who has discovered a conflict between national interests and Soviet policy has been proscribed or purged by the Communist Party. Communist leaders of Bulgaria, Hungary, and Poland who showed such tendencies have been purged; Tito alone survives, in the face of the bitter hostility of the Kremlin and the Cominform.

[3] This was supposed to be a concession as against the original draft, under which the onus of proof was entirely on the charged person. I am unable to see any but a purely verbal alteration in the present amendment. It would in any case be for the Crown to disprove an oath, by showing it to be a perjury, or by producing new facts.

In 1949, a number of leading Communists of different countries, including Australian Communists, made substantially similar statements on the attitude of the Communist Party in the case of a war between the Western democracies and Soviet Russia. Two of them, Sharkey and Burns, were convicted of sedition. The case of Burns was the more interesting for our purposes. At a public discussion meeting on the attitude of Communists in case of war, the following question was put to Burns:

> "We all realise that the world could become embroiled in a third world war in the immediate future between Soviet Russia and the Western Powers. In the event of such a war, what would be the attitude and actions of the Communist Party in Australia?"
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> Burns' answer was: "If Australia was involved in such a war it would be between Soviet Russia and American and British Imperialism. It would be a counter-revolutionary war. It would be a reactionary war. We would oppose that war, we would fight on the side of Soviet Russia."

On the casting vote of the Chief Justice, an equally divided High Court upheld Burns' conviction for sedition. Dixon, J., in his dissenting judgment, strongly emphasized the difference between sedition, incitement to disaffection against Government or Constitution, and exposition of the action which certain people or organisations, including the accused, would themselves take. In the opinion of Dixon and McTiernan, JJ., Burns had only made statements on what the Communist Party would do in certain circumstances.

In the present writer's opinion, the majority judgment stretches the definition of sedition dangerously far, and touches on one of the root problems of democracy. In effect, it describes the utterance of certain thoughts and convictions as in itself revolutionary and illegal, and it thereby blurs the borderline between dangerous thought and dangerous action. A democracy, like any other State, is entitled to defend itself against actions designed at its overthrow by unconstitutional means. But democracy cannot survive without the conviction that dangerous thought must be fought by persuasion and better arguments, not by suppression. Once it abandons this principle, the road is open for the methods of the police State and a totalitarian government for the "thought police" which George Orwell[4] has described with grim incisiveness.

The anti-Communist legislation is objectionable insofar as it does precisely the same thing: prosecuting association and belief as distinct from specific action. And because the outlawing of the Communist Party alone could be sidestepped by the formation of other organisations pursuing the same ends but bearing different names, any such legislation, like the Australian Act, must give a

[4] In his novel "1948."

general sweeping definition—it defines a Communist as "a person who supports or advocates the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin." A similar definition applies to Communist-affiliated organisations, which are outlawed under the Act. The immediate consequences of such a definition are mitigated by the right of appeal, which both individuals and organisations possess. But the vital consequences cannot be mitigated. Even if the judges of the High Court and the Supreme Courts can be presumed to have that intimate knowledge of political science and economics which would enable them to distinguish accurately the advocacy of the Marxist Communism from other forms of criticism of existing society, this will hardly apply to the hundreds of educational bodies, business organisations, returned soldiers' leagues, and others who will now feel entitled to probe into a person's political convictions. There are few intelligent teachers of political science, economics, law, or history living who have not supported some Marxist principles, sometimes in conformity with the teaching of Marx and Lenin, for Marx advocated, among other things, socialisation of basic industries and banking, and exposed the inter-dependence of law and economic power. Many of these conclusions have become widely accepted in modern jurisprudence, economics, and political science. Thousands of eminent teachers have accepted some of the Marxist teachings and rejected or modified others. Others have advocated, at various times and by various means, collaboration with Soviet Russia rather than with the United States. As long as the administration of such a law is in the hands of sane people, the worst excesses might be prevented. But it is bound to encourage the thousands of individuals who in calmer times are restrained by the weight of public opinion, but who can now let loose their ignorance, their jealousy, and their prejudices. It is precisely for this reason, and in the light of the reckless and despicable witch-hunting campaigns of which Senator McCarthy has been perhaps the most ignoble exponent, that President Truman unsuccessfully tried to veto the recent American Act. It is for this reason too that the British and Canadian Governments have firmly refused to enact legislation of this kind.

Without question, the Communists of today, like the Fascists of yesterday and perhaps of tomorrow, constitute a threat to democracy. Nobody other than a Communist will expect complete passivity in the face of such danger; every prosecution or every piece of legislation countering specific action aimed at the overthrow of the State is justified. We can see already many alarming signs that the democratic nations, in purporting to fight an external threat, are undermining the very foundations of their own existence, and that they rely on force or repression rather than persuasion. Yet the

decline of Communism in Western Europe during the last few years shows that, given a minimum of political education and economic welfare, the vast majority of the people in the democracies freely decide against Communism. This is a slower but surer way of preserving democracy.

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