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The Bomb

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THE Atomic bomb in the US, USSR, Britain and even France is just one more military weapon and cannot now basically change the political context in which it occurs. The first Asian bomb, particularly in the hands of a regime as powerful and ruthlessly ambitious as the Communist Chinese, is however less a military weapon than a political and psychological one of enormous importance.

China, with her bomb, offers a three-fold warning to the world:

- a) to the USA against permitting the liberation of Communist China from Taiwan;
- b) to India, should she attempt to take measures to regain her lost territory;
- c) to the USSR and the rest of the communist world, that Mao Tse-tung's China is not without the power and the will to strike.

Red China has also given Russia a compelling reason to ease her ideological conflict with Peking. Moscow's response after Khrushchev's dismissal is yet to take shape, but some detente between Moscow and Peking is more than likely.

With the bomb in her hand, China is expecting a freer and stronger hand in South-East Asia. China will also be able to collect from this achievement enormous psychological advantages in Asia and Africa as the first "coloured" country to break the "white" monopoly of nuclear weapons. This is a blow to India, because she has been fighting a losing battle in these Continents for sympathy against China's act of naked aggression.

No influential voice has been heard in Africa to regret China's action, let alone condemn it. On the contrary, the Arab countries, whose full-throated fanfaronade against previous nuclear tests was notable, are today curiously struck dumb; and the morale of China's satellites in the South-East region, and presumably in Africa too, has gone up sky high. Thousands of congratulatory messages are pouring into Peking in praise of Communist China's "great achievement."

Peking's statement that she would not use nuclear weapons needs to be taken with a large dollop of salt. The statement says: "The development of nuclear weapons by China is for defence....The

Chinese Government solemnly declares that it will never under any circumstances be the first to use nuclear weapons...." The words are luring. Seen minutely, the significant words in the operative para are "defence" and "first". As has happened before, the Chinese Communists can always find an excuse to justify their use of nuclear weapons and yet conveniently proclaim that they used them only for defence. They justified their attack on India with these very tactics, and successfully convinced many countries of Africa and Asia.

It was Soviet Russia's early help with "peaceful" reactors that sent China on its way in 1955. Three years later, more than 5,000 Red Chinese technicians were in a Russian-directed programme in China. Big universities had projects under way in atomic technology.

Just before the schism, the Chinese had the biggest foreign group at Russia's Dubna Research Institute, where at least 1,500 Chinese studied. By then Red China's first nuclear reactor, provided by Khrushchev, was in full operation in Peking.

The Chinese have now built at least three other reactors on their own, and US intelligence believes they are building a giant gaseous-diffusion plant, the "factory" needed for mass production of the ingredients of A-bombs.

The explosion of the bomb is no big surprise for the world, because there have been repeated warnings about Chinese ambitions in the nuclear field.

From the samples of radioactive fallout of the Chinese bomb brought back by American planes and analysed in San Francisco it appears that the explosive element used by the Chinese was not plutonium as was expected, but a more sophisticated material — uranium — 235. This means the Chinese have taken a short cut towards the production of a hydrogen bomb. The physicist who edits "Science", the weekly magazine of the American Association for the Advancement of Science, has said: "China by its ability to separate weapons of the grade of fissionable U-235 from non-fissionable U-238 had achieved greatly enhanced capability of producing iridium, the key constituent for thermonuclear bombs."

Immediately, all that Peking can do is to blackmail. Later, when she becomes a full-fledged nuclear power, the use it can make of its capability in support of diplomacy can be tremendous. It is already pushing guerilla wars in Indo-China, infiltrating Cambodia,

and supporting insurgents in Burma and Thailand and aggression against Malaysia.

In the face of such a situation, what is the right policy for India to follow?

India has three alternatives:

- 1) to do nothing;
- 2) to make the bomb;
- 3) to be frank in recognising the principle of interdependence — that the world has become far too small for a narrow, national solution of our problems.

1) This is the policy that the communists in India — both Moscow and Peking blends — including Mr. Krishna Menon, are suggesting. While they think it "foolish" for India to enter the nuclear race, they refrain from giving any alternative suggestion with regard to the situation created, especially in the field of defence, by China's nuclear blast. This attitude of theirs is natural, because it is in keeping with their policy of making India concede hegemony in Asia to Russia and China, with the consequent erosion of our national independence and our gradual deterioration to satellite status.

2) India cannot, for various reasons, enter the nuclear race. These reasons are:

- a) The astronomical cost of making the Bomb and of acquiring, maintaining and operating an effective delivery system consisting of a supersonic jet Air Force, would constitute a burden which would cripple India's already sick economy.

A recent study by an American authority, Christopher Hohenhemser, roughly estimates the cost of capital investment on a military-significant nuclear programme at \$50 million and the annual operating cost at \$20 million.

The U.S. Atomic Energy Commission estimates that, nowadays, for an investment of \$50 million, a country can establish enough plutonium production to manufacture just one crude weapon a year. The Prime Minister said at the A.I.C.C. meeting in Guntur the other day that it would cost Rs. 40 to Rs. 50 crores to make an atom bomb.

- b) Expense however is not the only, and nor even the biggest, consideration in arriving at a decision as whether to develop an independent nuclear deterrent. More important is the politico-military evaluation of such a weapon system in terms of whether it could in fact fulfil its purpose of deterring China.

Geographic, numerical and ideological disadvantages, from the military view-point, would make it necessary for India to demonstrate possibly as much as a ten-to-one nuclear superiority effectively to deter a determined China.

While most Indian cities and major installations are within easy range of Tibetan airfields, the distance between Indian bases and potential Chinese home targets is very much longer. The vital Chinese targets

such as Peking and Shanghai are 2,500 miles away from India, and the industrial complexes of Manchuria even further away. Many Indian targets, on the other hand, are within 300 miles of Chinese bases in Tibet.

The Chinese bomb can be carried by a propeller-driven TU-4 or a IL-28, with a combat radius of 1,800 to 2,000 miles and 600 to 700 miles respectively. (Combat radius is the distance a plane can fly and return with safety to its base without refuelling.) India on the other hand would have to depend on its subsonic medium range Canberra bombers or converted Boeing 707 airliners for long distances. Actually, neither would constitute a credible deterrent against China, and India would have to consider buying more recent and far more expensive long-range supersonic medium bombers like the French Mirage or the American Hustler. Further advances would have to be made as China develops newer weapons, involving million dollar programmes for hardened missile complexes, complete with intricate testing, tracking and guidance net-works.

Can the Indian people really afford such a luxury?

- c) China has a bigger and more regimented population with leaders who boast their willingness to accept casualties in millions. Said China's Mao Tse-tung reportedly to the late Prime Minister Nehru: "Even if a nuclear war should wipe out 400 million of our people, the remaining 200 million would conquer the world." India's anxiety, on the other hand, to avoid casualties was demonstrated by its reluctance to utilize the air force to check the Chinese advance in 1962.

- d) India has been constantly advocating the scrapping of nuclear programmes, so it would be contrary to what she has been preaching should she too enter the race. Canada gave India the Trombay reactor and has promised to give another for Rana Pratap Sagar — on the assumption that this was and intended for peaceful purposes. Canada is pledged not to use its considerable technical and scientific know-how in the nuclear field for war purposes. How can India justify the use of Canadian aid for purposes other than that for which it was secured?

- 3) In the world today, there are only two great nuclear powers — the U.S. and Soviet Russia — who can stop any Chinese threat directed at India.

To rely on Soviet Russia against China today, particularly after the exit of Khrushchev, would be folly of the highest order. Russia and China stand arrayed against the world, both believing in their eventual joint success, and therefore it is common sense that they will postpone their internecine disputes until they have finished off their opponents. It is obvious that the new Russian Government does not intend to toe the Khrushchev line all the way.

Thus, Russia is ruled out, and it leaves us with the best and only deterrent available — the U.S. umbrella. It is this that has in fact protected many weak nations in Europe and Asia, including ourselves, from being overrun by Communist imperialism during the last decade. In this context, it is significant that the British Labour Government has accepted this view and is seeking to abandon the "mythical nuclear deterrent" which the Conservatives had tried to create.

If India refuses to enter into the necessary agreement or understanding for mutual security with the U.S. and continues to depend on so-called Soviet military assistance, she would deny herself a firm assurance of the nuclear deterrent operation in her favour.

It is true that President Johnson, on October 18, gave an assurance that nations that did not seek nuclear weapons could be sure that, if they needed U.S. support against the threat of nuclear blackmail, they would have it. What India needs, however, is not the knowledge that U.S. nuclear retaliation would follow an atomic attack on India, but that the enemy should be deterred from making such an attack at all.

The chief value of the deterrent is its unconditional and automatic nature. For the Chinese communists to be left in no doubt about the automatic nature of the U.S. umbrella over India, and thus be deterred from any possible atomic attack on this country, it is essential that India, together with other free Asian countries, should come to the necessary understanding for mutual security with the U.S.A.

"If Power Without Law May Make Laws What Subject Can Be Sure Of His Life..." Charles I At His Trial

A. G. Mulgaonkar

THE Supreme Court gave its opinion (Mr. Justice Sarkar giving a separate differing opinion) which was read out by Chief Justice Gajendragadkar. The following are among the points: Sovereignty, which is enjoyed by the British Parliament, cannot be claimed by any legislature in India; 'In England, Parliament is sovereign; in India the Constitution is supreme: The task of construing the Constitution and safeguarding fundamental rights of citizens rests with the courts: A general warrant issued by a legislature is not conclusive; the courts can examine it.'

The British Parliament was sovereign, but the supremacy of the Constitution was fundamental to the existence of a federal State, in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing the delicate balance of power. Therefore, the Chief Justice said in a democratic country governed by a written constitution it is the Constitution which is supreme and sovereign.

The essential characteristic of federalism, he said, is the distribution of limited executive, legislative and judicial authority among bodies which are co-ordinate with and independent of each other.

The supremacy of the Constitution, the Chief Justice observed, is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers.

The Chief Justice said our legislatures are undoubtedly sovereign, but their sovereignty is controlled by the basic concept of the written Constitution itself.

Besides, the legislative sovereignty of our legisla-

tures, including the parliament, is normally controlled by the fundamental rights enshrined in Part III of the Constitution. If they trespass on the fundamental rights of the citizen in a manner not justified by the relevant provisions their legislative actions are liable to be struck down by courts in India. The sovereignty which can be claimed by the British Parliament cannot be claimed by any legislature in the literal, absolute sense. The Constitution had, moreover, entrusted to the judicature the task of construing the provisions of the Constitution and of safeguarding fundamental rights of the citizens. There can be little doubt, the Chief Justice said, that the powers, privileges and immunities are incidental powers, privileges and immunities which every sovereign legislature must possess in order that it may be able to function effectively, and that explains the purpose of the latter part of clause(3).

The Chief Justice said in dealing with effect of provisions of Art. 143(3) whenever it appears that there is a conflict between the said provisions and the provisions pertaining to fundamental rights, an attempt will have to be made to resolve the conflict by adoption of harmonious rule of construction. It becomes at once material to enquire whether the Constitution makers had really intended that the limitations on fundamental rights subject to which alone a law can be made by the legislature of a State prescribing its powers, privileges and immunities should be treated as irrelevant in construing the latter part of said clause. The Chief Justice said as a matter of construction of clause (3) the fact that the first part of said clause refers to future laws which would

be subject to fundamental rights may assume significance in interpreting the latter part of clause (3).

The Chief Justice said that the position in dealing with the present dispute is: We ought to proceed on the basis that the latter part of Art. 194 (3) is not subject to Art. 19 (1) (a) but is subject to Art. 21. He then considered the question whether it was the intention of the Constitution to perpetuate the dualism which rudely disturbed the public life in England in the seventeenth, eighteenth and nineteenth centuries.

These orders and writs, the Chief Justice said, could be issued against the State, person or authority. The word "State" as defined by Art. 12 includes legislature. So, he said, in appropriate cases the power of the high court under Art 226 could be exercised against the legislature. If an application is made to the high court for issue of a writ of habeas corpus it would not be open to the House to raise a preliminary objection that the high court has no jurisdiction to entertain the application because the detention is by an order of the House. What is true of Art. 226, the Chief Justice said, is still more true about Art. 32 (1) because it is a guaranteed fundamental right and puts the matter on a still higher pedestal.

The Chief Justice then referred to Art. 208 which provides that a legislature may make rules for regulating its procedure and the conduct of its business. If, he said, rules were made they would be subject to the fundamental rights. Whatever may be the extent of powers and privileges conferred on the House by the latter part of Art. 194 (3) the power to take action against a judge for contempt alleged to have been committed by him by his acting in the discharge of his duties cannot be included in them.

It is a tribute, the Chief Justice said, to the remarkable English genius for finding pragmatic ad hoc solutions to problems which appeared to be irreconcilable by a method of give and take. The result of this process has been that the House of Commons has not for a hundred years refused to submit its privileges to the decision of courts, and so, it may be said to have given practical recognition to the jurisdiction of courts over the existence and extent of its jurisdiction. On the other hand, the courts have always refused to interfere in the application by the House of any of its recognized privileges. His Lordship referred to a large number of English cases and said that it would not be inaccurate to observe that the right claimed by the House of Commons not to have its general warrant examined in habeas corpus proceeding has been based more on the considerations that the House of Commons is in the position of a superior court of record and has the right like other superior courts of record to issue a general warrant for commitment of persons found guilty of contempt. His Lordship added that even while

recognising the validity of a general warrant, judges have frequently observed that if they were satisfied that such a general warrant was issued for frivolous or extravagant reason, it would be open to them to examine their validity.

Art. 32 makes no exception and it would be illogical to contend that even if the right claimed by the House may contravene the fundamental rights of citizen, the aggrieved citizen cannot successfully move this court under Art. 32. The Chief Justice held that to the absolute constitutional right conferred on the citizen under Art. 32 no exception can be made and no exception is intended to be made by the Constitution by reference to any power or privilege vesting in the legislatures of this country. In our opinion, the Chief Justice said, the impact of fundamental constitutional right conferred on the Indian citizens by Art. 32 on the construction of the latter part of Art. 194 (3) is decisively against the view that a power or privilege can be claimed by the House, though it may be inconsistent with Art. 21.

In taking precipitate action of issuing warrants against the judges of the Lucknow Bench, the House did not conform to the uniform practice which the House of Commons had followed for more than a century and did not instruct its lawyers to make a return in time.

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This is the opinion of the Supreme Court of India. True, it is not a judgement in the strict sense of the term but nevertheless merits no less respect. It is possible that to many, including legislators, the opinion has come as a jolt; but giving it its due weight, and after an objective consideration of the matter, it will be seen that the opinion offers an easy solution to a situation which can well nigh become insoluble.

It is unfortunate, of course, that such a difficult situation should have arisen, but having arisen, doubtless, it had to be solved as the Supreme Court pointed out, in as harmonious a manner as possible and that with reference to the Constitution. Although it should not at this stage be necessary, it is required to be pointed out that whenever any constitutional problem arises, it can only be solved by reference to the Constitution and that the Supreme Court is the best authority to do so. Also, there is no reason to take a gloomy view whenever a crisis does arise. They have arisen aplenty in other democratic countries, even worse than the one that faced us, and have been solved. But one fact must never be lost sight of: that we have chosen a democratic way of life and that whatever difficulty arises must be solved in a democratic way.

There is one preliminary remark necessary to make, however, before discussing the merits of the question.

It was unfortunate that in the proceedings before the two judges, Beg and Sehgal JJ., in the Habeas Corpus petition, the usual procedure was not followed. In a Habeas Corpus petition there never is a question of granting bail; only whether the custody is legal and if the custody be held not to be legal then the person in custody is set at liberty. As the matter concerns a man's liberty (sometimes minors are involved) the petition on presentation is set down for hearing at the earliest date with notice to the party, in whose custody the person is, to produce him in Court. At this or any subsequent stage bail is not granted. At the hearing, the first issue to be decided is the Court's jurisdiction or competence to hear and decide the petition and grant the relief asked for. The merits of the matter i.e. of the legality of the custody can only be gone into if the Court holds it has jurisdiction. (See I.L.R. (1939) Mad. 708 at p. 711 L.35). Obviously, if this, the usual procedure, had been followed the learned judges would doubtless have come to the conclusion that the U.P. Vidhan Sabha had acted within its rights and if so that they had no jurisdiction. Clearly, the further unhappy events that took place, including the action against the judges, would never have happened. It is to be hoped that this matter will receive attention both from the Supreme Court and the Parliament.

That the Supreme Court Judgement holding that the High Courts under Art. 226 and itself under Art. 32 had both the duty and the right to entertain petitions for enforcement of fundamental rights, even against legislatures, is a right one. Considering all the rights, fundamental rights to the citizen and privileges to the legislatures flow from one source, the Constitution, can the legislatures claim that they will exercise their privileges but deny the fundamental rights to the citizen? Surely, it is well known that a donee or beneficiary cannot accept a gift, without also accepting the condition, if one is attached to it.

There is also a supreme reason why the superior courts should have jurisdiction in matters of freedom and liberty of the citizen. Representative assemblies, even the British Parliament, can also become as tyrannical as any monarch or tyrant on occasions. As Charles I said at his trial: "For if power without law may make laws, may alter the fundamental laws of the Kingdom, I know not what subject he is in England that can be sure of his life or anything that he calls his own." Indeed this parliamentary tyranny became so great at one time (during Charles II's reign) that a constitutional historian has recorded: "Every action of the Executive, however reasonable or necessary, was regarded with jealousy and suspicion, and the very judges, though appointed by the Crown, preferred to flout it openly rather than give an angry House of Commons the least reason to suppose that they favoured the cause of authority".

As the Supreme Court points out "the supremacy of the Constitution is fundamental to the existence of a federal state". The Indian Constitution (that it is written, necessarily introduces into it a rigidity from which unwritten ones tend to be free) distributes functions of the state between its three arms; executive, legislative, and political, and while they are co-ordinate and independent of each other, clashes are bound occasionally to arise between one and any of the other two. On such unhappy and rare occasions it is necessary that there should be an authority in which power is vested to resolve the difference calmly and harmoniously. It is best that this authority should be the Supreme Court. Should public opinion on any particular occasion of controversy not be behind the judicial decision, the legislature would be justified in effecting a change by its legislative powers. This necessarily arms the judiciary with great authority, and it behoves all the more those who exercise high judicial functions to keep aloof from all matters of public controversy.

Another reason, why it is necessary that the Superior Courts in India should have jurisdiction in matters pertaining to the privileges of legislatures has not received that attention in the country which it deserves. Of course, it was not relevant to the issues before the Supreme Court, hence it did not find reference in its judgement. The Constitution has given each of the States a legislature and some States two. Legislatures naturally tend to become jealous of their powers and privileges and it is conceivable that from time to time conflicts over their privileges between the two legislatures of a State, or the legislatures of different States, may arise. How are these conflicts to be resolved peacefully and harmoniously excepting through the detached agency of the Courts? That the legislatures can be on occasion capricious or even tyrannical in the matters of their privileges or dignity can best be illustrated by two instances. That they concern the British Parliament will surprise many but adds to the force of the argument. The first occasion was when in 1676 Shaftsbury and a few other members, pointing to an old act of Edward III's sought to prove that a Parliament that had not sat for over a year was *ipso facto* dissolved. This they did in order to embarrass the king, which most members were desirous of doing.

But instead of winning support for this interesting constitutional thesis the lords found themselves violently attacked for outraging parliamentary dignity and privilege. They were called upon to apologise or withdraw and on their refusing, their fellow peers ordered them to the Tower. The end of this matter is very interesting. After remaining a prisoner in the Tower for a year Shaftsbury offered in 1677 his most humble apology for his ill-advised action (in endeavouring to maintain that the Parlia-

ment was dissolved), the House felt that satisfaction had been received and petitioned the king to order his discharge. What is even more astounding, the House of Lords in 1680 passed this motion: "That the said order and proceedings (of 1676 committing the Lords of the Tower) concerning the said Lords were unparliamentary, from the beginning, and in the whole progress thereof; and therefore are all ordered to be vacated (by virtue of this judgement) in the Journal book of this House, that the same, or any of them, may never be drawn into precedent for the future". (The Shaftsbury case referred to by the U.P. Vidhan Sabha Counsel at the King's Bench was the outcome of this, when the Court refused to interfere). The other case is known to constitutional historians as *Sherley V. Fagg*. The first was a physician to the king and Fagg a member of the House of Commons. Sherley had filed an appeal in the House of Lords (from a lower court), while the Commons were in session which the Commons held to be a serious breach of their privilege. This brought on a head-on collision between the two houses. After most of the Counsel had been "committed to custody by the angry participants, and the Lords had accused the Commons of 'transcendant misbehaviour, breach of privilege, Magna Carta, subversion of government, and other high provoking and diminishing expressions', the King, after a vain effort to restore peace

prorogued Parliament", causing the controversy thereby to lapse.

It will therefore be seen what extravagant claims have been or can be made in the name of parliamentary privilege. British Judges have held that because power can be abused is no reason why that power should be denied. But Lord Coleridge C. J. in the same judgement on which so much reliance was placed on behalf of the U.P. Vidhan Sabha also points out: "That, when a question is raised before the Court, the Court must give judgement on it according to its notions of the law, and not according to a resolution of either House of Parliament.... Such cases might by possibility, occasion unseemly conflicts between the Courts and the Houses."

In India where there will exist at one time so many legislatures, it is easy to see what difficulties can arise and the argument of British Judges that possible abuse is no bar to the recognition of power, cannot work in India. It is necessary here, in our special circumstances, in order to prevent Constitutional deadlocks or even to prevent abuse of power by any of the three arms of the State, Legislature, Executive and Judicial that Constitutional curbs should exist. It follows therefore that the powers and privileges of Legislature should be, without delay, defined as provided in for Art. 193 and not be left vague to be ascertained by reference to those of the House of Commons.

Obscenity: Literature & Law (III)

N. S. Ranganath Rao

HAVING in view the defects stated previously certain changes in the law of obscenity as contained in the Indian Penal Code are suggested here. The most controversial question is as to whether a precise definition of obscenity be attempted in the Indian Penal Code. A rigid definition of obscenity may have the advantages of clarity and precision but at the same time in the context of the changing concept of obscenity such a rigid definition might not be workable. Probably having this problem in view The Obscenity Publication Act, 1959 does not attempt an independent definition though it considerably modifies the definition of obscenity as laid down in the *Hicklin's* case. Similarly certain Commonwealth Countries which have recently attempted to define obscenity have more or less attempted to modify the *Hicklin* test and tried to improve on it. Therefore, a similar modified definition is considered to be advisable in India also. It may be done by including an explanation to Section 292 of the Indian Penal Code. The explanation may be as follows:—

For the purpose of this Section any book, pamphlet, paper, drawing, painting, representation or figure or any other object shall be deemed to be obscene if its effect, if taken as a whole, is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in such object.

Similarly Sec. 292 as a whole can be recast in the following manner:—

(a) *Whoever knowingly and without lawful justification or excuse* sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) *knowingly and without lawful justification or excuse* imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or

having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation,

(c) takes part in or received profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section.

Shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Explanation: For the purpose of this Section any book, pamphlet, paper, drawing, painting, representation or figure or any other object shall be deemed to be obscene if its effect, if taken as whole, is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in such object.

Exception 1 — This section does not extend to any book, pamphlet, writing, drawing, or painting kept or used bona fide for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purposes.

Exception 2 — *Nothing contained in Sec 292 or Section 293 shall apply to any book, pamphlet, writing, drawing, painting, representation or figure meant for public good or for bona fide purposes of science, literature, art or any other branch of learning.*

Provided the opinion of experts may be admitted as evidence as to the literary merits of the object and also as to whether the object tends to deprave or corrupt. (The amendments suggested are in italics).

The proposed changes are expected to achieve the following results:—

- 1 The definition of obscenity as contained in the Explanation makes it necessary to take into consideration the entire work and its dominating influence while assessing its tendency to deprave or corrupt.
- 2 The inclusion of the words 'knowingly or without lawful justification,' in clauses (a) and (b) would make intention or knowledge of the accused a necessary element of the offence. This would re-

move doubts regarding the nature of the liability of booksellers and importers.

- 3 The literary, artistic or the scientific purposes of the object shall be a relevant consideration.
- 4 The admissibility of the expert evidence regarding the merits of the object and its tendency to deprave and corrupt may do away with the "well brought up school girl of fourteen" test.
- 5 Exception 2 may also mitigate the hardship arising out of the absence of trial by Jury in India.

Apart from the above suggested change in the substantive law of obscenity, certain problems regarding the practical enforcement of the law needs to be seriously considered. Though the law of obscenity as contained in the Sections of the Indian Penal Code has been stringent, as pointed above unreasonably stringent, yet the paradoxical fact is that quite a lot of obscene material, particularly in the form of books and periodicals is in commercial circulation in the country. It often happens that books of well known writers, the obscenity of which may be doubtful are often subject to process of law on account of the notoriety gained by the books elsewhere. But quite a volume of pornographic literature is available in the country. This reveals that the enforcement of the law of obscenity is defeating both the purposes of the law. Serious books of literature are sought to be condemned while pure pornography escapes the attention of law. It is also true that much of the circulated pornographic literary material is in the form of imported English books or periodicals.

The problem of administration of law of obscenity can be examined from two aspects:—

Firstly measures to be taken for preventing the import and smuggling of poor pornographic material, and secondly, effective measures to be taken against indigenous pornographic material.

So far as the imported periodicals and books are concerned the present administrative procedure adopted by the Customs and Postal authorities needs to be examined.

The Customs Act 1962 enables the Central Government to prohibit the import of publication or paintings if the Government "is satisfied that it is necessary to do so" for the purpose of the maintenance of the "standards of decency or morality". The Old Customs Act had prohibited "any obscene book, pamphlet, paper, drawing, painting, representation, figure or article." The change of words in the present Act seems to give greater latitude to the executive in prohibiting the import of books. It is suggested that with the adoption of a comprehensive definition of obscenity it may be advisable to make obscenity a precise ground of prohibition rather than "standards of decency or morality".

It appears that the present practice adopted by

the Government in deciding the ground of prohibition also needs considerable change. It appears that the present practice in deciding the nature of doubtful books is to refer it to a panel of persons seeking their advice. It seems that the persons who constitute the panel do not operate as a Committee. There is no mutual consultation and discussion. It also appears that the books are not even circulated to all the members of the panel. Depending on convenience, a member or two are consulted and their opinion will be generally the basis of action. This practice is not satisfactory. Firstly it gives vast discretion to Custom authorities who may not be the proper judges of the literary importance or the obscenity of the books. It is also possible in some cases that this discretion may be the cause of a number of pornographic imported books being in circulation in the country. Therefore, some changes in the practice are necessary. It is suggested that Regional Boards of qualified persons be constituted instead of the All India Panel which exists today. It is also suggested that the Board might consist of men of different branches of learning like literature, law, medicine and psychology. It should be obligatory for the Customs authorities to refer all suspected books to these Regional Boards constituted in leading importing centres like Bombay, Madras and Calcutta. The opinion of these Boards should not be merely in an advisory capacity but it should be binding. In contested cases it should be obligatory on the part of the Government to prosecute the importer and thus give them a chance to vindicate the nature of the book. This suggestion is made having in view that a compulsory judicial condemnation before prohibition and confiscation, might result in great delay.

It is also suggested that the present position, that the obscenity of a book or a work can be judicially established only by a criminal prosecution, is unsatisfactory. Moreover, the suggested amendment of the Sections of the Indian Penal Code is accepted, the prosecution might very often find it difficult to

prove knowledge or intention on the part of sellers. It is also possible that quite a few honest sellers may not have knowledge of the obscene nature of the books. Therefore, it is suggested that it is necessary that some provision in law must be made to make obtaining a judicial declaration, regarding the obscenity of a book or work possible. This proceeding *in rem* against the book *in rem* giving notice to authors or publishers or importers (as the case may be) has several advantages over criminal prosecutions. This suggestion of a civil proceedings *in rem* against the book or work made by professors M. 'Carie and Lockhart of the University of Minnesota Law School, has been approved by the American Law Institute and some of the States in U.S.A. have also adopted the same.

It also appears that a large number of objectionable books would reach the country through the Oversea Mail. Under the Indian Post Offices Act, transmission by post of any indecent or obscene printing, painting, photograph, lithograph, engraving book or card or any other indecent or posting article is prohibited. Such articles posted in contravention of the above rule may be opened and destroyed. It appears that the matter is purely in the discretion of the postal authorities and there is no procedure to obtain expert opinion on the matter. It is suggested that the Regional Boards suggested above might be used for the purpose of action under the Indian Posts Act also. If these measures are brought into effect it should not be difficult to trace the channel from which pornographic material has leaked into the country. Thus these measures would ensure a reasonable procedure for maintaining freedom of import and at the same time act against irregular commercial activities in pornographic material.

So far as indigenous pornographic material is concerned the present enforcement machinery is often quite inadequate for various reasons. The apparent identity of interest between books-sellers and buyers makes the enforcement machinery either slack or arbitrary. It is suggested that a Board of experts in various fields, as suggested above, might also be entrusted with the work of prior examination of the alleged material before judicial proceedings are taken. The Board might examine suspected pornographic material on its own initiative, on information by Police or on information by any member of the public. A representative Board constituted on sound principles alone could focus the attention of the law — enforcing authorities on pornographic materials. This might not only bring pressure on the Police to take prompt action but it might also save the authors and publishers from the inconvenience of facing judicial proceedings when their work is *bona fide* and honest creative art, science or literature.

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Press Council

THE Indian Committee for Cultural Freedom held a Seminar on the proposed Press Council Bill on October 19-20, 1964. A summary of the proceedings is given below.

Professor Ranganath Rao of Government Law College presided over the deliberations of the first session.

In his introductory remarks, the Chairman traced the background of the Press Council bill in the recommendations of the Press Commission. Comparing the bill with that for the British Press Council, it was seen that there, the liberty of the press meant freedom to publish anything which was not criminal. This required internal discipline, and hence a voluntary Press Council was constituted in England. Coming to the Indian Press Council Bill in Parliament, the following question was posed for discussion: Should there be a discipline imposed by the Press Council apart from the Criminal Procedure Code? If it was agreed that it should, then serious thought will have to be given to the diagnosis and remedies for the present maladies of the Indian Press. The discussions may therefore be started with the present state of affairs, diagnose the ills and then think of the remedies. In connection with the background of the Press Council bill one of the participants informed that the bill was actually brought before the Parliament when Shri B. V. Keskar was the Minister for Information and Broadcasting. It was allowed to lapse as it was opposed by both the Working Journalists and also by the Newspaper Editors' Conference. He was also of the opinion that the country needed the Council, because freedom of the press is new to this country and its politicians and also for embedding permanent conditions for safeguarding the freedom of the Press. The Indian Press Council as proposed in the bill was different from the British Press Council in its being a statutory body. This was due to the British democratic traditions and their firmness in dealing with cases. In India to create a body whose word is respected and whose recommendations will have quasi-judicial status it is necessary to make it statutory. He also added that such a self-regulatory body which has also powers to recommend the implementations of its decisions should not have any non-journalists or laymen as members. Another aspect apart from the code of ethics is the protection of the freedom of the Press against politicians and Government especially in regard to the free access to news. He however, conceded that in an underdeveloped country the freedom of the Press may be qualified in respect of the country's integrity. This qualification should however be self imposed.

It was pointed out by another member of the

Seminar that the Press Commission had recommended the setting up of the Press Council some ten years ago. It had taken the Government such a long time to arrive at a decision and that too when within these ten years conditions in the country have changed to (i) the Chinese Aggression (ii) Nehru's demise and (iii) Economic changes because of the Five Year Plans. Officialdom normally found safety and security in rigidity of outlook, approach and solutions of problems. Press and rigidity never go together. The Press Council should not have judicial powers and should not give judicial decisions which bring in resistance which results in delay. The seminar also considered the feasibility of a Press Advisory Council, in structure positively different from what has been envisaged in the bill, and as detailed hereunder:—

As it would be predominantly of an advisory character the member called it **THE PRESS ADVISORY COUNCIL**. The Press Advisory Council Act, when the Bill becomes law, would remain in force for 5 years. The Council would consist of a Chairman, a Deputy Chairman, and 9 members. Sub-committees of the Council would be formed with members of the Council as their respective Chairmen. The Chairman of the Council, in consultation with the Deputy Chairman, would nominate Chairmen of Sub-committees from among the members. Members of Sub-committees can be chosen by Sub-Committee Chairmen from among their colleagues on the Council or nominated from outside. Each sub-committee would have a minimum of three and maximum of five members including the Chairman.

Privileges — All pronouncements, decisions and actions of the Council and the Sub-committees, and the publication of these in the newspapers shall have the protection of the law; no appeal shall lie in a court of law against the bonafide pronouncements, decisions and action of the Council and sub-committees; the onus of proof of malafides shall lie entirely on the complainant.

Functions — The Council would (1) protect the freedom of the Press against all encroachments from any quarter; (2) maintain, at the highest level, the confidence of the public in the integrity of the press of the country. The Council would frame its own rules of procedure to carry out the above functions.

Some members also felt that public opinion had to be created to bring erring editors to book. It would however take a long time to impose discipline in the press unless penal measures are entrusted with the Council. It was therefore, felt that the Press Council should be entrusted with some powers. It was however conceded that if censure by the council was

enough then the Advisory Council as suggested by a member was good enough in so far as the idea of a Press Council would be a blow as it would curb the freedom of the Press by acting in a prejudicial manner. Propriety, decency and decorum should be protected by the Press Council which cannot be curbed by Law.

Another member was very emphatic in complaining that the Government, by slow attempts, was curbing the freedom of the press through various restrictions and controls not only on the freedom of the published news and views, but also on the structure of the newspapers. It was a deliberate and systematic attempt to hamstring the press (a) through licencing and registration system; (b) through restricted newsprint quotas and elaborate return system; (c) through controlling and indirectly denying advertisements to such newspapers as are opposed to Government policies and (d) most important, by channelising all news and drying up all sources of news to the news gatherer. He was therefore of the firm opinion that it would be much better to have a Press Council of independent Journalists and self imposed restrictions, rather than empowering Government in creating Press Council of the kind contemplated to forge new instruments for controlling the press.

There was some discussion on the representation of non-journalists on the Press Council. Whereas on the one hand most of the journalists who participated in the seminar were opposed to any non-journalists being on the Press Council, others were strongly in favour of non-journalists being represented on the Press Council as envisaged under Chapter II. 4(3)(c).

The consensus of the seminar was however for a Press Council which would be self regulatory and autonomous. Several amendments were suggested to the proposed Press Council Bill, details of which are stated below.

THE PRESS COUNCIL BILL 1963

Amendments/modifications/additions proposed at the Seminar held by the Indian Committee for Cultural Freedom on October 19-20, 1964.

Chapter I

Definitions

2(d) "prescribed" means rules prescribed by the Council under this Act;

Chapter II

Composition of the Council

4(1) The Council shall consist of a Chairman and nineteen other members.

4(3)-(c) & (d) to be deleted.

4(4) Delete the following "the two members to be chosen from among the members of the House of the People shall be nominated by the Speaker thereof and the one to be chosen from among the members

of the Council of States shall be nominated by the Chairman thereof; and save as aforesaid,"

4(6) Delete.

Term of Office & retirement of members

5(3) Delete.

5(7) A retiring member shall be eligible for re-appointment;

Provided that before any retiring member who has served for two full consecutive terms is re-appointed, there shall intervene a period of at least *thirty-six* months between the date of his retirement and the date of his reappointment.

Chapter III

Objects and functions of the Council

12(2)(b) Delete the following "to prevent the use of any information obtained by journalists for purposes of blackmail;"

12(2)(e) Add the following clause. "(e) (i) to foster free flow of news and to that end ensure to the press freedom of access to sources of news"

12(2)(i) Delete "and if necessary"

Powers to ensure

13(1) Add the following clauses—"13(i) (i)—If a person whose action has been questioned is himself a member of the Council, then the Committee chosen by the Chairman to consider the question will not include him as one of its members. If a member is judged by the Council to be guilty of objectionable journalistic conduct, he shall forthwith cease to be a member of the Press Council."

13(2) Add the following after the clause, "and to communicate to the Central and State Governments action so taken and compel all the newspapers for publication thereof."

13(2) Add the following clause — 13(2)(a) "where any editor or journalist has been victimised by the proprietor the Council may report the matter to the Central and State Government concerned for giving due safeguards to the victim, the Council may also take simultaneous action for proper publicity in all the newspapers."

Mr. S. Natarajan writes:—

I have read the report of the seminar on the Press Council Bill, held under the auspices of the Indian Committee for Cultural Freedom. I was unable to take part in it but I do not think my being present would have vitally affected the proceedings. The entire approach of the other participants differs radically from my own, and I do not see any way in which they could be reconciled. However, I should like to make the following points:

1. The Press Council, or any other machinery for that matter, cannot safeguard freedom of the Press. This is something internal to the Press. I would say it is a business that concerns every Editor indivi-

dually. To try to develop something which should be internal from outside is to promote irresponsibility. It would be honest to drop the hypocritical pretence of upholding high standard and to declare what the Council, if we must have it, is expected to serve.

2. The freedom of the Press is not a private possession of the Press. If it were, then I do not see why we should interest the public in it. As I envisage it, there is freedom of expression; there is the Press which is the major outlet for expressing opinion; there are the high costs of running newspapers and the time-consuming nature of newspaper production; and there is the not irrelevant fact that an individual may have one or two or three points to make which would not justify his leaving his ordinary profession or employment to enter journalism. It follows logically that somebody should be the zealous guardian of the citizen's constitutionally assured right to freedom of expression and that the obvious election to this responsibility is the Editor.

3. It follows from what I have said in Paragraph 2 that, if there is to be a Press Council and if it is to be charged with the task of guarding freedom of the Press, it is futile to distinguish between professionals and "outsiders." On the other hand, if this charge is abandoned, then the internal organisation and management of the Press may be left to the gentlemen of the Press.

Letter to the Editor

Sir,

May I be permitted to share with you my disappointment at the review of Mr. A. G. Noorani's book on "The Kashmir Question" in the November issue of *Freedom First*? I would have expected a journal like *Freedom First* to give somewhat more ungrudging praise to the notable effort at presenting the facts that the book represents.

The *Observer* of London actually carried an editorial article on 27th September commenting on this work in the course of which it wrote: "A book published recently in India by an Indian lawyer and political journalist, Mr. A. G. Noorani, points out with a wealth of evidence that, while India is right in claiming that Kashmir's accession to the Union is legally valid, she is quite wrong in claiming the accession as final and irrevocable. The accession was recognised by India to be provisional and Kashmir's future status still remains to be decided not only by the Governments of India and Pakistan but also by the people of Kashmir themselves. The solution proposed by Mr. Noorani is for part of Kashmir — the Valley, now held by India and Azad Kashmir, now controlled by Pakistan — to become an independent

4. "Propriety, decency and decorum" are matters of taste and there is no way of imposing taste or standardising it. You must raise the public level. After all, no one is forcing you to buy publications that offend against these three notions. A person who holds strong views, may be expected to express them strongly and after a manner that jars on the squeamish.

5. I think we are wasting time in offering suggestions to the Government on the basis that the Press Council is coming and we can only propose minor modifications. I have no objection to the Government amusing itself with toys but I do not see why serious-minded people should be kept from more useful work. The non-journalists who allow themselves to be drawn into the Council, may gain some prestige and a certain influence with the Press. The professionals will presumably represent the respective associations and be chosen for their reputation as "safe men". This will mean a strengthening of the political and commercial forces playing on the Press.

6. Regarding "codes of conduct", from past experience of the most elaborate and lengthy codes, I may say that the best thing editors and journalists can do with them is to lose them, which they generally do. They are of about as much value as copy-book maxims and the pledges to be honest taken by officials under Mr. Gulzarilal Nanda's inspiration.

neutral State with full autonomy but no foreign representation. Pakistan and India would keep the rest of the Kashmir territories they now hold. This plan is a welcome sign that some Indian opinion is beginning to look at possible alternatives to the present sterile policy." It is difficult to find in the review of the book in *Freedom First* last month any comparable appreciation.

May I also enter a caveat against the description of Jayaprakash Narayan as an "eccentric" even if that description is mitigated by the thought that follows that such men are the "salt of the earth"? I wonder why those, like myself, who happen to agree with Jayaprakash about relations with Pakistan and the need for a solution of the Kashmir dispute should be regarded as "eccentrics?" We may be in a minority at the moment in the country, but so are all anti-imperialists when they happen to be questioning the relationship between their own country and one that their country dominates. Were those Englishmen who opposed British rule in India all "eccentrics?" Should Frenchman who demanded the independence of Algeria be similarly dubbed, as also any Portuguese who might have objected to the continued domination of Goa?

(Continued on page 12)

With Many Voices

"The deep
Means round with many voices. Come, my friends,
'Tis not too late to seek a newer world."

—Tennyson.

China must have her atom bomb even if we go without pants.

—Marshall Chen-yi quoted in *Indian and Foreign Review* October 15.

Kosygin continued emphasis on production of consumer goods, while Brezhnev also promised greater investment in heavy industry.

—*Time*, October 30.

If the U.S. had an atomic test in the air, there would have been cries to expel us from the U.N. The Chinese explode one and people want to bring them in. These are the dividends of being a bastard.

—U.S. State Department official quoted in *Time*, October 30.

If Communism triumphs, Buddhism cannot survive.

—Buddhist weekly in South Viet Nam quoted in *Time*, October 30.

Of all reputations, political reputations are the least enduring, though they are the loudest while they last.

—*Link*, November 1.

The Fourth Plan, if implemented in its present shape, is likely to prove as great a danger to India as the Chinese atomic explosion.

—M. R. Masani, *Free Press Journal*, November 3.

Changes in the Kremlin are like changes in America's automobile models—the latest ones are the best.

—*Thought*, November 7.

(Continued from page 11)

If I may say so, eccentric or not, those who stand for the right of the people of any territory including Kashmir to determine their own destiny can legitimately claim that they at least are capable of putting Freedom First even at the cost of some temporary unpopularity.

Finally, I note with regret that Mr. V. B. Karnik's fine introduction to the book, extending over 12 pages, has not even evoked a mention in the journal that he edited with such distinction over a number of years.

M. R. MASANI

There is much talk about socialism today in the country but some seemed to think that socialism meant uniformity.

—Lal Bahadur Shastri, *Hindustan Times*, November 7.

Capitalism is using its money; we socialists are throwing it away. We should study capitalism to learn how to avoid waste.

—Fidel Castro, *The Sunday Statesman*, November 8.

Prime Minister Shastri is a pet. Among pets, he is more a bird than anything else, easy on the wing and apt to be airborne by a strong southern breeze. Since he is a self-confessed man of peace, perhaps we should think of him as a dove rather than a vulture.

—*March of the Nation*, November 14.

"Drink is your enemy," says a poster in Warsaw. And someone has scribbled underneath: "Poles are not afraid of enemies."

—*Thought*, November 14.

Villagers, especially their college-educated leaders, speak bitterly about the M.L.A.s who they say, are like absentee landlords. They visit the constituency only when they need votes.

—*Times of India*, November 17.

When we are ready there will be no need for any Panchasheel.

—D. N. Adit, Leader of Indonesia's Communist Party, *Indian Express*, November 19.

After a flag, an anthem, a single party and a national leader, every newly independent nation equips itself with a Development Plan....

Such Plans seem to be hatched in a glorious euphoric incubator quite detached from reality....

The planners are like spiders who spin intricate webs from their own insides.

—Elspeth Huxley, *National Review* (USA), June 30.

Know what an elephant is? It's a mouse built to government specifications.

—*National Review* (USA), June 30.