

"I Have Neither Eyes To see, Nor Tongue To Speak..."

A. G. Mulgaonkar

WHEN in 1642 Charles I, accompanied by his soldiers, entered the Commons Chamber (halting them outside the Bar) and occupied Mr. Speaker's Chair to address his faithful Commons: "...that albeit no King that ever was in England, shall be more careful of your privileges, to maintain them to the utmost of his power, than I shall be, yet you must know that in cases of treason, no person hath a privilege. And therefore I am come to know if any of these persons that were accused are here." On the King pressing the Speaker to tell him, Speaker Lenthall, dropping to his knees, said: "May it please Your Majesty, I have neither eyes to see, nor tongue to speak in this place, but as the House is pleased to direct me, whose servant I am here; and I humbly beg Your Majesty's pardon that I cannot give any other answer than this to what Your Majesty is pleased to demand of me..." An earlier instance, in the reign of James I, makes the position regarding Parliamentary Privilege even clearer. The occasion was a petition by the Commons to the King that his letter 'doth seem to abridge us of the ancient liberty of Parliament for freedom of speech, jurisdiction, and just censure of the House... the same being our ancient and undoubted right, and an inheritance received from our ancestors....' The King replied that 'we cannot allow of the style, calling it your ancient and undoubted right and inheritance; but could rather have wished that ye had said that your privileges were derived from the grace and permission of our ancestors and us...' When the Commons, in answer to this, proceeded to enter their famous Protestation upon their journal, 'The Commons now assembled in Parliament, being justly occasioned thereunto, concerning sundry liberties, franchises, privileges and jurisdictions of Parliament, amongst others not herein mentioned, do make this protestation following:

"That the liberties, franchises, privileges and jurisdiction of Parliament are the ancient and undoubted birthright and inheritance of the subjects of England....." History records that the King tore this from the journal with his own hand.

Even today on the election of the Speaker, of the House of Commons, an important and indispensable ceremony takes place which is part of the Constitutional practice. When the Speaker proceeds to the House of Lords to receive the royal approval, without which his election is not valid, after the signification of the approval by the Lords Commissioners he proceeds: '...It is my duty, my Lords, in the name and on behalf of the Commons of the United Kingdom to lay claim by humble petition to Her Majesty to all their ancient and undoubted rights and privileges, especially to freedom of speech in debate, to freedom from arrest, and to free access to Her Majesty whenever occasion shall require, and that the most favourable construction shall be put upon all their proceedings.' The Lord Chancellor makes this reply: 'Mr. Speaker, we have it further in command to inform you that Her Majesty doth most readily confirm all the rights and privileges which have ever been granted to or conferred upon the Common by any of Her Royal Predecessors....' The Speaker then returns to the Commons Chamber and reports: 'All these (claims) Her Majesty, by her Commissioners, has been pleased to allow and confirm in as ample a manner as they have ever been granted or confirmed by Herself or by any of Her Royal Predecessors.' This historical background makes it amply clear that the Parliamentary Privileges were originally a royal grant and even today in form continue to be so.

The opinion which the Supreme Court recently delivered in the Presidential Reference under Art. 143(1) of the Constitution of India is naturally regarded as of great importance, though in legislative circles it is looked upon as making serious inroads into privileges granted to the Parliament and the local legislatures under Articles 105 and 194. An objective examination of the whole matter should be of great value in understanding the position. The series of events which ultimately resulted in the Presidential Reference may be first recounted briefly. On March 14, one Keshav Singh was arrested by the Marshal of the U.P. Vidhan Sabha and on the same day, the House ordered him to be committed to jail for seven days. Thereupon the Speaker directed the Marshal to send Keshav Singh to the district jail with a warrant. On March 19, Mr. B. Solomon, Advocate presented a petition under Section 491 of the Cri. Pro. Code (Habeas Corpus) against the Speaker, the Vidhan Sabha, the Chief Minister and the Superin-

tendent of the Lucknow District jail, on behalf of Keshav Singh, that he be set at liberty as his detention was illegal and that pending disposal of his petition he be released on bail. Later the petition was amended into one under Art. 226 read with sec. 491 Cr. Pro. Code. On the same day the Lucknow Bench of the Allahabad High Court, Beg and Sahgal JJ., admitted the petition, ordered the issue of notice to the respondents and directed that Keshav Singh be released on bail. This was an *ex parte* order, i.e. in the absence of the opposite side (all the respondents). Keshav Singh was released from jail the same day on bail. Now events began to take a serious turn. On March 23, the Speaker, after a resolution and consequential orders of the House, issued warrants for bringing Beg and Sahgal JJ. under custody to the bar of the House. The same day, March 23, the two judges presented petitions to the High Court under Art. 226 of the Constitution praying for a writ of *Mandamus* restraining the respondents, (the same as in Keshav Singh's petition) from implementing the resolution of the House directing their production in custody at the bar of the House. Mr. Solomon, the advocate, also presented a similar petition. These two petitions were heard on the same day, March 23, by a Bench of 28 judges of the High Court and an order admitting them and restraining the Speaker from executing the warrants was made. The order was duly served on the Speaker and others the next day. On March 25, the warrants against the judges and the advocate were withdrawn but they were asked to appear before the Committee of Privileges to make their submissions. At this stage the President decided to make a reference to the Supreme Court under Art. 143(1) of the Constitution of India. Five questions were formulated; in effect inviting the opinion of the Supreme Court on whether the Lucknow bench of the U.P. High Court was competent to deal with the Habeas Corpus petition of Mr. Keshav Singh; whether Mr. Keshav Singh or Mr. Solomon, his advocate and the two judges had committed contempt of the U.P. Legislative Assembly; whether it was competent for the U.P. Legislative Assembly to direct the production of the two judges and Mr. Solomon before it in custody or to call for their explanation for its contempt; whether it was competent for the full bench of the U.P. High Court to entertain and deal with the petitions of the two judges and Mr. Solomon and to pass interim orders, and generally whether a judge of a High Court who entertains and deals with a petition challenging any order or decision of a legislature imposing any penalty on the petitioner for its contempt is guilty of contempt of the Legislature. Included in this last was the question whether that legislature is competent to take proceedings against such a judge.

The case of the U.P. Vidhan Sabha which was pressed vigorously and elaborately really amounts to this that under Art. 194(3) of the Constitution it has the same privileges that the House of Commons has (or rather had at the date of the Constitution) and that whoever chose to come between it and its privileges did so at his peril. It claimed that the Parliamentary Privileges were three: the power to commit for contempt; freedom of speech, debate and proceedings and exclusive control over its internal affairs.

As regards contempt, it quoted May: It may be stated generally that any act or omission which obstructs or impedes either Houses of Parliament in the performance of its functions, or which obstructs or impedes any member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt, even though there is no precedent of the offence. Further, depending upon a claim made in 1593 in the Commons 'It is above all courts, so it hath privileges above all other courts'; Without it the privileges of Parliament could not have become self-subsistent, but if they had not lapsed, would have survived on sufferance. It has been used not only against private individuals but also against Sheriffs, Magistrates and even Judges of Superior Courts. Lord Ellenborough was cited: Could it be expected that they should stand high in the estimation and reverence of the people, if, whenever they were insulted, they were obliged to wait the comparatively slow proceedings of the ordinary courts of law for their redress?

Two more cases were cited to show the power of the House to deal with judges and magistrates. In Brass Crosby's case, Crosby, Lord Mayor of London, acting as magistrate ordered the release of a person arrested by a messenger of the House in execution of the warrant of the Speaker issued under the order of the House and treated the messenger as guilty of criminal conduct, it was held that "When the House of Commons adjudge anything to be a contempt or breach of privilege, their adjudication is conviction and the commitment in consequence is execution and no court can discharge or bail a person thus in execution by the judgment of any other Court." In the other case two judges of the Court of King's Bench were found guilty of breach of privileges of the House and committed to prison. The House of Commons had resolved in 1837: That the House had sole and exclusive jurisdiction to determine upon the extent and existence of its privileges; that to dispute those privileges by legal proceedings was a breach of privilege; and that for any court to assume to decide upon matters of privilege inconsistent with the determination of either House of Parliament was

contrary to the Law of Parliament. As these were all cases which had been decided more than a hundred years ago, a recent opinion of the Judicial Committee (an advisory jurisdiction similar to Art. 143(1) of the Constitution of India) that the House would not be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a Member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges. The Judicial Committee, in a case of Parliamentary Privilege from Australia, had held: "Where the privileges of the House of Commons were expressly conferred on a Colonial Legislature the totality of those Principles passed to such Colonial Legislature. British Courts have made some distinction where the warrant of commitment stated on the face of it the reason for the contempt. The courts have held that where the nature of the contempt was not stated the court could not question the warrant but could do so if it was. In a case in 1847, Lord Coleridge said: "the power claimed by the House of Commons would enable the House to imprison all of us and that no authority has been cited in support of such power. This was overruled by the Court of Exchequer, on appeal by the House of Commons: the abuse of a power was no reason for denying its existence; that Superior Courts were given powers capable of abuse and that the High Court of Parliament was the highest court and its warrants were to be construed not like the warrants of a magistrate but like the warrants of a Superior Court.

From these the U.P. Legislative Assembly drew certain sequiters, the important of which are that the House of Commons (and therefore under 194(3) to the U.P. Legislative Assembly and under 105(3) to the Lok Sabha) is entitled to commit a person for contempt by a warrant which only stated that a person had committed a contempt of the House and no court has jurisdiction to go behind such a warrant. That the House has the power to send for a person on a matter of privilege by an order for his attendance without specifying in the order the object or the cause. That an unspeaking warrant was conclusive of contempt and the Courts could do nothing in the matter. Art. 9 of the Bill of Rights was cited as guaranteeing freedom of speech, debate and proceedings in Parliament and also the independence of the High Court of Parliament of the Courts in Westminster Hall. The word proceedings has very wide connotations even to the extent of superseding the law of the land. For this proposition the authority cited was the decision in *Bradlaugh's Case*: The House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute law which has relation to its internal procedure only.

What is said or done within its walls cannot be inquired into in a Court of law. A resolution of the House of Commons cannot change the law of the land. But a court of law has no right to inquire into the propriety of a resolution of the House restraining a member from doing within the walls of the House itself something which by the general law of the land he had a right to do, viz, take the oath prescribed by the Parliamentary Oaths Act, 1866. The judgment was of Stephen J. (whose part in the Codification of Indian laws is monumental). He said: Suppose that the House of Commons forbids one of its members to do that which an Act of Parliament requires him to do, and in order to enforce its prohibition, directs its executive officer to exclude him from the House by force if necessary, is such an order one which we can declare to be void and restrain the executive officer of the House from carrying out? In my opinion, we have no such power. I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the Statute law which has relation to its own internal proceedings and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable. Significantly, however, he added: I do not say that the resolution of the House is the judgment of a Court nor subject to our revision; but it has much in common with such a judgment. The House of Commons is not a Court of Justice; but the effect of its privilege to regulate its own internal concerns practically invests it with a judicial character when it has to apply to particular cases the provisions of Acts of Parliament . . . If its determination is not in accordance with law, this resembles the case of an error by a judge whose decision is not subject to appeal.

The U.P. Legislative Assembly therefore claimed that as a result of Art. 194(3) of the Constitution of India all these privileges and immunities had devolved on it. Referring to cases decided by the Supreme Court of India and by High Courts, it claimed that this principle had been recognised therein. In *Pandit Sharma's case*, the Supreme Court had held that the powers, privileges and immunities conferred by the latter part of Art. 194(3) were not subordinate to Art. 19(1) (a); that the Rules and Procedure prescribed by the Legislature was a matter of internal management and conferred no right on an outsider and also that breach of privilege was for the legislature to decide. That Subba Rao J's holding (in dissent) that the provisions of 194(3) were "transitory" did not affect the principle. In Australia exactly similar provisions in Commonwealth Act, 1900 are even today in operation.

Lastly, the U. P. Legislative Assembly claimed that it possessed a totally unfettered power to commit for contempt (as by the House of Commons in U.K.),

to judge itself of what is contempt and to commit for contempt by a warrant stating generally that a particular person has committed contempt of the House. This is what the House had done in the case of the two judges, the advocate and Mr. Keshav Singh.

The answer on behalf of the judges was much shorter but no less emphatic: The two main questions were of jurisdiction and contempt. It was inconceivable that the powers, privileges and immunities contained in Art. 194 should be above fundamental rights or that the wide powers given to High Courts under Art. 226 to issue writs to enforce fundamental rights should be considered to be restricted by Art. 194 (privileges of Legislators). If the Constitution of India wanted to restrict powers of the Courts, it could have been expressly provided by a provision under Art. 194(3). In a federal constitution there was division of powers among the three wings—legislative, executive and judicial and they must be assumed to have authority to exercise powers. The Constitution imposed express limitations on these powers. It provided judicial review as a check; but the powers of the judiciary were also subject to checks. Though Art. 212 conferred immunity on the legislature, it was only in regard to the irregularity of law and proceedings inside the House. There could be no comparison with the Australian Constitution as it did not contain any guarantee of Fundamental Rights. That the Indian Constitution expressly provided curbs on Fundamental Rights wherever it considered desirable. That the absence of such curb in Art. 194(3) meant it was subject to Fundamental Rights. If there was a seeming conflict, the rule of harmonious construction should apply. If the main legislative power of the legislatures was subject to judicial review under Art. 22, it must follow that the ancillary power to the main function was also subject to Art. 22. The powers of the House of Commons were given till the Legislatures made their own law defining their privileges and were therefore temporary. That Art. 194(3) could not have the effect of providing the totality of the powers of the House of Commons and in any case the Courts had the right of judging the existence and extent of a privilege; for that purpose the courts have jurisdiction to entertain and deal with any petition by a citizen committed for contempt on a general or a speaking warrant. If the warrant was in general form the courts may presume the legislature had acted within its rights. The courts recognised that the legislatures had the privilege to commit a person for its contempt committed within the chamber. It was claimed that the resolution of U.P. Legislature committing the judges violated Art. 211 which restricted discussion of the conduct of the judges in the legislature. The immunity of the judges under Art. 211 was absolute. The full bench of the Allahabad High Court had

jurisdiction to deal with the judge's petition because certain powers were given to the legislature. It did not follow that the legislature being the Supreme Parliament like the Parliament of England. If a court was acting with jurisdiction no contempt could arise. If there was jurisdiction, contempt could not be contempt in preventing the court from a breach of Constitutional provision.

(to be continued)

PLUS CA CHANGE—

In 1932, Spanish delegate and historian Indalecio de Madariaga pronounced the speech which is the precis of all disarmament speeches, and it has been widely borrowed by cartoonists and humorists to the present day. I don't remember his exact words, so I'll repeat it the way I borrow it.

"Once upon a time the animals held a Disarmament Conference.

"We'll abolish all beaks and antlers," said the Lion, 'but I need my fangs for self-defense.'

"Fangs and antlers must go," said the Eagle, 'but what's so bad about an innocent beak?'

"Beaks and fangs have to be abolished," said the Stag, 'but my antlers represent a long and glorious tradition.'

"Comrades," interrupted the Russian Bear, 'Let's be friends, abolish everything, and give one another a nice big hug!'

From "Peace in their time" by Emory P. Gollancz 1964.



The Victor

Courtesy: B.P.A.

A Palace Revolution

V. B. Karnik

IT is a pity that palace revolutions are still an order of the day in many a country. Russia has just gone through one. What happened in that country was a palace revolution for none but a few top leaders of the Communist Party were involved in it. It is they who decided that Khrushchev should be removed from the two crucial posts of the Prime Ministership and the First Secretaryship of the Party which he occupied and that Kosygin should take the former and Brezhnev the latter of the two posts. The people were informed only after the removal and the appointments were effected and they had to accept them without asking any questions. The Bolshevik Revolution has placed the Russian people in that unenviable position for the last forty years.

It must be admitted that the revolution has been carried out on this occasion in a much more civilized manner. A meeting of the Central Committee of the Party was held; a report condemning Khrushchev and asking for his removal was presented and discussed; a vote was taken; and, strange as it may sound, Khrushchev was allowed to attend and put forward his defence. This is an encouraging development; and far more important is the fact that Khrushchev was not liquidated. There is so far no definite news about his whereabouts, but very likely he is left in peace and may be assigned after some time some unimportant job. That was the practice that he adopted in the case of Malenkov, Molotov, Bulganin, Zhukov and others, his colleagues in power, whom he removed one after another. The old Stalinist practice of liquidating opponents and dissident elements appears to have fallen into disuse.

Being a palace revolution, one cannot expect significant changes in the internal policies of the Government. The new leader of the Party declared in his first public pronouncement that there would be no change. He made the same announcement regarding foreign policy. He said: "The basic foreign and home policy line worked out since 1956 was, is, and will be the sole and unchangeable line in the entire home and foreign policy of the Communist Party and the Soviet State." This is a reassuring statement; but does it contain the whole truth? It may be remembered moreover, that in communist practice the line as such may not change, but the emphasis on its various aspects may change and that may bring about many changes in tactics and strategy.

The same speech of Brezhnev throws out some significant hints which indicate some definite changes

at least in relations with China. He said the Russians "will strive for the consolidation of fraternal socialist countries on a fully equal footing." Continuing, he asserted that the Soviet party would "uphold the general line of the world communist movement, and work to unite all communist parties on the basis of Marxism — Leninism, proletarian internationalism and the declaration adopted by the world communist conference in 1957 and 1960". These remarks have a meaning of their own, and all observers are agreed that a fresh attempt will now be made to find a rapprochement with China.

It is not likely that there will be a sudden and big change in foreign policy. Even under the new leaders Russia will continue to talk of and to some extent work for peaceful coexistence, and reduction of international tension, for as stated by Brezhnev, "this is the only reasonable policy under present conditions." But the overriding desire to heal the breach with China, which seems to have asserted itself, may in course of time give it a different twist. It is difficult at the moment to say how far the Russian leaders will be prepared to go in order to placate the Chinese, and what response they will get from the latter, but there can be no doubt about the present anxiety of the former to settle the quarrel and restore unity in the international communist movement.

Khrushchev has been sacrificed in order to find a *modus vivendi* with China. *Pravda*, the organ of the Russian Communist Party has hurled a number of charges against him. He has been accused of "hair-brained scheming, immature conclusions and hasty decisions, actions divorced from reality, bragging and phrasemongering and commandism." He has been also accused of indulging in the so-called personality cult. Khrushchev might have committed all these crimes, but the real crime for which he has been overthrown appears to be his handling of the dispute with China. He had brought it to a breaking point, to the point of China's excommunication from the brotherhood of communist parties. Other leaders became alarmed by that prospect, disapproved as it was by some major communist parties of the world. The Chinese having made it abundantly clear that there could be no understanding as long as Khrushchev continued in power, those leaders had no other alternative but to throw him overboard in order to avoid the split with China. The palace revolution was organised in order to attain that objective.

The palace revolution could be organised, and organised successfully, because Khrushchev's libera-

lisation had not gone beyond abolishing and minimising some of the worst features of Stalin's terrorist regime. He had taken no steps in the direction of investing the people with some positive rights. Power remained concentrated, as before, in the hands of a few communist leaders. Khrushchev could not have changed that situation without breaking with or going beyond Communism. That was his obvious limitation and he paid for it by being unceremoniously dismissed from all positions of power, as soon as it became apparent that his continuance in power would endanger the solidarity of the international communist movement. That is likely to be the fate of all those who seek to liberalise a communist regime without liberating the people.

The trend towards a rapprochement with China which has been released by the palace revolution is likely to develop into a serious threat to world peace and freedom. It is possible however, that the trend may not be able to go too far as there are points at which the national interests of Russia and China clash against each other. On the other hand there is the tempting prospect of being able to dominate the world with combined strength, apart from the community of outlook that develops out of a common adherence to Marxism — Leninism. With the growing

rift between the two giant communist powers the danger of communist expansionism had receded to some extent. With a set of new leaders at the helm of affairs in Moscow and their anxiety to heal the rift, the danger will again assume a more menacing form.

India may be more directly affected by the palace revolution. The new agreements for military and economic aid that have been negotiated may not be scrapped immediately but may not be implemented quickly and fully. Russia will be less willing now to help us build up our defence against the Chinese threat. Pressure may also develop to compel us to adopt a more accommodating attitude towards China. The split in the Indian Communist Party may also heal and the internal danger of Communism may grow. India must get ready to face these new shifts in Russian policies. In totalitarian countries, policies, more particularly their implementation, depend on individuals. Now that there is a change of rulers in Moscow it will be unrealistic on our part not to expect changes. Closer the relations between Russia and China, the greater will be the distance between Russia and us, as long as China continues her present expansionist activity in Asia. The palace revolution in Russia may, instead of discouraging, encourage that activity and add to our dangers and difficulties.

Obscenity: Literature And Law (II)

N. S. Ranganath Rao

MEETING the argument that it is futile to combat obscenity, the advocates of restraint point out that the same could be said of narcotic drugs. Because it is difficult to suppress traffic in narcotic drugs no one would think of abolishing the laws which impose restrictions on the sale and consumption of such drugs. It is wrong to compare the law of obscenity with the law of prohibition or even the law of narcotic drugs. In the case of drinks or drugs the person habituated to them has an inner compulsion. He goes after them even in a clandestine manner. But there is nothing like habituation of obscene matter. It is easy accessibility that makes the victim ask for it. Therefore it is not correct to say that it is suppression that makes the trade thrive. On the other hand where obscenity laws have been effectively enforced, the volume of seriously offensive material has been greatly reduced.

Meeting the last argument that education must play a vital role in preventing the harmful obscene matters it is conceded that education is the ultimate answer to the obscenity racket but it is a long range and slow remedy that does not rule out the need of immediate remedies in the form of obscenity laws.

The essence of the problem is that the law of obscenity, while interfering in the least with the freedom of expression and investigation, must protect the society and particularly the youth from the harmful consequences of the anti-social and commercial activities of the peddlers of pornographic material which is devoid of any artistic, literary or scientific intention or purpose. The main object of law must be not to censor literature but to suppress pornography.

Having in view the above object of the law, the position in India needs to be examined. Sections 292 and 293 of the Indian Penal Code which provide punishment for commercial activities pertaining to obscene matters were incorporated in the Code to give effect to the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publication signed at Geneva in 1923. It would not be far from the truth if one were to state that the Code originally treated the law of obscenity as a part of the law of nuisance. But unfortunately as the Code does not define obscenity, the test was adopted from English Law. The test is the one laid

down by Cockburn C. J. in an English case (*R. Vs. Hicklin*). The test laid down in this case is "whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands the publication of this sort may fall." This test though universally adopted in India has a number of defects.

This legacy of English Law has not been a very happy one. It is possible that the English concept of obscenity was unconsciously influenced by ecclesiastical considerations. The concept of sin of the ecclesiastical law must have influenced the notion of "corrupting and depraving the mind." The Indian courts in spite of their several attempts to adjust the concept of obscenity to the needs of a different society and a different time have not been able to free it completely from the concepts of a more "intolerant age". The definition of obscenity as laid down in *Hicklin's* case and also the sections of the Indian Penal Code prescribing punishment for offences relating to obscenity have failed to meet the needs of a more liberal age. The law of obscenity in India needs a thorough reform.

The defects and inadequacies of Indian law, as it is today, are mostly the defects and inadequacies of the *Hicklin* test. The test emphasises the tendency of the matter instead of looking into the intention of the creator or the author. It is a well known principle of criminal law that *mens rea* (guilty mind) is, generally, a necessary ingredient of every offence which is punishable with heavy punishment. Strangely the "tendency" test laid down in the above case does not take into consideration the intention or the knowledge of the accused. Therefore an innocent person though not knowing or not having intended to deprave or corrupt the mind of others might be exposed to punishment at the vagaries of a magistrate.

Secondly, the test of obscenity laid down in the *Hicklin's* case completely ignores the purpose of the writer or the creator of the matter in question. Men of letters, artists and scientists who might have written or created the matter with a serious literary, artistic or scientific purpose might find themselves defenceless against the accusation of obscenity. Though there have been stray judicial observations in India that works of art are not considered obscene, the position of law on this matter is not free from doubt and uncertainty. On the other hand, there have been decisions which have ignored the purpose or the intention of the accused. The only redeeming feature is that Sec. 292 of the Indian Penal Code exempts bona fide religious works from the operation of the law of obscenity; but this is a poor consolation. However, in a recent decision, while holding that "*Lady Chatterley's Lover*" by D. H. Lawrence, obscene, the Supreme Court observed that treating sex and nudity in art and literature cannot be re-

garded as evidence of obscenity without something more. The Court also observed that the art must be so preponderating as to throw obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. While commenting on this observation on the basis of newspaper reports of the judgment, it is respectfully submitted that the test of throwing into a shadow or making obscenity trivial and insignificant is not free from doubt and ambiguity. This test may not give the necessary freedom for honest and *bona fide* creative work. The inequity and injustice of ignoring the purpose of the writer or the creator was fully realised in England. Therefore the Obscenity Publication Act, 1959 provides that the purpose of the author is a relevant fact to be considered.

There have been several decisions of the Indian Courts which have held a book obscene even if isolated words or passages in them had tendency "to deprave and corrupt". This is the most unsatisfactory part of the law. A work of art or literature or a scientific work is not for assessment in isolated parts. It would stand to commonsense that the depraving or the corrupting influence of a work or a book is in its entirety and not in isolated words or passages. Though no one would think of assessing the obscenity or otherwise of a painting by looking into parts, in the case of books, unfortunately, the Indian Courts have repeatedly held that a book is obscene even if isolated words or objects are obscene. This would make the law of obscenity unnecessarily harsh and severe, particularly, in view of the fact that neither the intention nor the purpose of the creator or the writer would be taken into consideration. Serious work of literature or treatise on scientific matters might incidentally contain some words or passages which in isolation might lead to "impure thoughts" but it is possible that the entire and the dominant effect of the work might be to elevate and enlighten human mind. In the same judgment mentioned above the Supreme Court has not been very clear on this subject as to whether a work which is obscene in isolated parts or passages should be condemned to be obscene. The Court observes that an overall view of the obscene matter in the setting of the whole would be necessary but the obscene matter must be considered by *itself and separately* (italics mine) to find out whether it is gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of these sort and to whose hand the book is likely to fall. It is respectfully submitted that the phrase "The obscene matter must be considered by itself and separately" does not throw light on whether the whole work should necessarily and primarily be taken into consideration.

Another unsatisfactory implication of the definition of obscenity as laid down in the *Hicklin's* case is that

the Courts would take into consideration the tendency "to deprave or corrupt those whose minds are open to immoral influence and into whose hands the publication of this sort may fall." This test would dictate a standard of literary or artistic creation and scientific investigation which would be safe to "a well brought up school girl of fourteen". It should be noted that the concept of obscenity including the concept of depravation and corruption are relative. A greater freedom of discussion and expression would develop greater immunity to corruption and depravation. On the other hand curtailing such expression and discussion would expose minds to easy depravation and corruption. Therefore it would be in the interest of society to promote greater freedom of expression and thus cultivate an immunity against depravation and corruption. On the other hand, this test of "those into whose hands this sort of publication may fall" restricts the standard of cultivation of the taste of a society to that of infants and abnormals. Courts in India have taken into consideration an ordinary reader or sometimes an ordinary reader knowing English, as the standard of persons who are likely to be influenced by the alleged matters. The concept of an ordinary reader or an ordinary reader knowing English is so vague and uncertain that it might vary from Judge to Judge and therefore might make the test mostly subjective. The ordinary reader in consideration would be one whom the Judge might think fit to choose and in fact such an ordinary reader who is susceptible to immoral influences of the writing or work of art might exist only in the mind of the Judge or the Magistrate. The injustice of this concept is more pronounced in India in view of the fact that the trials are not by jury. Prof Dicey observed that in England the liberty of expression is the liberty allowed by twelve shop-keepers taken at random but in India it would be the liberty allowed by one Judge or Magistrate taken at random.

Apart from the inadequacies of the definition of obscenity adopted from the Hicklin's case, the provisions of the Indian Penal Code regarding the law of obscenity are also defective. There have been decisions which have held that a publisher, a seller or an importer is under an absolute liability for publishing or being in possession for sale or for importing matters alleged to have been obscene even though he had no intention or knowledge of the obscenity of the matter in question. Even those courts which have considered knowledge or intention as a necessary ingredient of the offences under Sec. 292 have treated such intention as presumptive. In some cases the presumption has been almost irrefutable. It is submitted that the provisions of the Indian Penal Code need clarification and precision on this question. Though it is often said that a person is generally presumed to have intended or known the consequences of his act such a

rule might cause immense hardship in a number of cases.

Another aspect of the problem is regarding the propriety of admission of expert evidence on the question of corrupting influence. Fortunately most of the Indian Courts have departed from the old English practice and have allowed expert evidence to rebut the alleged influence of the matter in question. It is suggested that, by making the purpose of writer or the creator a relevant consideration, the Indian Courts may be able to admit freely opinion evidence regarding the literary or other merit of the matter in question.

In brief, the law of obscenity must serve a two-fold purpose. It must interfere in the least with the freedom of expression, creation and investigation, but at the same time it must efficiently suppress the commercial activities of those who deal in "dirt for dirt's sake". It is suggested that Indian Law presents a number of difficulties and it is not well designed to meet either of the purposes. An attempt will be made later to suggest some urgent reforms in the law of obscenity in India. (To be Continued)



"We see nowadays old countries bringing pressure on newly independent countries"

—President Soekarno in Cairo
Courtesy: Hindustan Times

Reviews

The Kashmir Question

By A. G. Noorani, P. C. Manaktala & Sons, Rs. 8.50

ON the release of Sheikh Abdullah in April, Rajaji and Jayaprakash Narayan took the lead in asking India and Pakistan to reconsider their attitudes towards the question of Kashmir, in the light of the overriding concept that India and Pakistan must come close together in their common defences in order to survive not only from a belligerent China, but having regard to their internal political and economic problems. This book claims to present the question of Kashmir's accession to India, admitting its legality, in the form of a review of the relevant documents on the case objectively, without apportioning blame. I had expected the book to be a sort of White Paper of the documents and the debates, presented in a readable and accurate manner. Stress is laid in the book on the U.N. Commission Resolutions of August 13, 1948 and January 5, 1949, claiming for them a binding agreement between India and Pakistan. The agreement by which ceasefire was entered into between the two countries, the correspondence before the Commission came to India, appears to be ignored altogether. There can be no doubt that immediately after partition, Jinnah had decided to take over Kashmir with or without the approval of the Maharaja, by persuasion if possible, and force if necessary. In this, when foiled, an attempt was made even to kidnap the Maharaja. If the ceasefire agreement had not included the withdrawal by Pakistani forces of the entire area occupied by them, it is unlikely that the attempt of the Indian Army to recapture the three districts of Kashmir would have been abandoned. All the resolutions, whether of the U.N. Commission or of the Security Council, admit, that even for the three districts the legitimate occupant was India, and any plebiscite or referendum could only be held under India's occupation. The Security Council was posed with only one question, namely, to declare Pakistan the aggressor.

Having regard to what used to happen in the League of Nations, we ought to have expected that international rivalries and interests, irrelevant to the main issue, would soon take the field and the main question single-tracked. There seems to be evidence in this book of haste in its preparation, a chronological order would have been better than what makes for confused reading between pages 53 and 56. The values of various debates could have been presented better, instead of details of what the intermediaries attempted.

A curious paragraph at page 58 runs as follows;

"Meanwhile, elections to the Constituent Assembly of Kashmir were over. Of the 75 seats the nominees of All Jammu & Kashmir National Conference were declared elected unopposed to seven. With regard to Jammu, however, the Paraja Parishad threatened to boycott the Constituent Assembly elections as a protest against irregularities. The results naturally failed to carry conviction abroad and the London *Times* in an editorial in its issue of September 7, 1951, entitled "No Fair Vote" characterized the results as "farical". The second sentence is obviously written in a hurry. It is not understood why overwhelming majorities for a popular Party should "naturally fail to carry conviction abroad", and the results characterised as "farical". The Assembly was convoked on the basis of free adult franchise. The Constituencies were delimited on the basis of one member to 40,000 people. All the 75 seats were won by the National Conference. There were only 2 contests in Jammu which were also won by the Conference. The total number of rejections was 14 and withdrawals 11.

Ever since 1934 the Muslim Conference, later the National Conference, was in the habit of winning elections with sweeping majorities. In 1938, they won 19 out of 21 Muslim seats, — the elections in those days were communitywise. In 1946 the Conference called upon the people to boycott the elections and not more than 8% of the electorate went to the polls.

Those who remember the elections in India before Independence will testify that the boast of Vallabhai Patel that he could get even a wooden post elected to the Assembly, actually he did send a cobbler up to the Assembly, was wholly justified.

Nevertheless there is no question that every attempt should be made by Government and people to approach Pakistan, despite rebuffs, to arrive at some agreement, even though it may involve some sacrifice on our part, to solve the problems which Pakistan has raised. Even if it is unlikely that Pakistan would abide by her commitments with regard to, say, the treatment of minorities in an Islamic Republic, attempts should be made to see that some measure of tranquillity be reached between the two peoples, particularly on our frontiers, and a measure of agreement for the defences of frontiers adjoining China. It is unlikely that a mere solution of the Kashmir problem, if it can be solved at all having regard to the attitude of Pakistan, will lead to a complete solution of our other difficulties. Those who have dealt even at official levels with their opposites in Pakistan, have been astonished at the utter rigidity and lack of cooperation by them even in small matters.

The proper approach is to treat Kashmir as part of a package deal in which the other issues, such as the treatment of minorities, should be emphasised. It

is unfortunate that since this April, even after the meetings between Jayaprakash Narayan and President Ayub, no clear indication is available of any flexible approach on the part of Pakistan. Those who are inclined to be critical of Jayaprakash Narayan's approach must be reminded of John S. Mill's saying that eccentrics are the salt of the earth, and the measure of a civilization is the number of eccentrics it contains. Jayaprakash, Vinoba Bhave, and Rajaji are keepers of our conscience and such Men of Goodwill deserve all our respect.

This publication is Mr. P. C. Manaktala's first venture in the field of publications. In the days of Ramananda Chatterjee's *Modern Review* a well-known reviewer used to end his book review with the sentence: "the book is beautifully got up and neatly bound". Mr. Manaktala has done better, the choice of print, paper and set up is admirable.

RAMAN DESAI

Indian Nationalism and Hindu Social Reform

By Charles H. Heimsath. Oxford University Press., Rs. 27.50

THE scarcity of material on the Indian Social Reform Movement makes every addition to the literature on it significant. Dr. Heimsath has gone to great trouble to use whatever material is available and the result is a book which was worth the effort to write and is well worth the effort to read. It is also a point in his favour that he himself draws attention in his preface to the major defect of his book—the neglect of developments within the Muslim Indian community, or the influence of Muslim thought on the reform movement. Maulana Abul Kalam Azad in a Congress Presidential address referred to the two streams of culture which had come together in India, the Arab and the Hindu, ignoring the third Western stream. Dr. Heimsath has accepted the other extreme view held by certain Hindu thinkers that there are two streams but that they are Hindu and Western. The thesis of Dr. R. C. Majumdar that Hindus and Muslims lived in the 19th century in two water-tight compartments which the author "has come to accept", is a political interpretation not borne out by facts. In the superstition into which both communities had sunk, there was considerable common ground at the lower level in areas where they lived together in considerable numbers. Raja Ram Mohun Roy's critical attitude towards idolatry came originally from Islam. It is true, however that in the field of education different ideals prevailed—the Hindu teachers interesting themselves in the spread of general education and the Muslims concentrating on the building up of an elite. On the other hand, until the emergence of Tilak and Gandhi—the first rousing Hindu communal conscious-

ness and the second fostering Muslim awareness of high aris belonging to an extra-territorial society and providing a national platform for Muslim communalists—old social there was a developing sentiment of nationalism. Curious And, as Dr. Heimsath himself points out, the social reform movement made a significant contribution to Indian nationalism: After all, the first important social legislation was effected by a Governor-General, Lord Bentinck, who had known more of India than Bengal alone; and the original intention of Allan Octavian Hume in founding the Congress was not political but social, an intention which was given effect to six years later when the National Social Conference was organised. The early history of the Conference reveals the steady development of an all-India outlook in the acceptance of a common programme, the integration of the work of regional bodies and the projection of social concepts.

Dr. Heimsath mentions an aspect of the Indian reform movement which presented a serious problem to early reformers and has a much wider application:

A subtle and important difference between Indians and others writing social criticism lies not so much in the quantity of the output as in the approach of the writers to their subject. In the West one is not surprised to read an outraged indictment of certain social usages from which the author stands apart as a critical observer; it would be a surprise, however, and in fact create uneasiness in the reader should he come across a critic after critic who places himself firmly in the society he is abusing and indicts himself along with the group. This is the usual style of Indian social criticism, and one subconsciously begins to feel that matters are even worse than the criticism suggests since the critics themselves are personally involved. One should remember that this is a stylistic trait. It may stem from unusual objectivity in self-analysis or from humility.

The refusal of the reformers to leave the community as Ranade pointed out, was a bitter pill for the orthodox; the failure of many leading reformers to live up to their ideals was a recurring shock which the movement had to learn to live with. Both the conditions arise out of the aspect brought out by Dr. Heimsath, which reflects the complexities of Hindu religion and society. The organisational weakness of the Hindus, the development of other influences and political conditions ruled out the application of social ostracism. A factor which the reformers appreciated, was that the pressures of caste were stronger than the influence of scripture—indicating thereby that the effect of regional practice was stronger than the influence of scripture. More recent sociological studies have pin-pointed the conflict between scripture and environment within the higher castes themselves and the approximation

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IT is, in political attitude. It is that the "Enco cal in sake, (of th for w

the awareness of which arises owing to the co-existence of regional and occupational castes along with the ideological four-communalists—old social system.

Curiously enough, there is a sense of something missing in Dr. Heimsath's painstaking publication. We find, for instance, a recital of English thinkers who influenced the reformers; but there is little awareness of the fact that men like Ranade tended to over-estimate the influence of Mills, Bentham, Comte and Spenser on British thought and assumed a permanent character which it did not have. It is clear from the record that Indian expectations of steady orderly progress rested not on some inherent quality in Indian society but on expectations of continuing liberal, secular, bias in British administrators in India and in Britain. The social thought of Edmund Burke which the author has ignored, had a powerful influence on Indian reformers. These cumulatively seemed to indicate the strength of British commonsense, justice and humanity. There was little reason to expect Indian conservatism to become organised and overwhelming: Despite Bentinck's plain hint that those who did not approve of his social legislation, could appeal to London, sixty years passed before the orthodox acted effectively on it. Possibly they would not even then have been aroused but for the excesses of the Bengal reformers, the extremism of Malabari and the impatience of the Madras rational school. But on the one hand, to use L. T. Hobhouse's vivid phrase, "the Rhine flowed into the Thames polluting the waters of the Ganga," British Liberalism turning Imperialist, and, on the other, the Indian reactionaries of all communities joined to resist the change. One misses the deeper implications of the reform movement though Dr. Heimsath, as, indeed, covered an extensive canvas and made a valuable contribution to the literature of Indian nationalism and religious and social development.

S. NATARAJAN

Half-way to the Moon

New Writing from Russia. Edited by Patricia Blake and Max Hayward. Weidenfeld and Nicolson, London. 1964. 30s. 276 pp.

It is, I suppose, inevitable that our main interest in Soviet literature should usually tend to be political—the Soviet party authorities, with their attitude to their writers, have made quite sure of that. It is all the more refreshing, therefore, to discover that this excellent anthology (originally published in "Encounter", for the most part) can, for all its political implications, be enjoyed as literature for its own sake. The book consists of 18 poems, five long stories (of the type which the Germans call *Novellen*, and for which there is no equivalent English term) and

the famous account of his travels which got Victor Nekrasov into such trouble with Mr. Secretary Khrushchev. To all of this Miss Patricia Blake has supplied a sensitive, sympathetic, lively, intelligent and illuminating introduction. All in all, this is a book which restores one's faith in the ability of the great Russian literary tradition to survive the onslaughts of Communist philistinism.

Although very different in style, merit and even tradition, all the writers here represented have one aim in common: to purify language from the effects of party cant and from the encrustations of propaganda usage. Those whose misfortune it is to have to read official publications of the Soviet authorities soon become aware of the destructive force of the official lie on what was once the most beautiful of all European tongues—the false enthusiasm, the hypocrisy, the dishonest political use of words ('peace', 'freedom' and the like), the boasting and the leering optimism. If language has once been degraded in this manner it must be purified and forged anew if it is to serve the honest writer as the medium of his art.

Mr. Auden's translations (and it is to be regretted that there are only two) are superlative refashionings of the originals. They are first of all poems in their own right. More than that, they seem to me to get as near to a translation of the originals as one could hope: they are accurate, both in meaning and in rhythm; they introduce no extraneous words or phrases to pad out the verse forms; and, above all, they reproduce as nearly as one can reproduce in another language the mood of the original—its humour, its allusions, its degree of cynicism, pathos or high seriousness—its flavour, in a word.

Prose is, of course, another matter when it comes to translation. One has only to think of the enormous influence which the, on the whole mediocre, translations of Chekhov have exercised on English (and Irish) short-story writers to realise that a foreign prose-writer can be brought much closer to us than a poet. The prose translations in this book seem on the whole excellently done. Nekrasov's account of his trip to Italy and the United States reads well enough in English, if it lacks some of the slangy raciness of the original. (English readers may find it difficult to understand why this seemingly harmless and amusing travelogue should have so alarmed poor Mr. Khrushchev that he seriously suggested that Nekrasov ought to be expelled from the party for it. But it is quite simple, if viewed from Mr. Khrushchev's somewhat limited artistic standards. Nekrasov committed the unpardonable sin of describing things as he saw them, both good and bad, whether they were Russian, Italian or American. He ought, of course, to have painted the bourgeois world in the traditional manner as wholly bad, wholly decadent and wholly

(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.

President Ayub denied the allegation that his men owned property worth Rs. 110 crores. He said the property was valued at Rs. 11 crores.

—*Times of India*, October 3.

Mundane considerations, not any moral principles, were the basis of the policy of non-alignment.

—*Thought*, October 3.

The detente in the cold war is threatening to rob the non-aligned of their place in the sun.

—Editorial, *Economic Weekly*, October 3.

I will be driving out of the Cabinet in my new car.

—D. Z. Palaspar, *Statesman*, October 4.

The coincidence which following Chinese aggression brought the U.S.A. and the U.S.S.R. closer together and both drifting in the same direction away from Peking, has reduced non-alignment to a curiosity rather than a policy.

—*Janata*, October 4.

In the world in which India has to live — the Asian and Afro-Asian world — nobody has faith in her.

—President Ayub Khan, *Times of India*, October 6.

Our cold war and arms race with Pakistan, as against our unpreparedness against China, tragically underlines how far prejudice had gone to obscure our real interests.

—B. G. Verghese, *Times of India*, October 7.

(Continued from page 11)

corrupt and, indeed, so repulsive as to produce in the Soviet traveller nothing but a heightened appreciation of his own life.) The style of Aksenov, which is something of a blend of Hemingway and Kerouac, is very well rendered by Mr. Hingley.

But the masterpiece of this collection in every respect is the long story of Matryona's Home' by Alexander Solzhenitsyn. This author is, of course, famous for his concentration camp story. But the English reader was perhaps prevented from sensing the full greatness of "One Day in the Life of Ivan Denisovich", partly by its (totally irrelevant) political sensationalism, and partly by the limitations of the available translations—it is an exceptionally difficult piece of writing.

If you enjoy nothing else in this book, it is well worth the price to discover 'Matryona's Home'.

LEONARD SCHAPIRO

It is curious how some of these states are more non-aligned than others.

—M. Tshombe, *Time*, October 16

If you can tell me there are no adulterers on the front bench of the Labour Party, you can talk about Profumo.

—Quintin Hogg, M.P., *Time*, October 16

This is the dirtiest trick in history. It's unprecendented to imprison a visiting head of government.

—Moise Tshombe, *Time*, October 16

Our policy must not be confrontation but co-operation.

—Lal Bahadur Shastri in Cairo, *Time*, October 16

I trust in the Lord and take vitamins.

—Billy Graham, *Time*, October 16

Panchayati institutions symbolize grass-root corruption and not grass-root democracy.

—Frank Anthony, *Swarajya*, October 17.

A monolithic system needs a monomaniac mind to shape and drive it. By denying its validity in relation to the democratic system, the PM has struck a valiant blow for freedom.

—Mr. P. Mahadevan, *Swarajya*, October 17.

He did not see any great significance in the change in Soviet leadership because Mr. Khrushchev's resignation was a genuine one due to health reasons.

—Mr. V. K. Krishna Menon, *Searchlight* (Patna), October 19.

We shall go ahead with our nuclear weapons and any attempt to stop us will only end in frustration.

—Chang Hsijo, President of the Chinese Peoples Institute of Foreign Affairs, *Indian Express*, October 20.

I have met Khrushchev. I have met Chiang Kai-shek. I have met American generals, but I have never met a more arrogant man than Nehru.

—Chou En-lai, October 1964.