

17th Amendment To The Constitution

A. G. Mulgaonkar

A NATION, any nation in the twentieth century which desires to be considered a civilised and democratic nation, must conform to certain well-known principles. Among these are the sanctity of personal liberty and private property. That is why, although these and some other rights in a similar category had fairly ample protection in the existing law, the Constitution makers considered it essential to introduce the chapter on Fundamental Rights in the Indian Constitution which came into operation on the 26th of January 1950. It is significant to note that though under Articles 358 and 359 the President is given the power to suspend the rights given to the citizens under Art. 19 and the enforcement of the various rights conferred by Part III when a Proclamation under Art. 352 is made by him, this suspension automatically lapses the moment the Proclamation ceases to operate. It is reasonable therefore to infer that the framers of the Constitution attached utmost importance to the inviolability of these rights.

The introduction of the Constitution (Seventeenth Amendment) Bill as notified by the Government of India in its Gazette of the 6th of May 1963 raises some grave and far-reaching questions of constitutional principle and propriety. In considering the Bill itself, i.e. what it seeks to enact, it is also important to consider the circumstances under which it is being introduced. Sometimes a bill, otherwise innocent and even necessary, becomes dangerous because of the circumstances in which it is introduced. The consideration of the history of some of the acts in the pre-independence era like the Rowlatt Act is enough to vouch the correctness of this statement.

The genesis of the Bill makes interesting reading. In the constitution as originally promulgated there was no Article like 31 A. As a consequence Art. 13 which declares void all laws inconsistent with or in derogation of the fundamental rights and Art. 19 which enumerated the rights were inviolate and would necessarily come in the way of any encroachment thereof. For purposes of considering the Seventeenth Amendment, Art. 31 and Art. 19 (1) (f) is relevant and it lays down that all citizens shall have the right to acquire, hold and dispose of property. Therefore if a citizen held any land which is required by the State for any public purpose it has to have recourse to the Land Acquisition Act in which

various safeguards were incorporated to ensure that the citizens received proper compensation. This Act not only allowed the citizen to approach the appropriate courts for the purpose of getting the compensation offered by the Government increased but also to challenge the very purpose of acquisition as not being a public one.

Naturally this legal position was a great obstacle in the way of the Congress Government in power, so within a year came the First Amendment to the Constitution. This took the shape of an altogether new Article 31 A to enable the government to abolish the class generally known all over as Zamindars. This class had largely been brought into existence by the British and the Zamindari system being historically unsavoury and even unsound was regarded by many as unjustified. As it was found that this Amendment also left untouched a large class of intermediaries (called by different names in different States) in between the State and the actual tillers, a further Amendment, the Fourth, was passed in 1955. In this Amendment the word used was "estate" and its acquisition or extinguishment was permitted. Now, the purpose of these two Amendments was not only the taking over or abolition of the two kinds of rights but also to remove the question of compensation from the purview of the Courts.

So the position in law as a result of the First Amendment of 1951 and the Fourth Amendment of 1955 was that the two kinds of property i.e. zamindari and estates could be compulsorily acquired by law, "and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate" (Art. 31) as amended in 1955. It is easy enough to see therefore that the position of the actual tiller of the land was untouched. In most States the system of land — tenure known as ryotwari (as opposed to zamindari) prevailed and here the actual holder was not only the owner but between him and the state there was no intermediary of any kind.

Now it has been known for a long time that the Congress Government has been intending to embark upon a vast scheme of agrarian reform, the aim being to establish collective farming all over the country after the Russian or Chinese pattern, though, of course, this was not clearly stated. By 1955 they had rid the country of such land-tenures as they considered feudal in character. In the process they had in some cases greatly encroached upon the fundamental rights guaranteed under Art. 19 and 31 (unamended) but this was of no consideration. Since 1955 in pursuance of this general policy of legalising the taking over of agricultural land by the State, a number of State legislatures (with their Congress majorities)

passed laws, altogether totalling 124, which laid down among other things the limit of a person's holding, the amount of compensation to be paid and most important of all that courts could not go into the questions of acquisition and compensation thereby rendering the matter non-justiciable. It must be stated that these two Amendments were retrospective i.e. as being in force from January 26, 1950.

Among such 124 acts was one passed by the Kerala legislature on the initiative of the Kerala Congress Government (following generally the pattern of an earlier one passed during the Communist government's regime but disallowed by the President) known as the Kerala Agrarian Relations Act (IV of 1961). This Act was declared *ultra vires* the Constitution and struck down by the Supreme Court in December 1961 and the Congress Government at the Centre has promptly come forward with this Bill to enact the Seventeenth Amendment to the Constitution to render legal all these 124 acts of the different State legislatures which would otherwise, following the Supreme Court judgement, be rendered *ultra vires*. It therefore becomes necessary at this stage to consider the judgement of the Supreme court briefly.

The Supreme Court held that the Act violated the Articles 14, 19, and 31 of the Constitution and was not protected under Art. 31 A (1). The main ground being that the definition of the word "estate" came into the Constitution from January 26, 1950, and was based on the existing law. Therefore the Court had to consider the meaning given to "estate" in the Madras Estates Land Act of 1908, a law relating to land-tenures, where this word was specifically defined. This act was in force at the date of the coming into force of the Constitution and under Art. 13 it was good law even after; and that Act did not apply to lands held on ryotwari system. The Supreme Court explains the ryotwari system in the following words: "The ryot is generally called a tenant of Government but he is not a tenant from year to year and can not be ousted as long as he pays the land-revenue assessed. He has also the right to sell or mortgage or gift the land or lease it and the transferee becomes liable in his place for the revenue". The judges then quote with approval the following from Baden-Powells Land Systems of British India saying the ryotwari tenure is summarised there as that "of a tenant of the State enjoying a tenant-right which can be inherited, sold, or burdened for debt in precisely the same manner as a proprietary right, subject always to payment of revenue due to the State".

It should be explained here that during the British times the question whether in the ryotwari system the assesment paid was land-tax or tenancy-rent was never finally resolved but the full proprietorship of the ryot was clearly recognised. It was therefore that the Supreme Court held that the two Amendments, the First and the Fourth, even together did not cover the class of proprietor-owners, and that they were protected by the chapter in the Constitution guaranteeing Fundamental Rights. It became necessary then either to drop quietly all these 124 different pieces of legislation which the various State governments had introduced in their respective legislature and which

were tainted by the common defect of attacking private property or to come forward with an amendment of the Constitution. It has chosen the latter alternative.

This amendment is sought to be effected by recasting clause (2) (a) so that the expression "estate" shall include "any land held under ryotwari system". This then is the whole purpose behind the proposed Seventeenth Amendment to the Constitution; that the lands held by the ryotwari holders of land in Kerala, Mysore, Madras, Andhra, Maharashtra and Gujarat States could be subject to compulsory acquisition by Government and that the compensation to be paid to the holders would be non-justiciable i.e. would not be liable to be reviewed by any court of law. And why this necessity to remove the question of adequacy of compensation from the purview of the courts? Because the Congress Party in 1959 took the decision, known as the Nagpur Resolution, calling for the State monopoly of food grains trade, imposition of ceiling on land holdings and the expropriation of the land of the peasants of India in order to establish collective farming under the name of Joint Cooperative Farming. This then was to be the Indian Great Leap Forward; the communes in China and the collectives in Russia have been such a colossal failure that it is surprising that anyone anywhere should be so foolhardy as to try the experiment once more. Edward Crankshaw, a recognised authority on Russia and Sino-Soviet affairs writes in his latest book: "And, on paper one of the most striking aspects of the Soviet example was the Collectivization of agriculture. The Chinese did not know that it had failed so lamentably that even to this day, and in spite of Khrushchev's frantic plunging to put things right (always within the framework of the Collectivization), it was responsible for the chronic lag in Soviet food-production. And so they (the Chinese) repeated Stalin's grossest error." "... the Russians having made their own great mistake had, twenty years later, forced all their European satellites to repeat that mistake, and that the only Communist country which had undone the collectivization, Poland under Gomulka, was the only communist country in which agriculture was not a national disgrace". So the pattern unfolds itself before our eyes unmistakably. Joint Cooperative Farming of the Nagpur Resolution has failed and so Collectivization with the aid of the Seventeenth Amendment. It is most surprising that this Leap In The Dark (not leap forward) which is such a monumental departure from the age-long pattern of India's agriculture should not have received the attention it calls for. But let no one close his eyes to the dangerous possibilities of the situation. Even in Russia and China, with conditions far more suitable, millions had to die — indeed, to be killed — before the process could get underway. The Indian peasant's attachment to his land, however small, is proverbial. The mildest and the most law-abiding among them when threatened with deprivation of land has been known to resort to violent crimes, even murder. Let those, who are determined to carry this measure through, calculate its full cost in suffer-

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Private And Public Enterprise

G. L. Mehta

(Extracts from the speech delivered at the Seminar on "Problems of Private and Public Industrial Undertakings" organised by The Federation of Indian Chambers of Commerce and Industry, in New Delhi on August 6, 1963.)

UNHAPPILY, we are all prone to become victims of our dogmas and prisoners of our clichés. We are living with ghosts, real and fictitious, alert and outworn — planning, public and private sectors, nationalisation, targets, exploitation, monopolies, profits.

Take, for instance, planning. Should we not consider what is meant by "planning" — what are its objectives and goals, what kind of plan it is, how it is formulated and implemented, what are its priorities and techniques? No. We must either be for planning and, therefore, "progressive" or condemn all planning and become "reactionary"; some fervently advocate it as though it would bring heaven on earth, others abhor it as the path to perdition. But, after all, planning is a method, a way of securing economic growth. Undoubtedly, it has political aspects and overtones: First, because planning of an economy is not possible without the State taking initiative, without the assistance and intervention of the State at some vital points. And the State, I presume, is a political institution. Secondly, planning is concerned with priorities which have social implications. It might, indeed, be argued that planning can be left to experts and technicians but whether that would make it more democratic or more acceptable to the business community or to workers is a question.

It is true that too detailed planning on too large a scale is neither possible nor desirable, more so in a country of the size of India with its regional variations and its lack of technical equipment such as statistics and of facilities for meticulous controls. We should, therefore, be clear both regarding the value and limitations of planning. What we differ about is whether planning should be simply to provide guide lines or to lay down a detailed blue-print. Moreover, we have also to decide whether the function of planning is to co-ordinate the desires and needs of individual citizens or whether it should provide an opportunity to shape society.

Next, let me turn to public and private sectors — which are regarded by some as inseparable Siamese twins and by others as brothers who are mortal foes in the *Kaliyug*. In the interminable and at times, misleading dialogue between these two sectors, which, I presume, are both parts of the national economy, the argument more often than not runs on parallel lines. Each side concentrates on the weaknesses and failures of the other while ignoring its own limitations and without acknowledging the strength of the other. It is contended that those who control and operate the public sector stultify development because of their amateurishness, their cross purposes and their susceptibility to political pressures and influences.

All this may be, and in many respects is true. But it does not necessarily follow that business is always competent, free from nepotism and run on strictly economic lines. Contrariwise, the private sector is represented by many of those in power of office as "monopolist" at one time and as unsocially competitive on other occasions, as primarily devoted to self-interest and almost wholly unscrupulous. And yet, no government is omniscient or free from narrow partisanship or corruption. If businessmen are overfond of money, politicians are greedy of power. The lure of office is not less pervasive and strong than the glitter of lucre.

It is not necessary to argue in abstractions as people do, that business cannot thrive without the protective and promotional activities of the State or that it is impossible for a bureaucracy to run industry, trade, transport, apart from ensuring law and order and national security. For, each side tacitly recognises its limitations and the necessity of the other sector even if it does not openly acknowledge it. What we should endeavour, however, is to ascertain the strength and weaknesses of each sector which result from our environment, traditions and characteristics. And secondly, we should determine the structure and functions of each sector relative to its sphere of operations and responsibilities. It may also be worthwhile to know what governmental corporations and private enterprises can learn from each other, or where necessary, unlearn. All large-scale organisations, whether in government or industry, have similar problems of hierarchy, procedures, recruitment and selection, initiative and discipline. Problems of flexibility as against a certain measure of consistency, co-ordination without dilatoriness, location of responsibility along with accountability — all confront such organisations. The private sector could teach the need for specific and practical objectives, the application of the test of actual costs while the public sector could inculcate a sense of social values and a recognition of wider considerations in the private sector. Both sides, indeed, should learn to avoid over-centralisation of authority, stifling of initiative at various levels, rigidity, indecisiveness and irresponsibility.

We cannot overlook the fact that those who run our corporations, public or private, come of the same stock. Our national characteristics are reflected in them as, indeed, they are in our legislatures, political parties, civic bodies, universities and other organisations and institutions. This is a matter not of inherent quality or innate capacity but of education and organisation. One illusion which we have, whether in Government or in business, big or small, is a

rooted belief in our own immortality and consequently, our indispensability. On the contrary, I suspect that we are all mortal and I agree with Prof. Harold Laski that "the success of a great leader is measured by the extent to which he makes himself dispensable". In other words, an organisation if it is worth anything has to outlive those who work in it; its efficiency like that of a machine depends on its continuity and interchangeability.

In an economy which is being industrialised and becoming complex and integrated, institutional forms and impersonal managements must replace proprietary and family patterns. Hereditary rights, as Stephen Leacock once remarked, are not infrequently hereditary wrongs. Delegation of authority, diffusion of responsibility, deliberate encouragement of initiative, a feeling of partnership sustaining a sense of discipline — these are essential for public as much as for private enterprise. Efficiency, productivity and profitability are equally important to both. Most countries today have and are going to have a mixture of private and public enterprises with presumably an increasing emphasis on public ownership and control, particularly in developing countries. Nothing is more important, therefore, than to make the private sector institutional in character and professional in methods while ways must be found whereby initiative and experiment and flexibility can be preserved within the public sector.

It is ironical that while people in many non-communist countries are busy with questions of long-term planning, in the Soviet Union and Eastern European countries the profit motive and the market mechanism seem to be gradually coming into vogue. Towards the end of last year, Mr. Khrushchev emphasised that "with regard to an individual enterprise the question of profit is of great importance as an economic indicator of its efficiency". Indeed, an economy if it is to develop must form capital. And capital is formed by the prudence and foresight of those who raise it and employ it. This is as true of governmental undertakings — be it railways or power plants or fertiliser factories or a state trading corporation — as of private industry. Hence, economic progress depends on corporate earnings. It was a Soviet plane designer, O.K. Antonov, who speaking some time ago of methods of Russian aircraft manufacturing described the social function of profits. The profit motive expressing itself through thousands of individual investment decisions, he observed, provides capitalists with an automatic feed-back that "forces them to make things better, sturdier and cheaper". More recently, schemes are being devised in the Soviet Union under which once the main target is fulfilled, the bonuses awarded to each plant would depend entirely on the total profit expressed as a percentage of the capital employed. This, I suppose, is a revolutionary step resembling bourgeois economic ideas.

But is it possible to have a profit motive without private ownership? There is no reason why this should not be possible any more than why it would be impossible to have private enterprise functioning with a

sense of social responsibility. Let me put the other side of the medal. Contrary to what industrialists in many countries would expect, some of the ablest managers in European countries today are civil servants who seek to expand the industrial production of their plant with a zeal worthy of any capitalist. M. Pierre Dreyfus who has built France's State-owned Renault Company into one of the world's most efficient manufacturers of automobiles has observed: "We have no reason to be nationalised unless we serve France — but on one condition we do not lose money". This is the spirit that inspires professional managers and technical directors of many a large industrial corporation in the private sector who might be salaried employees but are keen to expand production, increase efficiency and reduce costs. To them as to a commissar at the head of an industrial plant, profit is not simply a matter of personal appropriation, earnings are not a short cut for amassing individual fortunes; profit to them is an index of their performance, a yardstick of efficiency of their plant. May it not be that while we search for a way to harness private enterprise for public good, the Communists would, in their turn, give a respectable place to incentive and earnings instead of to fear and force to achieve targets in the economy? We might well meet half-way if we both recognise the fundamental need to serve the consumer, regard industry as a sphere of public service and rely more on consent than on coercion for getting the best out of a worker whether by hand or by brain.



"All right, all right! We didn't deliver Ram raj—but we have brought you Kamaraj..."

—Courtesy: Hindustan Times

Malaysia

Adam Adil

THE Federation of Malaysia, linking over 10,000,000 people of Malaya, Singapore, Sarawak and Sabah (formerly British North Borneo) by a bond of political and administrative unity and common nationhood — which came into existence on September 16, would be welcomed throughout the world. The credit for the birth of Malaysia goes primarily to Tunku Abdul Rahman, the Prime Minister designate of the Federation, who, during the prolonged period of the birth pangs of the new state, showed remarkable patience and spirit of accommodation and persuasion.

The British Prime Minister, indeed reflected an universal sentiment when he paid tributes to Tunku Abdul Rahman for his "statesmanlike vision and wisdom" in the task of achieving Malaysia. Naturally, the birth of Malaysia was a proudest moment for the Tunku and his words of confidence were fully justified. He said "surprises and disappointments, tension and crisis had marred the way to nationhood, but the people had endured them with confidence and patience. In a warm spirit of joy and hope, the people of many races now joined hands in freedom and unity Firm in their resolve for nationhood, the people of Malaysia looked forward with confidence to a future of peace and prosperity, harmony and happiness. They do so because they know that they have come together, through their own free will, in a true spirit of brotherhood and love of freedom."

Two of the constituent units of Malaysia namely, Sarawak and Sabah have become free from British domination simultaneously with the birth of the new State, while Singapore had attained its freedom a fortnight back. It is unfortunate that Brunei which had planned to join the new Federation at its very start could not do so because of its failure to adjust itself with certain conditions. However, it is certain that Brunei will not remain out for long.

The Federation of Malaysia is a multi-racial conglomeration of Chinese, Malays, Indians, Pakistanis and tribal people such as Dayaks Muruts, Dusuns, Bajans and Melanaus. They have not much in common and their territories are widely separated and at various levels of development. While Malay and Singapore are fairly developed, Sarawak and Sabah still linger in a state of backwardness and underdevelopment. Yet, these territories have come together, for, they felt that their unity would ensure their political stability and economic prosperity. Tunku Abdul Rahman had also other compelling reasons for his initiative in the formation of Malaysia. Geographically, Singapore is an integral part of Malaya; yet Malaya could not risk the integration of only Singapore with the mainland, for one simple reason, for, in that event, the Chinese, who constitute the seventy five per cent of the population of Singapore, would have outnumbered the Malays, that is

the Chinese would have been about 3,789,000, the Malays 3,642,000 while Indians and Pakistanis 908,500 and others about 162,300. Hence, the Tunku wisely thought of the alignment of other territories like Brunei, Sarawak and Sabah into a larger Federation in which the Chinese, although the largest single racial group, would be outnumbered by all others combined. Secondly the Tunku rightly thought that Federation of Malaysia would constitute a formidable bulwark against Chinese communist expansionism.

Under the terms of agreement between the British government and Tunku Abdul Rahman, Britain, at least for the present, will be allowed to retain bases in Singapore and have unrestricted use of the island. This fact is being exploited by Indonesia in furthering its policy of confrontation against Malaysia. Indonesia is the closest neighbour of Malaysia — at one point they are separated only by twenty miles of sea. Instead of following a good neighbourly policy, Indonesia has chosen to describe Malaysia as "bastion of neo-colonialism."

The reasons for Indonesia's policy of confrontation against Malaysia are not far to seek; Firstly, China is opposed to Malaysia for obvious reasons. The powerful Indonesian Communist Party under Mr. Aidit, which has taken a pro-Chinese line in the internal polemics of world communism, is literally driving President Sukarno into the policy of confrontation even though it means going back on his word to Tunku Abdul Rahman given at Tokyo as well as Manila. Secondly, hostility towards Malaysia would serve as a good subterfuge for distracting the attention of the Indonesian people from the domestic problems of acute inflation, unemployment, corruption, in other words, problems of cracking economy and political instability. After the settlement of West Irian question, Malaysia has come handy for President Sukarno for the exploitation of Indonesian sentiments!

It is clear, however, that the policy of confrontation followed by Indonesia is bound to fail in view of the determined self-confidence of the Malaysians to face the future. It is unfortunate that the Philippines too have chosen to be unfriendly, but it will not be long before they realise their mistake.

The broad outlines of Malaysian Constitution were recommended last February by a committee of four governments: Britain, Malaya, Sarawak and Sabah. The Committee held that the Constitution should be based on Malayan Federation and that the Head of the State should be nominated by the Queen of England and the Paramount Ruler of Malaya. Islam would be the national religion, although there would be no state religion in Sarawak and Sabah. The Committee also recommended that there should be constitutional guarantees for the freedom of worship. While Malay would be the national language of

Malaysia, English would remain official language for at least ten years in Sarawak and Sabah.

The membership of the present Malaysian House of Representatives would be increased from 104 to 159, with 15 extra members coming from Singapore, 24 from Sarawak and 16 from Sabah. Most taxation would remain a Federal subject and Britain would give £ 1.5 million a year for five years provided Malaya gives aid to subsidise the development of the backward territories of Sarawak and Sabah.

Singapore would continue to be a free port and enjoy a certain degree of autonomy in trade, commerce, and industry and finance. But the Federal Government would have control over the financial policies and national taxation. Defence, external affairs and internal security would be the responsibility of the Federal Government.

Undoubtedly, the Federation of Malaysia would have ingredients of being one of the most progressive, advanced and richest states in the world. As it is, it is supremely rich in natural resources. It will draw upon the immense rubber and tin resources of Malaya, which is today the world's biggest producer of natural rubber, supplying one third of the world's

demand. Malaya's Kinta Valley in Perak State is, indeed, the richest source of tin. Rubber and tin account for 70 per cent of the export of Malaya.

Besides, Malaya produces about 60 per cent of her own requirements. It has already embarked upon a programme of industrialisation. Industries now being developed include fertilisers, chemicals, steel, cement, rubber products, pharmaceuticals, paint, antibiotics and cigarettes. It is, therefore, not surprising that after Japan, Malaya enjoys highest standard of living in Asia.

Singapore, though it comprises an area of only 217 square miles, is not only a thriving commercial city, but a free and the fifth largest port in the world.

Sarawak has been developed only on coastal side, since its interior is mainly dense jungle and swamp. Its economy as well as that of Sabah is principally agricultural. The main products of both the islands are rubber, copra, hemp, tobacco, timber and pepper.

The various regions of Malaysia have exploited their respective natural resources only partially. It's obvious that their new unity and sense of togetherness will create an appropriate climate for laying the foundation of lasting peace and progress of the new State.

The Law Of Obscenity

N. S. Ranganath Rao

RECENTLY the proprietor of a reputed book stall in Bombay was tried and convicted on the charge of having imported certain books which it was held were obscene.

The proprietor of the book stall ordered for certain books from a foreign firm in response to orders placed on him by his customers, some very eminent men in the literary world. The books ordered by him were advertised in an English magazine of high literary repute. He had no knowledge that the books in question were obscene. The books were seized by the Custom authorities before he obtained possession of the books. He contended that as he had no criminal intention or knowledge he was not guilty of committing any offence under Section 292(b) of the Indian Penal Code which punishes the offence of importing obscene objects. However, the court, though seemed to have accepted the contention of the importer that he had no criminal knowledge or intention, yet was of the view that no such knowledge or intention was necessary to constitute an offence under Sec. 292(b) I.P.C. The section in question reads as follows:—

"Whoever imports, exports or conveys any obscene objects for any of the purposes aforesaid, (for purpose of sale, hire, distribution, public exhibition) 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 to be punished etc." The Court was of the view that know-

ledge of obscenity of the books imported was not necessary to hold an importer guilty under the section and convicted the proprietor though it did not sentence him to any punishment.

Though a literal reading of the section may appear to justify the interpretation, it is respectfully submitted that the correctness of the decision is highly doubtful. Courts of high authority, including the Privy Council, have held that "Unless the statute either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has a guilty mind". It was unfortunate that the attention of the court was not drawn to a recent decision of the Calcutta High Court (C. T. Prim v. State A.I.R. 1961 Cal. 177) which has held that *mens rea* or guilty mind is not dispensed with under Sec. 292 of I.P.C. The Calcutta High Court observed in the above case "Unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of the crime, no one should be found guilty of an offence under the criminal law unless he has got a guilty mind. Offences which can be held to be committed without a guilty mind are usually of comparatively minor character. The offence under Sec. 292 is not of a minor character, for the liberty of the subject is at stake. A sentence of three months rigorous imprisonment prescribed under Sec. 292 is not insignificant." The decision of the Calcutta High Court was in an appeal by the proprietor of a

book stall who was convicted under Sec. 292 I.P.C. A publisher or the proprietor of a book stall may be deemed to have intended the natural consequences of his act. Therefore guilty knowledge might be inferred by the act of publication or possession of the book. But in the case of an importer even this presumption of intending the natural consequences of one's act cannot attribute to him the guilty mind. Every importer who orders a new book cannot be presumed to have the knowledge that the book is likely to be obscene. To impose an absolute liability on an importer by dispensing with the doctrine of *mens rea* would amount to imposing an unreasonable restriction on his trade. As observed before, a literal reading of the Section may impose such liability. If such liability is imposed under Sec. 292, even the constitutional validity of the section is doubtful. The law on the point seems to be highly doubtful and needs clarification.

It is one of the fundamental principles of criminal law that a person shall not be held guilty of a crime for the act alone unless such act is accompanied with a guilty mind. The guilty mind might consist of either criminal intention, knowledge or even negligence. But certain modern statutes have dispensed with the requirement of guilty mind mostly because the acts punished may have serious consequences on public health, safety or such other matters of public interest and as the proof of such guilty mind is difficult. In the case of an importer of books none of these considerations are material. Importing books, even obscene books, may not have such serious consequences as, for example, trading in adulterated food stuff or drugs. This is particularly true as the imported books are generally examined by the Customs authorities before they are released to the book sellers.

Further imposing an absolute liability on an importer would make his trade impossible. In the instant case, the books were advertised in a reputed literary magazine. They were ordered by very respectable and well known literary persons. There could not be a better instance of a case where the importer acted in a most *bona fide* manner and exercised due care and diligence. Yet if the proprietor of a very respectable book stall were to be exposed to the risk of prosecution and conviction, the law, it is needless to say, imposes the most unreasonable restriction on the fundamental right guaranteed in our Constitution to practice any profession or to carry on any occupation, trade or business. Therefore it is absolutely necessary that Sec. 292 of the Indian Penal Code be amended not only to define the liability of an importer in a reasonable and just manner but also to save the Constitutional validity of the law of obscenity in India. It is true that the law of obscenity as a whole, as contained in Sec. 292 is defective. A private member's bill tabled in May 1963 is intended to amend certain aspects of the law. An attempt to examine the law of obscenity in India in the context of the amendment may be made some other time. But the law dealing with the liability of an importer seems to be the most unsatisfactory part of the law of obscenity in India.

Secs. 292 and 293 of the Indian Penal Code have

been inserted in the Penal Code by the Obscene Publication Act (VIII of 1925) for the purpose of giving effect to The International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, signed at Geneva in 1923, but the Convention does not compel imposition of absolute liability on importers. Several countries which have been parties to the Convention have prescribed knowledge or intention as a necessary ingredient of the offence of importing or trading in obscene matters.

There is another aspect of the question which deserves serious consideration. It appears that the present practice of the Customs authorities under the Sea Customs Acts is to refer only doubtful books to an expert for his opinion. In most of the cases the Customs authorities take the decision and then serve a show cause notice on the importer asking him why the books should not be confiscated. Only in doubtful cases they serve such notice after obtaining the opinion of the expert. Both these practices are highly unsatisfactory, particularly in the case of books. The judgment of certain executive officers who might not always be capable of appreciating the literary value of a book might expose an importer to unnecessary hardships. It is also possible that the opinion of one expert in matters where wide differences of opinion are possible might not be adequate even to assess the *prima facie* obscene nature of a book. Therefore, to avoid unnecessary hardship to the importers the proper course would be to constitute a board of qualified literary men to assess the nature of the books imported. Such boards might be constituted of men of different branches of learning like literature, law, medicine and psychology. The Custom authorities must refer all the books to such board before they proceed to act.

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R. Srinivasan

A PERUSAL of the book* gives rise to saddening reflections on the nature of Indian secularism. More than in any other country, secularism in India was the direct result of the challenge of the Muslim League to the claims of the Congress that it was truly national. The Karachi resolution of the Congress party in the thirties envisaged a secular stand which was a revolutionary step in the annals of Indian nationalism; for even after the rise of the Congress and of the Mahatma, Indian national movements having a mass appeal were not entirely non-secular but were quasi-religious. The independence of our country witnessed the birth of Pakistan and underlined the strength of communalism. But the Congress Party and the government wanted to adhere to the Karachi resolution and proclaimed that secularism would be made a reality in independent India. Since then the mantle of Roger Williams, the great 17th century secularist, has fallen on the shoulders of Nehru. But can an Indian Roger Williams deliver our society from the bonds of reaction and communalism?

It looks as though this will be a superhuman task. This is because our society has never been secular and it has always remained feudal and caste dominated throughout its history and continues to be so. *Indian government became secular even before Indian society developed secular values.* The difficulties faced by the government have been due to this stark reality. Will the communal society swallow the secular state? While Mr. Nehru readily condemns the Jana Sangh for its anti-secular attitude he should examine the activities of his government of the party which he leads. His party has often pandered to non-secular passions by patching up with reactionary forces founded on a denial of secularism. Its alliance in Kerala with the Muslim League is an instance. Individual congressmen have played to the communal passions of the public in election time; both in Rajkot and in Amroha this happened. Here the party instead of educating the people of the country has fallen in line with their non-secular outlook.

A government then cannot be secular when the society remains non-secular. We find instances of ministers high in government taking more interest in the activities of the Bharat Sadhu Samaj than in academic institutions or in social welfare societies. Mr. Nanda's hopes and his proposal that the *sadhus* should carry the message of the plans to the villages has provoked more derision among the thoughtful than any respect. You may as well expect a Catholic Priest to advocate artificial birth control.

One of the dilemmas that the government is facing in our times is directly related to secularism. It has decided that the benefits of a modern planned society should percolate to all the sections of the population

in the interests of social justice and that the privileged class alone should not have their fingers in the economic cake. But in all societies that are undergoing change, it is the well-to-do that initially take advantage of the new situation; and this is generally at the cost of the have-nots. To prevent this social injustice, the government resorted to solutions which it thought would meet the Indian situation admirably. The theory was that the backward classes had never been given any opportunity for bettering themselves and that given a chance they will do well. Therefore began the practice of reserving seats in the legislatures for them; similar reservations were made in the colleges and other professional institutions of higher education as well as in the civil service. In secular India all men are equal but some are more equal than others when it comes to an admission in a medical college or when applying for a governmental position. For twenty years before independence, the non-Brahmin classes had exercised pressure on the governments and had won considerable advantages for themselves. The government of free India never deliberated upon the consequences of opening this Pandora's Box. It was soon realised that there was a vested interest in belonging to one of the backward communities; since this involved the advantage of office it was but natural that every community should be particular in wanting not to lose the privilege of belonging to the backward classes. If the Brahmins could de-Brahminise themselves they would have done so. But while "sanskritisation" was easy the opposite direction was a difficult path to travel. Thanks to modern methods of communications, the backward classes could consolidate their castes and fight better of their privileges. They even went to the extent of changing their religion (as did the neo-Buddhists) and yet wrest their old privileges from the government. The effects of this reservation policy in the civil service and its damages to the administration, the lowering of the standards of excellence in the professions and in the world of scholarship are particularly due to this unfortunate phenomenon. The government of India realised too late that centuries of disabilities just could not be done away within one generation of privilege raj. This practice has perpetuated the classes and has made nonsense of realising the secularist dream. Nehru's secular government is unfortunately like the sorcerer's apprentice; it looks as though the greatest reverse to the cause of secularism will arise from the backward classes.

Meanwhile the government is driving another nail in the secular coffin. Wedded to the principle of secularism, the government is undertaking reforms that are patently unjust to the majority of the people for here too not all the sections of the people are treated alike. In India a Hindu cannot marry more than once though his religion permits him to do so; even so does Islam and the Muslim in India is free

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to marry more than once—even four times should he think it necessary. But in Pakistan which is a theocratic state zealous to preserve the purity of Islam the same Muslim cannot marry more than once! Pakistan is more critical of Islam than India is! In the Lok Sabha, Acharya Kripalani observed: 'If we are a democratic state, I submit we must make laws not for one community alone. Today the Hindu community is not as much prepared for divorce as the Muslim community is for monogamy... Will our government introduce a bill for monogamy for the Muslim community? Will my dear law minister apply the part about monogamy to every community in India?... I tell you this is the democratic way; the other is the communal way. It is not the Mahasabbhites who alone are communal; it is the government also that is communal, whatever it may say.' (quoted, p. 286-7.) The sentiments of the Acharya find a wide acceptance with the thoughtful. And the government has yet to satisfactorily reply to the charge.

In a society where barbers refuse to ply their trade on certain persons because they happen to belong to a lower caste and where the washermen think it beneath their dignity to wash the clothes of their caste inferiors, the western ideals of secularism will remain for a long time ideals impossible of attainment. It is one of the paradoxes that in a country that is most committed to casteism and communalism so much as to become an inseparable part of the political process, the constitution is wedded to the secular ideal. Not that there is any thing wrong about the ideal; only it falls very much short of the aspirations thanks to the policies of the government and the attitudes of the majority of the people in our country.

In a state that is truly democratic there is no need for specially making secularism a political virtue, for it is part of the larger democratic tradition. In India

there is emerging a built-in resistance to the secular forces; in the years to come these would strengthen and strike roots in our society too deep to be plucked out. While the classes claim loudly for their privileges curiously there is not one voice raised for secularism on questions of individual conscience. It is very doubtful if a case like the Flag Salutation Controversy will ever come up before our courts.

Professor Smith has done a magnificent service to the world of scholarship; for many years to come this would remain the definitive book on the subject. It is bound to be on the reading list of many scholars interested in the problems of democracy in India. But this does not mean that the Indian intellectuals can sit back and repeat the conclusions of the book. Now, more than at any time they have a pressing obligation to meet. One of the important factors which will make secularism a reality is in changing the minds of the common people by persuasion and by working with the forces for change. It is here that our colleagues have an opportunity and a challenge that will be important in the building of a future democratic India. We will have to know how exactly our people in the various walks of life think on secularism. Here the only approach that will be able to guide us with any sense of reality and exactness will be in empirical research where a band of scholars from institutions of learning will go round finding exactly what the people think about secularism. It is only when we know their attitudes with any definiteness will we be able to think of a public policy on this problem more appropriate than the one followed by the government. Mr. Smith has done his work admirably; we must do our with an equal zeal. Perhaps the greatest opportunity for furthering the secular idea is at hand. Will our scholar-social-scientists rise up to the challenge?

Without Comment

"THE GREAT MARCH"

The Special Correspondent of *Organiser* (Sept. 23), a political weekly published from Delhi, gives the following information about the communist demonstration in Delhi:

A team of staffers specially deputed by the *Organiser* to cover it thoroughly and, to the extent physically possible, to count every single head, has gathered some revealing details about the show.

The Deputy Commissioner of Delhi assessed the procession's strength roughly at thirty thousand. But a one-by-one count-down showed that the total number of demonstrators the party was able to huddle together in Delhi after its intensive 3-monthlong, Rs. 10 lakh expensive, campaign throughout the country, was less than twenty thousand!

After an over-all comparison of figures, the team was able to report the following province-wise break-

down of the procession in the order in which the groups were arranged.

1. General leaders etc.	50
2. Andhra, Mysore and Madras	759
3. Assam	101
4. Bihar, Orissa	715
5. Gujerat	175
6. J & K	416
7. Kerala	208
8. Madhya Pradesh	1,010
9. Maharashtra	1,060
10. Punjab	4,215
11. Rajasthan	1,944
12. Uttar Pradesh	5,785
13. West Bengal	280
14. Delhi	2,588

19,306

Seated, the demonstrators covered Parliament Street from the round-about upto Bank Square—now renamed Sardar Patel Square. This is an area measuring exactly 1,525 feet by 40 feet, that is 61,000 square feet. With one person covering on an average 3 square feet, and assuring that the entire area was jam-packed



"We must outflank, isolate, surround and capture this vital Congress peak, comrades!"

—Courtesy: *Hindustan Times*

—which it was not, the number comes to about 20,000. This fully corroborated the one-by-one count.

The figures given above make it clear that the capital's response to the Communist call was more than cool—it was cold. They also show that Punjab and U.P., the nearest two provinces, provided half the total strength, 127 buses hired by the Communist Party had given many in these two States the opportunity of a free joy-ride to the capital. Eighty percent of the demonstrators from Punjab were from the Patiala area.

The Prime Minister gave himself away when he came out to have a look at the demonstration. This was the first time in fifteen years that he did so. Never before has he come out to see even a Congress demonstration staged in his own support!

For the first time ever, the Talkotra Gardens in New Delhi were opened out to a political party to pitch tents. Uptil now only the Youth Festival and the Republic Day participants from the States have been allowed to stay there. More astounding still, vacant Government quarters in the vicinity of Talkotra Gardens were given to the CPI to house its more important leaders.

Again, for the first time in Parliament's history, a political party staging a demonstration was permitted the use of microphones near Parliament House. The Communists made full use of this facility and fitted seventy amplifiers on both sides of Parliament Street from the northern gate down to Sardar Square.

THE GENERAL WHO RAN

The Jawan's heroism has never been in doubt. Sri Chavan's statement before Parliament on the probe into the last year's NEFA debacle has vindicated the honour of the jawan.

Although you and I are not permitted to see the confidential report, Sri Chavan's carefully chosen words do admit that it was the Brass who had let us down in NEFA. Though names are not to be mentioned, with the NEFA debacle will always be associated the name of at least one general, whom some gullible American correspondent had once tipped as Nehru's successor. That was General B. M. Kaul — "Bijji" to the charmed circle of his New Delhi admirers.

The Prime Minister once praised Bijji's record as a

war horse. No doubt he had seen active service — as the in-charge of Army entertainment (Dilkhus was the name of the unit) on the Burmese front. But Bijji is no Stan Laurel or Harpo Marx; he is a smart guy. Leaving behind others who had won laurels on the battlefields of Kashmir, our Dilkhus General shot up into prominence basking under the generous patronage of a dynamic Defence Minister, and he won his laurels too — by building in record time, not outposts on the frontier, but Army tenements at Ambala.

Soon he became Chief of the General Staff, a key post that involves operational planning, without even having commanded a unit in actual war, not even a peace-time manoeuvre. And so when the Chinese menaced the McMahon Line, this Bijji, amidst a fanfare of publicity, was made the Corps Commander in direct charge of the resistance against the formidable invader.

Sri Chavan has told us of many of the shortcomings of our Defence, and the Prime Minister has also talked of the paucity of funds and the hang-over of the British days. But they did by no means explain why our fine Army at Se La had to be reduced to shambles overnight and had to retreat in utter disorder with thousands of jawans struggling back for weeks afterwards.

What did our Corps Commander do? In the very first onslaught of the enemy, the brave Bijji flew back to New Delhi — disabled, we are told, by bronchitis. But General, why should you have to rush all the way back to Delhi? Were there no good hospitals nearby — At Tezpur, Gauhati, Shillong or Calcutta? A Commander of an independent country engaged in patriotic defence of the motherland is supposed to face the ordeal along with his own troops, but here is a Brass, who in the style of the Spanish Generals, was the first to quit the front and recoup in his own cosy bungalow, twelve hundred miles away.

And then when he reappeared after a bracing up, he was the one who ordered the helter-skelter retreat from Se La and Bomdi La, bringing disgrace to our great Army and humiliation for the entire nation. What a contrast to the valour shown in Ladakh under far more trying circumstances!

The nation was left to lick the wounds inflicted by an unscrupulous invader. Not Bijji; he moved on to new pastures. Quietly retiring from the Army, the great General wangled a cushy job in the private sector, with a fat salary, all found, with posting in picturesque Japan.

Not all the probe into the NEFA disaster can wipe out Bijji's war record, nor the folly of those who backed him. He is our only General who ran.....

(*Mainstream*, Delhi, Sept. 7).

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SEVENTEENTH AMENDMENT TO THE CONSTITUTION — Continued from page 2

ing, lives and chaos. The Congress leaders talk of the present emergency. Are they prepared at such a time to undertake what must be regarded as a cataclysmic upheaval in the lives of hundreds of thousands which they are bound to resist?

It has been pointed out above that the aim of the 17th Amendment is to make applicable the principle of non-justiciability to the compensation paid for ryotwary lands, which principle already applies under the 1st and 4th Amendments to other kinds of lands. Why is this principle of non-justiciability of compensation being made applicable to all these kinds of lands? It is because the intention is to pay as little as possible and to delay the payment of that little even as long as possible. The experience of those whose lands under other tenures have been taken away under the previous Amendments is a tale of woe. People were reduced overnight to penury who only a little while ago were enjoying the fruits of their labour and leading happy and useful lives. Writers have already pointed out that in the Marxist dogma, the peasant must be liquidated, voluntarily if possible, compulsorily if necessary. The first Party programme which was promulgated in 1903 (there have been only two since then; the second in 1909 and the third in 1961) placed among the cardinal results to be achieved the over-throw of the bourgeois, landlord system. The Indian Communists, indeed communists all over the world, must naturally feel happy that so much of their dirty and dangerous work is being done for them by the leaders of the Congress. We in India can truthfully echo the sentiment in the opening words of the Communist manifesto of 1848 (which every Communist is said to have by heart): "A spectre is haunting India — the spectre of Communism". Has the Party in power fully considered where this Seventeenth Amendment which will expropriate land will take the country? The major upheaval it will cause will bring about all over India a class, millions strong, of landless peasants, very much like the Russian monjiks or the Egyptian fellaheens. Steeped in poverty, lacking in ambition, they will be a drag on the political progress of the country.

It now remains to consider some of the constitutional questions involved. It need hardly be pointed out that in this short period of twelve years (since the First Amendment in 1951) no less than sixteen amendments to the constitution have been passed. A Constitution stands on an altogether different footing from an ordinary law, which being within the purview of the legislature; it can change any such law duly passed whenever in its judgment a change is called for. That is why the Indian Constituent Assembly which originally passed the Constitution recognising the sanctity attaching to it, laid down a different method in which such changes could be affected. Unfortunately it failed to recognise that in the peculiar circumstances of India the easier this method was, the oftener would the Constitution be amended. Under Article 368 it is only necessary that the amending Bill should be passed in each House by a majority of the total membership of that house such majority being not less than two-thirds of those present and

voting. There is a proviso that if the amendment seeks to make a change in the article affecting the election of the President and the manner of his election and certain other articles concerning the States, the judiciary etc. the amendment is required to be ratified by Legislatures of half the States. In enacting this article, thereby making changes (small or great) in the Constitution so easy, the Constituent Assembly failed to guard against the possibility of a monolithic political party, present or future, effecting changes in the Constitution to suit its own political ends rather than serving the best interests of the country. That this has happened in many countries in recent times is common knowledge. Fortunately, however, there is a safeguard in the Art. 368 which must be pointed out and it is that the Bill (to effect amendment) shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended accordingly. In making the President's assent obligatory it was clearly the intention of the framers of the Constitution not only to place a check upon legislation but also when an amendment to the Constitution was proposed, he has to satisfy himself that the decision of the Government of the day is not a snap decision to suit the convenience of the ruling party, and that the measure has the support of the country as a whole. In Britain where the Crown enjoys the same constitutional role as the President in India, the Crown has been called upon to exercise on occasions this check on the legislative exuberance of the ruling party. When in 1910 Asquith advised King George V to create several additional Liberal peers for the purpose of ensuring the passage of Lloyd George's radical budget through the House of Lords (where the Conservatives were in great majority and had already thrown out several measures passed by the Liberal House of Commons) the king only consented to do so if Asquith fought another election on the direct issue of reform of the House of Lords. In other words what the British king did was to exercise his constitutional right to compel the ruling party to secure the sanction of the country directly on the issue of clipping the powers of the House of Lords as a revising chamber. It must be remembered that this function the Lords had performed for centuries and any alternation in their powers was a major constitutional change. Asquith had therefore to fight another election in December 1910, the earlier being in January of the year. In India too the President has to satisfy himself (Art. 368 gives him the powers) that a major alterations in the Constitution for the purpose of effecting a drastic change in the lives of millions has been properly placed before the electorate and that, by and large, such proposed change has received its support. Can it be suggested by any stretch of imagination that the Indian electorate, at the 1962 general election even remotely had the issue underlying the 17th Amendment before it and sanctioned it. The Congress Government must be held guilty of a grave constitutional impropriety in seeking to pass the Amendment

(Continued on page 12)

With Many Voices

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

Government by political machines, cliques or bosses is not democracy and never was.

—Mr. Richard S. Childs, *Swarajya*, August 31

It is not appropriate defence to say that Chinese betrayed India. It will be the policy of any country to mislead its likely enemy, just as equally it should be the job of every country not to be misled.

—Mr. K. Rangaswami, *Hindu*, September 9.

The Soviet Union practices co-existence to create conditions for the economic victory of socialism over capitalism internationally and to promote class war internally in capitalist countries.

—Mr. Grigovy Glezerman in *Pravda*,
Hindustan Times, September 12.

Have the revolutionaries of yesterday become the petitioners of today?

—Mr. H. V. Kamath, *Statesman*, Delhi,
September 14.

Words do not necessarily mean the same to all. Take the words "friendly neighbour". The U.S. accepted that as being what we call neutral countries. But later found that to the Soviets a "friendly neighbour" means a communist country.

—Mr. Averell Harrimann, *Times of India*,
Bombay, September 15.

If we don't learn mass production methods, no amount of curses and slogans will help us win.

—Mr. Khrushchev, *Century*, August 31.

Communism is not love. Communism is a hammer we use to destroy our enemies.

—Mao Tse-tung, *Time*, September 13.

Witch-hunting is bad no doubt, but white-washing is worse.

—Mr. Nath Pai, M. P., *Times of India*,
September 22.

I am free to confess that all of us — I include myself also — sometimes do not keep pace with the changing world and changing events.

—Pandit Nehru, *Hindustan Times*, September 17.

The atom bomb is a paper tiger.

—Mr. Liu Shao-Chi, *Times of India*,
September 22.

This conflict (between Russia and China) underlined the profound change that national interest rather than ideology is the main governing factor in international relations.

—Pandit Nehru, *Statesman*, (Delhi) September 17.

SEVENTEENTH AMENDMENT—Continued from page 11
without the direct and positive sanction of the electorate and the matter should be brought to the notice of the President by all the democratic opposition parties taking the initiative jointly. An aspect of the question and closely linked to the above which will occur to many is, whether another party in future will not similarly follow the Congress example of securing drastic changes in the Constitution when in power. Let Congressmen beware lest in future they are hoist by their own petard!

Many in this country and elsewhere must be wondering at the frequency with which the Constitution is being amended in India. It is distressing to see that these amendments are being effected to whittle down the various rights and freedoms guaranteed to the citizen. The question therefore arises, how fundamental are these Fundamental Rights and were they genuinely and sincerely meant when they were inserted in the Constitution? Or were they meant to be show-pieces at the opening show, to be discarded as the show advanced? Let us not forget that the modern democratic constitutions owe a great deal to the constitutional theories propounded by John Locke, the seventeenth century political philosopher. His "Treatises on Government" are classics on English Constitutional law and polity and for the principles which he enunciated the American War of Independence and the French Revolution were fought. Locke claims that the democratic tradition had erected a system of representative institutions designed to promote the good of the nation as a whole on the basis of private property. The State, he says, is the outcome of free contract rather than natural growth. That the people in the exercise of their sovereignty have the right to govern themselves in the way they judge to be for the common good. He rests this sovereignty on mutual contract on the part of the people themselves. The right of the people, therefore, to be consulted before a major change in the Constitution is inherent and inalienable.

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