

THE LIGHT OF THE CONSTITUTION

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By

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Next week the Constitution (Forty-fourth Amendment) Bill 1976 will be taken up by Parliament, while the Prime Minister's wish that there should be a "free and open public debate" and a "study in depth" before the amendments are passed into law has remained unfulfilled.

The Bill is so wide-ranging in its scope that a critical examination of its provisions, combining adequacy with brevity, would fill a handsome volume. The limited purpose of this article is to point out the glaring inconsistency between two of the "fundamental duties" sought to be enjoined by the Bill on the one hand, and the other provisions of the Bill and the arguments marshalled in support of them on the other hand.

One of the fundamental duties is that every citizen of India (including two-thirds of the population who are still left illiterate) shall develop "the scientific temper" and "the spirit of inquiry". The scientific temper postulates the habit of thinking with clarity and using words with precision, and a calm

and dispassionate consideration of every issue in conditions of normalcy. Thus, by definition, the scientific temper would necessarily rule out, in times of emergency, changes in the basic structure of the Constitution as are sought to be made by the Bill (assuming that Parliament is at all competent to make such changes).

The Constitution is part of the heritage of every Indian citizen, irrespective of party politics. Any vote for or against any provision of the Bill, within or outside Parliament, should be according to the citizen's conscience regardless of party affiliations. In order that such a vote may be cast with the care and knowledge which the subject deserves, "the spirit of inquiry"—one of our fundamental duties—would imperatively indicate an intensive discussion for several months, and an equal opportunity—through the mass media of the radio, the television and the press—for differing points of view to ascertain and arouse public opinion. It cannot be suggested that such a spirit of inquiry has been brought to bear on the Amendment Bill. Such a spirit involved almost three years of totally free public debate and profound deliberations in which all political parties and all shades of expert opinion took part, before the founding

fathers of the Constitution gave it the final shape.

The other fundamental duty of every citizen is "to cherish and follow the noble ideals which inspired our national struggle for freedom". One of the noblest ideals of the great visionaries and fighters for national freedom was to ensure for the country certain fundamental rights which would be inalienable, and to guarantee liberties for man's unconquerable mind.

The Constitution of India Bill, 1895, which is believed to have been inspired by Lokamanya Tilak, visualized a Constitution guaranteeing to every citizen certain basic rights, subject to reasonable legal restrictions, including the rights (a) to "take part in the affairs of his country", (b) to "express his thoughts by words or writings, and publish them in print without liability to censure", (c) to have "in his house an inviolable asylum", and (d) of equality before the law.

The Commonwealth of India Bill, 1925, in the preparation of which Mrs. Annie Besant had played an important part, enumerated fundamental rights which were almost identical in scope and nature with those adopted by the Irish Free State in its

Constitution of 1921. In the authentic summary of the Bill, the "Declaration of Rights" appeared in the forefront: "The following shall be the Fundamental Rights of every person: (a) liberty of person and security of his dwelling and property, . . . (c) free expression of opinion and the right of assembly peaceably and without arms and of forming associations and unions. . . . (f) equality before the law. . . ."

In December 1927, the Forty-third Annual Session of the Congress at Madras passed a resolution empowering the Working Committee to co-opt and confer with similar Committees to be appointed by other organizations and "to draft a **Swaraj** Constitution for India, on the basis of a Declaration of Rights".

Pursuant to the above resolution the Motilal Nehru Committee was appointed, which submitted its Report in August 1928. The Committee observed that "the conditions obtaining in the Irish Free State approximated broadly to those prevailing in India; and the first concern of the people of Ireland, as of the people of India, is to secure fundamental rights hitherto denied to them. . . . It is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not

permit their withdrawal under any circumstances." Clause 4 of the Nehru Report set out nineteen fundamental rights.

In 1945 a non-party Committee of intellectuals, of which Sir Tej Bahadur Sapru was the Chairman, reiterated the demand for fundamental rights. The Sapru Committee rested its demand on the ground that in the "peculiar circumstances of India fundamental rights are necessary, not only as assurances and guarantees to the minorities but also for prescribing a standard of conduct for the legislatures, the government and the courts".

In answer to the British Cabinet Mission's Plan of May 1946, the Congress Working Committee passed a resolution in that month emphasizing that among the objectives of the Committee were "the guarantee of the fundamental rights of each individual so that he may have full and equal opportunities of growth, and further that each community should have opportunity to live the life of its choice within the larger framework".

In the Constituent Assembly a number of architects of the Constitution talked of the fundamental human freedoms as permanent and inalienable.

Dr. B. R. Ambedkar said : "The Declaration of the Rights of Man... has become part and parcel of our mental make-up. . . . These principles have become the silent, immaculate premise of our outlook."

Dr. S. Radhakrishnan said : "We must safeguard the liberty of the human spirit against the encroachments of the State. While State regulation is necessary to improve economic conditions, it should not be done at the expense of the human spirit. . . . This declaration, which we make today, is of the nature of a pledge to our own people and a pact with the civilized world."

Pandit Jawaharlal Nehru said : "A fundamental right should be looked upon, not from the point of view of any particular difficulty of the moment, but as something that you want to make permanent in the Constitution."

Z. H. Lari said : "To assess the provisions of the Draft Constitution, we have to see how far the Draft Constitution ensures the inherent rights of man, rights without which life is not worth living." •

Sardar Hukam Singh said : "It may be argued that under a national government,

the legislature, representative of the people and elected on adult franchise, can and should be trusted for the safe custody of citizens' rights. But as has been aptly remarked, if the danger of executive aggression has disappeared, that from legislative interference has greatly increased, and it is largely against this danger that the modern declarations of fundamental rights are directed, as formerly they were directed against the tyranny of autocratic kings."

Hundreds of similar passages can be quoted from the Constituent Assembly Debates to illustrate "the noble ideals which inspired our national struggle for freedom".

How can one reconcile the fundamental duty to "cherish and follow" the aforesaid "noble ideals" with the proposal in the Bill to take away the basic human freedoms enshrined in Articles 14, 19 and 31 of the Constitution, including the right to equality before the law, freedom of speech and freedom of the press, the right to form associations or unions and to move freely throughout the territory of India? There is no socio-economic policy for the welfare of the masses which is in any way impeded by these human freedoms. (I am wholly in

favour of removing the pathetic remnant of the right to property from the Chapter on fundamental rights so as to put an end to the perpetual and deliberate distortion of the issue of the basic human freedoms by snide references to the right to property.)

Article 31C, as sought to be amended by the Bill, will permit any law giving effect to any of the directive principles of State policy to take away or abridge any of the aforesaid fundamental rights. Since every government acts, or purports to act, in pursuance of the directive principles of State policy, most laws, however arbitrary and authoritarian, would be said to be related to those principles. Article 31C empowers even State legislatures to pass laws which virtually involve a repeal of the fundamental rights. The consequence is that it will be open to the State legislatures to supersede a whole series of the basic human freedoms. Hereafter liberty may survive in some States and not in others, depending on the complexion of the political party in power.

The Bill seeks to deny the protection of fundamental rights to any anti-national activities or anti-national associations, and permits unrestricted freedom to enact a law to provide for the prevention or prohibition

of such activities and associations. It is but right that anti-national activities and associations should not be allowed to wreck the State under the shield of fundamental rights. The real question is—which authority should decide whether an activity or an association is anti-national? Under the Bill it can be left solely to the executive to make such a decision without a judicial adjudication of the issue involved. In a country where the check of a strong well-informed public opinion is absent, there would be all too natural a tendency to treat even honest criticism of the Government's policy as anti-national.

Many other provisions of the Bill, particularly those dealing with restrictions on the powers of the Supreme Court and the High Courts, the devaluation of the High Courts, and the absolute obligation on the President of India to act in accordance with the advice of the Council of Ministers in all cases, are fraught with great dangers. The President's limited power, under Clause 59 of the Bill, of amending the Constitution would virtually be the power of the Central executive.

In four respects at least, the Bill aims at altering or destroying the basic structure of the Constitution. First, it proposes to over-

throw the supremacy of the Constitution and install Parliament (a creature of the Constitution) as the supreme authority to which the Constitution will be subservient. The instrument will become the master, and the master the instrument. Secondly, the Bill seeks to enact that the eternal values enshrined as fundamental rights in the Constitution will no longer be justiciable or operate as brakes on legislative and executive action in most fields. Thirdly, the balance between the executive, the legislature and the judiciary will be rudely shaken, and the executive at the Centre will enormously gain in power at the expense of the other organs of the State, particularly the judiciary. Fourthly, the Bill envisages the enforcement of laws even after they are held unconstitutional by a majority of the Supreme Court or the High Court.

Every major constitutional change represents a mood. Today, the mood of the nation which is searching for its identity is hardly conducive to a proper evaluation of the long-term, mind-boggling consequences of the proposed amendments. The Bill merely seeks to provide for the exigencies of the moment, forgetting that the Constitution is meant to endure through generations to come.

It is Diwali—the festival of lights. As the lamps glimmer in and outside millions of homes, inexorable Time will be ticking away the remaining few days before the light goes out of the Constitution.

Courtesy :
The Indian Express, October 22, 1976.

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Published by M. R. PAI for the Forum of Free Enterprise
235, Dr. Dadabhai Naoroji Road, Bombay-400 001,
and printed at TATA PRESS Ltd., 414, Veer Savarkar Marg,
Prabhadevi, Bombay 400 025.