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PUBLICATIONS AND ENTERTAINMENTS BILL,

No. 72 of 1962

Earlier this year the University submitted to Parliament a memorandum on the Undesirable Publications Bill. A copy of the memorandum is attached hereto. The Select Committee which considered that Bill has now produced another Bill, renamed as in the heading above. Of the recommendations made by the University (and no doubt also by other interested bodies) on the earlier Bill, two have been met to some extent in the present Bill:-

(1) It was pointed out in the University memorandum that the use of the word "writing" in the earlier Bill would bring unpublished material (e.g. in manuscript or typescript) within the scope of the Bill and thus prepublication censorship, which the Bill tended to avoid, would be introduced. The word "writing" is now amplified to read as follows:

"any writing or typescript which has in any manner been duplicated or made available to the public or section of the public."

(2) Objection was made in the memorandum to the retention of the existing unlimited power of censorship with regard to imported literature. Such material could be banned by the Minister if in his opinion it was "indecent, obscene or any ground whatsoever objectionable." The new Bill in effect lays down in section 20(3) that the same criteria for censorship should now be applied to imported literature as are applicable to locally produced publications (see below) with the addition of the criterion of communism. This constitutes an improvement but the criteria of "undesirability" applied to local literature by the earlier as well as the present Bill - to which the University memorandum also objected - are still unduly wide. This point will be reverted to below.

For the rest, not only are the provisions of the earlier Bill retained in the present Bill, but the scope of the Bill has been considerably enlarged and some of the clauses of the present Bill are more stringent than those of the earlier Bill.

Scope of the New Bill

As the new name indicates, censorship of publications in this Bill is now being combined with that of entertainments. Cinema films and posters, theatre performances, gramophone records, works of art (painting and sculpture), photographic work are all brought under the umbrella of the present Bill. Moreover, newspapers which were previously excluded are now only excluded from the provisions of the Bill if their publishers are members of the Newspaper Press Union and thus subject to voluntary censorship. In the result also, the Bill has become involved and complicated and difficult to analyse.

The Censorship Board

A board of censorship (now called the Publications Control Board) is created by the Bill. The board shall consist of now less than nine members, all appointed by the Minister, of whom a third shall constitute a quorum. At least three members must be persons having special knowledge of art, language and literature or of the administration of justice, and the chairman and the vice-chairman must be designated by the Minister out of these three (sec. 2). Whether the requirement of special knowledge will act as a suitable safeguard is doubtful. Much will depend on the type of person appointed, and on whether they are independent men who have made their mark in the fields mentioned.

The powers and functions of the Board are very considerable, the Board gathering under its jurisdiction functions previously exercised by the Censorship Board for films and theatres, by the Minister with regard to imported material, as well as powers of censorship previously not exercised by any board or official.

It might well be questioned whether it is advisable to concentrate all powers of censorship in so many various fields in one body, the more so if that is a body of government appointed persons.

Local publications, works of art, records and photography

The Board may at the request of any person (including of course the writer or creator) examine any locally produced publication or object (the words used and defined in the Bill) and declare it to be undesirable, and in certain cases may recommend to the Attorney-General that a prosecution be instituted (section 8 and 7). The Board may cause its findings as to undesirability to be published in the Government Gazette. These provisions will encourage the lodging of many frivolous, malicious, vexatious and arbitrary complaints from all sorts of persons and societies, and multiply the work of the Board. In the previous memorandum objection was made to this. The Bill further gives the Board a very wide discretion to decide what is undesirable. It is not bound to hear evidence or outside expert opinion nor to conduct its proceedings in the open. This can develop into a very drastic form of censorship.

Once the Board publishes a finding of undesirability in respect of a publication or object, it becomes an offence for any person to distribute, exhibit, sell or keep for sale the article concerned. The offender can only be prosecuted in the Courts, but the court trying him cannot question the Board's finding in any way; it can only decide whether

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there has been publication, exhibition or sale. The Court's power of independent inquiry into the matter is thus excluded. An exception is however made in case of the printer, publisher, or the person who produced the work of art, record or photograph. In their case the Court decides whether the work is undesirable or not, and it is not bound by the Board's decision as to what is undesirable, but in the meantime, if the Board makes a finding of undesirability, this finding, although it has no legal effect, nevertheless would amount to a moral judgment which can do untold harm and cause considerable uncertainty and may tend to influence the Courts, especially the lower courts where most prosecutions will take place. Moreover, the printer, publisher or creator of the article has no appeal from such a finding, unless the Board and the Attorney-General recommend that a prosecution be instituted.

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Amended

The University should reiterate its views that the Board should in all cases have power to examine publications etc. for purposes of recommending a prosecution only and should not be empowered to make or publish findings of undesirability. The power to decide whether the matter is undesirable should rest in all cases with the courts. Also it should not be possible for private persons or bodies to ask for an investigation. The Board should employ its own initiative in the matter.

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Excluded from the provisions relating to local publications and works are the printing or publishing of law reports or of publications of a technical, scientific or professional nature bona fide intended for use in any branch of arts, literature or science, and also publications of a religious nature. It is not an offence to print or publish these and no permit is necessary. But there would seem to be nothing to prevent a person from submitting such a publication for examination by the Board, which may then under section 8 publish a notice that it is undesirable. No prosecution may follow but again it will be a moral judgment against which there is no appeal by the printer or publisher. Furthermore, only the printer or publisher of such exempted material is protected under the Bill. A person who exhibits or sells any exempted material declared undesirable is not protected from prosecution.

It is recommended that the Board should have no power to declare exempted works undesirable, and no distinction should be drawn between the creator and the distributor. Libraries in particular will be put in an invidious position by the present terms of the Bill relating to technical literature.

It should be added that the Board has power to exempt any person or institution from any of the provisions of censorship either indefinitely or for a specified period. Such exemption may be withdrawn at any time - sec. 5(5).

Imported literature and materials

Under existing law the power of censorship in respect of imported materials is in the hands of the Minister of the Interior who however has to consult the Entertainment (Censorship) Board - Customs Act, 1955, sec. 29. Import of any goods which are indecent, obscene or objectionable on any ground whatsoever is prohibited, and the decision of the Minister is final. Section 20 of the present Bill now transfers this power of censorship from the Minister to the Publications Control Board with an appeal to the Supreme Court in certain cases. The Board must apply the definition of "undesirable" applicable to locally produced literature and material, which is a great improvement, although the propagation of communism is introduced as an additional criterion of censorship. The Board is further given the power to examine at the request of any person any imported material and may state whether it is undesirable or not, and publish its finding in the Gazette. The Board may also prohibit or approve the import of material from a special publisher, or of a particular kind of publication. Any person who imports such material without a permit or exhibits or sells it shall be guilty of an offence. Imported material is thus brought into line with local material, but it is to be noted that imported scientific or professional material is not protected in the same way as in the case of local material - see above. The Board may, it is true, grant a permit for purposes of research, but that is not good enough. There should be the same protection as that provided for local material. 66 (4)(b)

Cutting right across these limited improvements in the treatment of imported material is the clause (sec. 5(1)(c)(1)) forbidding the import of any material with a paper back of the value of fifty cents or less, irrespective of whether it is undesirable or not. No doubt the purpose is to prevent the import of cheap inferior literature, but the drafters of the clause betray complete ignorance of the type of important educational and cultural publications now being produced in soft covers at prices of 50 cents or lower. Much of the Penguin and Pelican series for instance will be hit by this prohibition. The Board can give permits of exemption, but the whole business is unsatisfactory and will cause unnecessary delay and frustration. The University should strongly object to the clamping down on cheaper educational material.

What is undesirable?

The definition of "undesirable", to which objection was also made in the previous memorandum, has not been changed by the present Bill. Existing laws dealing with censorship of literature on moral grounds - there is of course much other legislation on censorship for political

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reasons - are limited to matter that is obscene, blasphemous or indecent. In the present Bill (sec. 5(2)), however, the categories of "undesirable" matter are greatly extended and also introduce criteria of a political nature such as the "safety of the state, the general welfare or the peace and good order etc." They are moreover couched in vague phrases, the exact ambit of which is difficult to determine and will give great scope to the personal likes and dislikes, if not prejudices, of the deciding authorities.

In addition, the Bill gives guidance on what is to be regarded as obscene, indecent, offensive or harmful to public morals. Although some of these clauses merely restate generally accepted existing criteria, the description of the meaning of "harmful to public morals" consists of fifteen printed lines, stating that it includes any improper treatment of all sorts of things - murder, death, fighting, horror, passionate love scenes, smuggling, drug-trafficking, etc. etc. This introduces a great deal of verbiage and the whole section is vague, prolix and unduly complicated.

Where the power of deciding these matters is in the hands of a court, the problem of giving such definitions concrete meaning or of limiting their ambit will be difficult enough, and the rôle of the court as an arbitrator will be very restricted indeed. Where the power of decision is left to a large Board not subject to the restraint imposed by the reasoning of law and precedent, it becomes a dangerous power. And if the matter is often, as is at present the case, in the hands of readers whose qualifications and experience to judge literature, art and knowledge, are questionable, the above definitions will create constant sources of frustration and embarrassment. Even with the best type of adjudication, the above definitions are bound to lead to considerable restriction on freedom of expression, and will have the effect of inhibiting creative writing and art.

The University should repeat its previous recommendation that the definition of "undesirable" be limited to the following clauses:

- (a) indecent, obscene, or harmful to public morals
- (b) blasphemous or offensive to the religious convictions or feelings of any section of the inhabitants of the republic,

and that the definition of indecent or obscene etc. be limited to the first paragraphs of section 6(1).

Censorship of films and theatre productions

The censorship of films and other public entertainment is also brought under the purview of the new Bill and placed in the hands of the Publications Control Board. Every film must be approved by the Board before it may be shown, except those films which the Board exempts either generally or for certain purposes or persons. These powers are however not new. They existed under the Entertainments Act of 1931 (as amended in 1953). All that has been done is to transfer the power to the Publications Board. The extent of the censorship is set out in section 10 of the Bill and is of very wide scope, but again most of it is taken from the existing 1931 Act with some variations. Certain new criteria of censorship are however also imposed and these introduce the definition of "undesirable" mentioned above, and the promotion and propagation of communism - sec. 10(a) and (b). In my opinion these sections do not add appreciably to the powers already exercised by film censors. The main innovation is that the Bill also controls the exhibition of films to clubs, and this might be a ground for objection. Completely private showings do not however seem to be subject to the Board's control.

As regards public entertainment other than films, the provisions of the Bill are far less stringent. In fact the censorship laid down for such public entertainment is the least stringent of all those embraced in the Bill, and more or less accords with the criteria of undesirability recommended by me above viz. indecent, obscene or offensive to public morals. Also the provisions of the Bill in this respect are not new but taken over from the Entertainments Act of 1931 with minor variations. No recommendation is therefore made in this connection.

The Rôle of the Courts

In general, the Bill gives the Publication Board large and wide powers. The Bill does, however, make some attempt to bring in the Courts also as a channel through which the censorship laws are to be applied. In most cases the courts come in as a forum of appeal. And in all cases, as already pointed out, the power of the court is limited because of the wide definition of undesirability and of the terms indecent, obscene, etc.

1. The court's place is most prominent in the case of the printer, publisher of books and newspapers and the creator of works of art, gramophone records, etc. In their case no prosecution may be instituted except on the recommendation of the Publication Board and on the authority of the Attorney-General and furthermore in such a prosecution the court is

not bound by a decision of the Board as to undesirability, but can decide for itself. This would be a salutary provision, if the definition of "undesirable" given in the Bill were not as wide as it is. At the same time, however, the Board, as already mentioned, may examine any publication or object at the request of any person and declare it undesirable. Against such a declaration the printer, publisher, etc. has no appeal to the Courts unless a prosecution is instituted against him. This would mean that a printer, publisher or painter, for example, may have his work investigated at the instigation of any crank, and the creator of the work has no appeal against a declaration of the Board, unless the Board chooses to prosecute him. It is a paradoxical situation which was probably not intended by the drafters. The paradox can be removed by empowering the Board in such a case only to recommend a prosecution, and not to make a declaration of undesirability or otherwise.

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2. A person who distributes, displays, or sells matter declared undesirable by the Board can be prosecuted, in which case the court is bound by the Board's decision on undesirability and cannot go into the question - all the court can do is to enquire whether the Board has made the declaration. There is no appeal whatsoever from such a declaration of the Board for the exhibitor, seller etc. (see sec. 14). It is recommended that there should at least be such an appeal, for what it is worth.

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3. The importer of publications or other censored material is given a right of appeal to the Supreme Court against a decision of the Board prohibiting import of any of his goods - sec. 14(b) and (c). But this does not include a dealer in such material. The power of appeal is also given to an outside person who submits an imported article for the opinion of the Board and the Board declares it not to be undesirable - secs. 14(c) and 8(3). This is completely unnecessary.

4. The person who submits a film for the Board's approval may appeal to the Minister against a refusal. There is no appeal to a court (sec. 11). This is in essence a reproduction of the provisions of the 1931 Act but the present provision is much stronger in that an appeal or review by the Court is specifically excluded by sec. 11(3) of the present Bill. It may be too late in the day to ask for an appeal in the case of films, especially in view of the wide discretionary authority of the Board in respect of films, but there is certainly no need to exclude a power of review by the Courts. A review is usual in all cases of administrative decisions. It is not an appeal, but merely a challenge on the correctness of the procedure and on whether there has been a fair hearing.

5. In the case of other public entertainment, a right of appeal

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to the Supreme Court against the Board's decision is given to the person in charge of the entertainment. As the criteria of censorship in this case are rather limited (see above), this appeal may be of some value.

Generally speaking, the grounds of undesirability and indecency etc. (apart from the case of public entertainment) are so wide that it is difficult to see by what standards the Supreme Court can on appeal measure a decision of the Board. It may be questioned whether the Court will ever be able to reverse a decision of the Board which is based on such wide definitions and discretions. The right of appeal, therefore, seems largely illusory, but it is probably better than no appeal. The fact that there is a possibility of questioning its decrees may also act as a brake on the Board's decisions. The cardinal fault of the Bill, however, is that the ambit of the definitions of undesirability and indecency etc. is so vast. It should be greatly curtailed in the manner suggested above. Such curtailment does exist in relation to theatre and similar entertainments. Why can it also not be applied to publications and to works of art etc.? This, it seems to me, is the crucial question.

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