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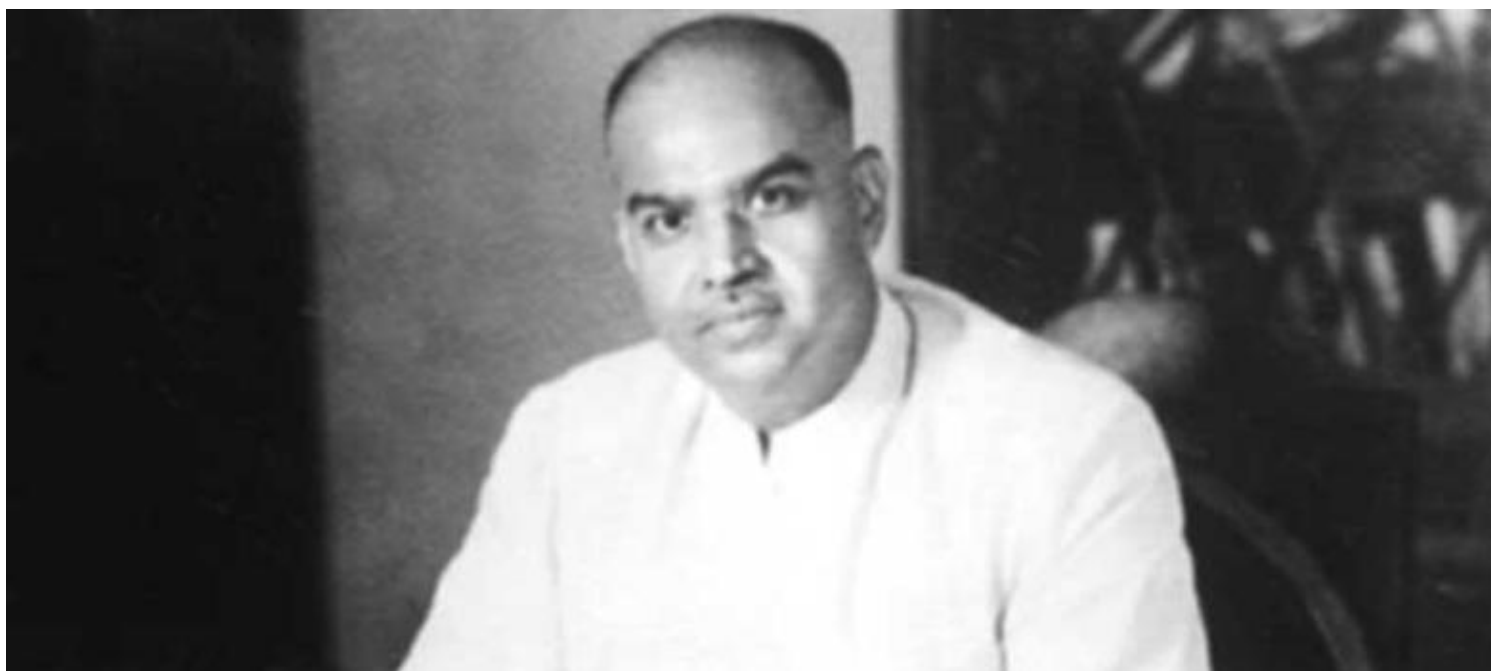
FREE EXPRESSION

Memo to Amit Shah: BJP icon SP Mookerjee would not have appreciated curbs on free speech

The Bharatiya Jana Sangh founder emphasised that he should have the right to air his own political views, no matter how unpopular they might be.

by *Arudra Burra*

Published Nov 25, 2016 · 01:30 pm



At a seminar on “**Democracy, Development & Dissent**” organised by the **India Foundation** (a right-wing think-tank), Bharatiya Janata Party president Amit Shah **reportedly** said that freedom of speech allows for the criticism of the prime minister, his ministers, and their policies but does not extend to speaking “against the country”.

He was echoing remarks he made in February, when he had said that “anti-national” speech **should not be tolerated** under the guise of free expression. Shah made these comments in the context of the crisis at Delhi’s Jawaharlal Nehru University, when student leader Kanhaiya Kumar

was arrested on sedition charges for allegedly helping organise an event at which slogans were chanted calling for the destruction of India.

Ironically, the party president's views are in opposition to the those of Syama Prasad Mookerjee, the founder of the BJP's predecessor, the Bharatiya Jana Sangh, whom Amit Shah has recently praised as “**a man of high morality, a man of great values and an extraordinary educationist**”. Mookerjee had made an impassioned plea for freedom of speech only a few months before he founded the Jana Sangha, during the course of Parliamentary Debates around the First Amendment to the Indian Constitution.

The ‘CrossRoads’ and ‘Organiser’ cases

In March 1950, the Supreme Court heard two constitutional free-speech challenges: one brought by *CrossRoads*, a magazine whose communist sympathies had led to it being banned in Madras State, the second by the Rashtriya Swayamsevak Sangh mouthpiece *Organiser*, which had been served a pre-censorship order by the Delhi government. *CrossRoads* and *Organiser* challenged these restrictions in light of the right to free speech, guaranteed by the new Constitution.

The right to freedom of speech and expression is guaranteed by Article 19 (1) (a) of the Constitution, subject to a list of enumerated exceptions provided in Article 19 (2). The original Constitution included an exception for any matter that “undermines the security of, or tends to overthrow, the State”. The court held that the exception would not allow the government to restrict speech in the interest of public order – to prevent a riot or a minor breach of peace, for instance – unless the disorder was so grave as to endanger the security of the State itself. Using this standard, the court struck down the the laws that authorised the restrictions on the two publications.

The *CrossRoads* judgment was soon applied by High Courts across the country to strike down various speech-restrictive laws. The law of sedition under Section 124-A of the Indian Penal Code was struck down by the Punjab High Court in a **case** involving the prosecution of the Akali leader Master Tara Singh. Controls on printing presses imposed by the Indian Press (Emergency Powers) Act of 1931 were also challenged in several High Courts. Hearing **one** of these challenges the same year, Justice Sarjoo Prasad of the Bihar High Court reluctantly concluded that under the Supreme Court's reasoning, the act of inciting murder or other violent crimes would be constitutionally protected.

The First Amendment

The Constitution (First Amendment) Bill was introduced in Parliament in May 1951. It sought to undo the effects of the *CrossRoads* and *Organiser* decisions by adding new exceptions to Article

19 (2), allowing free speech to be curbed in matters pertaining to the security of the state, friendly relations with foreign states, public order and incitement to an offence. The Bill also sought to revive the laws which had been struck down by the Courts.

The Bill was roundly criticised in Parliament by a range of distinguished figures including Hriday Nath Kunzru, HV Kamath, Acharya Kripalani, and Mookerjee. They argued that it was too soon to amend the Constitution, that it was improper to do so before the elections to the first Lok Sabha at the end of 1951, and that it excessively diluted the fundamental right to free speech.

Mookerjee's interventions on free speech were particularly striking. In his first speech on the Bill, Mookerjee said that he was perplexed why Nehru, who had been a "champion of liberty" all his life, should now undertake an amendment which he must know in "his heart of hearts" would strike at the very roots of the Constitution. Mookerjee added:

"I do not know why he has thrown up this challenge. Is it due to fear? Does he feel that he is incapable today to carry on the administration of the country unless he is clothed with more and more powers to be arbitrarily utilised so that his will may be the last word on the subject? Or is it his doubt in the wisdom of the people whose champion he has been all his life? Does he feel that the people of India have run amuck and cannot be trusted with the freedom that has been given to them? What is it that he has in his mind?"

"Pandit Jawaharlal Nehru as the leader of a big political party may oppose this view. He can appeal to his countrymen not to listen to those who today are advocating an annulment of the Partition of India. I can understand that: it will be an appeal to the logic and the commonsense [sic] of the people. That is a perfectly constitutional approach to the problem."

Mookerjee emphasised that he should have the right to air his own political views, no matter how unpopular they might be:

"If he says as the head of the government that he is prepared to allow any viewpoint to be circulated within the country – and that is what we understand by democratic freedom – so long as it does not advocate chaos, I would be at one with him. If he says that because he does not like that anybody should speak about the annulment of the partition he means to prevent us and therefore wants to put these words in the Constitution and later pass some law consistent with them, then I say it is most arbitrary and if done, will lead to very serious consequences."

In his last speech on the Bill, Mookerjee said that the right way to deal with dissent was not repression but persuasion:

“The answer to this present attitude of discontent in the midst of the people can only be fruitfully given, if government approaches the problems constructively. It must enter the minds and hearts of the people and not intensify the fear of repression, through Bills, creating new offences and sending them to jails. How many jails would be needed for this purpose in the whole of India?”

Mookerjee vs Shah on free speech

While praising Mookerjee at the inaugural function of an exhibition entitled “**Syama Prasad Mookerjee: a Selfless Patriot**” at the Nehru Memorial Museum and Library in June, Amit Shah **contrasted** Nehru, whose ideas were “imported from the West,” with Mookerjee, who felt that India’s policies should have “the aroma of our own soil”. However, no trace of this aroma is evident in Mookerjee’s defence of free speech, which drew squarely upon the Western liberal tradition.

Mookerjee was clear that political speech ought to be protected even when unpopular, unless it involved incitement to violence, that too under the “clear and present danger” **test** articulated by Justice Oliver Wendell Holmes. This holds that restrictions on speech are justified only when there is reason to believe that the speech will result in serious and imminent harm.

It is very hard to argue that the slogans allegedly shouted at JNU in February and **singled out** by Shah meet this standard.

Shah’s view seems to be that once speech has been designated as “anti-national”, free speech concerns simply do not apply. Mookerjee would have been suspicious of any attempt by a ruling majority to define the terms of debate so as to prevent rational discussion, especially with so emotive and slippery a term as “anti-national.” But in any case, he would have said that the question of whether expression is “anti-national” is simply irrelevant to its protection – only the clear and present danger test would apply.

Shah has repeatedly said that defenders of the right to freedom of speech at JNU and elsewhere must **first** answer whether they support the statements in question: would they agree, for instance, with the sentiments expressed by the slogan “*Bharat ke tukde tukde kar denge*” (we will break the country into pieces), or with the demands for self-determination in Kashmir, which were allegedly raised at the JNU event? Mookerjee would have claimed, instead, that one can defend another’s right to say something without defending what they have said.

Shah has earlier urged youngsters to “**isolate**” those who “speak against the nation” in the garb of freedom of speech. But Mookerjee would have said the reverse. He might have disagreed with the sentiments expressed by the JNU students, but the remedy, he would have said, is democratic

discussion and dialogue – “entering the hearts and minds of people” – not isolating them, **beating them up** or **sending them to jail**. I suspect that he would have sat with the JNU students, not against them.

Mookerjee would also have been appalled by Shah’s claim that “**sedition is being camouflaged as freedom of expression**.” Indeed, it was his erstwhile Hindu Mahasabha colleague, NC Chatterjee (father of CPM leader and Lok Sabha Speaker Somnath Chatterjee) who **won** the *Organiser* case, and successfully argued for the unconstitutionality of the sedition law in Tara Singh’s case. Mookerjee would have agreed with all of his contemporaries that the traditional law of sedition – invoked by Shah – has simply no place in a democracy.

According to the Dr Syama Prasad Mookerjee Research Foundation, the BJP under Shah is now on a journey of “**recollecting its roots**”. If those roots include Mookerjee’s views on freedom of speech, the journey might take Shah and his party to surprising places.

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