6

FREEDOM OF SPEECH IN THE EARLY CONSTITUTION

A study of the Constitution (First Amendment) Bill

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I

On 12 May 1951, Jawaharlal Nehru moved Parliament to introduce a Bill to amend the Constitution of India. The Statement of Objects and Reasons spoke of "certain difficulties" which had been brought to light in the last fifteen months of the working of the Constitution, particularly with respect to the chapter on Fundamental Rights. In particular

> The citizen's right to freedom of speech and expression guaranteed by article 19(1)(a) has been held by some courts to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence. In other countries with written constitutions, freedom of speech and of the press is not regarded as debarring the State from punishing or preventing abuse of this freedom.[2]

The "difficulties" in question arose because of two Supreme Court judgements from March 1950 which had struck down "Public Safety" Acts in Madras and East Punjab on the grounds that they violated the fundamental right to freedom of speech and expression guaranteed in Part III of the Constitution.[3] Art. 19(1)(a) guaranteed the fundamental right to speech and expression subject to exceptions set out in Art. 19(2), which originally read

> 19(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the

> State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.

The question was whether the statutes in question related to any matter which "undermines the security of, or tends to overthrow, the State". The Supreme Court construed the exception narrowly, as involving "nothing less than endangering the foundations of the State or threatening its overthrow". It contrasted "serious and aggravated forms of public disorder which are calculated to endanger the security of the State" with "relatively minor breaches of the peace of a purely local significance". The Public Safety Acts were held unconstitutional because they gave governments power to restrict speech in the interests of public order, even when these challenges would not be so grave as to undermine the security of the state or tend to overthrow it.

These judgements were followed later that year by High Court judgements in Bihar, Madras and Punjab which applied the Supreme Court's reasoning to strike down various sections of the Press (Emergency Powers) Act, 1931, as well as the provisions governing sedition (s. 124-A) and the promotion of enmity between groups (s. 153) of the Indian Penal Code.[4] It was the judgement of the Bihar High Court which was alluded to in the Statement of Objects and Reasons.

The case involved section 4(1)(a) of the Press (Emergency Powers) Act of 1931. Under s. 4 of the Act, authorities could require printing presses to furnish security deposits, which were liable to be forfeited in a range of conditions specified by s. 4(1). The first condition, s. 4(1)(a), allowed for forfeiture in case the press printed material which incited or encouraged the commission of murder or cognizable offences involving violence.

Writing for the court, Justice Sarjoo Prasad noted that

> Cases may be conceived where the publication may relate to murders or offences involving acts of violence without any political motives and yet publications relating to such murders may come within the mischief of s. 4(1)(a) of the Act. Cases may be conceived where directly or indirectly murders or acts of violence of that kind may be approved or admired. Let us, for instance, take the case of an individual who is a terror in a particular locality because of his being the head of a gang of dacoits and robbers. The man may have been clever enough to escape the clutches of the law, yet the people in the locality are so tired of him that pamphlets or leaflets are published inciting his murder or assassination.

> It may also be that even after the man is murdered, the people of the locality or some of them may publish documents approving the conduct of the murderer. Evidently, these acts have been done not with any political motive, yet these publications come as much within the mischief of s. 4(1)(a) and (b) as any other publication relating to crime of a political character.[5]

If restrictions on speech could only be justified when it was such as to undermine the security of the state or tend to overthrow it – as the Supreme Court had held in *Romesh Thapar* – then the restrictions imposed by s. 4(1)(a) were unconstitutional: they restricted speech which did not have *this* effect, even if it went so far as to encourage murder. A month later, the Punjab High Court applied the same reasoning to the law on sedition.[6]

The Constitution (First Amendment) Bill sought to introduce three new exceptions in 19(2), covering public order, incitement to an offence and friendly relations with foreign states; it also sought to remove the qualifiers relating to undermining the security of the state or tending to its overthrow. The amending clause in the Bill as originally introduced in Parliament read as follows (words in boldface indicate the major changes sought to be made):

3. Amendment of article 19 and validation of certain laws. – (1) In article 19 of the Constitution –

> (a) for clause (2), the following clause shall be substituted, and the said clause shall be deemed to have been originally enacted in the following form, namely: –
>
> "(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, **in the interests of the security of the State, friendly relations with foreign States, public order**, decency or morality, restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, contempt of court, defamation or **incitement to an offence**."[7]

Section 3(2) of the Bill sought to rehabilitate the laws which had earlier been struck down as because violative of Art. 19(2) as it was originally enacted:

> (2) No law in force in the territory of India immediately before the commencement of the Constitution which is consistent with the provisions of article 19 of the Constitution as amended by

> sub-section (1) of this section shall be deemed to be void, or ever to have become void, on the ground only that, being a law which takes away or abridges the right conferred by sub-clause (a) of clause (1) of the said article, its operation was not saved by sub-clause (2) of that article as originally enacted, and notwithstanding any judgement, decree or order of any court or tribunal to the contrary, every such law shall continue in force until altered or repealed by a competent Legislature or other competent authority.

It should be noted that freedom of speech was only one of the concerns of the Constitution (First Amendment) Bill. In an attempt to safeguard zamindari abolition legislation from what the Statement of Objects and Reasons called "dilatory litigation", the Bill sought to amend the right to property guaranteed by Art. 31 (Merillat 1970). The Bill also sought to amplify Art. 15(3) to explicitly empower the state to make "special provision for the advancement of any socially and educationally backward classes of citizens". This was in response to a Supreme Court case which struck down caste-based reservations for government professional colleges in Madras on the grounds that these violated Art. 29(2) (Galanter 1985).

Each of these three constitutional amendments was hotly debated in Parliament after the Bill was introduced on 12 May until its passage on 2 June. Substantive opposition aside, many opponents of the Bill claimed that it was too soon to amend the Constitution; others that it would be better to wait until the first elections under the new Constitution, which were only a few months away. The debates in Parliament were mirrored in critical commentary outside, much of it critical (Sethi 2015); at least one political party promised to overturn the amendment if it came to power in the general elections (Hindu Mahasabha 1951).

When the First Amendment is invoked today it tends to be mentioned in passing, but usually in negative terms.[8] Thus Pratap Bhanu Mehta seems to see in it as an instance of the Nehruvian State's bad faith in the matter of civil liberties, or at least as an instance in which statism trumped freedom (Mehta 2015); more recently, Ramachandra Guha has claimed that its long-term consequences were regrettable from a free speech point of view, for it resurrected colonial laws which the Constitution had sought to remove, and allowed the Government a great deal of leeway in suppressing dissent and criticism without leaving the Courts much room to protect it (Guha 2016, p. 28). Lawrence Liang (2016) points out that the cases overturned by the First Amendment were "remarkable for their ability to distinguish between different levels of threat and impact in assessing speech in the post-colonial context" (p. 286); in earlier work (Liang 2004), he claims that the First Amendment "marked the rather premature end of the vision

of a 'seamless web' with the promotion of national security and sovereignty being prioritised over the promotion of democratic institutions" (p. 439).[9]

In this chapter I attempt to tell a different story of the First Amendment, in connection with the debates on freedom of speech. I analyse the arguments presented for and against the Bill in the light of an analysis of the legal position resulting from the decisions in the *CrossRoads* and *Organiser* cases. I claim that this position was indeed untenable, and did require some kind of constitutional amendment – this much was eventually conceded by even the most bitter opponent of the Bill, Syama Prasad Mookerjee. I also argue that the need for an amendment introducing a "public order" exception in Art. 19(2) would have been recognised by the most influential members of the Constituent Assembly, and so in some important respects the amendment was not a huge departure from the initial constitutional scheme. Thus the Amendment need not be seen as an instance of high-Nehruvian statism. I conclude with the suggestion that we should be cautious about reading these debates in purely discursive terms, without also being sensitive to background political considerations.

II

The Parliament which debated the First Amendment Bill was an unusual body. The Constituent Assembly was set up under the terms of the Cabinet Mission Plan of May 1946. While the Mission recognised that adult franchise would be the most satisfactory mode of election to the Assembly, it rejected this solution as unacceptably slow. It proposed instead that the Constituent Assembly be elected indirectly by the Provincial Legislative Assemblies, which had themselves been elected in the winter of 1945–46 under the terms of the Government of India Act, 1935 (25 & 26 Geo. 5), on the basis of a restricted franchise. The indirect elections to the Constituent Assembly were held in July and August 1946: of a total of 296 seats in the Assembly, 208 were held by Congress nominees, and 73 by the Muslim League.[10] The inaugural session of the Constituent Assembly took place on 9 December 1946.

In July 1947 the formal grant of Indian independence was proposed under the terms of the India Independence Act, 1947 (10 & 11 Geo. 6). The act gave the power of legislation to the constituent assemblies of each of the new Dominions.[11] And so on 15 August 1947 the Central Legislative Assembly (which had been elected along with the Provincial Assemblies in 1945–46) was dissolved, and the Constituent Assembly assumed legislative powers – sitting as the "Dominion Parliament" in the mornings, and as the Constituent Assembly in the afternoons.[12] After the Constitution was adopted on 26 January 1950 and India ceased to be a Dominion, the

Constituent Assembly was dissolved, and the Dominion Parliament was now known as the "Provisional Parliament".[13] Its "Provisional" status was an indication of the fact that it had not been elected under the terms of the new Constitution of India.

Since the first elections under the new Constitution were not held until the winter of 1951, it was the Provisional Parliament which debated the First Amendment Bill in May–June 1951. Though the Constitution granted Parliament broad amending power in Art. 368, critics of the First Amendment argued that this power should not be exercised by the Provisional Parliament. Since elections were around the corner, surely it would be better to wait for a new Parliament, elected under a universal franchise, to amend the Constitution. So the institutional status of the Provisional Parliament – the fact that it was *provisional* – was used to question the legitimacy of the First Amendment.

On the other hand, as Nehru pointed out to critics who made this objection, the *moral* authority of the Provisional Parliament to amend this constitution was not in doubt: for until January 1950, it was the *very same body*, sitting as the Constituent Assembly, which had written the Constitution! Who better to interpret the constitution, and amend it when the Courts had shown themselves to interpret it incorrectly, than the very people who wrote the Constitution? This idea that Parliament had a special moral authority – derived not from its nature as a democratically elected body, but from the fact that most of its members had been part of the Constituent Assembly – was to be a major theme in the debates that followed.

III

The statutes held void by the Courts in the 1950s consisted of sections of the Indian Penal Code (1860), the Press (Emergency Powers) Act, 1931, and "Public Safety" or "Public Order" acts passed by legislatures in Madras and East Punjab. Table 6.1 summarises the impugned acts and the cases in which they figured.

Table 6.1 Relevant cases and statutes

Madras Maintenance of Public Order Act, 1949	*Romesh Thapar v. State of Madras*[14]
East Punjab Public Safety Act, 1949	*Brij Bhushan v. State of Delhi*[15]
Press (Emergency Powers) Act, 1931	*Amar Nath Bali v. The State*[16]
Press (Emergency Powers) Act, 1931	*In re Bharati Press*[17]
Press (Emergency Powers) Act, 1931	*Srinivasa v. State of Madras*[18]
Indian Penal Code, 1860	*Tara Singh Gopi Chand v. The State*[19]

Source: Author

The Indian Penal Code, 1860

S. 124-A of the Indian Penal Code (1860), as amended in 1870, defined the crime of sedition. An offender under this section was one who "by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards Her Majesty or the Crown Representative". The explanatory note to this section specified that "the expression 'disaffection' includes disloyalty and all feelings of enmity". In the famous decision of *Queen-Empress v. Bal Gangadhar Tilak* (ILR 22 Bom 112, 1897) it had been held that

> the offence consisted in exciting or attempting to excite in others certain bad feelings towards the Government and not in exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small.

In 1942 the Federal Court of India sought to "read down" the interpretation of sedition so as to necessarily involve a crime affecting public order (*Niharendu Dutt Mazumdar v. King-Emperor*, 1942 F. C. R. 38). This interpretation was overturned by the Privy Council in 1947 in the case of *Emperor v. Sadashiv Narayan* (49 Bom, L. R. 526). Thus, at the time of the First Amendment, the law on sedition stood as it had been expressed by Justice Strachey in Tilak's case.

In addition to s. 124-A, the Indian Penal Code also made it an offence to "promote enmity" between different groups, on grounds of religion, race, place of birth, residence and language (s. 153-A).

Both sections 124-A and 153 -A of the Indian Penal Code were invalidated in the decision of the Punjab High Court in the case of *Tara Singh Gopi Chand v. The State* (AIR (38) 1951 Punjab 27), decided in November 1951.

The Press (Emergency Powers) Act, 1931

The preamble to the Indian Press (Emergency Powers) Act (Act XXIII of 1931) proclaimed that it was "An Act to provide against the publication of matter inciting to or encouraging murder or violence".[20] It was enacted in October 1931, at the height of the Civil Disobedience movement, and the statement of objects and reasons made it clear that it was regarded as a tool against that movement. It read

> Experience has shown that propaganda in furtherance of subversive movements and of crimes of violence is carried on by newspapers, leaflets, pamphlets, bulletins and the like.

The Act gave the Government a great deal of power with respect to press censorship. The principal weapon in this regard was the power to require owners of printing presses and newspapers to furnish security deposits on the basis of executive judgement. These could be forfeited if the press or newspaper published material which met the criteria set down in s. 4 of the Act; if security deposits had not been paid, the printing press could itself be forfeited on such grounds. The Act also empowered the executive to declare all such material forfeited to the Government.

Initially s. 4 specified that these penalties were applicable to printing presses which were used to produce material which could incite or encourage violent crimes such as murder (s. 4(1)(a)), or express approval or admiration of such offences (s. 4(1)(b)).

In 1932 the Press Act was amended in ways which made the links between press censorship and the suppression of the nationalist movement even more explicit.[21] The Statement of Objects and Reasons to that Act acknowledged that these amendments to the criminal law were necessitated by the Civil Disobedience Movement, and claimed that "it is no difficult matter to start or revive such subversive movements" in the absence of the special powers it proposed to add to the existing criminal law.

The Act added a variety of new grounds for the forfeiture of security deposits, some of which mirrored the Indian Penal Code – for instance s. 4(1)(d) allowed for forfeiture in the case of publications tending to excite disaffection or bring the Government into hatred or contempt, while s. 4(1)(h) applied to publications which tended to "promote feelings of enmity or hatred" between different classes. Other provisions were more directly targeted at civil disobedience: s. 4(1)(f) referred to publications which encouraged people to interfere with the administration of the law, or to refuse payment of taxes; s. 4(1)(g) covered publications which induced public servants to resign or to refuse to perform actions connected with their public duties.

Section 4(1)(h) was struck down by the Punjab High Court in the case of *Amar Nath Bali v. The State* (AIR (38) 1951 Punjab 18) in September 1950. Sections 4(1)(a) and (b) of the Press Act were struck down by the Patna High Court in the case of *Bharati Press* (AIR (38) 1951 Patna 12) in October 1950. The following month, the Madras High Court struck down sections 4(1)(a) and 4(1)(d) of the Press Act in the case *Srinivasa v. State of Madras* (AIR (38) 1951 Madras 70).

Public safety acts

The sedition clause of the Indian Penal Code and the Press Act were both colonial laws clearly aimed at frustrating nationalist ambitions. This is why

there was substance to the charge, frequently made during the First Amendment debates, that the Government was trying to rehabilitate laws which had been used to suppress the movement for Indian independence. This was not true, however, of the two statutes which were at issue in the Supreme Court cases of *Romesh Thapar* and *Brij Bhushan*, the Madras Maintenance of Public Order Act, 1949, and the East Punjab Public Safety Act, 1949. These did not originate in the colonial state, but were enacted after Indian independence in 1947: similar legislation had been enacted in several other provinces such as Assam, Bengal, Bihar, UP and the Central Provinces following the formation of the Interim Government in September 1946.

These "Public Safety" Acts had begun as ordinances crafted to deal with serious communal riots, and were later passed as temporary emergency legislation (Press Laws Enquiry Committee Report (1948)). Thus the focus of these statutes shifts from "disaffection", "disloyalty" and incitements or inducements to disobey the law, to more generic problems having to do with "public safety" and "the maintenance of public order". These Acts were not aimed at preventing or combating expressions of opinion against the *state* (which was now Indian): the worry was now with respect to expression which could lead to communal violence, as in the post-partition riots.[22]

These Public Safety Acts did not impose criminal or civil penalties on speech but nevertheless gave the Executive a great deal of power. Whether or not a publication is such as to pose a danger to public safety or public order is a matter much more open to discretion (and therefore discretionary abuse), than, for example, whether or not it incites people to disobey the law. The forms of press control they allowed included pre-censorship (as in *Brij Bhushan*) or complete blocks on circulation (as in *Romesh Thapar*). This degree of continuous interference with the process of publication was absent in the Press Act and the Indian Penal Code.

This concern with communal violence is reflected in the nature of the cases themselves: *Brij Bhushan* involved the *Organiser*, organ of the Rashtriya Swayamsevak Sangh (RSS). The articles in question had to do with the East Bengal disturbances of 1950, which led to anti-Muslim riots in Calcutta, and might have brought India to the brink of war with Pakistan (Burra 2016a, 2016b; Raghavan 2010, pp. 149–184).

In *Amar Nath Bali*, the offending publication was a book entitled *Now It Can Be Told*, an account of partition riots which blamed much of the anti-Hindu violence in Punjab on administrators who displayed a partiality to Muslims, including M. G. Cheema, Magistrate of Lahore, who "took upon himself to be another Mahmood of Ghazni, out to smash the temple of Somnath of the Lahore minorities [i.e. Hindus and Sikhs]" (p. 29). The Akali leader Master Tara Singh wrote an appreciative foreword to *Now It Can Be Told*, and one can fairly surmise that the speeches for which he

was prosecuted in 1950 also touched upon communal issues with possibly violent implications.[23]

Fear of communism, and in particular the Telangana uprising, was of course another animating *motif* behind the prosecutions of 1950 and the enactment of the First Amendment; the cases of *Romesh Thapar* and *Srinivasa Bhat* both concerned communist sympathisers. But on the whole I suspect this was a lesser fear, at least for leaders like Nehru. In July 1951 he wrote to Rajagopalachari that

> I have no doubt that the Communist Party have been guilty of atrocious crimes and that we have to deal with it as such. Nevertheless, I feel that certain communal elements in India are far more dangerous to our unity and to any progress that we might hope to make, than the Communists. The Communists could never have brought about a situation which existed in Punjab or in Delhi in August – September – October 1947.
>
> (Sethi 2015, p. 28)

III

By the time Nehru introduced the First Amendment Bill in Parliament, it had already been discussed for several months – within Government, in the Cabinet, with Chief Ministers, in the Congress Parliamentary Party and in the public.[24] In his initial speech on the motion to refer the Bill to a Select Committee (Parliamentary Debates 1951, cols. 8814–8832), Nehru noted that the Bill had already received a fair amount of criticism, both in India and abroad.[25] One criticism has already been noted: opponents claimed that the Provisional Parliament did not have the authority to amend the Constitution because it had been elected on a narrow franchise and didn't represent the will of the community. Nehru's response invoked a claim to original authorship over the Constitution:

> Now, there is no doubt that this House has that authority. There is no doubt about that, and here, I am talking not of the legal or constitutional authority, but of moral authority, because it is, roughly speaking, this House that made the Constitution. We are not merely technically the inheritors of the fathers of the Constitution. We really shaped and hammered it after years of close debate.
>
> (PD col. 8816)

Nehru's case for amendment did not involve criticism of the judiciary. The claim was not that the Courts had incorrectly interpreted the

Constitution; rather, the decisions had revealed certain "drafting errors" or lacunae already present in the Constitution which were now to be corrected. As for the role of the Courts,

> [S]o far as the interpretation of the Constitution is concerned, it is the right and privilege of the highest courts of the land to do it, and it is not for us as individuals or even as a Government to challenge that right. The judiciary must necessarily stand above, shall I say, political conflicts and the like, or political interpretations. They have to interpret it in the light of the law and with such light as they can give to it.
>
> (PD col. 8816)

Nevertheless, the question was whether the Constitution as interpreted did in fact give effect to the intentions of its framers, and here it was important to take the assistance of the House in "clearing up doubts" as to what those intentions were (PD col. 8817). In principle this process might have gone through the judiciary itself, had there been more time for the Courts to soften "the written word in all its rigid aspects" and give effect to "the many inner meanings which we sought to give to it" (PD col. 8818). It was only because the times were changing so rapidly that Parliament had to step in – rather than wait for a "generation or two" for the proper conventions to develop (PD col. 8829). But both in the case of incitements to offence and land reform, there was simply no time to be lost.

The contrast between the "static" nature of the legal process and the dynamic nature of the world around was to be a major feature of Nehru's subsequent case for the Amendment throughout the debates. It was also a clever rhetorical device. After all, the Bill did decisively overturn the judgements of the Supreme Court and High Courts; yet Nehru could argue that in doing so he was not undermining the institutional authority of the Courts at all. The claim, rather, was made in terms of relative institutional competence having to do with lawyers and the nature of the law itself:

> [A] lawyer represents precedent and tradition and not change, not a dynamic process. Above all, the lawyer represents litigation. . . . Somehow we have found that this magnificent Constitution that we have framed was later kidnapped and purloined by the lawyers.
>
> (PD col. 8832)

The point was especially artful because his opponents were only claiming that considerations of the Bill should be postponed until after elections to the Lok Sabha or, even more mildly, that the Bill should be circulated

to the public for comments before taking it up again in a few weeks.[26] But delay in considering the Bill, even by a few weeks, could be here conflated with a desire to slow down the pace of social change altogether, or with paying insufficient attention to the rapidly changing nature of the world.

Allied with the argument from institutional dynamism there was in fact also a clever argument about institutional authority. It was not, Nehru said, that he begrudged the fact that the Constitution had become "a paradise for lawyers": what he did object to was "the shutting of the door and of barring and bolting it and preventing others from coming in" (PD col. 8832). Opponents of the Amendment were effectively opponents of democracy itself, in effect betraying the aims of the independence movement:

> It is only here we seem not to rely on ourselves, not to have faith in ourselves, in our Parliament or our Assemblies, and rely, just as some of us may have relied on external authority like the British power of old days; we rely on some external authority – maybe geographically internal – and not perhaps have faith in this Parliament.
>
> (PD col. 8825)

This form of an argument from "colonial continuity" was also to play an important part in the rest of the debate, with many people reminding the Government that the arguments in favour of the Bill had also been made by the British to justify repressive rule during the Raj, and the laws resurrected by it had also been used to crush dissent at the time.[27]

On the substance of the amendments themselves, Nehru made three points. First, he claimed that the Bill was only an "enabling" measure – the Bill merely gave Parliament the *authority* to enact laws which might constrain freedom of speech; it did not itself enact any such laws, and nor was it likely to do so in the short time left before the General Elections (PD col. 8818).[28] And so he repudiated the suggestion that the enactment of the Bill cleared the way for the misuse of state power in the context of the forthcoming elections. If at some later point in time the Government then in power did attempt to curb freedom of expression by enacting repressive legislation, that would be the appropriate moment for Parliament to discuss the issue (PD col. 8828).

Nehru also attempted to rebut the charge that the Government was trying to curb freedom of the press. Here he made a distinction between "responsible" and "less responsible" journals, the latter of which were "full of vulgarity and indecency and falsehood, day after day, not injuring me or this House much, but poisoning the mind of the younger generation, degrading their mental integrity and moral standards" (PD col.

8823). While press of the responsible kind was essential to the functioning of democracy, the "little sheets that come out from day to day and poison or vitiate the atmosphere" were another matter. While on balance it was better to allow them to function rather than not, it was important to have the power to curb them if the need arose – particularly in the present state of deep crisis (PD col. 8826).

Nehru's discussion of the new clauses sought to be introduced by the Bill – governing friendly relations with foreign states, public order and incitement to an offence – was relatively brief. On the first clause, Nehru argued that his Government was not at that point contemplating the stifling of criticism of foreign countries, but "we cannot easily take on the risk when something said and done, not an odd thing said and done, but something said and done repeatedly and continuously, may lead . . . to our relations with that foreign country deteriorating rapidly" (PD col. 8827).[29]

With respect to public order and incitement to an offence, the rationale for introducing the clauses came from the High Court judgement mentioned in the Statement of Objects and Reasons, which held that the Constitution as then interpreted would permit the preaching of murder and like offences (8828). While Nehru acknowledged the danger of executive overreach and abuse, he claimed that the proper time to discuss these dangers would be as and when actual speech-restrictive legislation came before Parliament.

Nehru's opening speech covered the main themes which were to be discussed at length in the ensuing debates: the propriety and legitimacy of Constitutional amendment in the first place; the proper relation between Parliament and the Courts; the nature and value of free expression and the justification for the particular clauses in the Bill. Before moving on to consider the arguments of his critics, it is useful to compare his arguments in favour of the Bill with those provided by two other major figures – Pandit Thakur Das Bhargava and Dr B. R. Ambedkar.

If Nehru had opened the door to an argument by authorial intention – that the amendment sought to clarify the original intention of the Constituent Assembly – it was left to Thakur Das Bhargava to make the historical case, one which he was well placed to do given his own participation in the debates around fundamental rights in the Assembly.

Bhargava began by reminding the House of the legal position which the Supreme Court judgements, as finally interpreted in the case of Master Tara Singh, had left the Government:

> So the present position is that every person in the land is at liberty to preach disaffection against the Government. Every person in this land is at liberty to sow seeds of disaffection and enmity

> between different classes living in this country. This attempt can go on as long as the last words in this clause are not satisfied, *viz.*, "which undermines the security of, or tends to overthrow, the State." I maintain that there is no civilized country in the world with a written or unwritten Constitution which is not armed with provisions relating to sedition or to meet situations as lead to public disorder which are presently outside the purview of these last words.
>
> (PD col. 8869).

Bhargava reminded the House that the Constituent Assembly had moved to delete the word "sedition" from among the provisos to the free speech clause, because the word was "obnoxious", and it was a reminder of the repressive use of these laws by the British – though as he pointed out, there had not been at the time much discussion of this point (PD col. 8871). While the offence of sedition understood as the preaching of disaffection surely had no place in a democracy (PD col. 8871), sedition understood as an offence of creating public disorder surely did. The law of the country was now deficient, he claimed,

> because of us, because in the Constitution we did not take full care to see that the words are as a matter of fact there which could enable the Government to make whereby public order could be maintained.
>
> (PD col. 8874)

The "mistake", he suggested, was to have removed "sedition" without replacing it with an equivalent phrase to cover public order (PD col. 8886).[30]

While Bhargava was thus in favour of amending the Constitution, he thought the amendments proposed were "too vague, too wide and too drastic and too unbridled" (PD col. 8887). The restrictions involving friendly relations with foreign states and public order were vague, the latter so wide that is was "unheard of even in the history of the British regime". And the term "incitement to offence" was not defined at all. Indeed, the term "offence" was itself not clearly defined: under the Factory Act, for instance, spitting in a place not prescribed was considered an offence (PD col. 8887).

Bhargava's biggest problem with the amending Bill, however, lay in the fact that the scheme of Article 19(2) by its very nature gave an "absolute" power to make laws, because once a law was found to fall under one of the enumerated restrictions, no further enquiry could be made into the propriety of the law itself.[31] He suggested that the clause specify that any such

restrictions would have to be "reasonable", as they were in the other Article 19 rights. This alone would make them justiciable and give Courts the ability to protect people from their infringement (PD cols. 8886–7). Finally, Bhargava questioned the propriety of giving the Amendment retrospective effect (PD col. 8890).

Like Nehru, Bhargava was careful to claim that he was not criticising the Courts; he claimed that the Punjab High Court had decided Master Tara Singh's case correctly in the light of the Constitution (PD col. 8868). It was left to the Law Minister, Dr B. R. Ambedkar, to mount an attack on the Courts themselves. In describing the *Champakam* judgement striking down reservations as "utterly unsatisfactory", he reminded the House that in his legal practice he would sometimes tell judges that he was bound to obey their judgements but not bound to respect them (PD col. 9006–7).

The criticism of the free speech cases was more muted, but nevertheless firm: the Courts had declined to read into the Constitutional text the doctrines of "police powers" and "implied powers" which had been developed by the US Supreme Court to frame limitations on the free speech clause of the US Constitution despite the fact that it was stated in absolute terms.[32] Thus, even though the Art. 19 clause was framed in large part on the model of the American Constitution, the Indian Courts had declined to follow the interpretive practices of the US Supreme Court. This was why they were unable to make the necessary adjustments. Ambedkar suggested obliquely that he did not quite understand the reasoning of the Courts in denying to recognise the doctrine of police powers, and claimed that the Constitution did in fact permit the recognition of implied powers (PD col. 9013–4).

Ambedkar's intervention came on the third day of the debate, after a number of trenchant criticisms had already been made by opponents of the Bill – a diverse group including Syama Prasad Mookerjee, H. V. Kamath, and Hriday Nath Kunzru. Of these Mookerjee's was the strongest. Speaking just after Nehru's initial speech introducing the motion, Mookerjee said that he was perplexed why someone 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:

> 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?
>
> (PD col. 8838)

Where Nehru had suggested that opponents of the Bill did not fully trust Parliament, Mookerjee reversed the charge. It was Nehru who did not trust Parliament, because he was not giving its members full liberty to decide the question – Mookerjee claimed that Nehru was treating this as a "party matter", having issued a party whip which instructed all members of the Congress to be present and vote for the Bill without moving any amendments (PD col. 8839).

Mookerjee also resisted Nehru's attempt to frame the Supreme Court as an alien institution (an "external authority") which represented some reactionary element somehow opposed to the spirit of the Constitution:

> Here are a set of men who are selected by the Government. They are not foreigners coming from outside. They are our own chosen selected men holding office during their life, entrusted with the duty of seeing whether the country is being administered in the spirit of the Constitution.
>
> (PD col. 8855)[33]

It was the clause governing "friendly relations with foreign States" that drew Mookerjee's greatest ire. He took his own views on Pakistan to be one potential target:

> Why should you pass such a law? I do not know whether it relates to the demand which is made in certain quarters about a possible reunion of India and Pakistan. I know the Prime Minister holds very strong views about it and he has said a number of times that any such movement or agitation is harmful to the interests of the country and that he does not like it. I do not mind it: it is his view. But if I hold the contrary view as indeed I do most seriously and earnestly, that this partition has been a mistake and has to be annulled some day or other why should I not have a right to say that?
>
> . . .
>
> Why should I not have the right to agitate for it? 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 goodsense

> [*sic*] of the people. That is a perfectly constitutional approach to the problem.
>
> (PD col. 8847)

The position articulated was a classically liberal one:

> 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.
>
> (PD col. 8847)[34]

Between Mookerjee and Ambedkar a number of other people spoke forcefully against the Bill. These included H. V. Kamath (PD cols. 8909–8924), who called it a bit of "midsummer madness" to pass the Bill in such a hurry without extensive public discussion: it would give the impression that the Government – already armed with extraordinary powers through the Preventive Detention Act – was doing so solely with a view to making things smooth for the Congress in the upcoming elections. Pandit Hriday Nath Kunzru (PD col. 8896–8904) also opposed the Bill, arguing that Nehru's claim that the Bill was merely an "enabling" measure was deceptive, because it *already* made individuals less secure in their liberties, since they would no longer be protected against "the tyranny of changing Parliamentary majorities in the future".

By the time Nehru rose to reply (PD cols. 9069–87), opposition to the Bill had thus been articulated in a number of different registers, by voices representing a range of different political interests.[35] Nehru began on a combative note, claiming that those who opposed the Bill had either not understood it or deliberately tried to misunderstand what it contained; some of the opposition speeches had the air of "play-acting". Syama Prasad Mookerjee, in particular, had fallen into the habit of connecting any issue ("whether it relates to the stars or this earth") with that of partition and Pakistan; but the Bill had nothing to do with either. The "foreign relations" clause was justified on the grounds that it might sometimes be necessary to curb actions which might lead to war.

Fears about executive overreach and misuse were appropriate when Parliament was enacting laws which gave specific powers to the executive: but

the First Amendment Bill did not give the executive any new powers, and no such law was then being contemplated.[36]

Given the government's majority in the House, there was no question that the motion to refer the Bill to the Select Committee would pass in its original form, i.e. without any delays for public consultation as many of its opponents had requested. It was instructed to submit a report within five days, on the 23rd of May; this was later extended by two days.

IV

Both Nehru and Ambedkar had been conciliatory about how exactly to frame the speech clause, for instance with respect to the vague category "offence", claiming that this was a matter for further discussion in the Select Committee. H. V. Kamath was cynical, claiming that there was a ploy to deliberately leave open a lacuna which the Select Committee would change, thus feeling satisfied that it had changed the Bill, and "lay[ing] the flattering unction to their soul that after all they have done something" (PD col. 8914). Whether or not Kamath's charge was justified, the Select Committee did in fact alter the Bill significantly, adopting the suggestion made by Thakur Das Bhargava and others to add the term "reasonable" before the term "restrictions" in Art. 19(2). As amended by the Select Committee, section 3 of the Amended Bill now read

3. Amendment of article 19 and validation of certain laws. – (1) In article 19 of the Constitution –

> (a) for clause (2), the following clause shall be substituted, and the said clause shall be deemed to always to have been enacted in the following form, namely: –
>
> "(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, including, in particular, any existing or other law relating to, contempt of court, defamation or incitement to an offence."[37]

The composition of the Select Committee was interesting. Apart from Nehru, Ambedkar, Rajagopalachari (then Home Minister) and Satya Narayan Sinha (Minister for Parliamentary Affairs) on the Government side, and a range of Congress stalwarts, it included some of the Bill's severest critics (Mookerjee, Kunzru and Naziruddin Ahmad), as well as other

members (Hukam Singh, K. T. Shah, R. K. Sidhva) who were generally sceptical of the "Congress-line", and had played an important role in voicing civil liberties concerns during the debates over fundamental rights in the Constituent Assembly.[38]

Though they acknowledged the importance of inserting the term "reasonable", many of the critics continued to have reservations which they expressed in notes of dissent.[39] G. Durgabai expressed the worry that the amended right could be abused by state legislatures, and so wished to give Parliament the exclusive power to restrict fundamental rights. Kunzru claimed that Government had failed to make a "clear and convincing" case for the amendments, and criticised the Government for not even being able to provide a list of the laws which the judicial decisions had rendered void; this complaint was echoed by Mookerjee as well as Naziruddin Ahmad, who complained in a separate note about the lack of time available for deliberation – he had not even been given time to see the actual text of the Bill by the time he had to write his minute of dissent.

Mookerjee argued that the Government had made no effort to revise the "repressive and retrograde" laws formulated under the old regime, but had adopted the "strange procedure" of adhering to these "lawless laws" and altering the fundamental rights in order to save their validity. He acknowledged the possibility that an amendment might be needed in order to cover incitement to violence; if the term "public order" was to continue, he argued, it must be subject to the "clear and present danger" test of the US Supreme Court. And he concurred with Durgabai's view that laws restricting fundamental rights should be framed only by Parliament, and not by Court legislatures. While the tone of his dissenting note was much less strident than that of his speech in Parliament, it nevertheless ended on a defiant note, claiming that if the Government found some judicial interpretations not to its liking, "A better and more honourable course would have been not to have a written Constitution at all and make Parliament the supreme body" (p. 9).

K. T. Shah, Naziruddin Ahmad and Hukam Singh acknowledged that Parliament had the "technical" competence to pass the Bill, but said they had grave doubts about the "wisdom, the propriety, and the justification" for the Bill. The claim that the Provisional Parliament was the proper descendant of the Constituent Assembly was itself dubious: it was a "materially different body", whose membership had changed significantly since 1950; perhaps not even a majority of members in the Provisional Parliament had in fact been members of the Constituent Assembly. They reiterated the complaint that the Parliament was now functioning "in the full sway of the Party machine"; in the Assembly, by contrast, party whips and instructions were "wisely kept out" (pp. 8–12).

V

The Select Committee produced its report on the 25th of May, and Nehru moved a motion to consider it on the 29th. The reason why the word "reasonable" had not been put in sooner was not, he said, "that we wished to avoid the courts coming into the picture to give their interpretation"; rather, it was "to avoid an excess of litigation about every matter", which would not only hold up the working of the State, but produce "mental confusion" in people's mind, at a time when such confusion might do "grave injury" to the state (PD col. 9623).

Nehru continued to stress the importance of approaching the Constitution in a "dynamic" spirit. But the target here was not the "static" Courts, but the fears of members of Parliament that they were tampering with the Constitution so soon after it had come into force:

> A Constitution must be respected if there is to be any stability in the land. A Constitution must not be made the plaything of some fickle thought or fickle fortune – that is true. At the same time we have in India a strange habit of making gods of various things, adding them to our innumerable pantheon and having given them our theoretical worship doing exactly the reverse. If we want to kill a thing we deify it. That is the habit of this country largely.
>
> So, if you wish to kill this Constitution make it sacred and sacrosanct – certainly. But if you want it to be a dead thing, not a growing thing, a static, unwieldy, unchanging thing, then by all means do so, realising that that is the best way of stabbing it in the front and in the back.
>
> (PD col. 9624)

This second round of debate introduced another element into the discussion. By 1951 at least some of the initial optimism about independence had dimmed: government abuse was not an abstract possibility, but for some a concrete, disappointing reality in the current regime. This was the basis for Acharya J. B. Kripalani's attack on the Bill. Kripalani had been the chairman of the Fundamental Rights Committee in the Constituent Assembly, and was now critical of the changes contemplated in Parliament. Discussing the "public order" exception, he noted:

> We know how public order is disturbed in this country under the present regime. If a procession is taken out public order is disturbed. If some students want some facilities in their schools and colleges, public order is disturbed. If there is a hunger-march and

> people want food, public order is disturbed. When public order is thus disturbed, what do the Government do. They have ample powers. They use the police. Our police are very good at shooting. They shoot to kill.
>
> (PD col. 9723)

The point was twofold. Not only did the present government misuse executive discretion in its handling of what it called "public disorder": More importantly, allowing the state to criminalise certain forms of protest obscured the fact that much of this protest was *legitimate*, a democratic response to failed governance. The trouble was that the Government wanted powers to tackle the "agitator". But as Kripalani put it, "The agitator is not the trouble but the trouble is the conditions in this country. Improve those conditions and all the power you want we will give you" (PD col. 9729).

Another new voice in the debate was that of C. Rajagopalachari, who had taken over as Home Minister after Sardar Patel had passed away at the end of 1950. He reiterated the "lacunae" argument made by Nehru. The right to freedom of expression was, as he put it, a natural right, not like "a right given in a clause or lease or an insurance policy, to be enforced like Shylock's pound of flesh, according to the letter of the law". The content of this right simply did not include, for instance, the freedom to incite murder. The fact that the *language* of the Constitution permitted – even mandated this interpretation – was a reason to clarify it (PD col. 9761).

Rajagopalachari also made an ingenious point with respect to the charge of colonial continuity. One of the primary charges made against the amendment with respect to "incitement of offence" and "public disorder" was that it would lead to the penalisation of forms of non-violent protest that had formed the moral basis for the independence movement. Thus Kripalani had said

> What is not an offence? As a matter of fact, during all our struggle we were preaching against what was considered by the State laws as offences. The whole of our *satyagraha* movement was to break the law, to break such provisions of the law that created offences. Today, if you pass this amendment, even *satyagraha* can come to be legislated against.
>
> (PD col. 9722)

Rajagopalachari's response was that the whole *point* of civil disobedience conceived of as a form of protest was that it should be punished: it was the acceptance of the penalty which gave such protest its moral force. So to the

extent that such a form of political agitation was worth preserving, it was important to allow it to be punished. To do otherwise would be like "trying to learn to ride on a wooden horse. It must be a real horse; it must kick and throw out" (PD col. 9765).

In addition to Rajagopalachari, speeches in favour of the Bill were made by Rev. D'Souza (who argued that comparisons with English political precedent ignored the "phlegmatic English character which is not easily ruffled and does not respond to incitement", PD col. 9692), Thakur Das Bhargava, S. N. Mishra, D. D. Pant, Dr Deshmukh and Frank Anthony. Anthony made the startling claim that his support for the Bill rested on a suspicion of democracy. He was prepared to grant Jawaharlal Nehru "blanket powers" to prevent a later dictatorship of the proletariat; but this support rested on his trust in Nehru himself. He was not prepared to give these blanket powers to "every Tom, Dick and Harry in the political field", but he did want it frankly acknowledged that the amendments were not merely a clarification of original intent, but a radical change from the original article (PD col. 9789).

Apart from Kripalani, the voices speaking against the Bill were by now familiar – K. T. Shah, Naziruddin Ahmad, Syama Prasad Mookerjee, Deshbandhu Gupta and Kunzru; though of course their opposition was to some extent blunted because of the introduction of the term "reasonable". The motion passed on 31 May with a margin of 246 to 14.[40]

VI

The stage was now set for the clause-by-clause discussion of the Bill on the June 1. The debate on the Art. 19(2) exceptions in clause 3 of the Bill was brief, and covered familiar ground – it was passed by a majority of 228 to 19.[41]

There was an interesting exchange at this stage between Mookerjee on the one hand and Ambedkar and Rajagopalachari on the question of "incitement to an offence". In his earlier intervention on the Bill Rajagopalachari had suggested that the scope of this clause should go beyond crimes of violence – for instance theft or black-marketing: once an act was criminalised, one should also criminalise its encouragement or incitement (PD col. 9762). Mookerjee now suggested that this would allow the state to prevent people from arguing against Prohibition in areas where it was in force – indeed the Supreme Court had recently struck down sections of the Bombay Prohibition Act for precisely that reason (PD, cols. 9855–9857).

In the earlier debate Rajagopalachari had pointed out difficulties in defining the term "violence" and introducing it into the law. How was the term to be defined in the first place? Gandhiji, after all, used the term in "a free way", to cover many acts which did not involve bloodshed (PD col. 9768).

Now Ambedkar extended the point. Was "violence" to apply only to physical violence? On such a narrow reading, it would not be possible to pass a law, e.g. punishing calls for social boycotts of Scheduled Castes. Absent a definition of violence, it was unclear whether "incitement to violence" would cover, for instance, a case in which caste Hindus called on some of their men to poison the drinking water in a well from which members from a Scheduled Caste had drunk (PD col. 9868). For these reasons it was better to leave the definition open (see Menon 2004 for discussion).

The final reading of the Bill was held the following day, June 2, and began with a long speech by Shibban Lal Saksena which summarised the case against the Bill. In the short space of two hours there was not much scope for further debate, and in any case the issues had been discussed "threadbare", as the Speaker put it, in the last few weeks. Syama Prasad Mookerjee made the final case from the opposition, and reiterated his charge that instead of asking the people to trust the Government, the Government should trust the people:

> 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?
>
> (PD col. 10091)

The last word, however, was with Nehru. It was an uncharacteristically aggressive speech – he called the Bill's opponents "petty critics" who seemed to "live in some distant age", who lacked a grip on reality, and were stunting the growth of the country by their narrow-mindedness (PD 10096). Anyone who claimed that the amendments curbed the liberty of the press was simply lying, according to Nehru, and had to be challenged, "here, in the country, and everywhere". He concluded on a lofty note:

> At any rate, I welcome this debate, not because of its intimate connection with these issues, but because it is good for us to talk about great matters, about the freedom of the Press and the freedom of the people and to educate ourselves and our people in the process. Unfortunately, our politics in this country gradually drift away from great public debate: it is becoming or tends to become a parlour variety of debates. That is a bad thing for democracy. Let us have great debates on a high level, let us discuss the bearings of

> each problem and then come to decisions, so that the public may know our minds. Therefore, although this particular issue did not to my thinking raise these grave issues, nevertheless I have welcomed this great debate, because it has been good for us generally.
> (PD col. 10103)

This Bill as a whole was passed with a majority of 228 to 20.[42] Though Rajendra Prasad had his doubts about the advisability of assenting to it, it became law on 18 June, as Act 37 of 1951.[43]

VII

As I noted in the Introduction, contemporary discussions of freedom of speech in India tend to see the First Amendment in a negative light. Is this a fair assessment? I would argue not: I think a good case could be made for Ambedkar's claim that *Romesh Thapar* and *Brij Bhushan* were wrongly decided on grounds of statutory interpretation, though I cannot argue that point here.[44] But even if they were correctly decided given the Constitutional text, it seems clear that *Shailabala Devi* and *Tara Singh* had left a constitutional void of the kind described by Thakur Das Bhargava. No civil libertarian has ever denied that the state may sometimes curb speech in the interests of public order.[45] The Supreme Court's interpretation of Art. 19(2) would not allow such restrictions unless the law in question was directed at undermining the foundations of the state. This would exclude a large range of cases in which restriction would surely be appropriate.

Even Syama Prasad Mookerjee acknowledged in his dissenting note in the Select Committee (1951) that the original constitutional limitations did not cover incitement to violence (p. 6). Those who opposed the "public order" clause worried about overbreadth but didn't dispute the necessity of giving the executive *some* powers to restrict speech on grounds of public order. For instance, both Mookerjee and Kunzru claimed that the Preventive Detention Act gave the Government sufficient powers to do so (PD col. 8842).

Indeed, I suspect Nehru was correct in arguing that the Amendment (at least without the "foreign relations" clause) was an expression of the original intent of the framers of the Constitution. Of the twenty-one "most important" figures in the Constituent Assembly listed by Austin in (1966, pp. 420–432), ten voted on the Art. 19(2) amendment, nine of them in favour of it: Nehru, Ambedkar, K. M. Munshi, M. A. Ayyangar, Shankarrao Deo, G. Durgabai, T. T. Krishnamachari, H. C. Mookerjee and

Satyanarayan Sinha; J. B. Kripalani was the sole opponent.[46] At least four others on the list would have been in favour of the amendment, even if they were not in a position to vote: Alladi Krishnaswami Ayyar, B. N. Rau, Sardar Patel and Govind Ballabh Pant.[47]

Once we add Rajagopalachari to that list, I think it is fair to say that this galaxy of stars would have made sure to have included a public order exception in the original Constitution had the issue come up. I cannot argue the point here, but I think that Thakur Das Bhargava was correct in arguing that the omission of the term "public order" was simply an oversight caused by the failure to note that the problems which would be created by deleting the term "sedition" from the final draft.[48]

If this analysis is correct, then much of the recent criticism of the First Amendment by scholars such as Guha, Liang and Mehta misses the point. Indeed, one needn't see the introduction of the term "reasonable" as in some ways only partially making up for the introduction of essentially undemocratic exceptions to Art. 19(2). The open invitation to judicial review of speech-restrictive statutes might be seen instead as a radical move in favour of *diluting* executive power, one which placed the onus of developing a constitutional jurisprudence of free speech squarely on the Courts in a way that was not envisaged during the Constituent Assembly Debates.

Given the Congress majority in Parliament, Nehru's government could easily have forced through the Amendment in its original form. That it chose not to do so requires some serious analysis: at the very least, it makes it harder to sustain the charge that the Amendment was an instance of high Nehruvian statism.

Indeed, the term "Nehruvian" may be doing more work here than it should. When commentators take the introduction of the term "reasonable" as a "partial defeat" for Nehru (Liang 2004), or as an instance in which Nehru had to "bow to the wishes of others" (Chandran 2016), they have in mind presumably a letter from Nehru to T. T. Krishnamachari describing his reluctance to introduce the term (Austin 1999, p. 47). But Austin also reports (p. 45) that the Cabinet Committee on the Amendment was against the introduction of the term "reasonable" in March 1951, and Deshbandhu Gupta claimed in Parliament that Rajagopalachari had taken some convincing over the introduction of the term "reasonable" in the Select Committee (PD 9741). Nehru's colleagues in the Cabinet and the party at this time were not exactly pushovers, and people like Ambedkar and Rajagopalachari were hardly shy about the exercise of state power. Without further evidence, we should not assume that Nehru's was the lone voice which held out against the introduction of this term.

VIII

How should one understand the debates around the First Amendment Bill in the light of Udit Bhatia's introductory comments on reading the Constituent Assembly Debates? Consider first the attempt to see the Assembly as a *discursive* body. To be sure, the Provisional Parliament was not the Constituent Assembly, despite Nehru's protestations to the contrary. One difference, repeatedly remarked upon by opponents of the Bill, was that the deliberations of the Constituent Assembly had not been affected by party political considerations, for instance by the enforcement of a party whip. On the other hand, the members of the Provisional Parliament were keenly aware of the fact that they were debating a constitutional amendment and not an ordinary piece of legislation – the fact that the Constitution is so easy to amend in a sense forces upon any parliament the responsibility to act like an assembly.[49] One should be cautious, too, about ignoring the ways in which discussions in the Constituent Assembly might have been inflected by political considerations which were in some sense "off-stage" from the deliberations themselves.[50]

If we see the Provisional Parliament (and, I would argue, the Assembly before it) as a discursive body, how should one assess the quality of discourse within it? It does not strike me as terribly sophisticated. I have argued elsewhere that arguments from colonial continuity are limited because they can be used to defend substantive positions both for and against the same claim (Burra 2010, 2016c). One set of arguments in the debates were framed in terms of comparative law, with each side defending its position on the proposed amendments by appealing to the law in other parts of the world. Such arguments face a similar problem, because they depend upon an appropriate choice of jurisdiction, and these must be justified on independent grounds. Appeals to constitutional traditions in countries one holds up as ideals – say the United States or Britain – can always be met, as they were by defenders of the First Amendment, with the claim that the appropriate background conditions do not obtain (recall Rev. D'Souza's point that comparisons with English law were beside the point because Indians lacked the "phlegmatic" character of the English).

The same is true of the philosophical arguments in favour of free speech. A claim to free speech which stems from fears of executive overreach, such as that made by Acharya Kripalani, cannot be supported by anecdote alone; it must be supplemented by empirical and institutional analysis (the same applies, of course, for the claim that executives will *not* abuse the powers granted to them). Arguments from the marketplace of ideas – such as advanced by Syama Prasad Mookerjee in the context of the foreign

relations exception – have boundary conditions (the avoidance of warfare) which must be noted explicitly. Arguments couched in terms of mistrust of the government have limited applicability when one is in favour of broad government intervention on the whole, or when that government claims popular democratic legitimacy. And I suspect Mookerjee's claim that one should trust the citizenry would not in fact have had much traction in a country which had experienced several years of communal violence.

What of the view that constituent assemblies are to be seen as *political* bodies? The political dimensions of the debates in the Provisional Parliament, and before that in the Constituent Assembly, need to be explored in much greater detail.[51] How should one think about Syama Prasad Mookerjee's defence of press freedom when one learns that the *Organiser* case had to do with the publication of inflammatory material regarding the conflict in East Bengal in 1950, a conflict which led Mookerjee to resign from the Cabinet in April that year, and in which the Hindu Mahasabha from which he had recently resigned is quite likely to have had a role in anti-Muslim violence in Calcutta (Raghavan 2010, 149–185)? Does it get further complicated when one learns that Mookerjee was an office-bearer of the All-India Civil Liberties Union, which was based out of the Servants of India Society in Pune – an organisation of which Hriday Nath Kunzru had been the president (Burra 2016a)? Does our view of Acharya Kripalani's attack on the Government change when one learns that he broke away from the Congress to form the *Krishak Mazdoor Praja Party* only a few days after the First Amendment Bill was passed (Kochanek 1968, chapter one; Krishak Mazdoor Praja Party 1951, p. 13)? What should we make of Hukam Singh's vote against the Bill upon learning that he was at that time an associate of Master Tara Singh's in the *Akali Dal* (Nayar 1966, 135–138)? Or of Nehru's views on press freedom in light of his letters to chief ministers asking them not to abuse speech-restrictive legislation?[52]

To understand the parliamentary debates around the First Amendment we need to understand more clearly what background political factors might have been driving some of the alliances and responses whose expression is evident in the debates, keeping in mind the political turbulence of the times. Doing so need not lead to a reductive argument from political interest to ideology; after all, the causal link might just as well go the other way. What is required is some theoretical way of integrating the political history of these debates with the text of the debates themselves. This is an exciting field for further enquiry: the lessons learned are bound to enrich our understanding of the Constituent Assembly Debates as well.

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Notes

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2 Statement of Objects and Reasons, Constitution (First Amendment) Bill (Bill No. 48 of 1951).

3 The cases were *Romesh Thapar v. State of Madras* (AIR (37) 1950 Supreme Court 124) and *Brij Bhushan v. State of Delhi* (AIR (37) 1950 Supreme Court 129).

4 See Table 6.1 for a list of the cases and relevant statutes.

5 *In re Bharati Press*, AIR (38) 1951 Patna 12 (Patna High Court, 13 October 1950).

6 The case was *Tara Singh Gopi Chand v. The State*, AIR (38) 1951 Punjab 27.

7 The Constitution (First Amendment) Bill, 1951 (Bill No. 48 of 1951, as introduced in Parliament).

8 Despite the intensity of debates around the First Amendment after its passage and soon afterwards (the Press Commission of India (1954) devoted most of a chapter to it), the story of the First Amendment has attracted little scholarly attention in recent years – Sethi (2015), Austin (1999) and Menon (2004) are notable exceptions to the general silence.

9 In his recent account of Indian free speech jurisprudence, Gautam Bhatia (2015: 53) is slightly more circumspect. He notes that *Romesh Thapar* and *Brij Bhushan* were highly speech-protective cases, and that the First Amendment was criticised at the time for the breadth of its restrictions and the possibility of their abuse. He does not, however, take an explicit position on the Amendment.

10 See Austin (1966) for more details about the formation of the Constituent Assembly. As he points out (1966, pp. 11–15), many of the Congress nominees were not in fact members of the Congress party. In November 1946, Jinnah formally disassociated the League from the Constituent Assembly, and so only 207 members took part in the inaugural session. The League never lifted this boycott; thus the restricted franchise was only one source of what some took to be the unrepresentative character of the Assembly.
11 S. 8(1) of the India Independence Act. The Act also specified (s. 8(2)) that the new Dominions and their Provinces would be "governed as nearly as may be in accordance with the Government of India Act, 1935" unless the Constituent Assembly deemed otherwise.
12 Austin 1966, p. 8.
13 In Austin 1999, p. 5, Austin seems to suggest that the terms "Dominion" and "Provisional" Parliament can be used interchangeably to describe this body both before and after the adoption of the Constitution. Here I believe he is incorrect, because once India became a Republic it ceased to be a Dominion.
14 AIR (37) 1950 Supreme Court 124 (Supreme Court, 26 May 1950).
15 AIR (37) 1950 Supreme Court 129 (Supreme Court, 26 May 1950).
16 AIR (38) 1951 Punjab 18 (Punjab High Court, 12 September 1950).
17 Also known as *Shailabala Devi*, AIR (38) 1951 Patna 12 (Patna High Court, 13 October 1950).
18 AIR (38) 1951 Madras 70 (Madras High Court, 2 November 1950).
19 AIR (38) 1951 Punjab 27 (Punjab High Court, 28 November 1950).
20 In what follows, I will refer to this as the "Press Act".
21 These were made by the Criminal Law Amendment Act (Act XXIII of 1932).
22 Nehru stresses this repeatedly in various letters in 1951, to B. N. Rau among others (Sethi 2015). Many thanks to Mahesh Rangarajan for drawing my attention to Nehru's letters to his chief ministers in connection with freedom of speech. See Sethi (2012) for more on the relationship between censorship and partition violence.
23 Hugh Tinker (1977) reports that Master Tara Singh had been implicated in plans to assassinate Jinnah in 1947, and Ian Copland (2002, p. 680) reports that after April 1947 the politics of the Akali Dal, of which Tara Singh was the leader, had moved beyond a demand for Khalistan to a desire for revenge; their efforts in this direction included reaching out to Hindu groups such as the Hindu Mahasabha and the RSS, who shared a similar fear of Muslim domination.
24 See Austin 1999, pp. 42–46 for the story on the executive side. Sethi 2015 discusses the shape of commentary on the Bill within the press.
25 I will henceforth abbreviate the Parliamentary Debates as "PD". Citations are to columns within the debates, not page numbers.
26 See the amendments moved by Naziruddin Ahmad, Sardar Hukam Singh, Shri Sarangdhar Das, Syamnandan Sahaya, S. P. Mookerjee and H. V. Kamath (PD col. 8834-35).
27 For instance, J. P. Srivastava (PD col. 9045) compared Dr Ambedkar's support of the Bill with those of Reginald Maxwell – who, as Home Member in 1942, had been responsible for much of the repressive framework of the Government response during the Quit India Movement. In Burra 2010 and Burra 2016c I argue that we should treat such arguments with caution.

28 This claim might also be debated: for the Bill did seek to revive laws which up to that point had been declared unconstitutional.
29 Nehru did not specify just what aspect of the international situation warranted the introduction of this clause; one interpretation was that it was targeted at criticisms of Pakistan by politicians such as Syama Prasad Mookerjee. This is the view of Chandrachud 2016. However, Sethi (2012, 254) quotes a letter from Nehru to B. N. Rau in which he says "As a matter of fact these "Foreign Relations" [*sic*] was put in for good form, and not because there was any positive need for it".
30 This is a slight reconstruction of what he says.
31 Here he echoed an earlier criticism made by Sardar Hukam Singh during the Constituent Assembly Debates on fundamental rights. Hukam Singh was a staunch opponent of the First Amendment Bill in Parliament, and voted against it.
32 The doctrine of "police power" gives the state the right to protect itself whether or not the right is given explicitly in the constitutional text; the doctrine of "implied power" allows Courts to presume that, if an authority has been given one power, it has also got the powers relating to the necessary means for fulfilling it – whether or not these subsidiary powers were explicitly granted (PD col. 9012).
33 This should be seen as a piece of rhetoric: the Congress government would not have had a hand in almost any judicial appointments at this point.
34 The term "annulment" has a neutral ring to it, but at least at one point the previous year Mookerjee had contemplated war. See Raghavan (2010), chapter five, for background.
35 In addition to those noted earlier, speeches against the Bill were made by Deshbandhu Gupta, Kameshwara Singh, Syamnandan Sahay, Husain Imam, Sarangdhar Das, J. P. Srivastava and K. K. Bhattacharya. One should not assume, of course, that they all spoke in one voice.
36 With respect to the question of the "revival" of the laws which had been struck down, Nehru argued that the revival would not be automatic. It would still be up to the Courts to pronounce on the validity of the laws in relation to the amended Constitution. But in any case it would still be up to Parliament to decide whether or not to continue with laws governing sedition and the like.
37 The Constitution (First Amendment) Bill, 1951 (Bill No. 48 of 1951, as amended by the Select Committee).
38 In addition to Nehru, it comprised Professor K. T. Shah, Sardar Hukam Singh, Pandit Hriday Nath Kunzru, Dr Syama Prasad Mookerjee, Naziruddin Ahmad, C. Rajagopalachari, L. Krishnaswami Bharati, Awadeshwar Prasad Sinha, T. R. Deogirikar, Dr B. R. Ambedkar, V. S. Sarwate, Mohanlal Gautam, R. K. Sidhva, Khandubhai Desai, K. Hanumanthaiya, Raj Bahadur, G. Durgabai, Manilal Chaturbhai Shah, Dev Kanta Borooah and Satya Narayan Sinha.
39 Eight notes of dissent were filed in all: by G. Durgabai, Mookerjee, Kunzru, Hukam Singh and K. T. Shah in their individual capacities, as well as two by Naziruddin Ahmad. K. T. Shah, Naziruddin Ahmad and Hukam Singh also signed a joint note.
40 The opponents were Shri Birua, Sarangdhar Das, Hussain Imam, Sardar Hukam Singh, Jaipal Singh, Acharya and Sucheta Kripalani, S. P. Mookerjee,

Naziruddin Ahmad, Babu Ramnarayan Singh, Shibban Lal Saksena, D. S. Seth, K. T. Shah and Shri Subbiah (PD col. 9805).

41 Professor K. K. Bhattacharya, Shri Birua, Sarangdhar Das, Sardar Hukam Singh, Hussain Imam, H. V. Kamath, Acharya and Sucheta Kripalani, H. N. Kunzru, Damodara Menon, S. P. Mookerjee, Naziruddin Ahmad, Babu Ramnarayan Singh, Sadiq Ali, Syamnandan Sahaya, Shibban Lal Saksena, K. T. Shah, M. P. Sinha and R. Velayudhan voted against it (PD cols. 9888-9889).

42 Professor K. K. Bhattacharya, Shri Birua, Sarangdhar Das, Sardar Hukam Singh, Hussain Imam, Jaipal Singh, Acharya and Sucheta Kripalani, H. N. Kunzru, Sardar B. S. Man, S. P. Mookerjee, Naziruddin Ahmad, Shri Oraon, Babu Ramnarayan Singh, Shibban Lal Saksena, D. S. Seth, K. T. Shah, M. P. Sinha and R. Velayudhan voted against it (PD cols. 10106-7).

43 See Prasad's letter of 14 June seeking Alladi Krishnaswami Ayyar's advice on this matter in Choudhary, ed. (1991, pp. 69–70). Prasad had previously expressed his reservations about the Amendment at the end of April (pp. 273–277).

44 It was first suggested to me by President Aharon Barak. H. M. Seervai (1991/2015) does suggest that J. Fazl Ali's dissenting judgements in both cases were correct, but he does so only in passing (715). A similar claim is made by Bedi (1966, pp. 403–404).

45 Even the highly speech-protective standard of the US Supreme Court in *Brandenburg v. Ohio* (395 U.S. 444, 1969) allows for censorship of the advocacy of force "where such advocacy is directed to inciting or producing imminent lawless action". Arguably, the *CrossRoads* standard is even more stringent, since it permits such advocacy unless it is directed to undermining the security of the state.

46 See the division of votes on the motion to take into consideration the Amendment Bill as reported by the Select Committee, columns 9802-9805 of the Parliamentary Debates, vol. XII (31 May 1951).

47 Alladi Krishnaswami Ayyar had written to B. N. Rau in March 1947 of the need for a public order exception in the fundamental rights clause (Shiva Rao 2004, vol. 5, p. 212); in a letter from Nehru to the Speaker of the House, G. V. Mavalankar, Nehru noted that Alladi Krishnaswami Ayyar had been consulted about the amendments and had approved of them (letter of 16 May 1951, SWJN Second Series, vol. 16, pp. 171–172); B. N. Rau's draft constitution of October 1947 included a public order exception (Shiva Rao 2004, vol. III, pp. 8–9); Sardar Patel had written to Nehru about the possible need for a constitutional amendment in July 1950, merely a week after the Supreme Court judgements came out, and would certainly have approved of the amendment had he been alive. See the letter from Patel to Nehru of 3 July 1950 in Das (1972, p. 358), quoted in Austin (1999, p. 42). (Austin does not mention that Patel had spoken of the possible need for an amendment in this letter.) Austin also describes (1999, p. 43) a letter from Pant which suggests that he saw a need to curb freedom of speech, though he seems to have been ambivalent about the need for a constitutional amendment.

48 It is worth noting here that K. M. Munshi, who had moved to drop the term "sedition" in the Constituent Assembly, voted in favour of the amendment to Art. 19(2). He had been an influential member of the Sub-Committee on Fundamental Rights in the Constituent Assembly, and was also member of a Cabinet Meeting in October 1950 when the amendment was discussed (Austin 1999, p. 48).

49 Thanks to Pratap Bhanu Mehta for alerting me to this point.
50 For instance in the Congress Assembly Party, which Austin (1966, p. 27) takes to have decided the fate of most provisions before they reached the floor of the Assembly (Austin notes that attendance was not restricted to members of the Congress, and included people like Syama Prasad Mookerjee: this does not affect the point about off-stage deliberations). See also Aditya Nigam's (2008) observations on the ways in which the Assembly might have fallen short of an ideal deliberative body.
51 Thanks to Kalyani Ramnath for stressing this point.
52 See Sethi 2015.

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