1 Civil liberties in the early constitution

The *CrossRoads* and *Organiser* cases

Arudra Burra[1]

I

Contemporary discussions of civil liberties in India are marked by two striking absences. The first is the lack of what one might call a "Voltairean" sensibility in defences of freedom of speech – a sensibility expressed in words attributed to Voltaire, to the effect that one may vociferously defend another person's right to say something while at the same time vociferously disagreeing with what that person has to say. Groups such as the American Civil Liberties Union (ACLU) have endorsed something like the Voltairean sensibility in their own work. Thus the "Free Speech" section of the ACLU's website concludes with the words

> Over the years, the ACLU has frequently represented or defended individuals engaged in some truly offensive speech. We have defended the speech rights of communists, Nazis, Ku Klux Klan members, accused terrorists, pornographers, anti-LGBT activists, and flag burners. That's because the defense of freedom of speech is most necessary when the message is one most people find repulsive. Constitutional rights must apply to even the most unpopular groups if they're going to be preserved for everyone.[2]

1 Some of this material has been presented to audiences at the Centre for the Study of Law and Governance, JNU; the South Asian Studies Conference at the University of Madison–Wisconsin; Ashoka University; at a workshop on Media and the Law at the Centre for the Study of Developing Societies; and at the IIT Delhi-University of Michigan South Asian studies colloquium. My thanks to the audiences at these talks, as well as to Pratiksha Baxi, Andre Beteille, Anuj Bhuwania, Pritam Baruah, Joya Chatterji, Rohit De, Ramachandra Guha, Mathew John, Sitaramam Kakarala, Prafulla Ketkar, Richa Kumar, Rinku Lamba, Pratap Bhanu Mehta, Nivedita Menon, Siddharth Narrain, Jawahar Raja, Kranti Saran, Mitra Sharafi, Shiv Swaminathan, V. Upadhyay, and Aparna Vaidik for helpful discussion; and to members of the "Research Blues Group" (Yashpal Jogdand, Debasis Mondal, and Sourabh Bikas Paul).

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2 See www.aclu.org/issues/free-speech. The reference to "Nazis" is to the case of *Skokie vs. Illinois*, which involved a neo-Nazi group which sought to march through a Chicago suburb in

Contemporary free speech advocates such as Glenn Greenwald look upon these defences of "freedom for the thought we hate" as badges of honour.[3] As he puts it in a recent article, the distinction between "defending the right to disseminate Idea X and agreeing with Idea X" – a distinction which "only the most simple-minded among us are incapable of comprehending" – is central to free speech activism.[4]

One would be hard-pressed to find similar examples in contemporary India. Right-wing figures such as Pravin Togadia of the *Vishwa Hindu Parishad* or Subramaniam Swamy of the BJP have been prosecuted in the recent past for instances of alleged hate-speech.[5] Swamy's constitutional challenge to hate-speech laws was articulated in classically liberal terms – he has said that these laws lack safeguards to for discussion of "various nuanced truths of interaction between groups," and serve as a pretext for government harassment.[6] Free speech activists on the liberal-left – who have an understandable abhorrence for Swamy's views – have not, however, flocked to his defence.[7]

Contrast this with the ACLU's stance in favour of Fred Phelps, the anti-gay activist and leader of the Westboro Baptist Church, who was sued in 2006 for

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which many Holocaust survivors lived; see "ACLU History: Taking A Stand for Free Speech in Skokie" (www.aclu.org/other/aclu-history-taking-stand-free-speech-skokie). The ACLU also defended the free speech rights of the Ku Klux Klan in the landmark case of *Brandenburg v. Ohio*, described briefly at www.acluohio.org/archives/cases/brandenburg-v-ohio.

3 See, for instance, his admiration for the ACLU's stand in Skokie in an interview with Nico Perrino of the Foundation for Individual Rights in Education (FIRE) on 21 June 2016, www.thefire.org/so-to-speak-transcript-glenn-greenwald/.

4 See Glenn Greenwald, "In Solidarity with a Free Press," *The Intercept*, 15 January 2015, https://theintercept.com/2015/01/09/solidarity-charlie-hebdo-cartoons/.

5 See "Maximum Hate Speech Cases Against Pravin Togadia, Owaisi Faces 11 Such Cases: MHA," *Economic Times*, 23 April 2014, http://ecoti.in/PuJqjb, – these included cases in Bhopal for a speech asserting that Muslims should be disenfranchised and not allowed to hold constitutional posts, and a speech in Bhavnagar (Gujarat), which purportedly claimed that Muslims should not be allowed to buy houses in Hindu areas.

As of June 2016, Swamy had cases against him in Delhi, Mumbai, Assam, Mohali, and Kerala, and had challenged the constitutionality of India's hate-speech laws in response to the case against him in Assam, arguing that the laws curtailed "vibrant and vigorous public discourse." (See Indrani Basu, "Subramanian Swamy Appeals Against Hate Speech Law in Supreme Court," *Huffington Post India*, www.huffingtonpost.in/2015/06/23/subramanian-swamy-hate-sp_n_7642294.html.)

6 See Amit Anand Choudhary, "Subramanian Swamy Challenges Hate Speech Law in SC," *Times of India,* 23 June 2015, https://timesofindia.indiatimes.com/india/Subramanian-Swamy-challenges-hate-speech-law-in-SC/articleshow/47776651.cms.

7 In contrast, Swamy's other free speech constitutional challenge – to the law of criminal defamation – has had a wide range of support across the political spectrum. See Gautam Bhatia, "Why *Subramanian Swamy vs Union of India* Is Arguably the Most Significant Free Speech Case in Years," 14 July 2015, https://scroll.in/article/740037/why-subramanian-swamy-vs-union-of-india-is-arguably-the-most-significant-free-speech-case-in-years. The challenge failed: Supreme Court upheld the law of criminal defamation in May 2016. See Gautam Bhatia, "Why the Supreme Court Ruling on Criminal Defamation Bodes Ill for the Future of Free Speech in India," 14 May 2016, https://scroll.in/article/808115/why-the-supreme-court-ruling-on-criminal-defamation-bodes-ill-for-the-future-of-free-speech-in-india.

picketing outside the funeral of Mathew Snyder, a soldier who was killed in the line of duty in Iraq. Leaders of the Church believed that God punishes America for tolerating homosexuality, particularly in the military: the picket signs contained messages such as "Thank God for Dead Soldiers" and "God Hates Fags." Despite the overtly homophobic content of these slogans, the ACLU supported Phelps' cause when he was sued by Snyder's family for causing them severe emotional distress.[8]

Nor is the Hindu right known for its defence of free speech, whether in theory or in practice. The prosecution of Arundhati Roy on sedition charges for a speech on Kashmir in 2010 was made on the basis of a complaint by the campaign manager for Arun Jaitley, now Finance Minister in the Bharatiya Janata Party (BJP) government led by Prime Minister Narendra Modi.[9] The student wing of the BJP, the Akhil Bharatiya Vidyarthi Parishad (ABVP), has led assaults all over the country on freedom of speech, particularly when it comes to speech it regards as "anti-national."[10] The BJP President Amit Shah has also claimed that freedom of speech does not extend to "speaking against the country."[11]

The point extends beyond freedom of expression to other classical civil liberties as well, such as freedom of association or the right to a fair trial – to defend the rights of someone *accused* of a crime is hardly to justify the crime itself. Here too, I think it is fair to say that by and large civil liberties are invoked in a "sectarian" or partisan way. This is not a new complaint.[12] One result is that invocations of civil liberties are seen as opportunist or cynical when employed by one's political opponents – a depressing and familiar spectacle today.

8 See Chris Hampton, "Why Fred Phelps's Free Speech Rights Should Matter to Us All," 7 October 2010, www.aclu.org/blog/speakeasy/why-fred-phelpss-free-speech-rights-should-matter-us-all. In *Snyder v. Phelps,* 562 U.S. 443 (2011), the US Supreme Court ruled in favour of Phelps on free speech grounds.

9 See "The 'Seditionist' Speech," *Outlook*, 1 December 2010, www.outlookindia.com/website/story/the-seditionist-speech/268505.

10 There is no dearth of examples – the most high-profile of them being the drive by the ABVP to expel students of the Jawaharlal Nehru University (JNU) for raising so-called "anti-national" slogans at an event on Kashmir in February 2016. The ABVP's national organizing secretary, Sunil Ambekar, was quoted as saying that there are "excessive" rights in India today. See Prashant Jha, "People Have Excessive Rights in India, Says ABVP Leader," *Hindustan Times*, 17 February 2016, www.hindustantimes.com/india/people-have-excessive-rights-in-india-says-abvp-leader/story-6PYOwE3GsmfygTk538RonI.html.

11 See Arudra Burra, "Memo to Amit Shah: BJP Icon SP Mookerjee Would Not Have Appreciated Curbs on Free Speech," *Scroll.in*, 25 November 2016, https://scroll.in/article/820946/bjp-founder-sp-mookerjee-wouldnt-have-related-to-amit-shahs-views-on-sedition-an-anti-nationalism.

12 See, for instance, Pritam Singh, "Sectarianism and Human Rights Discourse: The Politics of Human Rights in Post-Colonial Punjab," and Nilanjan Dutta, "From Subject to Citizen: Towards a History of the Indian Civil Rights Movement," in Michael R. Anderson and Sumit Guha, ed. *Changing Concepts of Rights and Justice in South Asia* (New Delhi: Oxford University Press, 2000).

My other observation is that, by and large, defenses of civil liberties are not premised on a general suspicion of the exercise of state power, and the scope for its abuse. The point is familiar enough with respect to matters regarding national security or anti-terrorism laws: right-wing defenders of the minimal state tend not to be bothered by the existence of such laws, despite the extent to which they provide the state ample powers for misuse, and despite the fact that this misuse is well-documented.[13]

But it applies also to the progressive left, broadly speaking. To take one example from the recent past, the Maharashtra Prevention and Eradication of Human Sacrifice and Other Inhuman, Evil and *Aghori* Practices and Black Magic Act, 2013, enacted in the wake of the murder of the anti-superstition activist Narendra Dabholkar, makes it an offence to promote or propagate a series of quite vaguely defined "inhuman, evil and *aghori* practices and black magic," and gives powers of entry, search, and seizure to a "Vigilance Officer" who is empowered to do so whenever he has "reason to believe" that an offence under the Act has been or is being committed.[14] Opposition to the Act on civil libertarian grounds was here voiced by members of the religious right.[15]

To take another example, the Commission of Sati (Prevention) Act, 1987, criminalizes a variety of expressive acts of "glorification," which include "supporting, justifying, or propagating the practice of sati," and creating a trust or constructing a temple with "a view to perpetuate the honour of, or to preserve the memory of, a person who has committed sati."[16] In the case of abetting sati – which includes "making a widow believe that the commission of sati would result in some spiritual benefit to her," and "participating in any procession in connection with the commission of sati" – the burden of proof of innocence lies with the accused.[17]

In both cases, the laws in question give a great deal of discretionary power to local authorities, both executive and police, to curtail what might in some guises be seen as basic civil liberties concerning expression and religious freedom. A certain kind of civil libertarian might deplore the practices in question, and hope for

13 To take just one instance, see the discussion by Mayur Suresh and Jawahar Raja of the use of the Unlawful Activities (Prevention) Act to ban the Students' Islamic Movement of India: "'Detrimental to the Peace, Integrity and Secular Fabric of India': The Case against the Students' Islamic Movement of India," *Working Paper Series 14*, Centre for the Study of Law and Governance, Jawaharlal Nehru University (November 2012). See also Ujjwal Kumar Singh, *The State, Democracy and Anti-Terror Laws in India* (New Delhi: Sage Publications, 2007).

14 Maharashtra Act XXX of 2013. See sections 5 and 6 for the scope of the duties and powers of Vigilance Officers.

15 See, for instance, the article "Oppose Black Magic Bill: A Draconian law targeting faith" (www.hindujagruti.org/hindu-issues/anti-faith-bill) published on the website of the Hindu Janajagruti Samiti, an organisation "For the Establishment of the Hindu Rashtra." For a sensitive discussion of the issues surrounding religious freedom in this context see the interesting discussion by Meera Nanda, "In the Name of Faith," *Frontline*, 4 October 2013, https://frontline.thehindu.com/cover-story/in-the-name-of-faith/article5137396.ece.

16 Act 3 of 1988. "Glorification" is defined in section 2(b).

17 Note that I am drawing attention here to the *speech-restrictive* aspects of the laws in question: not sati per se, but its glorification; not the "evil practices," but their promotion.

their eradication, while being loath to invoke the state's coercive power in service of this goal – not least, because of quite general fears about how state officials might abuse such powers. Such concerns have indeed been voiced by civil libertarians one would associate with the liberal left; but my sense is that their voices are somewhat muted in this regard.[18]

Discussions of civil liberties – regardless of the substantive ideologies of the people or groups on whose behalf civil liberties claims are made – have thus tended to take place without a consistent position on the limits of the exercise of state power as such. One reason why this is striking is, of course, that the classical defenses of civil liberties are premised precisely on fears of government misuse and over-reach.

In making these two observations, I do not wish to reiterate the by-now well-worn claims about hypocrisy or "selective outrage" on the part of civil liberties advocates, whether on the left *or* on the right; one may point out an inconsistency without claiming bad faith. On the contrary, I think the fact that civil liberties discourse tends to be sectarian in the ways outlined above, and that civil libertarians are sometimes ambivalent about the proper limits of state power, says something about the nature of civil liberties themselves, and reveals tensions between the ideal of civil liberties and those of social and economic reform in the modern Indian state. The tensions themselves are hardly new, but I think have been inadequately discussed in the Indian context. This chapter is in part a plea to begin such a discussion.

I should also emphasise that I do not invoke the ACLU/Voltairean sensibility on free speech as an ideal to which we must aspire and are found wanting.[19] It is not that I am neutral with respect to it – indeed, I think there is a great deal to be said for it, though I will not attempt to argue the point here. Instead, my aim in drawing attention to it is two fold. First, having a simple, sharply delineated model before us disciplines our own thinking. There are excellent reasons to think that the sensibility simply does not speak to our circumstances: making the contrast explicit is one way of forcing us to articulate those reasons, and understand what specifically in our situation makes it inappropriate. This in turn might help us clarify what norms and ideals we think *are* appropriate for our context.[20]

18 See, for instance, Maja Daruwala's criticism of the provisions concerning glorification and the reversal of burden of proof in the Sati (Prevention of Glorification) Act, published in "Central Sati Act – An analysis" (PUCL Bulletin, July 1988).

19 According to Nivedita Menon, for instance, Sunil Khilnani's lament that Indian liberalism was "crippled from its origins" because it did not see liberty as an individual right is classic case of seeing post-colonial democracy "as a Lack" ("Citizenship and the Passive Revolution: Interpreting the First Amendment," *Economic and Political Weekly*, May 2004). The charge against Khilnani is that he brings to bear the wrong kind of normative standard, one borrowed from the European enlightenment – and that in general it is a mistake to think that we have to justify Indian democracy "in terms of 'liberalism' as an a priori value." In the present context, all I wish to say is that by noting an absence I do not mean to attribute a Lack.

20 Thus I do not find it helpful to cast these debates as being about whether Indian constitutionalism is truly "liberal," for debates framed in that way lead, in my view unhelpfully,

Second, part of my aim in drawing the contrast is to understand more clearly just what are the limitations of that model in the first place. What assumptions about democracy and democratic institutions must we make in order for the ACLU model to make sense? Do they hold even in the American context? It is hardly an uncontroversial ideal even within that context, as witnessed for instance by debates around pornography and hate speech.[21]

The same point applies to thinking about the scope of state power. While one might well articulate a defense of civil liberties on the basis of a more general libertarian advocacy of the minimal state, surely this is not the only basis on which to mount such a defense. A liberal defense of civil liberties might allow for considerable state intervention, particularly in the context of a great deal of *private* violence and oppression.[22] So I do not mean to suggest that defenders of civil liberties in India cannot consistently argue against repressive security legislation on the one hand, and in favour of laws designed to eradicate sati, on the other. But I do think that there is a need to articulate a theoretical position within which such a stance can be consistently defended.

These observations about the contemporary scene, and the theoretical questions they invite, are not, however, the focus of this chapter. My aim is instead to examine an episode in Indian legal history in which I think something like the ACLU sensibility was on display, at least in some limited fashion. I take as my starting point the first two cases Supreme Court cases on free speech under the Indian constitution, both decided exactly four months after it came into force, on 26 May 1950. These were the cases of *Romesh Thapar* and *Brij Bhushan*, each of which challenged speech-restrictive provisions of a "Public Safety" Act as being inconsistent with the newly granted fundamental right to freedom of speech and expression in Article 19(1) of the Constitution.[23]

The Court struck down these laws on the grounds that they were over-broad, and its decisions had far-reaching consequences. High courts across the country followed its reasoning were to strike down a range of other speech-restrictive laws: the Press (Emergency Powers) Act of 1931, as well as the sedition clause of the Indian Penal Code. This in turn paved the way for the first great confrontation

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to questions about what liberalism consists in, and what justifies us in regarding a certain political philosophy with roots in the European enlightenment as the standard against which to assess our own constitutional vision. To my mind the question is simpler than that: do we think that a particular normative standard – in this case the ACLU/Voltairean vision with respect to free speech – is the correct one for us? Neither its compatibility with something called "the liberal tradition," nor its origins in a particular historical context quite different from ours, is relevant to *that* question.

21 See Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2014), for the criticism that US free speech discourse is limited precisely because of its inability to make space for the regulation of hate speech. Catherine Mackinnon has long argued against liberal defenses of a right to pornography, for instance in *Only Words* (Cambridge, MA: Harvard University Press, 1993).

22 Thanks to Andre Betèille for useful discussions of this point.

23 The full case citations are *Romesh Thappar vs The State of Madras* (1950 AIR 124) and *Brij Bhushan And Another vs The State of Delhi* (1950 AIR 129).

between Parliament and the Supreme Court, the First Amendment to the Indian constitution in 1951.[24]

My interest in this cases is not, however, in their jurisprudence, or in their legal consequences. I wish rather to examine the story of how the publications in question were banned, and how they came to be litigated in the first place. That story, I think, will shed some light on the two absences I have discussed in this introduction. The case of *Romesh Thapar* concerned a magazine called *CrossRoads*, which though not officially an organ of the Communist Party of India was closely affiliated with it: its history of troubles with the censors had very much to do with this political affiliation, as expressed in articles about the Telengana uprisings in Hyderabad state, as well as on firings upon Communist detenus in Salem Central jail. *Brij Bhushan*, on the other hand, had to do with the *Organiser*, organ of the RSS, which was censored for communal articles concerning riots in East Pakistan. Despite the major ideological differences between these groups, an investigation of the archives of these two publications reveal interesting convergences on issues concerning civil liberties, both with respect to freedom of speech but also more broadly.

The lawyer for the *Organiser*, N. C. Chatterjee, was at that time Vice-President of the Hindu Mahasabha, but also a member of the Calcutta-based Civil Liberties Committee, which had been set up in the 1940s against the background of Communist suppression. And the cases took place against the background of a civil liberties movement which regarded suppression of Communists and the RSS as instances of the same problem – the All-India Civil Liberties Council included among its office-bearers figures such as Chatterjee and Syama Prasad Mookerjee on the Hindu right, as well as trade-union leaders such as N. M. Joshi. The Council maintained an active connection with the ACLU, and members of the Council were keenly aware of the ACLU's work on civil liberties, particularly freedom of speech.

Indeed, examining this history should lead us to revisit the very idea of an "Indian" tradition, whether with respect to civil liberties or elsewhere. N. C. Chatterjee's free speech arguments did not draw from some imagined Hindu past, but rather from the American liberal tradition embodied in such figures as Brandeis and Holmes, whose defences of free speech can be traced back further to Mill.

II

Let me begin with an analysis of *CrossRoads*, which was inaugurated in Bombay on 29 April 1949 by Romesh Thapar (later founder of *Seminar*).[25] His wife Raj describes them both as committed to communist causes without being formally

24 For more on the debates around the First Amendment, see Granville Austin, *Working a Democratic Constitution* (Oxford University Press, 1999), chapter two. The legal issues are addressed in some detail in Arudra Burra, "Arguments from Colonial Continuity: The Constitution (First Amendment) Act, 1951" (unpublished draft, 2007).

25 Many thanks to Professor Romila Thapar, and to Malvika Singh, for background on *CrossRoads*.

members of the Communist Party of India – but certainly part of a social and political circle in Bombay whose main currents were inspired by communism, and whose cultural connections included participation in the Indian Progressive Theatre Association, amongst other organisations.[26]

The first issue of *CrossRoads* (Figure 1.1) included articles by Mulk Raj Anand, Pablo Neruda, Maurice Dobb, C N Vakil, and Balraj Sahni. Free speech was an early concern: Sahni, a member of the communist-associated Indian People's Theatre Association (IPTA) wrote an article addressed to Tagore, lamenting a ban on IPTA's performance of his songs. Thapar notes in his first editorial that he was asked to give a security deposit when starting the magazine, because, according to the officials at his interview, "author is considered a staunch communist, likely to publish objectionable material."

The journal was strongly anti-Congress, though it did not spare the Socialists either: it had a regular feature called "Our Congress" which made fun of the current dispensation based on news snippets (see Figure 1.2), and then, more darkly, a regular series called "Inside Congress Jails." The violation of civil liberties was a constant theme, as was coverage of police firings and jail deaths. In addition, it carried a great deal of international coverage, on the US involvement in Korea, and pro-Communist articles on Russia and China. It also provided coverage and criticism of the Draft Constitution, referred to often as the "Slave Constitution."

The first ban on *CrossRoads* came from what it called the "Hyderabad Military Government" in July 1949, following a series of articles on the Telengana struggle, including a campaign against the award of the death sentence for communist activists (Figure 1.3).

In July 1949 *CrossRoads* was banned by the Bombay Government for "threatening the peace and tranquillity of Bombay Province," under section 9A of the Bombay Public Security Measures Act. The offending article was the reprint of a message from the All-China Federation of Labour condemning Government crackdowns on trade unionists and communists (Figure 1.4). The problem was with the title of the article ("Criminal") – the doing of Thapar's sister, the distinguished historian Romila, then a college student in Pune, who was helping with the copy-editing while on holiday.

Thapar was summoned to the Press Advisory Board chaired by Morarji Desai, then Home Minister (Frank Moraes and Sadanand, editor of the *Free Press Journal,* were the other members of the Board). Morarji demanded an apology which Thapar refused to give, following which the ban was imposed. Thapar described

26 Raj Thapar, *All These Years* (Seminar Publications, 1991). In its entry on Communist Party of India, *The Indian and Pakistan Year Book and Who's Who 1950* refers to "The unofficial English organ of the Party (the official organ is banned) is skillfully got up and ably edited though the mode of expression is sometimes very crude and intemperate." While it does not name *CrossRoads*, the reference is clear and would have been in the nature of an inside joke – Frank Moraes, editor of the *Times of India* (which published the *Year Book*) had also employed Romesh Thapar to work for him, and had been the one to introduce him to Communist circles in Bombay – though they had a subsequent falling out.

WHAT ANOTHER ONE!

commentary

WHEN we told friends of our intention to add a new political and cultural news-weekly to the large number that already exist, their faces invariably dropped, the expression twisted and we heard the chorus-like jibe: "What, another one!" Yes, it IS another one, but with a difference.

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Why CROSSROADS? Because as a people we are at the crossroads and must find a path out of the jungle of conflict on almost every aspect of life—politics, economics, art, drama, literature, human relations and what have you. In such an age, we are all assailed by many doubts, but we can still attempt to evolve a consistent and honest approach to the multitude of problems that confront us.

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We shall not be afraid of being partisan, for in such an approach, there is more integrity than in the ways of the wishy-washy compromisers who pride themselves on their so-called "neutral" attitude. Neutrality, to-day, means in effect support for the *status quo*. We reject the policies of the *status quo* and the confusion that arises from them. We shall take a democratic path, measuring every act on the basis of how it affects the future of the broadest sections of the people.

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There is no alternative—There are no other leaders with a national following—During the present emergency we must rally behind the authorities—You cannot expect a transformation overnight—We must be patient in these difficult times. Such is the propaganda barrage with which the rulers of to-day seek to gag and sidetrack all independent thought and action. Daily the pen-pushers maintain that the present overlordship must continue. We also reject these myths and claim that an effective and lasting alternative to maladministration, exploitation, corruption and nepotism can and will be found.

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We shall, in the course of campaigning for Prosperity and Peace, give the correct meaning to vital words like Freedom, Democracy, Fraternity, Equality—the fundamental rights of man which have been distorted and twisted so that to-day they sound like empty, tattered phrases. We shall respect and cherish these watchwords of progress and expose those who use them as a convenient cover for their sordid plans.

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We shall espouse the cause of all peoples—the new masses who by their faith and courage are struggling against a centuries-old bondage. CROSSROADS will focus attention on the great advances of peoples of other lands and draw inspiration and guidance from their struggle for a new world purged of the money-makers and money-grabbers. We shall point the path to liberty and economic democracy.

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We go forward in the confident hope that the many friends of independent thought and actions will rally to our side. People must have the courage to speak out if they believe certain things are important to say. In that way lies integrity, because criticism is the essence of democracy. And we are fully conscious of our responsibilities.

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This is an inaugural number. It carries, we hope, the first breath of fresh air for those who have become stifled by the cant and hypocrisy which is being widely sold as "straight news." From us, you will get news patterns which throb with vital and true impulses. There will be no pulling of punches and no "doctoring" of reportage. Ours will be a progressive weekly voicing the thoughts, hopes and aspirations of democratic peoples the world over.

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All this may seem presumptuous, as assertions of faith always seem to do, but our paper is a humble offering. It isn't all that we should like it to be, but we are confident that we will improve as the weeks go by. In this we will also need your help, advice and co-operation. If you have four annas a week to spare for a paper like this, you know what to do.

Figure 1.1 "What, Another One?" *CrossRoads* inaugural issue, 29 April 1949

Source: Microfilms Division, Nehru Memorial Museum and Library.

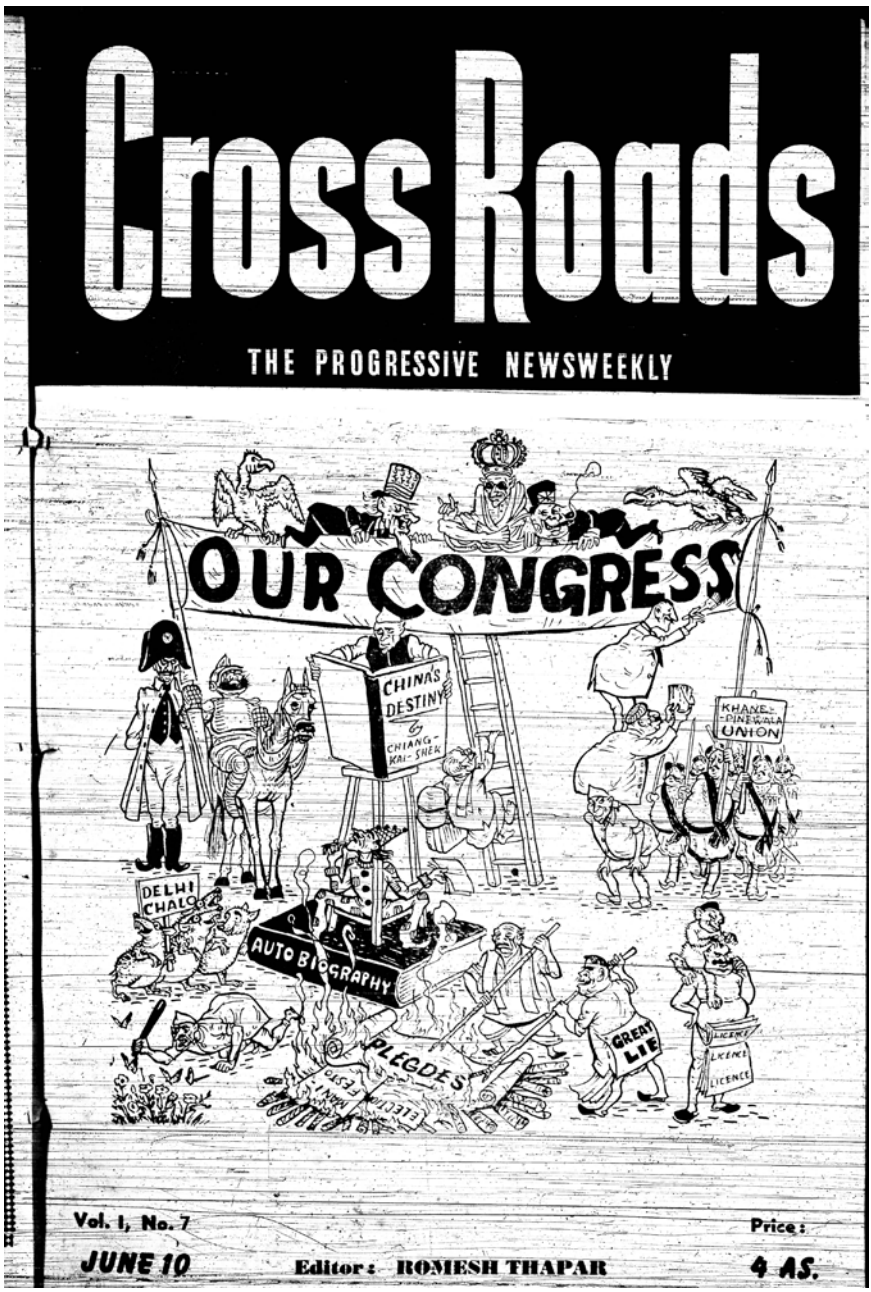


Figure 1.2 An early *CrossRoads* cover

Source: Microfilms Division, Nehru Memorial Museum and Library.

Our Correspondents report

HYDERABAD : LATHI CHARGE IN JALNA DETENUE CAMP

HYDERABAD:

WHILE the eight peasant leaders of Nalgonda condemned to death are awaiting news of their fate, the indignant people of Hyderabad are shocked at the brutal lathi charge reported to have been made on May 21 on the 2,000 political prisoners locked up in the Jalna concentration camp. Two hundred prisoners, although seriously injured, were kept segregated and in protest the entire camp went on hunger strike the next day.

It is reliably understood that the lathi charge was made following the request of the 2,000 prisoners of the camp for permission to send in their protest against the death sentence passed on their eight comrades-in-arms from Nalgonda. When the request was arrogantly turned down by the jail authorities, the prisoners are said to have raised slogans, whereupon hundreds of armed police crashed into the barracks and beat them up.

The 200 prisoners seriously wounded include Hanumantha Rao, a student leader of Hyderabad city; A. Gopal Rao, a student of the Andhra Vidyalaya, Hyderabad; Venkataram Narsimha Reddy and Venkata Reddy, students from Nalgonda; and worker leaders Ramulu, Raghavendra Rao, Kokil, Sudarshan Reddy, Bhagavandas, Srinivas, Linga Reddy, Kesava Reddy, Markandeya, Angamia, K. Gopal Rao and Venkatram Narsiah. These 200 men were kept segregated and were not given any food till midnight. Raghavendra Rao and Linga Reddy were reported to have been unconscious throughout the night.

Next day, all the 2,000 prisoners refused to take food in protest against the atrocities of the jail authorities and demanded an enquiry into the lathi charge, cancellation of the segregation order and restoration of the facilities withdrawn as a punishment. Information received till May 21 shows that they were continuing the hunger strike.

The Military Administration of Hyderabad is fast getting isolated from all sections of the State people. Dr. N. M. Jaisoorya, the son of the late Sarojini Naidu, writing in the "Deccan and the disintegration of the State. The deceptive facade they have been maintaining by talking big to fool the people hitherto has been thrown to the wind, and they have come out openly as the servitors of the the powers that be.

Addressing the Standing Committee of the Andhra Congress, Dr. G. S. Melkote is reported to have said at Ghanpur that the Communists must be broken; ribs and bones, that Nalgonda and Warangal must be cordoned off and martial law declared enforcing the law of 'shoot at sight'. Similarly, Congress President, Ramanand Tirth, in a public statement, said that in the course of his recent trip to Dehra Dun he had impressed upon Sardar Patel and Pandit Nehru "the urgent necessity of taking all possible steps to eradicate the Communist menace in the State once for all."

Commenting bitterly on the total subservience of these so-called leaders, Dr. Jaisoorya wrote in the article referred to: "I have never criticised the State Congress till now in public. I am compelled to do so because I think this body and its leaders are creating confusion in the country by their repeated 'volte face'. Examine all their statements. One day, it is a highly revolutionary statement telling the Military Administration to clear out. Then they get a kick in the pants from Delhi and the next morning, it is a docile statement saying what they were told to say. Since I know the inside facts, I have kept quiet all this time. But it is the limit of indecency for a party that has neither guts nor the courage of its convictions to blow hot and cold alternately. A party that cannot stick to its convictions and be prepared to go into the desert, a party that constantly threatens and next day knuckles under at the first lash of the whip is not worth a tinker's damn....

This discredited rabble that sells under the label of the State Congress does not care at all if 74 per cent of the people in the districts of Nalgonda and Warangal have no land and

The nation

4.8 per cent of the holders own as much as 43.8 per cent of the land; that 15 lakhs of people are compelled to live on the landlord's land; in the name of abolishing Jagirdari the present administration pays a huge sum of Rs. 155 lakhs annually to a mere 11.67 per cent of the jagirs.

The State Congress leaders, true to their class character, don't worry about these problems at all. They, on the other hand, are spear-heading the destruction of what the Telengana peasants have created. And naturally, they are getting furious when the united people are staunchly defending their gains shattering their illusions.

TELENGANA FIGHTERS MUST NOT HANG

End Fascist Repression In Hyderabad

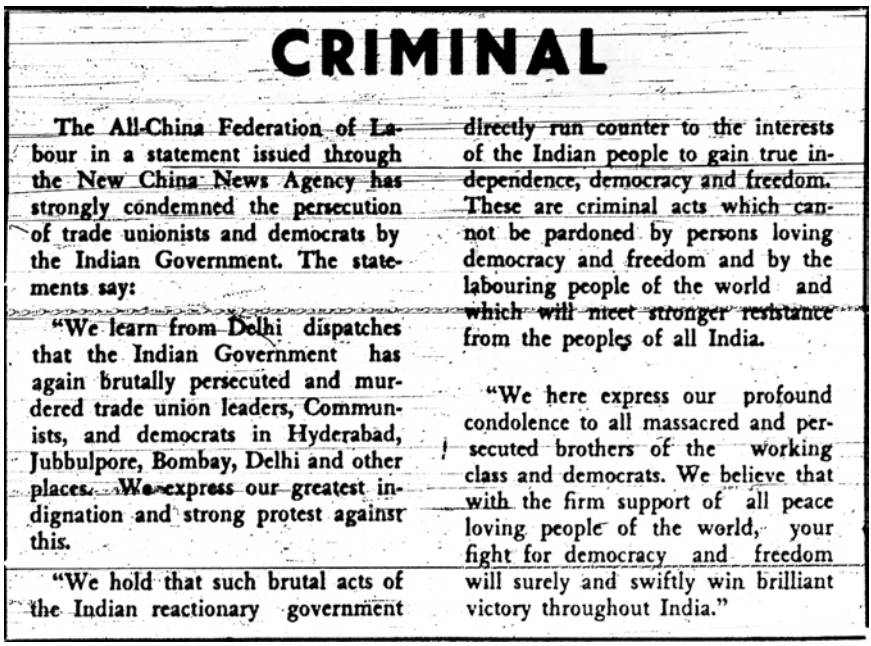
Figure 1.3 "Hyderabad: Lathi Charge in Jalna Detenue Camp," *CrossRoads*, 10 June 1949

Source: Microfilms Division, Nehru Memorial Museum and Library

this episode in an editorial titled "They Shall Not Gag Us," when *CrossRoads* resumed publication in December, criticizing the Press Advisory Committee for having taken on "the role of a prosecutor" instead of defending the press against attacks from the government, and writing: "The demand for a servile apology and various undertakings met with the rebuff it deserved."

Thapar also discussed the legal issues arising from the ban. An appeal to the Bombay High Court to stay the ban and review the order was rejected on 19 August, the Court arguing that it lacked jurisdiction because the ban order was an executive order.[27] When this point in turn was appealed to the High Court,

27 The episode is discussed by Raj Thapar, op cit 83–86; the legal issues are described in the *Yearbook*'s entry on "The Press."



CRIMINAL

The All-China Federation of Labour in a statement issued through the New China News Agency has strongly condemned the persecution of trade unionists and democrats by the Indian Government. The statements say:

"We learn from Delhi dispatches that the Indian Government has again brutally persecuted and murdered trade union leaders, Communists, and democrats in Hyderabad, Jubbulpore, Bombay, Delhi and other places. We express our greatest indignation and strong protest against this.

"We hold that such brutal acts of the Indian reactionary government directly run counter to the interests of the Indian people to gain true independence, democracy and freedom. These are criminal acts which cannot be pardoned by persons loving democracy and freedom and by the labouring people of the world and which will meet stronger resistance from the peoples of all India.

"We here express our profound condolence to all massacred and persecuted brothers of the working class and democrats. We believe that with the firm support of all peace loving people of the world, your fight for democracy and freedom will surely and swiftly win brilliant victory throughout India."

Figure 1.4 "Criminal": The article for which *CrossRoads* was banned in Bombay, *CrossRoads* 10 June 1949

Source: Microfilms Division, Nehru Memorial Museum and Library.

the Chief Justice, M. C. Chagla, ruled against the government, stating that the grounds upon which which the order had been passed were indeed within the purview of judicial oversight, and directing the lower courts to hear the matter on its merits.[28] This matter was *sub judice* at the time Thapar wrote his editorial. He concluded

> At a time when the Congress-capitalist alliance is attempting to stifle all democratic and free opinion, the struggle for the freedom of the Press assumes a new and immediate urgency. We, on our part, will continue to steadfastly battle for a democracy of the toilers, the India of our dreams. We appeal to our readers, friends and comrades to win legality for the democratic and free press, for it is they who, in the final analysis, must decide the issue between People's Democracy and Congress fascism.

28 The case is *Ramesh Thaper vs the Province of Bombay* (AIR 1950 Bom 213). It seems to have been Thapar's fate to have his name misspelled on legal cases – the citation for what came to be called the *CrossRoads* case in the Supreme Court spells his name as "Thappar."

CrossRoads continued from where it left off, with articles attacking the Constitution, covering the condition of detenus, police firings, and strikes.[29] In February 1950, it launched a series of sustained criticisms of the Madras government for a firing on communist prisoners in Salem Central jail which left 22 prisoners dead.[30] It was for this series of articles (as well as other criticisms of the Madras administration) that the entry and circulation of *CrossRoads* was banned in Madras Province.[31]

CrossRoads covered the story of its own ban in Madras with great vigour, starting with an editorial on 17 March, "Madras Ban on *CrossRoads* Must Go" (Figure 1.5), in which it called the ban "a fascist attack" which showed that Congress leaders were afraid of the truth. Two weeks later it announced that it would challenge the ban in the Supreme Court, and appealed to readers to raise Rs. 2000 by May Day towards its "Fighting Fund." On 7 April, it announced that the petition was filed and would be heard on 10 April. The following issue (14 April) was devoted entirely to freedom of the press: an entire page, titled "*CrossRoads* Leads Battle for a Free Press," consisted of letters of support from other publications, as well as messages from the Progressive Artist's Group and the Progressive Writer's Association. Coverage of this sort continued through the announcement of its victory in the Supreme Court.

III

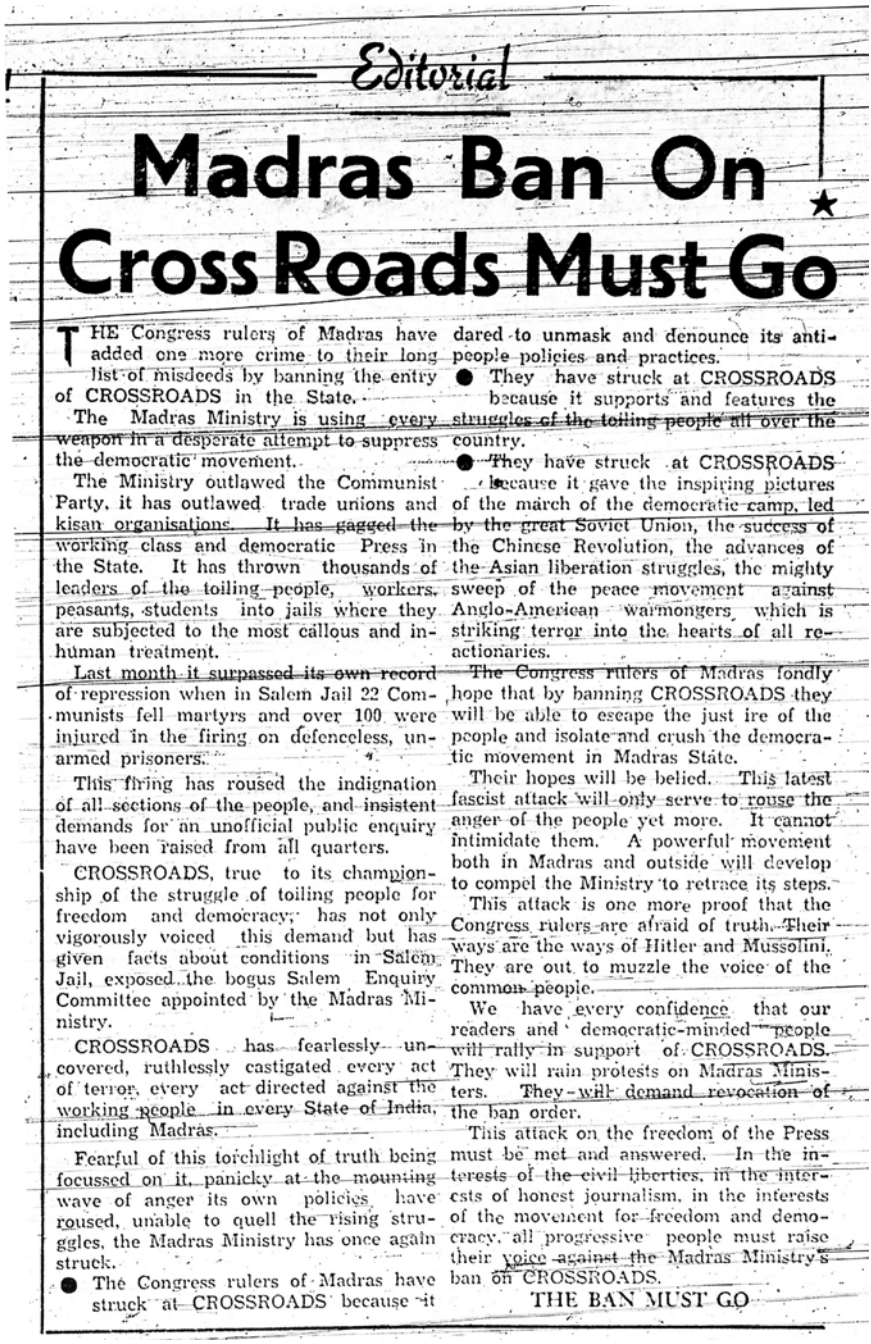
CrossRoads' adoption of the mantle of defending civil liberties in the face of government repression was also mirrored by another journal of a very different ideological persuasion. The *Organiser* had been inaugurated in July 1947, and was banned in February 1948 following the ban on the RSS after Gandhi's assassination.[32] When it reappeared in October of that year its tone was not particularly

29 One change which seems to have come about early in 1950 is that of the cover page: the earlier, more edgy covers by the artist Chittoprasad were now replaced by a more humdrum design.

30 For a retrospective account from one of the prisoners who was there at the time, see "Survivor of Salem Prison Massacre Recalls the Black Day," *Hindu*, 13 February 2006, https://www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/survivor-of-salem-prison-massacre-recalls-the-black-day/article18408295.ece. The incident was serious enough to warrant a concerned letter from Sardar Patel to K. Madhava Menon, the Minister for Education, Law and Jails, saying that he was rather disturbed over the casualties inflicted. See Sardar Patel's correspondence, vol 9, 295–297.

31 The order of 1 March 1950 read "In exercise of the powers conferred by section 9 (I-A) of the Madras Maintenance of Public Order, Act, 1949 (Madras Act XXIII of 1949) His Excellency the Governor of Madras, being satisfied that for the purpose of securing the public safety and the maintenance of public order, it is necessary so to do, hereby prohibits, with effect on and from the date of publication of this order in the Fort St. George Gazette the entry into or the circulation, sale or distribution in the State of Madras or any part thereof of the newspaper entitled *CrossRoads* an English weekly published at Bombay." The Communist party had been banned in 1948.

32 Many thanks to the present editor of the *Organiser*, Shri Prafulla Ketkar, for background on its early history, and for introducing me to its archive.



Editorial

Madras Ban On Cross Roads Must Go

THE Congress rulers of Madras have added one more crime to their long list of misdeeds by banning the entry of CROSSROADS in the State.

The Madras Ministry is using every weapon in a desperate attempt to suppress the democratic movement.

The Ministry outlawed the Communist Party, it has outlawed trade unions and kisan organisations. It has gagged the working class and democratic Press in the State. It has thrown thousands of leaders of the toiling people, workers, peasants, students into jails where they are subjected to the most callous and inhuman treatment.

Last month it surpassed its own record of repression when in Salem Jail 22 Communists fell martyrs and over 100 were injured in the firing on defenceless, unarmed prisoners.

This firing has roused the indignation of all sections of the people, and insistent demands for an unofficial public enquiry have been raised from all quarters.

CROSSROADS, true to its championship of the struggle of toiling people for freedom and democracy, has not only vigorously voiced this demand but has given facts about conditions in Salem Jail, exposed the bogus Salem Enquiry Committee appointed by the Madras Ministry.

CROSSROADS has fearlessly uncovered, ruthlessly castigated every act of terror, every act directed against the working people in every State of India, including Madras.

Fearful of this torchlight of truth being focussed on it, panicky at the mounting wave of anger its own policies have roused, unable to quell the rising struggles, the Madras Ministry has once again struck.

- The Congress rulers of Madras have struck at CROSSROADS because it dared to unmask and denounce its anti-people policies and practices.
- They have struck at CROSSROADS because it supports and features the struggles of the toiling people all over the country.
- They have struck at CROSSROADS because it gave the inspiring pictures of the march of the democratic camp, led by the great Soviet Union, the success of the Chinese Revolution, the advances of the Asian liberation struggles, the mighty sweep of the peace movement against Anglo-American warmongers, which is striking terror into the hearts of all reactionaries.

The Congress rulers of Madras fondly hope that by banning CROSSROADS they will be able to escape the just ire of the people and isolate and crush the democratic movement in Madras State.

Their hopes will be belied. This latest fascist attack will only serve to rouse the anger of the people yet more. It cannot intimidate them. A powerful movement both in Madras and outside will develop to compel the Ministry to retrace its steps.

This attack is one more proof that the Congress rulers are afraid of truth. Their ways are the ways of Hitler and Mussolini. They are out to muzzle the voice of the common people.

We have every confidence that our readers and democratic-minded people will rally in support of CROSSROADS. They will rain protests on Madras Ministers. They will demand revocation of the ban order.

This attack on the freedom of the Press must be met and answered. In the interests of the civil liberties, in the interests of honest journalism, in the interests of the movement for freedom and democracy, all progressive people must raise their voice against the Madras Ministry's ban on CROSSROADS.

THE BAN MUST GO

Figure 1.5 "Madras Ban on *CrossRoads* Must Go," *CrossRoads,* 17 March 1950
Source: Microfilms Division, Nehru Memorial Museum and Library.

militant, but it did start to cover a number of themes similar to *CrossRoads*, such as the denial of civil liberties. It spoke of the formation of a civil liberties group in Delhi called the *Jan Adhikar Samiti*, and carried a series from a lawyer in Shimla on "Your rights under arrest." Another issue in October 1948 called for the repeal of Public Safety Acts, and an article in November by Balraj Madhok was entitled "Fundamental Rights Have Been Made the Playthings of the Party in Power." An article in 1949 covered hunger-strikes in jail, in early 1950 it complained about the lack of "Fundamental Freedoms" in the Constitution. While it was critical of Nehru and the Congress, it was not virulently so.

There was a marked change in tone starting in late 1949, when it started covering violence against Hindus in East Bengal.[33] In December 1949 a police squad had gone to Kalshira village in Khulna district to arrest suspected Communists. It was alleged that they mistreated women in what was a predominantly Hindu village – this led to a clash with the villagers in which two policemen were killed. A larger party of police, along with a militia aided by local Muslims, retaliated by destroying houses and assaulting villagers in the area. Some of these villagers then escaped to West Bengal: by the middle of February the Indian government claimed that 24,000 refugees had entered West Bengal. Their stories of harassment led to anti-Muslim riots in early February, fomented by the Hindu Mahasabha. These in turn led to the migration of Muslims out of West Bengal to East Pakistan, and a fresh cycle of anti-Hindu riots in Dhaka followed by further migration to West Bengal. In August 1950 the Government of India claimed that between 7 February and 8 April 1950, 8,57,579 Hindus had left East Pakistan for India, and 3,68,778 Muslims had left in the reverse direction.

In February 1950, Nehru suggested a number of confidence-building measures to his counterpart in Pakistan, Liaquat Ali Khan, including the setting up of joint fact-finding commissions in each of the two provinces, and later that they should make a joint visit to the affected areas.[34] Liaquat demurred, suggesting instead that they take steps to discourage the migration of minorities. Meanwhile, Nehru faced an enormous amount of pressure from within his party, as well as the country as a whole, to take "strong steps" in response to the situation in East Pakistan – including the possibility of going to war if necessary, or if not, to force a transfer of populations between the two countries, accompanied by an exchange of land. These demands were spearheaded by those elements of the political class of Bengal which had urged the Partition of the state just a few years before.[35] Amongst them was Syama Prasad Mookerjee, former leader of the

33 The accounts which follow are based on Srinath Raghavan, "Bengal 1950," in *War and Peace in Modern India* (Ranikhet: Permanent Black, 2010) and B. D. Graham, "Syama Prasad Mookerjee," in D. A. Low, ed. *Soundings in Modern South Asian History* (Berkeley; Los Angeles: University of California Press, 1968). Their accounts differ in minor respects.

34 See Raghavan, op cit., for a detailed analysis of India's diplomatic attempts to bring Pakistan to the table, as well as internal conversations within Congress and the Cabinet about the possibility of military action.

35 See Joya Chatterji, *Bengal Divided: Hindu Communalism and Partition, 1932–1947* (Cambridge: Cambridge University Press, 2010) for a very helpful guide to this broader political landscape.

Hindu Mahasabha, then a member of Nehru's Cabinet as Minister for Industries and Supplies.[36]

Nehru was opposed to war for a number of reasons – while he was confident of the prospects of a military victory, and did not rule out the possibility of going to war, he thought it would be disastrous from the point of view of protecting the rights of Hindu minorities in Pakistan, who would face the brunt of retaliatory violence. In the end, Liaquat did agree to a meeting with Nehru, partly out of worries about the mobilization of Indian troops along the Eastern border. On 2 April 1950 the two Prime Ministers met in Delhi, and on 8 April signed what came to be called the Delhi or the Nehru-Liaquat Pact. It affirmed the intention of both governments to protect their minorities, restore communal harmony, and provide help both to migrants and refugees who wished to return. The Pact was seen as unsatisfactory by some of Nehru's opponents like Syama Prasad Mookerjee, who doubted Pakistan's good faith: Mookerjee resigned from the Cabinet in protest.[37]

The press had played an important role in the pressure campaign against Nehru, and the *Organiser* was no exception. On 27 February it published three articles for which it was later asked to "explain itself" before the Delhi Provincial Press Officer.[38] One of these was a front-page column entitled "Six Questions" from an un-named Special Correspondent:

Is it a fact –

1 That one of these days the Chittagong Mail crossed into Bharat with no passengers but only broken bangles and numerous blood spots?
2 That while the Chief Secretaries of East and West Bengal were conferring in Dacca, a massacre of Hindus was staged just outside the venue of the meeting – . . .
3 That planes reaching Calcutta on 16 February, brought only old woman and children because all the men-folk of the party had been murdered, and all young women abducted, in Dacca?
4 That life in Dacca is so insecure that our Deputy High Commissioner in Dacca has sent away his family to Calcutta?
5 That a number of refugees on reaching Bharat are exchanging blood for bread – in the blood banks?
6 That Karachi has sent 30,000 Baluchi and frontier troops to Chittagong?

36 Mookerjee had resigned from the Hindu Mahasabha in November 1948, over a disagreement having to do with whether the Mahasabha's status as a political body exclusively concerned with Hindu interests: Mookerjee felt that after Independence there was no longer any need for such a body.

37 Mookerjee was to play an important role the following year in debates on freedom of speech at the time of the First Amendment. See Burra, "Arguments from Colonial Continuity" for more on this.

38 The original articles and cartoons from the *Organiser* mentioned here can be found online at http://web.iitd.ac.in/~burra/research/civ-lib-resources.html.

Another was a cartoon on Nehru's policies vis-à-vis the refugees, attributing to him the statement that "Government's responsibilities were as much to protect the interests of nationals in general as to protect the minorities of India, no matter what Pakistan did to its minorities." It showed Nehru, in one panel, as a cobra protecting (Muslim) evacuee property from (Hindu) refugees coming into India, and in another, feeding a Muslim man in his arms from a milk-bottle labelled "Protection." This image of the "appeasement" of Muslim minorities in India was contrasted in a third panel with the situation in Pakistan, where the gleeful Premier Liaquat Ali Khan is watching as a baby labelled "Pak minorities" is burned above a bonfire.[39]

The third article which came to the Press Commissioner's attention was titled "Villains vs. Fools." It began: "The villainy of Pakistan can be matched only by our own idiocy," and went on to criticize the government for its policy on Muslim evacuee property:

> We do not want Muslim evacuee property to be "administered". It must forthwith be disbursed among the most needy Hindu refugees. The fact of the meagreness of Muslim evacuee property need no confound our government. There can be no two opinions about Leaguers. Their place is in Bharat. It is easier for a camel to pass through the needle's eye than for a Leaguer to be loyal to Bharat. Wolves in sheep-skin are Wolves all the same. They must be shown the way to the land of their sanguine labours. Their disloyalty is a fact. How many of them have supported our defence of Kashmir? Can they be relied upon to defend Bharat? Bharat is no charity-house. And charity to wolves? – Never! The enemies of Bharat and Bharatiyata can have no place in Bharat. No sermons on secularism by its highest priests can reverse this fact.

On 6 March, the *Organiser*'s front page carried the headlines "Organiser Threatened." The article below, subtitled "Delhi Administration Endangers Freedom of the Press," began defiantly:

> During the brief but brilliant career of 32 months of the *Organiser* the first free government of Bharat has thought fit to ban it outright on three occasions and thus stop its publication for an aggregate period of 14 months. The Delhi Administration, however, seems far from satisfied about its hat-trick performance and seems bent upon taking some action against it once more. In the circumstances I deem it my duty to place the whole matter before the general public to enable it to form its opinion about it.

The article was by the *Organiser*'s editor, K. R. Malkani, and recounted two previous instances in which he had been called before the Delhi Provincial Press

39 "Flogging the Dead Horse," *Organiser*, 27 February 1950. The original cartoon is available at http://web.iitd.ac.in/~burra/research/civ-lib-resources.html#flogging.

Officer before the Central Press Advisory Committee: these were for articles written in the issues of 12 January and 17 February.

He ended on an equally rousing note:

> We owe it to the public to lay before it official acts of harassment of the press for publication of undisputed facts in a manner which has not disturbed, and is not likely to endanger, the public peace. To threaten the liberty of the press for the sole offence of non-conformity to official view in each and every matter, may be a handy tool for tyrants but only a crippling curtailment of civil liberties in a free democracy.
>
> We trust the Delhi administration will work for the consolidation of liberties, and not for their denial. A government can always learn more from "bona fide" criticism of independent-thinking citizens than from the fulsome flattery of charlatans.

It is hard to see the "Six Questions" as involving "undisputed facts" whose publication was unlikely to "endanger the public peace," but the *Organiser* continued to editorialize about its own censorship, while writing extensively about the Bengal situation.

One trope was the use of personal testimony to detail the horrors faced by Hindus in East Pakistan, for instance by reprinting purported extracts from letters sent by them. One letter begins "We may be killed at any moment. An orgy of loot, arson and massacre has started in our Hindu area since Sunday. . . . We may be destroyed, along with our property, at any moment."

Another letter is more dramatic:

> MOTHER AND ALL OTHERS HAVE BEEN INHUMANLY KILLED. I ALONE AM ALIVE. NOTHING MORE. ONLY IF I MEET YOU IN THE FUTURE CAN I TELL YOU HOW ALL THIS HAPPENED. FOR I CANNOT SAY WHAT WILL BECOME OF ME EVERY PASSING MOMENT.

A third extract, from a young girl to her father, is more dramatic still:

> JUST YESTERDAY MOTHER'S *NICCA* WAS PERFORMED. I AM TO BE MARRIED TOMORROW. DO NOT COME HERE. THESE BEASTS WILL KILL YOU.
>
> ("Without Comment Again", *Organiser*, 27 February 1950; capitalisation in original)

On 2 March the *Organiser* received an order from the Chief Commissioner requiring it to "submit for scrutiny, in duplicate, before publication, till further orders, all communal matter and news and views about Pakistan including photographs and cartoons other than those derived from official sources or supplied by the news agencies." This order was pursuant to a determination, under the

terms of the East Punjab Public Safety Act, 1949, that it had been publishing "highly objectionable matter constituting a threat to public law and order and that action as is hereinafter mentioned is necessary for the purpose of preventing or combating activities prejudicial to the public safety or the maintenance of public order."

This order was reprinted in the 13 March issue, which also contained a front-page editorial criticising it, side-by-side with an emotional appeal to support the "*Organiser*'s Bengal Relief Fund," which was to be administered by the Bengal Provincial RSS. The appeal spoke of "Harrowing tales of ghastly barbarities of cold-blooded murders and mass expropriation, of beastly violations of chastity and forced conversions to an alien hated creed"; the editorial concluded

> Facts are sacred. To withhold their publication because they are unpalatable would be to play false to Truth. If the administration earnestly wants ugly facts not to appear in the press, the only right and honest course for it is effectively to exert itself for the non-occurrence of such brutal facts. Suppression of facts is no solution to the Bengal tragedy. Surely the Government does not hope to extinguish a volcano by squatting the more tightly in its crator [sic].

Bengal continued to be the main theme through March and April, with the Liaquat-Nehru parleys being a particular focus for criticism – an article in the 3 April edition was titled "Peace if Possible, War if Necessary." But now the *Organiser* also drew attention to "Censors Scissors" when parts of an article had not been approved for publication; occasionally, this would extend to an entire article: thus on 24 April it published a blank page with a copy of the Provincial Press Officer's order not to publish an article on the Education Ministry, then run by Maulana Azad.

A week earlier, the *Organiser* announced on its front page that it had challenged the ban in the "Supreme Court of Bharat," and that hearings were scheduled for the 19 April. A great part of the 1 May edition was devoted to the case which it described on its front page as *"Organiser" vs. The State*; it carried a detailed account of the oral arguments before the Supreme Court. On 5 June, it announced on its front page news of "A Great Event": the Court had declared the relevant section of the East Punjab Public Safety Act unconstitutional. The judgement was published on the front page, which also carried a note of "Thanksgiving" to its sympathisers and readers who "bore with us the censor's scissors for three long months."[40]

40 The judgement had been delivered on 26 May: The Supreme Court had decided it on the same day as the *CrossRoads* case, on substantially similar grounds. This is why the *Organiser* judgement is brief: the bulk of the analysis was provided in the *CrossRoads* case. For an analysis of the reasoning of this case, see Burra, "Arguments from Colonial Continuity." See Austin, *Working a Democratic Constitution* for a discussion of the immediate aftermath of these judgements.

In an editorial in the same issue entitled "All's Well That Ends Well," Malkani wrote triumphantly

> After a gruelling three months subjection to the galling orders of an over-reaching executive we once again breath the air of freedom. Our felicity is heightened by the fact that the freedom achieved is for the whole nation and not a mere personal salvation. For our freedom marks the guaranteeing of the freedom of the entire press of the Nation. Generations yet unborn will look upon this decision as the corner stone of the arch of liberty for the people no less than for their press. For the press it is a veritable Magna Carta under whose provisions it can go from strength to strength in an empyrean of liberty. We have no words to congratulate the Supreme Court for its supreme sense of duty to uphold the spirit of our Democratic Republican Constitution. We thank them not only on behalf of ourselves but on behalf of the entire national Press of Bharat.

Malkani concluded with a reference to *CrossRoads* – the first time either of these journals had acknowledged the other's role in the legal battle for press freedom:

> [D]emocracy lives by a free press. The free press is the first casualty of fascist regimes the world over. Democracy lives, so long as press lives to inform, instruct, and organise public opinion. If free press goes democracy too goes even as the day passes with the setting of the sun. That we an our Bombay contemporary should have been the vehicle of this democratic dispensation to the national press is a source of gratification to us.

The *Organiser*'s cartoonist turned to mythology, depicting a bearded sage sitting in front of a house labelled "Organiser," protected from the arrows of a royal figure assaulting him by a staff labelled "truth." In the background is a cow, the "Kam Dhenu," representing freedom of the press. The caption explains:

> By his "Brahma-danda", Rishi Vashista nullified the furious assault of King Vishwamitra for the capture of "Kamadhenu". The democratic Constitution nullified the government efforts to deprive the nation of the free services of its "Kamadhenu" – the free press.[41]

IV

Despite a common opposition to the Congress, *CrossRoads* and *Organiser* were journals driven by very different – and usually completely antithetical – political ideologies, and the circumstances of their censorship were rather different. In the

41 "Organiser vs. The State," *Organiser*, 5 June 1950. The cartoon is available at http://web.iitd.ac.in/~burra/research/civ-lib-resources.html#kamadhenu.

case of *CrossRoads* there does not seem to have been much more at stake than government embarrassment, while in the case of the *Organiser* there were serious concerns both about public order within the country, as well as with regards to foreign policy. Nevertheless, they articulated their concerns about censorship in almost exactly the same way, seeing them as an assault on democracy and civil liberties. Malkani's final editorial might well have been written by Thapar, and the Supreme Court's judgements do not once refer to the actual views expressed in either journal.

What are we to make of this? There are at least three ways in which to interpret the facts. The first interpretation is cynical: neither the communists nor the Hindu right had any interest in civil liberties as such, but used the language of civil liberties because it was a useful strategic device with which to defend its own partisan political interests and oppose the government of the day. The second interpretation is not cynical so much as opportunistic: here the claim would not be that the parties in question were uninterested in civil liberties, but that their interest in civil liberties was limited to those liberties which most affected their own people; this is the charge of "sectarianism." The third interpretation is a more principled one: the players involved really did have a commitment to civil liberties as such, which extended to the civil liberties of groups other than their own.

I wish to offer some evidence in favour of the third, "non-sectarian" interpretation of this episode, focussing here on the Hindu right, though I suspect that the argument applies more broadly. Before I do so, it is worth pointing out, first, that one should not assume that the groups involved were monolithic entities. Syama Prasad Mookerjee, for instance, resigned from the Hindu Mahasabha in 1947 because he felt that after Independence there was no need for a separate political forum to represent Hindu interests alone. Second, one should not assume that simply because a group or a formation has a self-interested motive in making a civil liberties claim, it is thereby cynical or opportunistic.

How one might begin to make such a case? Let me start with the figure of N. C. Chatterjee, the lawyer for the *Organiser*. Chatterjee was also the President of the Hindu Mahasabha in 1947 and then again in 1954, and ran for the first and second Lok Sabha elections (in 1952 and 1957) as a Hindu Mahasabha candidate.[42] His son, Somnath Chatterjee – distinguished leader of the Communist Party of India (Marxist) and Speaker of the Lok Sabha – reports that his father became disaffected with the Hindu Mahasabha's politics and stayed away from it following the period just after Mahatma Gandhi's assassination: it was during this time (July 1948) that he was appointed a judge of the Calcutta High Court.[43]

42 Many thanks to Rohit De for initially encouraging me to explore N. C. Chatterjee's contributions in relation to this project.

43 See Somnath Chatterjee, *Keeping the Faith,* 14–17 for biographical details on N. C. Chatterjee.

Chatterjee resigned from the judiciary in 14 months, fearing that the new constitution would disallow members from the judiciary from ever taking up legal work after retirement. He then moved to Delhi and began a Supreme Court practice. It was at this time – right around the *Organiser* case – that he renewed his acquaintance with the Hindu Mahasabha.

Chatterjee was also a member of the Calcutta Civil Liberties Committee (CLC), set up following the ban on the Communist party imposed by the B. C. Roy government in 1948. While the CLC was a communist-led initiative, it included among its members figures such as Meghnad Saha, K. P. Chatterjee, and Sarat Bose.[44] A flavour of the CLC's vision is related in the following anecdote by Nilanjan Dutta:

> During a discussion with the author a veteran communist activist recalled that once an old lawyer attached to the CLC had told him: "You know what is the difference between your approach and mine? You are not interested in civil liberties as such, you are only interested in your comrades' release. I am also interested in getting your comrades released, but only as part of the civil liberties movement."[45]

Somnath Chatterjee writes that his father's involvement with civil liberties increased after his defeat in the 1957 Lok Sabha elections. He was a prominent office-bearer of the All-India Civil Liberties Council and was its President in 1958.[46] In 1966 he was involved in constituting an independent Commission of Inquiry appointed by the Democratic Lawyer's Association – an organ of the CPI(M) – to probe police firings across West Bengal on the day of a general strike, in which 25 people were killed: the other members were Mr. Arub Prokash Chatterjee, Justice A. N. Mulla, and Justice Sarju Prasad.[47] He also fought against

44 See Nilanjan Dutta, "With Little Victories and Big Defeats," in Sujato Bhadra, ed. *Civil Rights: Past and Present* (Calcutta: Association for the Protection of Democratic Rights, 1986) and "From Subject to Citizen," in Michael Anderson and Sumit Guha, eds. *Changing Conceptions of Rights and Justice in South Asia* (SOAS Studies on South Asia, 2001). Curiously, in this latter piece he refers to these figures, including Chatterjee, as "non-partisan" intellectuals.

45 Dutta, "With Little Victories," 45. Dutta attributes the decline of the CLC to its sectarianism, since it was no longer relevant to the communists after their cadres were released from jail in the early 1950s.

46 See N. C. Chatterjee, "Presidential Address to the All-India Civil Liberties Conference," 26 April 1958 (Ambala). D. R. Kakati writes that Chatterjee was to have presided over the All Assam Convention of Civil Liberties in mid-1951, but could not attend because of illness. See D. R. Kakati, "The Civil Liberties Movement in Assam," in APDR, ed. *Civil Rights Past and Present* (Calcutta, 1986).

47 See Nilanjan Dutta, "Democratic Rights in West Bengal – Issues and Approaches," in A. R. Desai, ed. *Expanding Government Lawlessness and Organised Struggle* (Bombay, 1991). Somnath Chatterjee writes that his father organized the constitution of "the important Mulla Commission and Sarjoo Prasad Commission of Enquiry, non-official bodies that looked into human rights violations and civil liberty issues" (17). Here I believe is confusing

the detention of communist leaders such as Jyoti Basu under the Defence of India Rules. Indeed, he was close to many members of the undivided Communist Party of India (CPI), then led by a great admirer of his, S. K. Acharya.[48] In the mid-1960s, he also wrote a book on emergency powers and the law.[49] Along with M. C. Setalvad and others, he was also involved in campaigns against the Defence of India Act and the declaration of emergency following the Chinese withdrawal in 1962.[50]

These facts by themselves suggest that Chatterjee's involvement in the *Organiser* case was not a sectarian one. But consider in addition a remarkable speech of his to the Rajasthan Bar Council, entitled "Law and Lawyers in Free Bharat." Extracts from this speech were published by the *Organiser* in May 1950, in an issue which also carried the reports of the oral arguments before the Supreme Court.[51]

The speech begins as one might expect, with the invocation of a shared history between Bengal and Rajasthan in which figures such as Rana Pratap are given pride of place. He alludes circumspectly to the Bengal riots as involving devastation and inhuman atrocities, and extends gratitude to the people of Rajasthan for an expression of solidarity in this "hour of peril." The "fundamental unity of culture and sentiments" ("reinforced by the logic of mutual national interests") which binds Bengal to Rajasthan as well as to "the rest of Bharat" is an assuredly Hindu one.

Nevertheless, the bulk of the speech, which concerns the importance of lawyers and the judiciary in protecting personal liberty under the new constitution, does not hark back to an imagined Hindu past, but rather points to strands of contemporary liberalism evinced in England and the United States. The justification for

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the 1966 Commission with later official commissions on corruption and improper conduct, one headed by Justice Mulla in Kerala in 1967, and the other headed by Justice Sarju Prasad in Orissa in 1971. See A. G. Noorani, "Commissions of Inquiry: Skeletons in the cupboard," *India Today*, 15 June 1977, http://indiatoday.intoday.in/story/commissions-of-inquiry-skeletons-in-the-cupboard/1/435599.html, last accessed 24 December 2015. According to Somnath Chatterjee (19), the Democratic Lawyers' Association was an organ of the CPI(M).

48 The CPI approached him to contest a Lok Sabha bye-election as an Independent candidate with their support in 1963, and then again in the fourth general elections in 1967; it was only with his permission that Somnath Chatterjee himself joined active politics as an Independent with CPI(M) support in the fifth Lok Sabha elections in 1971. See Chatterjee op cit., 17–22.

49 P. Parameswara Rao, *Emergency and Law, with Special Reference to India* (Bombay: Asia Book House, 1966).

50 See Austin, *Working a Democratic Constitution*, pp. 65–66. Chatterjee contributed, along with Setalvad and others, to a volume, *Parliament: Emergency and Personal Freedom – Opinions of Jurists* (New Delhi: Bar Association of India, 1963). He was also signatory to an appeal to the President and Prime Minister to revoke the Emergency and restore fundamental rights, signed by all former Chief Justices of India as well as other eminent personalities.

51 N. C. Chatterjee, "Law and Lawyers in a Free Bharat," *Organiser* III:36, 1 May 1950, p. 8 and 19.

the enforcement of Fundamental Rights is the classical liberal doctrine of limited government:

> The Bharatiya Constitution has prescribed and guaranteed certain Fundamental Rights like the rights of free speech, free association, freedom of movement and security from unlawful detention to all the citizens. It is the prerogative and the duty of the Judiciary to dispense Justice in such a manner that the Fundamental Rights may be effectively enjoyed by the citizens of Bharat. Every Government is apt to have an unconscious bias in its own favour. Power has sometimes a corrupting influence and consciously or unconsciously, a Government is often led to a position from which it does not like to retrace. When there is no organised Opposition Party functioning in a State, opposition is likely to be crushed, criticism may be resented, the press may be muzzled and the executive may be vested with extraordinary powers. It is for the Judiciary to step in and to prevent the violation of the Constitution and the infringement of the rights and liberties of the people which have been guaranteed under the new dispensation.

The heroes now invoked are judges of the US Supreme Court such as Cardozo, Holmes, and especially Brandeis ("It is the dream of every free-thinking citizen that Independent Bharat will produce Judges and Jurists like Mr. Justice Brandeis, who will have the vision and the courage to utter words pregnant with wisdom and hope"). He goes on to quote Brandeis' famous dissent in *Whitney v. California*:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed that freedom to think as you will and to speak as you think – are means indispensable to the discovery and spread of political truth; that without free speech and assembly, discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine.

It might seem surprising that an office-bearer of the Hindu Mahasabha would appeal in a defence of free speech not some ancient or imagined Indian past, but a liberal judge of the American Supreme Court, whose views echo Mill's defence of freedom of speech as involving a "marketplace of ideas." In the conclusion of this chapter, I will argue that the appearance of contradiction is illusory – not because of some deep fact about the ideology of the Hindu right, but because of a deep fact about the nature of civil liberties, at least as classically construed.

V

Chatterjee was not alone in articulating a civil libertarian position based upon the fear of arbitrary government action. In 1948, Chatterjee's associate P. R. Das

wrote a remarkable pamphlet entitled "Liberty Under the Draft Constitution," which was a critique of the proposed Art. 21 formulation of the guarantee of life and liberty. The criticism was the familiar one that without a "substantive due process" guarantee, the article allowed the legislature to pass any law restricting liberty, as long as it met the procedural requirements to make it a valid law. But Das articulated the worry in especially clear terms, pointing to the inherent dangers of being corrupted by power:

> "We, the people of India" are about to give ourselves a Constitution; and it is of the utmost importance that we should examine "The Draft Constitution" with a view to ascertaining whether it embodies a guarantee of personal liberty against the coercive powers of the State. It has been suggested that a guarantee of personal liberty, however important under a monarchical government, a foreign government, is of no moment in a constitution of a Government framed by the people for themselves and under which public affairs are to be managed by an Executive chosen by the People. So it was argued by the framers of the American Constitution; and in the Constitution originally framed, there is no guarantee of personal liberty at all. But experience showed that such a guarantee was necessary even though the Executive were chosen by the people themselves. Why? As Pandit Nehru has said somewhere in his *Discovery of India* – "Power corrupteth a man and absolute power corrupteth absolutey" [sic]. The aggressive tendency of power is such that it was deemed necessary by the fathers of the American Constitution to enact this guarantee, and this they did by the celebrated Fourteenth Amendment.[52]

In 1949 Das had presided over the All-India Civil Liberties Conference at its first session in Madras. For this inaugural session, the Madras Civil Liberties Union published a volume of reports concerning civil liberties violations across the country. Many of these reports concerned violence against trade union leaders and communists. But it is clear that the civil liberties community saw restraint of communists as part of a larger problem. One of the reports, for instance, reprints the answer to a question posed in the Madras Assembly on the number of RSS prisoners detained in Madras Province in 1949. The report presents this information in two columns, one each for communists and the RSS (see Figure 1.6).

52 P. R. Das, "'The Draft Constitution' and Personal Liberty," *Indian Law Review Office* (to be published in a combined issue of the *Indian Law Review*: vol II, 3&4). Das was also the lawyer for a number of prominent zamindars in zamindari abolition cases in the early 1950s, starting with *Sir Kameshwar Singh (Darbhanga) v Province of Bihar* (AIR 1950 Patna) and continuing through *Shankari Prasad Deo v The Union of India and the State of Bihar* (1952 (3) SCR 89). In the latter case he was joined by N. C. Chatterjee, who had argued in *Bela Banerjee's* case that a law providing for the acquisition of property for evacuee purposes was unconstitutional; apparently Chatterjee was against land ceilings altogether. See Austin, *Working a Democratic Constitution*, 90. Das also gave the Presidential Address at the All-India Democratic Convention in Lucknow in May 1950, which had been organised by zamindars: he says in his speech that he is not a communist, and believes in private property (Syama Prasad Mookerjee's papers, subject file 54, Ist installment).

APPENDIX II

R. S. S. PRISONERS IN MADRAS

2846 were arrested, 96 detained, and 1098 convicted.
(Reply to a question in the Madras Assembly)
(See Hindu March 28, 1949.)

The number of R. S. S. prisoners for the whole of India is between 3000 and 4000. All minor members under the age of 18 have been released. In other cases too releases have been liberal and more releases are expected (4-6-49. API)

Communists and R.S.S. Arrests in Madras Province.

		Communists. (*No. of arrests*)	R. S. S. Members. (*No. of arrests*)
Madras City	...	37	752
Anantapur	...	7	nil
North Arcot	...	64	nil
South Arcot	...	6	nil
Bellary	...	11	nil
Chingleput	...	5	nil
Coimbatore	...	229	nil
East Godavary	...	239	132
West Godavary	...	137	7
Guntur	...	1,001	301
South Kanara	...	276	532
Krishna	...	2,739	330
Kurnool	...	66	1
South Mathurai	...	7	nil
North Mathurai	...	87	265
Malabar	...	1,491	214
Nellore	...	174	36
Ramnad	...	66	nil
Salem	...	97	264
Tanjore	...	44	nil
Tirunelveli	...	65	nil
Tiruchirapalli	...	47	nil
North Vizagapatam	...	163	2
South Vizagapatam	...	89	3
		7,145	2,837

Up to January 31st, 7271 Communists were arrested, 4632 were prosecuted and 1067 detained, 1578 Communists were released (including those detained or prosecuted and subsequently released).
(Reply to a question in the Madras Assembly March 21)

Figure 1.6 "R.S.S. Prisoners in Madras" (Madras Civil Liberties Union, 1949)

In a companion volume to this conference, *Civil Liberty under the New Constitution*, S. G. Vaze of the Servants of India Society gave an analysis of three freedoms threatened in the new constitution – those of association, speech, and personal liberty. He begins his analysis of freedom of association by mentioning the RSS ban of February 1948, discussing it in classic civil libertarian terms:

> Thereupon followed, throughout the country, the detention of thousands of R.S.S. workers in custody without trial, and when this continued for several

> months, a protest movement was carried on by the R.S.S. on a very large scale, demanding that the ban on the Sangh be lifted and that those who were suffering imprisonment without any charge being proved against them be either released or put on their trial for specific charges.

A sentence later he makes a comparison with the Communist party:

> Like the R.S.S., the Communist party was also declared an unlawful association in West Bengal, and it is reported that the Central Government is considering the question of banning the party throughout India. Although in provinces other than West Bengal the party as such is not under a ban, this has not prevented the governments in these provinces from depriving communists of their personal liberty and detaining them in prison for an indefinite period under various extraordinary laws. It is obvious that communists have escaped being declared members of an unlawful association only because of the power conferred by these laws upon the executive to impose what restraints it chooses upon their personal freedom.[53]

S. G. Vaze was the Secretary of the All-India Civil Liberties Council, which was based out of the Servants of India Society in Pune. Very little has been written about what seems to have been a remarkable organization.[54] It published a monthly newsletter called the *Indian Civil Liberties Bulletin*, edited by Dr. R. G. Kakade.[55] After the Madras conference in 1949, it held All-India Civil Liberties Conferences in Patna (1950), Nagpur (1951), and Bombay (1952); the Patna proceedings were covered approvingly by both *CrossRoads* as well as the *Organiser*. Its office-bearers included trade union leaders such as N. M. Joshi of the All India Trade Union Congress, as well as prominent members of the Hindu right, such as Syama Prasad Mookerji, who presided over its Nagpur session.

53 The RSS/Communist comparison was made frequently, for instance in Parliament (see e.g., Patel's speech to Parliament reported on 18 March 1949, *Collected Works of Sardar Patel* vol. XIV p. 105). In 1950, the *Organiser* carried a criticism of the Supreme Court's judgement in the *A K Gopalan* case, in which it upheld the constitutionality of preventive detention (Gopalan was a prominent Communist leader from Kerala).

54 It merits one mention in passing in Somnath Chatterjee's memoirs, and a couple of footnotes in Granville Austin's history of the Indian constitution, and none at all in the otherwise fascinating accounts of the histories of the civil liberties movement by Nilanjan Dutta, in "From Subject to Citizen," and "With Little Victories and Big Defeats". The annual reports of the Servants of India Society give something of a flavour of the Council's activities. Indeed, the Society had a role to play in the defence of civil liberties beyond the activities of the members in the council: H. N. Kunzru, its head, and Lakshmi Narayan Sahu, a Senior Member, were both members of the Constituent Assembly and raised many civil liberties issues there. Vaze's name is also mentioned by Damodar Swarup Seth in connection with the right to freedom of speech, in a debate on the draft Constitution on 1 December 1948.

55 To give a flavour of the contents of these Bulletins, Granville Austin reports (*Working a Democratic Constitution*, 62) that the Bulletins for August and September 1952 carried lengthy analyses of the law of preventive detention, along with reports of individual detention cases and parliamentary debates.

The Council also had an interesting international connection. It was an affiliate of the International League for the Rights of Man, established in New York in 1941, and headed by Roger Baldwin, who also founded the ACLU; P. R. Das was a member of the Advisory Committee of the League.[56] The League's work was directed mostly at the United Nations, and the Council corresponded with the Human Rights Commission in 1953 during its deliberations over the Covenants on civil and political rights as well as social and economic rights.[57]

The Council's re-print of Nares Chandra Sen Gupta's presidential address in 1952 published this ringing endorsement by Baldwin of the *Bulletin*:

> The Indian Civil Liberties Bulletin is the most complete coverage of national issues of any publication in the world specializing in civil rights. It combines scholarly legal research with forthright positions in the best tradition of principles now generally accepted by always highly controversial in application. To us abroad it conveys the most satisfactory interpretation of civil liberties which we get from any country. In the present formative state of Indian law and practice, and in the face of much journalistic misinformation about India here, we find the BULLETIN invaluable.
>
> The BULLETIN deserves a far wider audience in India than it appears to have, considering the imperative need in any democracy of critical opposition to any inroads on rights presumably guaranteed by law. Liberty lives only by the courageous and persistent efforts of its champions and defenders. The BULLETIN has that spirit, as well as fidelity to fact and principle, uncompromised by partisanship of any sort.

The presidential addresses to the annual conferences offer some useful insights into thinking about civil liberties in this period. One sees a distinct libertarian strand in Atul Chandra Gupta's address at the Patna conference in 1950:

> Hitler is dead and Germany is down. But the cult of immediate success by harnessing the total energy of a nation is stalking abroad. . . . But in the process the soul of the nation dies within. Great thoughts and great imagination disappear, as they only flourish when the mind is free and not driven by problems authoritatively set. Between the regulation of a police-state and the regimentation of a super-welfare state it is not easy to say which is more killing.

56 See Jan Eckel, "The International League for the Rights of Man, Amnesty International, and the Changing Fate of Human Rights Activism from the 1940s Through the 1970s," *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 4:2, Summer 2013, pp. 183–214.

57 See, for instance, the letter of March 31, 1953 from S. G. Vaze, Secretary of the Council, to J. P. Humphreys. United Nation Archives at Geneva, file: SOA 317/1/01 (3) G – Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation, Comments from Organizations. Thanks to Ananda Burra and Nathan Kurtz for bring this letter to my attention, and to Neyko Iltchev of the United Nations Archive for making it available to me.

Another insight is that national independence was compatible with the loss of individual liberty. Here is how Nares Chandra Sen Gupta makes the point in 1952, in an address chiefly devoted to the topic of preventive detention. He refers to the fact that leaders of the Congress have been charged with hypocrisy for defending the very policies which they agitated against before Independence:

> I do not forget that the ministers are not frank enough to acknowledge their faith. They insist there is a distinction. Those who drove the screw in the past were aliens. The same screw would change to sweetmeat in the hands of a national government. Not so, I am sure, to the sufferer. The animal which is having its tail twisted would not feel the difference if the hand that twists it changed from white to black.
>
> But if these stalwarts of the Congress can be charged with having eaten their words, I do not think that the Congress organisation, which is now ruling us, can fairly be charged with such a *volte face*. For since the famous Karachi resolution it has always avoided any reference to the term 'freedom' and set their goal to be 'independence,' pure and simple, which is now in their pocket. I had the temerity then, thanks to the editorial hospitality of our good friend, Mr. Vaze, to point out that the independence spoken of by the Congress did not necessarily mean 'liberty' or 'freedom.' I suppose everybody will now acknowledge that I was right. The Congress was not committed to personal freedom of the citizen as part of its goal.

Many writers on the history of civil liberties in India have noted that the Congress abandoned its civil liberties platform after coming to power: at the Madras civil liberties conference in 1949, the lawyer A. K. Pillai remarked that "[f]rom our experience, the all-too-limited liberties which the subject had under the British regime, have themselves become the first casualty in the wake of the advent of national independence."[58]

But it is important to see that Nares Chandra Sen Gupta is also making an important conceptual point about the distinction between political sovereignty and personal liberty. This is a distinction which is often obscured by the use of the term 'freedom' to refer to both. Berlin makes this point especially clearly in his discussion of Mill:

> The third characteristic of this notion of liberty is of greater importance. It is that liberty in this sense is not incompatible with some kinds of autocracy, or at any rate with the absence of self- government. Liberty in this sense is

58 In 1936, Jawaharlal Nehru set up the Indian Civil Liberties Union, but it seems to have run out of steam well before Independence. See Datta, "From Subject to Citizen," 280 and more generally Munmun Jha, "Nehru and Civil Liberties in India," *International Journal of Human Rights* 7:3, 2003; also Kalyani Ramnath, "ADM Jabalpur's Antecedents: Political Emergencies, Civil Liberties, and Arguments from Colonial Continuities in India," *American University International Law Review* 31:2, 2016, pp. 228–231.

> principally concerned with the area of control, not with its source. Just as a democracy may, in fact, deprive the individual citizen of a great many liberties which he might have in some other form of society, so it is perfectly conceivable that a liberal-minded despot would allow his subjects a large measure of personal freedom. The despot who leaves his subjects a wide area of liberty may be unjust, or encourage the, wildest inequalities, care little for order, or virtue, or knowledge; but provided he does not curb their liberty, or at least curbs it less than many other regimes, he meets with Mill's specifications.[59]

VI

I think there is enough evidence to suggest that the story of the *CrossRoads* and *Organiser* cases is part of a larger story of a civil libertarian tradition, now lost, whose focus was on the arbitrary exercise of state power, regardless of who exercised it, and whose members came from both ends of the ideological spectrum.[60] One might continue to tell this story in purely political terms, and argue that even if the tradition was non-sectarian, it was no more than an alliance of convenience or expediency, based on the experience of post-Independence repression at the hands of the Congress, and the principle that my enemy's enemy is my friend.[61]

59 Isaiah Berlin, "Two Concepts of Liberty," in Henry Hardy, ed. *Liberty* (Oxford University Press, 2002), p. 176.

60 I have not said anything to establish a direct link between the *CrossRoads* case and this civil libertarian tradition, but it is plausible to think that such links existed. Romesh Thapar was involved with the Bombay Civil Liberties Union, which also included trade union leaders such as Dinkar Desai who were colleagues of Vaze's in the Servants of India Society. The lawyer for *CrossRoads* in the Supreme Court was the Madras lawyer, C. R. Pattabhi Raman, who also represented V. G. Row two years later in a celebrated case regarding the freedom of association. Row was a well-known left lawyer who was accused by the State of Madras of supporting the Communist Party, which had been banned in August 1949. It seems likely that Row would have been a member of the Madras Civil Liberties Union, one of whose members, K. G. Sivaswamy, was also a member of the Servants of India Society, and an office-bearer of the All-India Civil Liberties Council. (Interestingly, Row accompanied M. K. Nambiar in his defence of the Communist leader A. K. Gopalan, who challenged the constitutionality of the Preventive Detention Act in 1950 – in this case, Pattabhi Raman appeared for the State of Madras!)

61 It is worth noting, however, that these civil libertarians would also, precisely because of their political ideologies, have had a more ambiguous or oblique relationship to the Congress-led nationalist movement *before* Independence as well, so Congress-repression cannot be the whole story. In an interview to Smitu Kothari, Justice V. M. Tarkunde, one of the founders of the People's Union for Civil Liberties (PUCL), writes that his own political leanings pre-Independence were those of M. N. Roy, whose priorities in the 1940s were with the anti-fascist struggle rather than the movement for Indian independence. See Smitu Kothari, "An Interview with V.M. Tarkunde," in Smitu Kothari and Harsh Sethi, eds. *Rethinking Human Rights: Challenges for Theory and Action* (New York: New Horizons Press and Delhi: Lokayan, 1989). Tarkunde makes a passing reference to Vaze (spelled "Waze" in the transcript).

It is hard to argue against such a reading without more evidence, though certainly the story of the All-India Civil Liberties Council does not seem to be entirely susceptible to such an explanation. I want to conclude by suggesting that an ideological commitment to civil liberties, understood as a doctrine of limited state power, is part of what makes such alliances possible. This represents both a strength and a weakness in the classical civil libertarian position.

The strength of the position lies precisely in its non-partisan character: one claims that state power should be checked *regardless* of who is in power, partly because of the corrupting potential of the exercise of that power. If one recognises the temptations of those in power to curb dissent and political opposition, regardless of who is in power, one is lead naturally to something like the Voltairean position on protecting speech regardless of what is said: content-neutrality follows as a corollary to protections against potential suppression by the institutions of the state. At least this is true of speech which represents or advocates the ideologies of particular political parties. It is precisely the non-partisan character of such a civil liberties position that allows it to accommodate a range of partisan political ideologies on other issues.

One systematic exposition of this line of thought within our own intellectual and political tradition was made by Rammanohar Lohia in a pamphlet on civil liberties published in 1936.[62] Lohia's conception of civil liberties is clearly confined, as he puts it, to "the struggle that the citizen has eternally waged against his State." On his view, "[c]ivil liberties are violated when the State either itself attacks the various freedoms of opinion and association of its citizens or permit private gangsterdom to do so. The basic factor in all such State and private violence is the fear of criticism and revolt against the existing system of laws and government." His analysis of such violations is a classic constitutional one, which locates at least one source of the problem in the fact that repressive or vague laws "deliver the citizen to the caprices of the Executive."

Lohia points out that a special defence of civil liberties as such is important even when there are broader political battles to be fought. One of these benefits is instrumental: "the front of civil liberties is more broad based and inclusive than that of freedom and progress. Among the ranks of freedom and progress, there may be differences of opinion on other matters but they will all unite on an issue of civil liberties."

Of course the weaknesses of such a position are immediately apparent as well. If one adopts a posture of uniform suspicion against the use of state power, it is hard to argue for the expansion of state power, in either the economic or social sphere. At least one needs to do so by way of an argument which distinguishes at an institutional level those laws which might be susceptible to executive abuses from those which are not. This kind of civil libertarian would at least start from a position of suspicion at laws such as the Prevention of Sati (Glorification) Act and

62 Rammanohar Lohia, *The Struggle for Civil Liberties* (Allahabad: Foreign Department, All India Congress Committee, 1936).

the Maharashtra Anti-Superstition Ordinance. The same kind of civil libertarian might wonder why an organisation like the People's Union for Civil Liberties needs to be involved, for instance, in PILs over the Right to Food.[63] Finally, such a civil libertarian might welcome the involvement of "Men's Rights" groups who opposed s. 498-A of the Indian Penal Code in debates around the Juvenile Justice Bill.

A more subtle, but equally familiar, weakness with the position is that it makes most sense upon the assumption that there is adequate institutional and intellectual space outside the realm of state-controlled activity for competing political ideologies to be articulated and debated. But if this public sphere is itself marked by deep inequalities (whether economic or otherwise), then the protection of civil liberties will have an inherently conservative bias. As Upendra Baxi pointed out a long time ago, an anti-state discourse is no help when it comes to the eradication of social evils such as sati and untouchability.[64] This is also true in the context of free speech – hence the attractions of a highly speech-protective standards for a politician like Subramanian Swamy.

The reasons why the particular strand of (what I would like to regard as) a certain form of liberalism embodied in organisations such as the All-India Civil Liberties Council did not survive are then perhaps not so hard to fathom: there has been a powerful consensus in Indian political life that state power should be used in the service of social and economic reform, and a powerful awareness of the inequalities of the political process. A civil liberties movement premised upon identifying the state as a primary source of oppression may have little traction in situations where, first, non-state actors are equal if not greater sources of oppression; and second, where the state can in some cases at least hold out the prospect of protection from such oppression.[65]

Uday Mehta makes this point vividly in the context of a discussion of the place of freedom in Indian constitutionalism:

> Arendt was clearly wrong to identify political power that concerns itself with social issues as necessarily leading to terror. But Arendt's error was one of exaggeration and not of a lack of insight, because her trenchant statement does flag a powerful tendency in the functioning of political power when such power is obligated to primarily concern itself with social questions. The prophecy regarding terror has not been borne out in India. Constitutionalism, especially when it is democratic, clearly checks tyranny and many aspects of absolutism. But the commitment to redress historical injustices, alleviate the sufferings of the body, create social equality, or a unified nation, in the manner envisioned by the Constitution, has produced a form of political

63 See *PUCL vs State of Rajasthan*.

64 See Upendra Baxi, "Law, Democracy and Human Rights," in Kothari and Sethi, ed. *Rethinking Human Rights*.

65 Many thanks to Andre Betèille for emphasizing this point to me.

absolutism. Constitutionalism in India has not led to a legacy that limits the power of the state or constrains its reach.

In this sense our constitutionalism is very much in the tradition of Hobbes, where there was never a suspicion of power, because power was identified as the condition of life. Similarly the absolutism of politics and the state has, perhaps, also contributed to a culture in which the prestige of power in all segments of the population is inordinately high. Our constitutionalism constitutes power and increases and celebrates its ambit. It is only through politics and the specific kind of power it sanctions that the nation can be imagined, administered and made just. But, it must be added, in that vision, freedom is consigned to a distant prospect and the tendency for political power to operate without limits deeply ingrained, even if it is not always acted on.[66]

Mehta's observations lead us back to an old question about the relation between concerns for individual freedom and concerns for social or economic justice. As I have noted, it is not difficult to characterise contemporary invocations of civil liberties as stemming from a desire to protect narrow parochial ("sectarian") interests, rather than an interest in defending civil liberties "as such." Putting the point in this way suggests that what is at stake is some kind of failure of character – a moral weakness or blindness on the part of those raising such concerns in such a selective manner.

I suspect, however, that this obscures a deeper diagnosis of the problem. Perhaps one reason why we lack a "non-sectarian" vision of civil liberties is simply that concerns for individual freedom have *in general* been overshadowed by concerns to achieve social or economic justice in our political thinking. If there is a failure here, it may lie in the domain of theory rather than of practice.

Many criticisms of the civil liberties movement in India have taken the form that these movements have mistakenly regarded so-called Western universalist conceptions of rights as applicable to the Indian context.[67] Taken with respect to the classical civil liberties, I suspect the criticism misses the mark: for one thing, they are addressed *to* the state, and it does not take a very great conceptual apparatus to demand justifications, say, for being locked up in jail.

The harder question for a contemporary civil libertarian, I think, is a theoretical one. Given what we know about the exercise of state power in our context (and in the possibilities of institutional reform), how much discretion should we be willing to give to executive authorities to decide when to lock people up or punish them in other ways? If the answer to *this* question depends only upon the substantive goals for which some particular law has been passed – the eradication of sati, say, or for that matter cow protection – then it is not easy to escape the charge of hypocrisy, regardless of one's political ideology.

66 Uday Mehta, "The Social Question and Absolutism of Politics," *Seminar* 615, 2010.
67 This is the theme of many of the essays in *Rethinking Human Rights.*

If these substantive goals in turn depend for their realisation on abridgements on speech, we are at some distance from a Voltairean world. This does not mean that, given the choice between upholding the Voltairean dictum and arguing for strong limitations on state power, we must choose the former over the latter. But it is important to keep in mind that the choice may have to be made, and that it is not easy to see how to make it.

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