

# CRITICAL ASSESSMENT OF FREEDOM OF SPEECH AND EXPRESSION UNDER THE EARLY CONSTITUTIONAL FIRST AMENDMENT ACT

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## ABSTRACT

The Constitution (First Amendment) Act, 1951 continues to be one of India's most controversial changes to the Original Constitution. It was stirred by the series of High Court judgements that adopted the reasoning provided by the Supreme Court in the striking down of the 'Public Safety Act' in Madras and East Punjab. The court was of the opinion that unless the issue was threatening the foundations of the State or in furtherance of overthrowing of the State, it was within the right to expression. This attracted the attention of the then Interim Prime Minister of the Dominion Parliament who moved the Parliament to pass a bill that would amend several provisions of the Parliament of India, especially in Chapter III. The Statement of Object and Reasons stated that the nation experienced 'certain difficulties' in the last fifteen months since the enactment of the Constitution. This paper aims to analyze the reasoning and background behind the passing of India's first-ever change of the fundamental principles of the Constitution.

**Keywords:** Freedom of Speech & Expression, First Amendment Act, provisional parliament, colonial continuity, institutional legitimacy.

## INTRODUCTION

In the words of B.R. Ambedkar, "Constitution is not a mere lawyer's document, it is a vehicle of Life, and its spirit is always the spirit of Age." The Constitution is the Supreme Law of the

Land. That is to say that it has a special legal sanctity, wherein no provisions of any other legislations can violate what is given in the constitution. There was a need to have a constitution as this was a determining factor for the relationship between the state and its citizens. A constitution is essentially a tool to ensure the political stability of a state.<sup>i</sup> Thus, a drafting committee was constituted under the able leadership of Dr. B R Ambedkar on 29<sup>th</sup> of August, 1947. After a lot of deliberation, the final draft of the constitution was ready on 26<sup>th</sup> November, 1949. This day is now celebrated as Law Day. The Constitution finally came into effect on 26<sup>th</sup> January, 1950. The first amendment to the Constitution took place in 1951.

## JUDGEMENTS THAT PRECIPITATED THE AMENDMENT

With the adoption of the Constitution in 1950, an assortment of judgements (Romesh Thapar v State of Madras and Brij Bhushan v State of Delhi<sup>ii</sup>) all across the nation called for the then Prime Minister Jawaharlal Nehru to call for an Amendment to overcome the strict judicial interpretation of the Fundamental Rights by the Courts of India. The first such instance took place when the Supreme Court struck down the ‘Public Safety’ Acts in Madras and Punjab as it was considered to be a violation of Article 19(1)(a) guaranteeing the right to freedom of speech and expression.<sup>iii</sup>

“19(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.”<sup>iv</sup>

The cause for concern began to rise after an onslaught of judgements from the High Court of Bihar, Punjab, and Madras, quashing the Indian Press (Emergency Powers) Act, 1931, as well as the provisions governing sedition (s. 124-A) and the promotion of enmity between groups (s. 153) of the Indian Penal Code (as mentioned in the Statement of Objects and Reasons). The court refused to consider ‘public order’ as an exception to Art 19 and held that a law restricting speech under such grounds unconstitutional. Some argued that the judiciary was even encouraging riots and murder.

The paper Organizer was critical of the Nehru led provisional parliament, mostly due to the riots and chaos that arose at the time of partition and how the government approached the matter. It stated the status of the people caught in the midst of peak Hindu-Muslim violence and how the Prime Minister's policies were ineffective to deal with them. After a long-drawn court battle that was raised due to the pre-censorship order issued under the East Punjab Public Safety Act the supreme court quashed the order as it was unconstitutional and against the Right to Freedom of Speech and Expression.

## **OVERVIEW OF FIRST AMENDMENT ACT (FREEDOM OF SPEECH & EXPRESSION)**

The First Amendment of the Constitution drastically altered several Fundamental Rights in Chapter III, despite the Constitution being only 17 months old at that point in time. It provided against abuse of freedom of speech and expression, validation of zamindari abolition laws, and clarified that the right to equality does not bar the enactment of laws that provide "special consideration" for weaker sections of society.<sup>v</sup> The device of the Ninth Schedule to protect certain legislation from the judicial review also found its origins in the first amendment.

The Constitution (First Amendment) Bill attempted to amend the newly enacted Constitution, which had only been in operation for less than sixteen months. The law would be passed sixteen days later, changing the Constitution even before India's first elections.<sup>vi</sup> The amendment's most important modifications were to three constitutional rights: freedom of speech, non-discrimination, and private property.<sup>vii</sup> Article 19 was amended to include new grounds for curtailing freedom of speech (2). Speech can now be controlled in the name of "public order" and "friendly ties with foreign states," but such limitations must now be "reasonable." Nehru was very much against the introduction of the term 'reasonable' and had actively expressed that in his letter to T. T. Krishnamachari. Some considered this as a rare occasion where Nehru conceded defeat and respect the opinions of the minority group.

The reason for the immediate passing of the Bill was to remove any 'lacunae' that was present in the constitution surrounding the liberties provided under Fundamental Rights. The statutory

interpretation of courts was indirectly promoting violence and agitation in the country and hence had to be resolved by the Parliament.

## **INSTITUTIONAL LEGITIMACY OF PARLIAMENTARY BODY TO AMEND THE CONSTITUTION**

Several legal historians and researchers have often questioned the status of the interim government and its statutory authority to pass the Constitution (First Amendment Act), 1951. The Interim government was in reality the Constituent Assembly that was set up under the authority of the Cabinet Mission Plan of 1946. This body was elected indirectly by the Provincial Legislative Assemblies under restricted franchise. Prior to independence, the powers of legislation were transferred to the constituent assemblies of each of the new dominions. With the dissolution of the Central Legislative Assembly, the Constituent Assembly undertook the responsibilities as 'Dominion Parliament'. With the formal adoption of the Constitution on 26<sup>th</sup> January 1950, India ceased to be a Dominion and was now known as the Provisional Parliament.

Critics argue that the institutional legitimacy of the Provisional Parliament to amend the Fundamental Rights under Chapter III was never questioned. The Bill was debated by the Provisional Parliament prior to the first elections under universal adult franchise. However, it was pointed out by Nehru himself that the same body that called for an amendment was the one that passed the Original Constitution 15 months prior to the introduction of the First Amendment Bill. He stated that the 'moral authority of the Provisional Parliament was never questioned until that very instance. He also stated the fact that it was the provisional parliament that was continuing the colonial regime, in fact, it was the Opposition that was furthering arguments from colonial continuity by misplacing their trust in an outside authority, that is, the courts. The fact that the body derived its power from the fact that its member belonged to a constituent assembly instead of deriving it through a direct democratic process was a fact in issue for several subsequent constitutional debates.

## CRITICAL ANALYSIS OF THE AMENDMENT (CONSTITUTIONAL DEBATES)

The Constituent Assembly primarily comprised of members of the Indian National Congress, and hence one might assume it could easily pass such a bill due to the overwhelming majority, it was met by stiff opposition from multiple leaders of that era. However, they mostly included representatives of socialists, Hindu extremists and various minority groups. Their united front tried to oppose the majority of the Provisional Parliament from passing such a radical bill that would completely alter the landscape of our nation's democratic values.

Opposition members criticized the bill even prior to its introduction due to reservations regarding the legal authority of the Provisional Parliament. Many contended to postpone all discussions surrounding the bill until after the first election. The haste to fasten the passing of this bill without a public referendum or lengthy parliamentary debates raised the eyebrows of several by watchers.

His argument was said to be in line with colonial continuity, in other words, mirroring the same justification provided by the British Raj for the passing of several suppressive laws. Some were even of the opinion that this Act would lead to the re-enactment of colonial-era suppressive laws such as Section 124A (sedition) and Section 153A (promoting enmity between groups) of the Indian Penal Code, which would be used in the same format the British used them to control public riots that would hamper the smooth functioning of the administration. Ramachandra Guha, a prominent Indian historian, stated that the restrictions on free speech have severe long-term consequences, and also in a way resurrected colonial laws that were created to control public dissent and criticism which the new government promised to remove. It also indicated that the post-independence government prioritized national security and public order over the growth of democratic values.

Moreover, the idea of a bill was proposed after the court's interpretation of the Fundamental Rights, which began to question the legitimacy of the balance of power between the different organs of the government as it sought to overturn the judgements of the High Courts and Supreme Courts regarding the interpretation of Fundamental Rights.



An unusual degree of protection from judicial review was granted to the Acts that were struck down due to the Amending Act, as the restrictions to free speech were retrospective in effect from the date it was originally enacted. Nehru was also contradicting his own statements, as he sought to undermine the authority of the courts due to its institutional continuity with the British Raj, ignoring the fact that his own constituent assembly was a product of institutional continuity. He stated that the judges were appointed by the British regime and hence were accustomed to thinking from the old perspective.

The resistance group included BR Ambedkar, Syama Prasad Mookerjee, H. V. Kamath, and Hriday Nath Kunzru- in essence, an extremely diverse panel. Mookerjee was widely regarded as the leader of the Opposition as his voice and opinions were the loudest amongst the panel. He severely criticized Nehru as he proclaimed himself as a 'champion of liberty' yet was in favour of passing an amendment that would drastically affect the roots of the constitution. He also stated that it was Nehru who did not have faith in his administration and parliament as he was asking them to arbitrarily accept the bill which would alter the stature of fundamental rights significantly. H. V. Kamath believed that the government was being 'hasty' and deliberately rushing the bill without scope for public discussion and referendum. The overreach of powers by the executive had gathered a sense of fear due to the possible misuse of parliamentary powers to restrict individual liberties.

Modern critics argue that the Nehruvian government set a very disturbing precedent of altering the constitution when the courts gave adverse judgements that do not align with their interests. The balance of powers between the legislative, executive and judiciary was disturbed resulting in the over-empowerment of one organ over the other.

It was, however, far worse. Amendments to the Constitution require a two-thirds vote in both Houses of Parliament. The interim parliament, on the other hand, was a unicameral body. The Rajya Sabha did not exist in 1951. To get around this, Nehru abused the Constitution (Removal of Difficulties) Order. This was not the intent of the legislation; however, it was interpreted to his advantage.

## CONCLUSION

Revisiting the Constitutional debates surrounding the First Amendment is crucial to understand the background of the right to freedom of expression and implement the interpretations to navigate India's continuing journey to be an ideal democracy. The background behind these constitutional debates was subjected to the changing form of governance, the devastating impact of partition, the unusually high number of Hindu-Muslim riots across the nation, the shift from colonial oppression to independent administration and so on. Despite being native to an archaic era, and the rapid growth of human rights throughout the history post-independence, these debates are still relevant to address issues occurring in today's era such as the Pegasus surveillance system. The arguments from colonial continuity have been extensively been criticized by several legal historians stating that re-enactment of colonial-era legislation would be a betrayal to the people of India, who were promised a fair democratically institution for their struggles of Independence. Nehruvian scholars argue that it was the courts that were stuck in a colonial mentality and it was the moral duty of the provisional government to expand its jurisdiction to address these issues surrounding the absoluteness of fundamental rights.

It is not wrong to state that the judiciary was subordinated to the executive in this instance and hence in violation of the basic features of the Constitution. However, Nehruvian scholars' defence to the same was that the Parliament was an embodiment of the people's opinions, and its actions were drastic so as to benefit the future generations of Indians. Opposition suggested they pass the bill after the elections, but however, it was deemed urgent and necessary to curb the situation of chaos and unrest.

Though these powers were not misused greatly by the Provisional Parliament in place at that time, it has been interpreted by several administrations post-independence to suppress political agitation on sensitive issues, for example, CAA, Sedition law, CBFC, Unlawful Activities Prevention Act, National Security Act- primarily to restrict freedom of the press, social activism, acts of political opponents and so on. A recent instance involves the amendment of Art 370 by the Narendra Modi led government to alter the constitutional character of Jammu and Kashmir. The definitions under the provisions were altered to de-constitutionalize the Article.

This component of the First Amendment debates' context has been omitted from the extant research on the subject. Understanding the socio-economic aspects and compulsions of the country's turmoil during the time of independence would help us better comprehend this historical period.

## ENDNOTES

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- <sup>i</sup> Adhila Muhammad Arif, Why do we need a Constitution <https://blog.ipleaders.in/why-do-we-need-a-constitution/>
- <sup>ii</sup> Romesh Thapar v State of Madras and Brij Bhushan v State of Delhi, 1950 AIR 124, 1950 SCR 594
- <sup>iii</sup> INDIAN CONST. art. 19, cl 1.
- <sup>iv</sup> INDIAN CONST. art. 19, cl 2.
- <sup>v</sup> First Amendment of the constitution of India, [https://www.hmoob.in/wiki/First\\_Amendment\\_of\\_the\\_Constitution\\_of\\_India](https://www.hmoob.in/wiki/First_Amendment_of_the_Constitution_of_India)
- <sup>vi</sup> Constitutional Crossroads, Bastian Steuwer <https://caravanmagazine.in/books/law-first-amendment-constitution>
- <sup>vii</sup> *Id*