PROJECT 39A
EQUAL JUSTICE
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3RD PROJECT 39A ANNUAL LECTURE (2020)

THE DISSENTER AS CRIMINAL

Relfections On Dissent And The Law

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Annual Lecture Series in Criminal Law
Project 39A, National Law University, Delhi

Good evening! It's a real honour and pleasure to be here. One, actually, because, of 39A. Project 39A is one of the most interesting, morally relevant, analytically rigorous projects in criminal justice that we have seen in India for a long time. I just want to congratulate Anup Surendranath and all his colleagues for really setting a new benchmark for how you can do meaningful research and advocacy within the academia. So, it's a real privilege to be speaking under the auspices of Project 39A. I am also little bit intimidated because I am speaking to a group of very accomplished lawyers who know a great deal more about the subject I'm going to speak about than I am.

What I had thought I'd do, over the course of the next 45 minutes or so, just so that we leave time for questions, is to offer some reflections on the paradoxical place of dissent in a society that is supposedly democratic and supposedly marked by the rule of law, or at least has institutions that claim to be furthering the rule of law, however imperfectly that they do so. My motivation for thinking about the subject is obvious. Many would argue that dissent in all its different varieties that I shall talk about briefly in a second, has fallen upon hard times in democracies, not just in India but globally. If you look at the range of laws that have been enacted in the last 35-40 years, whose spirit is incompatible with the spirit of liberal democracy – laws around sedition, laws around preventive detention, laws that prevent protest from taking place, law that allows police to easily arrest protestors, you know, anti-conversion laws, laws that regulate NGOs – the whole panoply, in a sense, of legal instruments that are brought into place by liberal democratic states is actually making dissent much more difficult, paradoxically, even in liberal democracies.

Some of this is specific to particular ideological formations. But, one of the claims that I want to make today – and it is the spirit

in which these reflections are offered – is that this contemporary moment of this suspicion of dissent, this crackdown on dissent, a subterfuge, in a sense, about managing and crushing dissent, and in particular, dealing with dissenters almost as if they were criminals. This particular tendency is not just a characteristic of particular political parties being in power or particular regimes being in power, even though those regimes might actually, deeply exacerbate them. I think what this moment throws up fundamentally, and that's what I'll be talking about today, is something about the nature of liberal democracy itself. Is there something inevitable in the form in which we have conceived of liberal democracy that it will, more and more, construe the dissenter as a figure of criminality? That it has no other language in which to understand the figure of a dissenter. An Anand Teltumbde, a Sudha Bhardwaj – just to take two obvious examples – of people who are being treated as criminals, unjustifiably. That it has no other language in which to understand dissent and protest.

So, that's the question I've set myself. I'll be talking theoretically. I dabble in political theory so, that's my field; that's my route into this subject. It's not going to be the details of the law, which most of you know better. It's not even going to be the details of the cases that are, in a sense, currently being litigated. Partly because it would be inappropriate to talk about them, partly because, again, you know those details better. But I'll just try and lay down a conceptual framework about why is it that again and again, in contemporary democracy the dissenter is being constructed as figure of criminality; is being increasingly dealt with through laws that have the character of criminal laws.

So, "Dissent is the safety valve of democracy.", our courts intoned, very eloquently in Romila Thapar versus the Union of India. And we all value dissent. A society without dissent will be docile. It would be without the means of renewal; it would be without freedom and

perhaps it would be without politics altogether. We would all be trapped into a stultifying conformity. In that sense, dissent itself is good. Many would go one step further and argue that there is a right to dissent; that there is something particularly important about human dignity that the right to dissent captures. And yet, while we sing the praises of dissent – for pragmatic reasons, for principled reasons – actual dissent in any political order always invokes anxiety. There is a familiar anxiety – a self-serving anxiety of holders of power – that dissent will displace them, attenuate their power or diminish it. Power always resents and fears dissent. This is a pretty understandable reaction, that the purpose of dissent is to alter the structure of power. And whether we like it or not, most societies run on Thrasymachus's observation that 'justice is the interest of the stronger'. Today's dissenters may, in turn, also fear other dissenters. It's often true of dissenting groups. They fear internal dissent. Or they, in a sense, turn out to be those people who clampdown on dissent when they themselves come into power. So, there's a kind of perpetual anxiety around dissent. But as I said, this is a self-serving anxiety. It is an understandable one but a self-serving one. They uncannily see that dissent is about altering structures of power, let's make no two bones about it. That's what is significant about it. And in some senses, you have to say that those who crush dissent at least have the decency of taking it seriously! They do understand what it is about. Unlike, I think, sometimes many liberal defenders of dissent who actually think dissent is important but it will change nothing. A different kind of worry about dissent, which is somewhat less self-serving but it's also still psychological, is that dissent as a word almost seems too negative. Dissent is against something. I actually think George Eliot was right when she said that if you're looking for the right to rebellion - rebellion in the broadest sense, dissent - that the right to rebellion of any kind is the right to seek a higher rule, not wander in lawlessness. And the word 'dissent' or the activity of dissent often conjures up the spectre of negativity. 'I know what I

am against' but 'what is the higher rule I am invoking' is actually not clear. And I think, critics of dissent are right, that dissent itself is not a freestanding value. To construct dissent as a freestanding value is to conjure up the image of somebody who simply says, "whatever you are for, I am against it". Dissent is not a freestanding value because it is grounded in moral judgement. It has, as George Elliot said, to speak in the name of a higher rule; it has to speak in the name of a common good; it has to be reaching for something better. Otherwise it simply is a disposition to subvert, where the means become the ends. In this sense, the Gandhian idea of dissent, which is grounded in satyagraha - a rebellion grounded in truth - I think, had more going to it than the mere word dissent does. So, just as a discursive point, when we say that space for dissent is shrinking, we have to recognise the ambiguity of that claim. We often mean that the space for seeking something better; the space for seeking justice; the space for expanding our moral horizons; the space for imagining an alternative and better future might be shrinking. Or it can be taken in a different sense, which is often done in politics, that the space for opposition for opposition's sake is shrinking. Now, even opposition for opposition's sake might be valuable. There is a, sometimes, inherent value to, you might say combating docility - just for its own sake. But simply saying 'I am a dissenter' or 'I have a right to dissent' or 'I dissent', without specifying the normative context in which that dissent is being articulated - that higher rule that George Elliot was referring to - can be a double-edged sword. It even allows fascists, actually, sometimes to claim the mantle of dissent. They are also always dissenting against something. So, I think we should be careful in acknowledging that sometimes the discursive rhetoric of dissent forgets that it's not a normatively freestanding value. It is in a sense grounded - it has to be grounded - in some higher truth.

So, while we recognise the importance and value of dissent in a liberal democracy, dissent does have this uneasy place.

What I want to do is reflect on an even deeper paradox. This stuff that I've just outlined is a prolegomena; it's very familiar. And my starting point is an observation in this rather troubling judgement that was passed in the Shaheen Bagh protest case. This was the order that the Supreme Court passed recently. The judgement was troubling in more ways, more levels than one can list. First of all, passing an order when it has...when the matter has become kind of irrelevant; been shut down anyway. The order engaged in a kind of needless pontification in the morality of protest. It introduced novel and, to my mind, dangerous constitutional ideas, that the exercise of rights - if protesting is a right - is somehow subject to the performance of duties irrelevant to that right. It's an order that completely whitewashed the Court's own role in producing a crisis of legitimacy. Why were there protests in the first place? In part because of the Court's role in producing both, a constitutional doctrine and then in not actually giving protesters a genuine hearing on the substantive matter at hand, namely: is the CAA discriminatory? So, for all those reasons it's a strange order. But I want to give the Court due respect. Take them seriously as a political theorist and pick up one sentence in that order which said...the claim was that "erstwhile mood and manner of dissent against colonial rule cannot be equated with dissent in a self-ruled democracy", almost suggesting that there are forms of dissent that might be appropriate to colonial rule, maybe in authoritarian state, but these forms of dissent are not appropriate in self-ruled democracy. In fact, you can extend the point further, dissent in the form that was being enacted in Shaheen Bagh, might have been a mode of activity more suitable to a colonial and authoritarian regime, not to democracy.

Now, why is this claim important? Maybe it's just a throwaway remark. Maybe the justices had not meant anything considered and serious by it. But it is a remark that captures a lot of common

sense views people have about democracy. It's quite an intuitive and widespread and appealing idea actually. After all, you might say, in democracy you might have the freedom of expression. Words and argument, deliberation and rhetoric is the currency in which we express views and differences in a democracy. Now, of course this claim would be helped a great deal if the courts protected freedom of expression and freedom of expression of all forms, including expression of contempt, which is also a form of legitimate criticism. But let's for a moment grant this point. Look, you have the freedom of expression in democracy, huge words! Write, petition, make arguments. If words work, if the logic of arguments work, protest should not be necessary. Moreover, in a democracy we can supposedly cashier the rulers for misconduct. We can throw them out in the next election. So, what more do you want by way of dissent? You can speak what you want, you can vote what you want. And, in a sense, the bounds of legitimate activity are, in a sense, governed or enabled by these modes of expression. Add on to this, a further point, which is often made by invoking Ambedkar's speech in the Constituent Assembly on the grammar of anarchy, in which the problem of dissent in a democracy is compounded even further. On this view, the problem with the dissenter in a democracy is the dissenter claims unilateralism. The dissenter sets themselves up as a final judge and arbiter against the Court, against Parliament and sometimes even against public opinion. So, people are protesting because they are not satisfied with Parliament decision, they are not satisfied with the court's decision or rather the court's non-decision. Sometimes they're against even protesting against public opinion. Now, in a democracy, this form of dissent is kind of hard to understand and explain. Ambedkar was too good a political theorist and of course, recognises the danger in unilateralism of dissent. After all Gandhi's big sun, in his eyes, was not just that Gandhi was patronising about caste but Gandhi was completely unilateral in the way in which he understood the rightness of his views. It's Gandhi,

right or wrong. ‘Ekla Chalo Re’ may be a good inspiring call for claims of conscience. It may be a good inspiring call for protesters standing valiantly against public opinion. But surely it can’t be the basis for settling legitimate claims. The dissenters’ seeming unilateralism, their sovereign pronouncement over the sovereign, as it were - ‘my way or the highway’ - seems to be part of the problem. And the one thing we do do when we enter civil society; when we leave the state of nature, as it were - I have a picture of Hobbes behind me and I think, on this, Hobbes was right, as it were - is we do see, in part the right of unilateral judgement of what is right. In fact, political equality demands that we see that. If I can unilaterally decide what is right, then in a sense, I’m not granting you equal political standing. And so, this idea of unilateralism also makes the figure of the dissenter a pretty suspicious figure in a liberal democracy. ‘What are they claiming?’, you know.

So, here is the paradox that the honourable justices might be hinting at when they say ‘certain forms of protest are not appropriate to liberal democracy’; when they say, ‘in a democracy you don’t need protest and dissent in quite the same way’. The thought is in a perfectly functioning democracy, all relevant moral considerations have been taken into the account. All discussions have taken place. Respect due to all persons, free and equal, has been granted. Why would you need dissent? Now, you might be tempted to respond but that’s exactly the point! Our democracy is deeply flawed! The representative process is not a responsive process. The rule of law is intermittent and, by God, the Supreme Court is making sure it is intermittent. And, at best often our democracy does little to protect the vulnerable and the marginalised. It’s a perfectly good response to make to this worry. You might go further. You might say the court wants us to, in protesting, abide by our civic obligations. But, you might say, are these civic obligations binding on people who do not have a fair share in the scheme of cooperation. If the basic scheme

of social cooperation itself does not respect freedom, equality and dignity of persons, why should the onus of cooperating on civic obligations fall on those protesting. Think of innocent adivasis, the group that, in a sense, has got the worst end of every state - colonial state, democratic state, authoritarian state. Why should the burden of abiding by these civic obligations fall only on them in the absence of a framework that grants them minimal standing and reciprocity. Why are courts and Parliament so keen to remind us of our duties only when there is a protest. What about reminding those who have the power to draw the larger social contract? Does not protest serve as an epistemic function of drawing attention to the problems that might otherwise go unnoticed in a democracy? Do we still have an obligation, civic obligations, if the social contract does not recognise us as free and equal? So, this is a pushback you can give against the court. You are assuming these institutions are working well. What if they are not? This is a common sense answer and I think, empirically and descriptively, a very, very powerful answer. Rule of law and democratic process can often be an abstraction. We throw in, as it were, a fight over relationships of power that do not describe the existing realities of our institutions. And so we want to say, look, protest is important. These are people, these are our fellow citizens protesting in the name of a higher order rule. Allow them to redeem the promise of democracy by bringing neglected concerns to your attention. This is a perfectly sensible answer to give. Why won't we give this answer? Now, it turns out, the problem is more complicated. It's not an easy answer to give. It sounds easy to give, that's what we always say: "But ours is not a perfect democracy. It needs a safety valve." Why is it not an easy answer? It's not an easy answer for some, again, basic political reasons. No settled democratic processes like to admit that they are illegitimate in this way. No Supreme Court can admit that there is no rule of law in India in parts. No Parliament can admit that we are not a deeply representative democracy. So, in a sense, giving this answer - that our formal institutions are

imperfect, it is already in some senses putting a question mark over the legitimacy, which they cannot accept. Sometimes you don't concede to this answer because politics is a partisan game and you do not want to concede to the other side. Whether we are right or wrong, whether the protesters are right or wrong is immaterial, what is important is that they be defeated. So, you see protest only in the framework of a kind of tactical negotiation. But there is an even deeper conceptual challenge - why a democracy might look at suspicion and look askance at protest and dissent. And I'll be very crude about this, just to, sort of, concentrate on our mind; it's a bit simpleminded but hopefully, heuristically it will work. So, suppose you protest. The Shaheen Bagh protesters protested, Punjab farmers are protesting. If the protest and dissent is expressed before all other formal means of redress - elections maybe, courts of law maybe, petitioning your MP maybe, using the public sphere in writing maybe - whatever. If you protest before all other formal means of redressing your problem have been exhausted, then the court will say,"well, isn't this protest unfair?" "Why don't you use these settled means to convey what you want to convey". On the other hand, you can have another scenario, where you have engaged all of these means: you have knocked at the door of the Supreme Court, you have knocked at the door of Parliament, you have petitioned every politician, you have got, you know, every useless columnist to write an op-ed - everything that a democracy allows you under free expression. And yet the outcome is something that is deeply, deeply detrimental to the principles of liberal democracy, maybe it's discriminatory. In which case, if you protest after the fact the retort is, "But look! You're engaging in unilateralism". How can you set yourself as sovereign over what is right, after Parliament has pronounced, after the Court has pronounced. So, here, in a sense, is the paradox: if you dissent and protest before all the remedies are exhausted, you are a troublemaker. If you dissent and protest after all remedies. This is the bare simple logic of how a dissenter is viewed in a democracy.

So, how do you then deal with this figure of a dissenter. What you then have to do, is...you have to deny them legitimacy. The issue is not whether they are right or wrong - that's a second order issue, that already grants them standing. The issue is to trap them in the catch-22 of dissent. If you prematurely dissent, you don't believe in democracy. If you dissent after democracy has pronounced its verdict, you are this sovereign unilateralist. So, if you follow this logic, you can see why the problem...the dissenter is a figure who is a permanent threat to the logic of democracy. Premature protest is not abiding by the process. Protest after the process, is not abiding by the decision of the process. Either way, the dissenter is putting a question mark over the legitimacy of the state. Dissent, therefore on this view - not serious dissent - cannot have any place in a democracy. This is the sense in which a democracy can force us to be free. If one of the conditions of freedom is that we don't exercise unilateral judgement, democracy can force us to be free.

But you might say, "hang on, this is a bizarre view. Does not democracy require tolerating a variety of views. Doesn't it require pluralism - of views, interests and so forth?" Of course, yes. But remember, there is a historical specificity to the idea of dissent. Dissent is not just about a society having a variety of viewpoints or different points of view. We often use dissent capaciously, in that sense. Dissent becomes a synonym for toleration, for pluralism. Tolerate dissenters, tolerate different points of view etc. This is the sense, for example, we invoke when we say 'India has a long tradition of dissent'. What we are saying is 'India has always had a variety of views; different world views, ideologies, religions have always contended'. But you know, pluralism and toleration is not dissent. Because dissent, in political terms, has a more specific meaning, namely dissent implies a withdrawal of consent. So, let me take a very simple example. I may think, the tax rate, top tax rate should be 45%. The government may think it should be 30%. It's a genuine

difference of opinion, for whatever reason. We might both think we have good arguments on our side. The government's position wins. I still have the right to express my view; I still hold on to my view that a higher tax rate would be preferable but I don't, in some senses, withdraw my consent from whatever the tax rate that government, in a sense...This is legitimate disagreement in a democracy. I live another day to have my viewpoint heard, persuade my fellow citizens and so forth. And still, as it were, within the logic of arguments and counter-arguments, election cycles, procedural, as it were, ways of reconciling this dissent. When I express a difference of opinion. But the act of a protester, a dissenter, is actually something deeper and rightly so. It is a refusal of consent or rather, they want to be seen, in a sense, to be refusing consent. So, when we say a law is discriminatory; it is targeting a group for who they are, that's not exactly the same kind of disagreement that you might have over a tax rate. In protesting against a law of that kind, you are, in some senses, performing a kind of refusal of assent to that law. Dissent, in this sense, always carries a taint of disobedience with it, and rightly so. So, one way of thinking of dissent, is that dissent is, literally speaking, the opposite of consent. That's what it is the opposite of. You might say dissent is to consent what falsehood is to truth, heresy is to faith. So, just like truth will always find falsehood a threat, faith cannot tolerate heresy, the logic of consent by itself, cannot tolerate dissent. So, here's the paradox: the more a government claims dissent as the basis of its own legitimacy, the more dissent is a conceptual threat. Who are these people who are refusing consent? And that's, I think, what the justices seem to be referring to. I think they capture the paradox quite rightly. Of course, we're in democracy now, why do we even need dissent now, right? Now, if what I have argued - albeit a little crudely - is correct, there is a kind of anti-dissent logic that is inherent in democracy. When democracy mobilises consent as a legitimising principle, because what does dissent do? It punctures the myth of consent. When people come

out to the streets; when protesters come out, what are they saying, what are they performing, what are they enacting? They are actually puncturing the myth of consent. They're saying 'this law is not something that we think is legitimate'. They're not simply saying 'we have disagreement'. Disagreement is easy; that's within the logic of democratic process. And for a democracy; for a regime in a democracy, for a ruling party in democracy, it is actually the preservation of the myth of consent that is itself important. Which is why they see dissent as always the foundational attack on the very basis of the state.

So, how do you deal with dissent, if dissent has this logic. And by the way, every single democracy faces this problem. You can't just deal with it within the simple logic of disagreement. That's easy, I can just choose to ignore you. You can say whatever you want, so long as you're not being able to persuade other people it's perfectly fine. So, when faced with genuine dissent, in a sense, this prospect of withdrawal of consent or this puncturing of the myth of consent; this puncturing of the legitimacy that the state is claiming in respect to that matter, the states option that becomes is you want to deny those who are dissenting this way, their standing. You want to say that their seeming performance or threat of a withdrawal of consent; their enacting a refusal to recognise the legitimacy of a law does not count because they are violating some basic civic obligations. And the only way in which you can do this is by de-facto criminalising them. The attack on dissent is not so much an attack on particular ideas - often it is, the government just doesn't like those ideas - but what makes the attack on the dissenter - why you need to criminalise them - is you have to, in a sense, deny them standing as citizens. Because only by denying them that can you say "look, our myth of consent has not been punctured or questioned". Now, this rather obvious truth - that the crushing of dissent in a democracy; the crushing of thay refusal is about preserving the legitimacy of the

myth of consent - explains two things. One, it explains the logic of laws that actually regulate dissent and convert dissent into criminal crimes. Think of all the laws through which dissent is criminalised - sedition, terrorism, public order provisions, regulation of public protest, the ban on strikes, in a sense, the regulation of speech that expresses contempt of court sometimes. What is the common thread in all of these laws? In sedition and suspicion of terrorism charges, the claim is express: that these are groups that are withdrawing their consent from the state and that is manifest in the fact that they committed to the violent overthrow of the state. And of course, sometimes there are groups like that, let's not underplay that fact. But the criminalisation - the process of criminalisation of dissent is the idea that more and more groups should be treated not just as expressing a different opinion but as different ways of withholding consent. This is exactly the strategy that is being, for example, deployed in two of the major protests of our times. The targeting of CAA protestors - why are they being tired under UAPA, which is a law expressly designed for those whom you don't want to give standing as reasonable citizens.

The four tropes that are used in, in a sense, criminalising these protests - whether it's the Delhi riots cases or the Bhima Koregaon cases. The first will be the government's claim, 'you know, this protest seems to be public' - remember civil disobedience used to say that always carry out your act publicly because what you are trying to do is you are trying to justify your acts at the tribunal of public justification. That's the Gandhian logic of public satyagraha. But the government will almost always want to show that these acts actually have a secret conspiracy behind them. By the way, every single democratic government employs the same logic. One of the striking things if you look at, for example, the recently released FBI files on the Occupy Wall Street protest, it's exactly the same logic. They seem to be carrying it out in public, they seem to abide

by the Constitution. In India's case, they seem to be carrying pictures of Gandhi and Ambedkar and enacting the grammar of higher constitutionalism but at the heart of this protest is a secret conspiracy. The public avowal of constitutional values masks the fact that they are secret conspirators. Who tells us that? A secret intelligence service, like the FBI or the CBI or something like that. Second, notice, in delegitimising these protesters, the attention is shifted from the particular moral claim they are making - is the CAA discriminatory, should bankers in the United States be prosecuted for malfeasance fraud, is the NRC justified - the attention is being shifted from the moral claim to the standing of the protesters. 'They must be Maoists', 'they must be jihadists', 'this is a Leftist-Maoist-liberal-Jihadist conspiracy', 'the nonviolence was a facade, underlying it is a will to anarchy, no higher rule here but a propensity to lawlessness'. Again, remember, they are forced into this logic because the only way they can conceptualise the dissenter is through that act of refusal. It's not about that substantive moral claim they're arguing. Can we give more evidence for this fact? It's often buttressed by the fact that the state will construct the dissenter as a self-chosen vanguard. As the state says, there are professional dissenters who show up everywhere. They are dissenters in this negative sense. Think of another example - so it's dissent in the specific sense, that you want to construct this group as carrying out an act of refusal which punctures that myth of consent. This same phenomenon, about the refusal of consent, shows up in place: the right to strike.

This is a very controversial right in many constitutional jurisdictions but it is fair to say that this is a right that has been significantly eroded in all democratic jurisdictions in the last couple of decades. In part because the balance of power between labour and capital has shifted, as manufacturing declined. And India's new labour laws completely shift this power in favour of capital. Those laws might

as well be meaningless for the most part, at least the operative ones that deal with the balance of power between the two. Our new labour laws are designed to accelerate this trend by making strikes almost impossible. The ratio of strikes to lockout has long been tilted in favour of lockouts. Unions have generally been weakening in India. There was a lot of support for these kinds of anti-labour dissent measures. Particularly those who lived in Mumbai and Kolkata, have long memories of labour issues in the 1970s and to be fair, often that kind of labour unrest did have serious consequences. The scholars who have calculated that Bengal probably lost a tenth of its GDP in a decade due to those hartals and strikes. But at the core of diminishing the right to strike is not this empirical fact which is often invoked. That's a judgement call you can make. It is a fear. What does the strike do? It explodes the myth of consent. The legitimacy of the labour contract is founded on the claim that the contract is made freely and with some reciprocal obligations - both for the employer and the employee. The right to strike, in its core, is not just about maintaining the relative bargaining power between labour and capital. It, in a sense, is also underwriting the myth of free consent in labour relations. And the big change in global attitudes to strikes has been about what does the strike demonstrate - it punctures the myth that an employee-employer relationship is a free and reciprocal relationship. The fact that you need a strike, that fact itself is the objectionable fact. Not the moral substance of the claims there might be advanced.

So, in a variety of ways, it is actually the logic of democracy and consent that pushes the state to dilute the distinction between political dissent and criminal activity. And this is really the one large point I want to make - that in thinking about dissent, we often think of the traditional model of dissent, the language of repression - there is a state, there are individuals, individuals have rights,

the state is repressing those rights, the state is taking those rights away. And of course, that's exactly right in some respects. The state - when it's arresting people arbitrarily for protesting, when it is curtailing the freedom of expression, when it is making the right to strike completely meaningless right - it is in some senses engaging repression in particular ways. This is the familiar sense in which we also, for example, think of the continuity of state forms. If you read H. W. Hale's Terrorism in India, an account of the colonial state's construction of terrorism at the dawn of the century, or James Kerr who worked in British intelligence under the Raj and compiled reports on political troubles in India, many of their modus operandi look exactly identical to what the Indian state is doing in the Delhi riots, in the anti-CAA cases or in the Bhima Koregaon cases. Intelligence evidence tells you there are secret political groupings. The thing you want to do is impugn the standing of the protester. You don't want to, in a sense, engage with the substance of the moral claims. But this continuity - that this is about state repression - should not blind us to what is more problematic about criminalising dissent in modern democracies. It is the fact that the language of consent in democracy is also being mobilised in blurring this line. The claim is being made is not so much that it is a state repressing citizens without rights, as in a colonial setting, but it is a democracy that is denying standing to those who want to gain democratic citizenship. The democratic imprimatur behind blurring the lines between the criminal and the dissenter is also as serious as the imprimatur of the state and that is what makes it combating harder.

The charge is made that the dissenter is subverting democracy, not the state, and he or she has to be represented as such. So, that's why. In a sense, this criminalisation of dissent has a pattern. These are not people who are part of democratic discourse, they don't believe in it. That's the only way in which you can respond to dissent - they're Khalistani, they're jhadi, something like that. But what I am suggesting to you that the uncomfortable thought is that you

are pushed into this by the founding myth of consent - democratic legitimacy as the basis of the state. Of course, there are lots of other things that have also facilitated this dilution between dissent and criminality - expansion of terrorism related discourses in law is a very important facet of that. The crucial play in laws relating to terrorism UAPA, TADA, POTA - and by the way, this is true of all jurisdictions in the world, whether it is United States, Canada, United Kingdom. In normal criminal law, the focus of criminal law typically is on post-facto punishment. That is supposed to be the deterrent; that is supposed to be the occasion on which society expresses its normative disapproval for crime committed against society. But terrorism involves the idea of preemption and preemption changes the nature of state power irrevocably. First, it changes the nature of the social contract which the state is expected to discharge. The state is now dealing with an enemy that does not fit into the usual logic of post-facto punishment. We sleep well at night because we know that if somebody assaults us the state might capture them and punish them. This is the second-strike capacity that Hobbes talked about. But the logic of dealing with terrorism is supposedly different - it's preemption. The state does not say 'we have the power to make a criminal feel sorry', whatever that might be. The state now wants to say 'it is better to be safe than sorry', you know, a very reasonable sentiment on the face of it. But the state has to preempt the act and in preemption it can license, in a sense, the most invasive intrusion into our right imaginable - surveillance, preventive detention, even assessment of intention. When you are talking about preemption, the causal connection between ideology and the act is always necessarily conjectural. 'I was carrying Mao's little red book in my bag'. On the logic of preemption it is understandable why you might think 'hey, is he a Maoist?' It's not a logic that would apply to normal criminal law but the shift in the nature of the social contract towards preemption, again, done with our agreement in our connivance, in a sense licenses this expansion of invasion into our rights. In the logic of

preemption, by definition a political position becomes a criminal one. Because the connection is necessarily much more conjectural. But now that is the charge we have given the state - prevent terrorism at all costs.

The third feature - so, there's democracy, there's preemption - the next feature of contemporary politics that pushes towards the criminalising of dissent has to do with the mediatised and spectacular nature of protest and dissent. As I said, part of the fascination of political protest and dissent; the real, you might say, fun - the real political act in it - is when it is a refusal of consent. It's not just about disagreement. Disagreement is a kind of garden variety, nothing might be at stake in that disagreement. Protest gets serious when there is a matter of deep principle at stake and the matter is so deep that, in some sense, you want to express your refusal of consent. Now, in a social media environment, in a highly mediatised environment, this refusal of consent can be played out spectacularly and often decontextualized. The meaning of a protest in India might be something very different when it's seen halfway across the world in the US or vice versa. The problem with a mediatised environment is that you have to enact...you know, Renan said that the nation is a daily plebiscite. The claim to legitimacy and the claim to that legitimacy being founded on consent is also something you have to perform daily. You often perform it through formal processes - elections and so forth, that's what make governments legitimate. But remember, in the act of refusal of dissent, what is being called into question in part is the legitimacy of the outcome of that very process. We are in part saying, 'elections are not enough, the Supreme Court is not enough sometimes, if the Supreme Court does hear us in the first place'. So, the fear is that... if the enactment of consent requires a daily performance, protest by its very nature punctures that very performance. Like with terrorism, a state may lose its battle of legitimacy if it deals with protest post-

facto, once the crowd has gathered, once the TV cameras have come in, once, as it were, the poetry of the protest has been written. So, in some senses, what modern states have realised, to preserve the myth of their own legitimacy and consent, they have to make sure that protest is not a spectacular performance. And it is for this reason that all democratic states are making protest more difficult, denying permissions, not making protest grounds available, using police power, Section 144. The ostensible worry is protest might lead to violence, protest might inconvenience other fellow citizens. But the underlying logic is deeper. The Supreme Court can says "make the Ramleela Grounds available". the fact is the state doesn't have an interest in making that available because the thing you don't want is a spectacular enactment of that refusal to consent. So, what you want to do is you want to preempt protest, just as in some senses censorship is often a means of drawing attention, marking the dissenter as a criminal is a means of drawing attention to the fact that you want to deny them standing altogether. Which leaves you in this convenient position of not having to deal with the substance of that moral claim. Now, there's another paradox that comes out of this attempt to pre-empt. And by the way, this is true of all jurisdictions. If you look at the New York's...Supreme Court's ruling in the Zuccotti Park cases, initially the courts were very supportive - there's a right to protest, you can occupy public spaces, et cetera et cetera. But as the protest became more significant, the courts in a sense, also began to backtrack. And you're reminded of Mark Twain's...you know, Mark Twain once said that they won't let you vote if it actually made a difference. They won't let you dissent if it actually made a difference. In this, I think, the court in the Shaheen Bagh case and India are not, as it were, alone. But here is the added Catch-22 or paradox of this position - the more rules you have preempting protest, you can't protest in the parks, there is section 144 here - the more you are putting the protester in the position of disobeying the law formally. But that's exactly what you

want because what you want to show is that this protester is not motivated by George Eliot's higher rule, this protester is motivated by simply the refusal to consent and this is actually how it plays out. Now, by the way, since there's been a lot of discussion...I just close in 3 to 5 minutes, sorry, I've gone on a little bit long...this is exactly the logic that plays out in bail hearings, for example. There's been a lot of discussion about discretion in bail hearings and I was actually surprised to find - maybe I shouldn't have been surprised to find - that even in other jurisdictions like the United States, Canada, very significantly, there's a vast literature on the political weaponisation of bail as an instrument. Jackie Esmode, for example, has a classic paper on the use of bail as a political weapon in dealing with protest in Canada. So, when there were anti-APAC protests, anti-globalisation protest versus other kinds of protests around poverty or civic community, Jackie Edmonde's paper actually showed that in part what determined the grant of bail was not that bail was a right, will leaving a person be a threat to the community, can they interfere with the course of justice - all the basic kinds of things you ask when you grant bail. Actually what was operative under there was this construction of that dissenter as a particular kind of criminal whose crime is not that they say 'I am against globalisation'; whose crime is not that they want to question a trade agreement; whose crime is not that they want to question a discriminatory law like the CAA or they want to protest atrocities against Dalits in Bhima Koregaon - that's not the crime. The crime is that in the act to protest they were enacting that refusal to consent on which the legitimacy of the state is founded. So, this construction...the dissenter, as I'm trying to argue, is like the person in the informal sector in India; they're always in the zone of illegality that is created by the discursive structures of the state itself.

Finally, of course, this line, the pressure to blur the line between the protester and criminal, the dissenter and criminal is of course,

buttressed greatly by nationalism - the one ideology that requires an undifferentiated myth of consent and unity. Why is almost always nationalism, let's say, in tension with or hostile to civil liberties and the one ideology that justifies being hostile to civil liberties almost whole scale. Because the raison d'être, the guiding principle of nationalism is, in a sense, the myth of...the undifferentiated myth of consent and unity which a protest, a dissent, a plebiscite...it punctures that plebiscitary claim to legitimacy that nationalism has. You might actually think of these love jihad legislations not just as legislations about regulating the freedom of conscience but also, in a sense, enacting the logic of a particular kind of national... nationalist plebiscite. Our nationalist imagination is now becoming ethnonational; it is becoming demographic; this is a Hindu country, in some ways, it's founded by a demographic anxiety that Hindus' political power by sheer weight of their numbers should always remain hegemonic in every single respect. The love jihad legislation is actually an enactment of that nationalist unity. The act of conversion - this is not about religion, that's an act of civil disobedience. That's in a sense refusing consent to this undifferentiated myth of unity that nationalism requires.

And finally, as I said, no court, no Parliament...they have such an investment in this myth of consent because otherwise their own legitimacy comes into question. So, their inclination will always be to say 'the potential naxal sympathisers' - so-called Urban Naxals, a figment of their imagination - 'is dangerous to the polity because they're refusing consent'. What they will never question, what they cannot question is Parliament's and the court's own complicity in bringing about the state of affairs where so many citizens, in a sense, feel outside of the social contract.

So, what I've been suggesting to you is that we have to face this uncomfortable thought. The state is not treating the dissenter as a

state of exception, as many people like to think. This is not also the dual state where there's a normative order for few people and the exercise of prerogative for others. Actually, the figure of the dissenter is always being construed as a threat to the logic of democratic legitimation itself. What can change this? I'm not a big fan of courts, as has been apparent. I think courts are important but I don't think courts can be relied upon to do the work of politics. There are some brave High Court judges giving extraordinary decisions even in these times but mostly the courts have internalised the logic of the figure of the dissenter as a threat, as, in a sense, a criminal. The courts also are too invested in their own mythology. We are a republic of the rule of law and democracy. If you are dissenting, you must be either prematurely dissenting - in which care you're wrong, go to the processes - or if you're post-facto dissenting, you're just this unilateral sovereign, questioning our authority. The courts are too invested in their own mythology and they will maintain it by evasion, even suspending the habeas corpus, political reading of bail, you know, all of these things. The judicialisation of politics is always dangerous, in part because it always puts you in this corner solution - is dissent a right or not? As I said, you actually can't answer this question without looking at the normative content of dissent. So, if you want to further dissent, protect dissent, you will have to imagine democracy differently. And that imagination will require two things: one, it'll require solidarity because what protects the dissenter from this charge that the court always foists on them, the state always foists on them - these are unilateral sovereigns, refusing consent of proper procedure. That charge of unilateralism can, in a sense, be negotiated only if there is widespread solidarity with that cause. I'm afraid, I think the CAA movement, as promising as it was, I think, failed in that sense. Not enough Hindus joined it, let's put it bluntly. And the second thing you need, apart for, solidarity, is an imagination of democracy where democracy is understood to be a process of negotiation. It's always a work in progress where you

don't say of a dissenter, they are, in some ways, subverting the logic of democracy. As Frederick Douglass once put it, it was a wonderful quotation, "those who profess to favour freedom and yet deprecate agitation, are people who want crops without ploughing the ground, they want rain without thunder and lightening, they want the ocean without the roar of its many waters. The struggle may be a moral one or it may be a physical one or it may be both but it must be a struggle. Power never concedes nothing without demand; it never did and it never will".

Thank you for your patience and my apologies for going on so long.

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