Dharma and Adharma
A Persisting Contradiction within Indian Democracy

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The point of departure of this article is B R Ambedkar's observation, when presenting the draft Constitution, that India was entering a "life of contradictions." One such contradiction, between the noble pronouncements of the Supreme Court, especially in the last four years, and the lived reality of vulnerable groups, as illustrated by the four cases discussed, is considered. The coexistence of these two worlds of light and darkness is questioned.

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In his last speech to the Constituent Assembly, when presenting the Draft Constitution on 25 November 1949, B R Ambedkar (2016) pronounced that India was "entering a life of contradictions."[1] In the speech he pronounced three warnings. This article is a reflection both on the "first warning" and the "life of contradictions."

> *The first thing* in my judgement we must do is to *hold fast to constitutional methods of achieving our social and economic objectives*. It means we must abandon the bloody methods of revolution. It means that we must abandon the method of civil disobedience, non-cooperation and satyagraha. When there was no way left for constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods. But where constitutional methods are open, there can be no justification for these unconstitutional methods. These methods are nothing but the *Grammar of Anarchy* and the sooner they are abandoned, the better for us. (Ambedkar 2016)

These were historic words. They were both prescient and enigmatic. You could almost hear the pathos in his voice, for you could tell from his choice of words that he understood the enormity of the task, of aligning political equality with social equality. As one who had experienced so much humiliation and discrimination, the thought that the only way to achieve the values of liberty, equality, and fraternity for the new republic, was through the slow and patient constitutional way, must indeed have been very frustrating. And yet, Ambedkar steadfastly held on to that belief.

While it would have been wonderful, after 70 years, to carry out an audit of the successes and failures of "constitutional methods," it is too large an exercise to do in these pages. The best I can do, therefore, is to provide a glimpse of the road that has been travelled by the republic and use the discussion of this journey to forcefully pose the question: Can the law, both in precept and practice, change our social behaviour and bring about fraternity? (Sen 1986). This is a question that has plagued Indian democracy since its inception, leading to much cynicism and some hope. When one looks at the record of our democracy's working, one feels that the trajectory of law, its pronouncements and interventions, based on the constitutional values that Ambedkar so cherished, belong to a different world of performance from the dynamics of everyday politics that he so decried. So how does one reconcile the tension between these two worlds?

In this article, I propose to examine the life of one such contradiction. The cases that I shall be discussing coexist in our polity, illustrating this "life of contradictions." Since a contradiction has two sides I shall, in this article, use a language that is fair to the core aspect of each side's performance. I have relied on the word "performance" to give my analysis a sense of neutrality, at least initially, because alternative words, such as each side's "achievements" or "gains" or "advances" claim more than I am presently prepared to permit. So, "each side's performance" is acceptable here.

The contradiction I wish to discuss is, on the one hand, the constitutional deliberations and judgments of recent years where some important pronouncements have been made, and, on the other, the working of the polity and society today, seven decades after the Constitution's adoption. The article is organised into three sections. The first will look at some recent cases that have been debated in the Supreme Court. The second will discuss four episodes from politics and society that illustrate our democratic functioning. In the third, I will offer my views on the cases presented, so that we can take a position not just on the character of Indian democracy, and the life of contradictions, but also on the larger issues of the human condition (Arendt 1998). Let me, for allusive purposes, call

the sections: dharma, adharma, and reconciling the tension between them.[2]

Dharma

The Supreme Court of India has, over the last few years, since Kesavananda Bharti in 1973, emerged as the custodian of the Constitution of India and the interpreter of what it prescribes and proscribes. The Court has become the new Bhishma, the new purveyor of the dharmic code of our democracy. While its signposting of Indian democracy can be traced through many important cases,[3]—such as *Kesavananda Bharati v State of Kerala,* 1973, which gave us the doctrine of "basic structure," and ADM *Jabalpur v Shivkant Shukla*, 1976, which ruled on the suspension of habeas corpus during Emergency—I shall, here, concentrate only on the most recent cases from 2014–18 to outline this new public morality, the new dharma, that the Court seeks to promote. I shall discuss the cases in the same chronological order in which they have been debated, since later cases build on the achievements of earlier cases.

A political theory analysis of the cases shows that there are two aspects to each Supreme Court judgment: settled jurisprudence, and innovative jurisprudence. The former is where the Court reiterates the observations of earlier judgments, or of similar judgments in international courts, or of basic principles accepted by the state through the international agreements it has signed. It uses these sources to remind the state of its commitments and responsibilities. In this aspect of settled jurisprudence, the Court extends the law to areas and communities where these constitutional guarantees have not been enforced. The judgment in this aspect seeks to overturn the denial by the state, either through neglect, cussedness (the state can be cussed), or through a regressive imagination of the rights of vulnerable persons or communities. Settled jurisprudence colonises the areas where constitutional values have a weak presence. The law is clear, but its application is infirm and it is this infirmity that the courts seek to address.

Innovative jurisprudence, in contrast, refers to aspects of a judgment that gives to the letter of the law new interpretations. Innovative jurisprudence extends the law to domains where it had not earlier been thought of as being applicable. It makes connections that had hitherto not been made and in doing so expands the protections offered by the Constitution and thereby strengthens the rights landscape of the polity. Innovative jurisprudence responds to the new discourses on rights that characterise the contemporary global public sphere and engages with it in a creative way to borrow some of its arguments. It draws on bodies of literature from as far apart as psychology and gender studies, anthropology and religious studies, to enrich its reservoir of insights into the role of law in dispensing justice in a society. Both aspects of settled and innovative jurisprudence can be seen in the illustrative cases chosen from this brief period from 2014 to 2018.

Transgender rights and protections: The first case was the *National Legal Services Authority (*NALSA*) v Union of India* (*UoI*) (2014), before Justices K S Radhakrishnan and A K Sikri. It has come to be referred to as the NALSA *v UoI* case, and concerns the rights of transgender persons. It drew on both domestic and international laws to argue that transgender persons faced several disabilities such as unequal treatment in services (Article 14), discrimination in the public sphere (Article 15), lack of access to government employment (Article 16), lack of opportunity to express themselves as persons (Article 19(1)), and vulnerabilities because of threats and abuse (Article 21). Thus, five articles of the Constitution were invoked, and interlinked, to make the consolidated case that transgender persons, and the transgender community as a whole, faced many insecurities because their status and requirements, as a different gender, had not been recognised by the state and society. The facts of the case have been neatly summed up by the Equal Rights Trust (2014):

> The case concerns legal gender recognition of transgender people, and whether the lack of legal measures to cater for the needs of persons not identifying clearly as male or female contradicts the Constitution. Pre-existing Indian law only recognised the binary genders of male and female, and lacked any provision with regard to the rights of transgender people, which advocates in India have also defined as "third gender." The gender of a person has been assigned at birth and would determine his or her rights in relation to marriage, adoption, inheritance, succession, taxation and welfare. Due to the absence of legislation protecting transgender people, the community faced discrimination in various areas of life.

The case was argued drawing on material from civil liberties and human rights organisations such as the People's Union for Civil Liberties Karnataka (PUCL–K), which prepared a comprehensive and well-structured report on the discriminations suffered in the domains of law, at the hands of the police,[4] within families, at work, in public spaces, and even by the medical establishment, which has attempted, through sexual reassignment surgery (SRS), to make "normal" the sexual disposition of transgender persons. Another source which detailed the emergence and persistence of such discrimination was the Human Rights Watch report, which found that a Victorian morality—courtesy Lord Macaulay under whose chairmanship the Indian Penal Code (IPC) was drafted—had been imposed on an Indian cultural space which was more accepting of what is today called an LGBT (lesbian, gay, bisexual, and transgender) presence in the public sphere.[5]

Justice Radhakrishan, who wrote the main judgment, and Justice Sikri who concurred, drew on a range of resources from case law to historical studies of the colonial origins of sodomy laws, from studies on sex and biology to studies on the psychology of the self, and from international covenants such as the Yogyakarta declaration to the European Court of Human Rights cases, to deliver a judgment that creatively combined "settled" and "innovative" jurisprudence. The judgment instructed the state to recognise transgender persons as the "third gender," to affirm their right "to decide their self-identified gender," to treat them as socially and educationally backward classes of citizens and, thereby, to extend reservations to them, to frame social welfare schemes for them, to give them special attention in hospitals, and to work to overcome the fear, shame,

gender dysphoria, and social stigma which they face so that they can "feel that they are part and parcel of the social life and not be treated as untouchables" and so that they "regain their respect and place in the society which once they enjoyed in our cultural and social life" (*National Legal Services Authority v Union of India* [2014]: para 129).

The judgment is a powerful statement against discrimination and in defence of the universal principles of equality, liberty and the dignity of all citizens. It not only provides a restatement of the new moral coordinates of the republic, outlined in the Constitution, especially in the preamble, but also seeks to give vulnerable groups, such as transgender persons, the assurance that their insecurities of life and livelihood remain a concern of the Court. Much of the text of the judgment belongs to what I have described as settled jurisprudence as the judges go through elaborations of Articles 14, 15, 16, 19(1) and 21, showing their interlinkages, to make a forceful case for the state to protect the rights and life of transgender persons. While these sections make for fascinating reading, there are inspired sections of innovative jurisprudence too which open up new vistas for reflection. Let me quote from two paragraphs from the judgment to show this play of judicial imagination.

The first is the introduction into the debate of the psychological stress and trauma of transgender persons who have to reconcile their physical characteristic with their psychological nature (para 34). The judgment recognises that gender identity may be at variance with sex assigned at the time of birth that refers to each person's "deeply felt internal and individual experience of gender, which may not correspond with the sex assigned at birth, including the personal sense of the body" (para 19). This recognition of the psychological dimension of discrimination is valuable, because it compels us to think, through the haze of prejudice, of transgender persons as persons who have insecurities that need to be assuaged. Transgender persons also need to be given the same protections and opportunities given to other persons for the development of their psychological selves. By taking the discussion into the psychological dimension of the lived world of transgender persons, the Supreme Court judgment contributes to a public discourse in India described by Martha Nussbaum (2009) as the "education for sympathy."

The second aspect is to link the sense of self, of belonging to the third gender, to the guarantee of freedom of expression in all the areas that are available to others. The judgment holds that

> Article 19(1) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one's personal appearance or choice of dressing. (para 62)

Further, the state

> cannot prohibit, restrict or interfere with a transgender person's expression of such personality, which reflects that inherent personality… we therefore hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the constitution of India and the state is bound to protect and recognize those rights. (para 66)

This is enlightened thinking to defend the lived world of the transgender person by invoking the freedom of expression. The judgment is a creative statement of settled and innovative jurisprudence.

Right to privacy as part of right to life: The second case is the judgment in *K Puttaswamy v Union of India* (2017). The bench that delivered the verdict was a nine-judge bench headed by the Chief Justice. The case was brought by Justice Puttaswamy (retd) against the Aadhar policy and the practice of collecting personal data on a range of issues and making it mandatory for the opening of bank accounts, medical treatment, driving licence, school admission, etc.

Centred on Article 21, the right to life, that "No person shall be deprived of his life or personal liberty except according to procedure established by law," the petitioners challenged the constitutionality of the Aadhar regime as a violation of their right to privacy guaranteed by the Constitution. As respondents, the Government of India opposed this linking and referred in their defence to the judgments of *M P Sharma v Satish Chandra* (1954) where a unanimous decision of eight judges held that privacy was not protected by Article 21 and a later judgment of four judges in *Kharak Singh v State of Uttar Pradesh* (1964), which also held that there was no constitutional right to privacy. It is a long and complex judgment, not a majority one since the bench had four judges concurring with the judgment written by Justice Chandrachud on behalf of the Chief Justice, while the other five did not oppose their views but wrote independent judgments, and so it is described as a plurality and not a majority judgment.[6] The defence of privacy, in passage after passage, makes for fascinating reading (Bhaskar 2017). Many aspects of privacy, drawn from humanities and social science literature, are articulated in the judgment providing another good example of innovative jurisprudence.[7]

> Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being. (*K Puttaswamy v Union of India* 2017)

The judgment challenges the respondent's arguments that privacy is an elitist concept and one that is an impediment to the delivery of welfare benefits in the Aadhar scheme. It has many aspects such as the overturning of the Supreme Court judgment in the ADM Jabalpur case that allows the suspension of habeas corpus during a state of Emergency. It is a massive 547-page judgment to which I cannot do justice here, but I will concur with the opinion of several commentators that the case will serve as the basis of many challenges of the constitutionality

of many of the laws on the grounds that they violate the rights of the individual especially that of privacy. We can see in the Puttaswamy case another powerful example of the new "dharmic" order being built, brick by ethical brick, for a democratic India.

There are many sections making the linkage between privacy and right to life and I will quote just one more section to show the link with the rights of vulnerable minorities, especially sexual minorities.

> The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the "mainstream." Yet in a democratic constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. (*K Puttaswamy v Union of India* 2017)

Other cases are the Supreme Court judgment on the constitutionality of Article 377 of the IPC, the Triple Talaq case, the striking down of the prohibition of the entry of women of ages 10–54 (the general menstrual age), from worshipping at Sabarimala temple. I shall not discuss these here, but have merely flagged them to illustrate my argument that the Supreme Court is setting the coordinates for a new "dharmic" order of a democratic India.

Adharma

The above-mentioned cases show convincingly, I hope, that Indian democracy is building, brick by brick, the ethical structure of protections for the weak and vulnerable that any constitutional order is mandated to provide. Not only is there an extension of settled jurisprudence to areas where it has hitherto been feeble in its practice—what I have described as the "colonisation of these spaces by law," adapting a phrase made popular by Habermas in the 1980s—but it has also built this structure of protections by confronting such worlds of vulnerability with innovative jurisprudence. In the cases discussed, we get a clear picture of the onward march of a moral political order, especially with respect to the rights of vulnerable and abused groups. As the meeting organised at the India International Centre on 24 August 2018, to celebrate one year of the Puttaswamy judgment, declared, it is truly an occasion for celebration.[8]

However, when we contrast these fine arguments, and the rights interlinkages made by the Supreme Court judgments, with another world that is not just present but pervasive, we find ourselves wondering how to reconcile the co-presence of two worlds. How do they coexist?

The four cases I wish to describe, in this section that I have titled adharma, are well-known, and so I shall attempt only a brief narration.

Shelter homes and spaces from hell: The first relates to the recent report by the Tata Institute of Social Sciences (TISS) on the shelter homes in Bihar (Tewary 2018; Tripathi 2018). Fourteen such homes were studied, all managed by non-governmental organisations (NGOs) for, and on behalf of, the state. By state, I mean not just the federal unit but the abstract entity referred to in theories of modern constitutionalism with which citizens have made a compact for the protection of their rights. Each shelter home, with names such as Sakhi (generous, bountiful), Nirdesh (instruction) and Panaah (refuge), was expected to be a "protective zone," where vulnerable women and girls from across the state, who have either been abandoned or abused in society, were rescued from these abusive situations and housed in state-supervised "shelter homes." By having such safe homes, and by providing for them, the state was sending out the message that it is party to the compact of guaranteeing the rights and security of its vulnerable citizens.

Yet, the lived reality of these homes is very different from that which was promised by the law and captured by the term "shelter home." In reality, local power elites have taken over these homes to create for themselves, as perverse as it may sound, resources for sexual exploitation. Defenceless women in these homes are psychologically brutalised and coerced into sexual submission to those who control these homes. They do so in connivance with the NGOs who are tasked with managing the homes. In fact, the NGO is only a front for this sexual exploitation. The staff in these homes, often women, collude with the abusers. The TISS report, after looking at all 14 institutions, stated that "institutions of all categories were found to be indulging in some form of abuse. Incidents of harassment, sexual abuse, corporal punishment, neglect and humiliation were reported rampantly across the state." Sexual violence was used as a form of punishment. In one shelter home in Muzaffarpur, one Brajesh Thakur, who controlled the home, was alleged to have abused 34 girls. He was a local leader who had deep connections with influential people as was shown in the address book on his phone. The report suggests that the sexual exploitation was well-known. It was not a unique episode but instead was widespread across all shelter homes. Imagine the vulnerability and terror of the women who, after being rescued from the streets, were then forced to live in spaces where the terror of exploitation has no exit. The caring state had turned into a monster state. My language might sound dramatic, "trapped," "monster state," "terror of exploitation," etc, but when one tries to imagine the "psychological distress of the women and girls," the same psychological distress referred to in the Radhakrishnan judgment of the Supreme Court, this language is, in fact, rather tame.

The details, as reported in the press, are grim. The shelter home had become a virtual hell as every protective layer was eroded: the civil society partner—supposed, as we are told by the democratic discourse, to be a bulwark against tyranny—became a partner to tyranny; the visiting committee, an institutional device to serve as a check against mistreatment, was complicit; the welfare officials, who were supposed to monitor the working of the homes, were indifferent to the condition of the girls; and the larger society within which these homes were located, it appears, was inured to such happenings.

In the report we get a dismal picture of failure of both state and society. I want to suggest that this is more than a lapse. What we are seeing in this episode is the

capture of the power structures of the state by local elites and the imposition, on them, of the culture of caste and patriarchy. It is the normal that we have insufficiently theorised. We treat it as a social pathology and by doing so, wrongly imply that the normal is something else, more humane, and more civilised. This is not the case. This abuse of the vulnerable is the normal. The fact that neither did the abusers see themselves as criminals, and nor did the others who had the authority to stop them, only points to a mindset whose features we need to understand and rage against if we want to realise the dharmic order that the Supreme Court seeks. We need to create a counter discourse of outrage as the French thinker and survivor of the concentration camps, Stéphane Hessel, wrote in his book *Time for Outrage!* This normal has persistent features. In it, those who are at the bottom of the social structure and who face extreme livelihood vulnerability, have to face daily anxiety about their physical security. Being abused and humiliated is a regular experience. That is why we have enacted the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. The constitutional state holds little fear for the abusers and exploiters.

Banality of evil: The second case is equally disturbing. In the town of Yadadri in Telangana, which is an important pilgrimage centre because of the Sri Lakshmi Narasimha temple, the state government has plans to invest hundreds of crore (something between ₹800 and ₹1,800 crore as reported in the papers) to develop the town. It was reported, a few days before the celebration of India's 71st Independence Day (very ironical), that the authorities had busted a racket where kidnapped girls, as young as 10 years old, were being forced into prostitution (Pandey 2018a; 2018b). It appears that of the pilgrims who came to the town, some went up to pray to the deity, while others would engage in child prostitution. The younger girls were forced to watch the slightly older ones being sexually abused, in order to train them for their future profession. If they protested, they were beaten up. Some houses even had an underground cellar where the protesting girls were kept as punishment. An elaborate system had been evolved where the kidnapped girls, some as young as five years, were registered in schools to get local identities and to have the system recognise them as the children of the adults with whom they had come to be registered. They were then taken out from the school and forced to enter the world of prostitution. In this working system, a doctor was an integral part. His job was to administer the younger girls with hormone injections so that they would reach puberty early.

The neighbours knew what was happening for they heard the cries of the girls every night, yet they did not protest. The papers reported that the number of houses in which these activities were taking place exceeded 20, for when the police raided the town, many houses were locked and the occupants had fled. Housewives, neighbours, a doctor, local officials, were all part of the system of abuse. The hormone injections, that were being given, reminded one of the experiments by the doctor, Josef Mengele in the Nazi concentration camps. Has evil become so banal, to refer to Hannah Arendt's phrase "the banality of evil," that housewives, temple priests, government officials, neighbours, NGO activists, and even god in the temple, did nothing to stop the abuse of innocent girls and oppose the hormone injections? We see in this case the same disregard for constitutional morality, and concern with the humanity of the young girls, as in the earlier case of shelter homes.

If the first case reveals the perversion of welfare and protective role of the democratic state, the second reveals the absence of its protective institutions. Both cases reveal collusion between the abusers and the functionaries of the state, between civil society organisations and the local tyrants. The aspect that is most alarming is the normalisation of this pathology, as if the victims do not deserve the protections promised by the Constitution; as if, because of who they are, they do not merit the full range of citizens' rights and protections discussed in such fine detail in the cases presented earlier in the section on dharma. Again, the challenge we are faced with is how to treat this case: Is it a deviation from the normal? Or, is it the normal when seen from the perspective of the vulnerable, something that they accept as their lot, a world far away from the exhortations of the Supreme Court?

Psychology of hate: The third case refers to the lynchings that have become so widespread in India, and which, one is beginning to suspect, are even being encouraged, or at least ignored by the regime in power because of the electoral dividends it produces. The list is long. But since this section is on adharma, I do not want to dwell on all lynchings, such as those sparked by rumours of child lifters, etc, but only on those where the actions performed go beyond just being offensive. These are lynchings that are evil. I shall place before us, for reflection, particular aspects of two lynchings. The first is from Alwar in Rajasthan where Pehlu Khan, a cattle trader, who was transporting cattle legitimately, was lynched. The newspaper report states that the mob stopped his vehicle and asked him and the others in the vehicle to get down. First they separated persons on the basis of name. Persons with majority community names were allowed to go with a warning. Then, they asked Pehlu Khan to also go since he was elderly. They said to him, "tu buddha aadmi hai, bhaag." He started running. Then they chased him and beat him up amidst derisive laughter. Chasing an innocent man from another community to death has, for a section of the population, become a kind of sport. Khan succumbed to his injuries from the beating (Mander 2018; Krishnan 2017).

The second episode took place in Rajasamand, Rajasthan where a daily wage labourer was hacked to death with an axe, ostensibly because of "love jihad." The killer then attempted to burn the body. This in itself is horrible, but what I want to draw attention to is not the crime, but the instruction by the killer to his 14-year-old nephew to record a video of the man being killed. The video was recorded and a juvenile was thus made party to the killing (Singh 2017). The video went viral, and the dead man's

children saw it in another part of the country. They were shocked to learn that the body being burnt was that of their father. When the state, on the basis of the video recording, began to prosecute the killer, there were rallies in his support (*Indian Express* 2017). How does one understand the psychology of hate that causes people to support the killer? How does one explain the instruction of the killer, to his young nephew, to film the event as an act of triumphalism? What are the processes in society and politics that have produced such individual and collective psychology, where the act of killing, and where the videographing of the act, is seen as acceptable and even one to be celebrated? This is what we must analyse. This India also exists. Again, we are faced with the challenge of trying to reconcile the barbarity of the acts in Rajasamand and Alwar with the noble statements articulated by the Supreme Court. How do these two worlds relate to each other?

Rogue citizens? In the fourth case I shall turn the gaze back from the society to the state. It is about the use of pellet guns by the state government in Kashmir as a measure of crowd control (Nair 2016). While there are many troublesome issues concerning the actions of the security forces in Kashmir, I have chosen to focus on the use of pellet guns because of the indiscriminate damage that they cause to the soft tissue of the protesters, and even to some bystanders watching the protest. This is because the pellet guns have no definite target and upon firing, disperse pellets in the general direction in which they are fired. As a result, violent protesters and innocent bystanders get hit. Pictures of the victims have appeared in print and digital media. Ravi Nair, director of the South Asia Human Rights Documentation Centre, stated, "It is reported that at least 92 people have lost their eyesight and at least 1,500 people have sustained serious injuries from pellet guns since 2010" (Nair 2016). For a state to consider it legitimate to use pellet guns against its protesting citizens, is difficult to fathom. Many of the children hit by the pellets have permanent eye damage. For a moment, forget the injunctions of international law and the manuals of crowd control, and think about the mindset of the authorities who took the decision to use pellets against protesting citizens, including women and children. How can one imagine it to be a legitimate weapon for crowd control, especially since it is known that pellet guns spew out hundreds of micro metal particles that disperse and lodge in the skin and eyes of the protesters? What do the officers of the state and of the security services see when they look at the crowd of protesters that includes women and children? How do they see these people as legitimate targets of pellet guns? Again, we must turn to the psychology of the security forces that converts protesting human beings into entities that must be subdued by the force of pellet guns. Is it like shooting at a charging rogue elephant? Do they see a rogue people and not a protesting citizenry?

Life of Contradictions

The four cases that I have briefly discussed under adharma were chosen not to point to the existence of tyranny in society and state. That is a background assumption for me, a given. Here, I want to take our thinking beyond the exercise of establishing, with evidence, the existence and performance of tyranny. I want to ask why ordinary persons (even members of the security forces) have become so inured to violence that they become participants in the performance of evil. The acts described, I believe, are more than just offensive. They are evil normalised.

It is this process of normalisation that we have to analyse. In India, unfortunately, we do not analyse it enough because we feel that we have satisfied the requirement of analysis by establishing the fact and act of tyranny. Calling it offensive allows us to treat it as a deviation from the norm and thus one that can be righted through the fine-tuning of the instruments of state. And then, the further belief that the fine-tuning, as the Supreme Court judgments have done, will take care of the problem. But what I have described here—shelter homes that have become hell holes, hormone injections to kidnapped girls to hasten puberty, videographing of a murder by a juvenile under instructions from his uncle, the killer, deployment of pellet guns that damage the eyes of children—require us to look beyond this theory of deviance. We must recognise that what we are confronted with are expressions of a societal pathology, one that suppresses basic humanism. Our task is to examine the causes and drivers of that pathology. We too, like the Supreme Court judges, need to delve into social psychology to explain why it is happening.

Several explanations suggest themselves. We could see them as an expression of a mental landscape produced, over centuries, by the rules of social interaction in a stratified society, where those at the lower end are not expected to enjoy the same rights and respects enjoyed by those higher up. There is a natural gradation of enjoyment (to distort a phrase by Ambedkar). That is why there are such clashes when a Dalit boy rides to his marriage on a horse through the main street in the village. He is assaulted by boys from the so-called higher castes. Such a stratified society inhibits the production of a feeling of fraternity across social strata. But fraternity is necessary for the emerging constitutional order. And fraternity is proscribed by the old dharmic order. Can Supreme Court judgments produce this required fraternity?

In another direction, we could see this outcome as the product of a democratic politics of "othering" such that "the other" is seen as the source of misfortune, as the embodiment of everything that is in opposition to that represented by the self. Therefore, the other is the adversary who must be vanquished for reasons drawn from the past, or from the present, or even from the future. We could also see it as the competition for livelihood security, where elimination of the competitor secures some security for the agent of the action. This line of thinking takes us into conundrums of democracy, where competitive politics results in the production of an adversarial other that must be defeated.

All these possible explanations may address the issue of normalisation of those actions that can only be described as evil. As social scientists we need to

document the processes that produce such normalisation, and to look for responses that go beyond the law alone. The question we must pose is: What are the processes that inhibit the feeling of fraternity that the new dharmic order, being outlined by the Supreme Court, so requires? Or, asked positively, how do we build such fraternity?

Martha Nussbaum talks of education for sympathy. We need to look at curricula, textbooks, resource material, teacher training, classroom pedagogy, and of course the strengthening of public education, where class populations are diverse and mixed, a plurality which sets the foundation for feelings of fraternity. School is an important site where children get the experience of diversity. It is here where they naturally accept, as normal, the common but different ways of living together. This is the normalisation we want, the normalisation of the good and the right. Higher education also needs to be primarily public, accessible and inclusive—against the trend of privatisation, and of elite production that is taking place in higher education today—so that leaders from the different communities are nurtured in the same classroom. Education is one area, if not the primary one, where the normalisation of evil can be combated. For example, in a small experiment children can be asked to visit each other's homes regularly, drink water or tea there, and write about the visit. What would their experience be?

As checks against the practice of brutality, we need to strengthen the oversight institutions of law, both the big and small ones. Here too, we have to look for state interventions which are innovative and which have factored in the existence of the "crooked timber of humanity" (a phrase used by Isaiah Berlin borrowing it from Kant) in their design. Placing at risk the interests of the officials is an area in which such oversight actions can be made more robust. For example, the denial of pension and the withholding of retirement benefits such as gratuity (a law would have to be enacted) of the officials who have been complicit would be an idea worth considering. The judgments may have fine-tuned the legal structure, but what is required now is to think of ways to strengthen its implementation. Complicity must become costly.

The big question remains, however, to explain the coexistence of the two worlds of dharma and adharma. We need to look beyond education and penalties to explain this coexistence.

Saying India is a vast country is a truism. But the truism becomes profound when we discover that within this vastness different social realities coexist and operate under different dynamics, and that the dynamics of one rarely intrudes into that of the other, except by chance. Does this vastness allow the coexistence of the two different worlds to exist, since it does not require the logic of the Supreme Court or the constitutional logic, to meet the logic of tyranny in the everyday world of the vulnerable "citizen," except in accidental situations? They do not meet because the media is too focused on the metropolis and so has little place to report such everyday realities. The courts, too, are preoccupied with managing modernity to suo motu go to the lived reality and beyond what the battery of lawyers present before it. Justice is due process, not simply stamping out tyranny. The political class is too busy working a modern state, and its competitive politics, to really think about equality and fraternity. The educated class is too engaged with looking for opportunities to display their links with global cosmopolitanism and thereby to travel beyond the opportunity-laden metropolis in which they live and to which they migrate. And so on, a long list of explanations for the coexistence of dharma with adharma.

Will, in the long run, the dharmic world, with its legal and pedagogic interventions, win against the adharmic world? This is the hope of constitutional practitioners. Are the pathologies discussed above on the losing side of history, or will they continue for many more decades? Is 70 years too short a historical time to arrive at a judgment? Or is it long enough for us to be alarmed? Even if we work with the assumption that evil is a part of the human condition, and hence must be controlled through the architecture of an enlightened state, since we find expressions of such evil in other countries and other democracies, we need to probe further this coexistence conundrum. I want to suggest that coexistence takes place because there are many spaces in our polity and society where the constitutional state does not penetrate, and which, if it does, is very feeble.

I am making the size argument here. Size permits the existence of a social topography containing spaces that march to a different logic than the humanist one we seek. Some of these spaces exist in the mind. Patriarchy and caste, and the lenses they offer from which to see the world, are the most pervasive. As a result, human beings are not seen as equal to each other, as equal bearers of rights, and as ends in themselves.

This raises the second aspect that we have to consider, in addition to size and space: time. Because both worlds simultaneously exist in the India of today, we realise the urgency of action. Which brings me back to Ambedkar's faith in the slow constitutional way. Did he not consider the prospect of it being hijacked by slick lawyers, a dime a dozen in Delhi? Or, did he but still believe that the constitutional way would come up trumps? Was he being too naive when he advocated the constitutional path? Is there another way to bringing a constitutional morality across all social spaces in India than through the slow constitutional method? It appears we today have to struggle, much more than we are doing, with this life of contradictions.

NOTES

1 "On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life?" (Ambedkar 2016).

2 Even though we write in English, it is good to occasionally introduce concepts from outside the English language sphere for several reasons: accuracy of depiction, subversion of English hegemony, production of a more diverse analytical vocabulary, expansion of the range of perspectives on the human condition, and enfranchising concepts from other languages.

3 For interesting illustrations of important cases in the Supreme Court, see Justice Adda (2017).

4 In Section 2.2.3 titled "Abuse," the report states that: "The systematic abuse suffered by sexual minorities is brought out in a revealing remark like 'the police were very nice they beat me only once.'" Such a remark indicates the degree of internalisation of self-hatred, wherein the person believes that he actually deserved to be beaten up. This is a serious psychological consequence of abuse. This is a very tragic narrative of the world of fear in which LGBTs live (PUCL-K 2001).

5 "Colonial legislators and jurists introduced such laws (Section 377) with no debates or 'cultural consultations', to support colonial control. They believed laws could inculcate European morality into the resistant masses. They brought in the legislation, in fact, because they thought 'native' cultures did not punish 'perverse' sex enough. The colonised needed compulsory re-education in sexual mores. Imperial rulers held that, as long as they sweltered through the promiscuous proximities of settler societies, 'native' viciousness and 'white' virtue had to be segregated: the latter praised and protected, the former policed and keep subjugated" (Gupta 2008).

6 The conclusions are set out on pages 260–65 of the joint judgment. It is held that privacy is a constitutionally protected right, which emerges, primarily, from Article 21 of the Constitution. This is not an absolute right but an interference must meet the threefold requirement of legality; the need for a legitimate aim; and proportionality (p 264). It is also noted that, as informational privacy is a facet of the right to privacy the government will need to put in place a robust regime for data protection (Tomlinson 2017).

7 "The right to privacy was reinforced by the concurring opinions of the judges in this case which recognised that this right includes autonomy over personal decisions (for example, consumption of beef), bodily integrity (reproductive rights) as well as the protection of personal information (for example, privacy of health records)" (GFE 2017).

8 Celebrating one year of *Justice K S Puttuswamy v Union of India Judgment*, 24 August 2018, organised by the Indian Council for Research on International Economic Relations (ICRIER) and Centre for Communication Governance at National Law University Delhi.

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