

UNDOING A LEGACY OF INJUSTICE

Relevant for: Indian Polity & Constitution | Topic: Judiciary: Structure, Organisation & Functioning

In 1871, the colonial regime passed the notorious Criminal Tribes Act. This law was based upon the racist British belief that in India there were entire groups and communities that were criminal by birth, nature, and occupation. The Act unleashed a reign of terror, with its systems of surveillance, police reporting, the separation of families, detention camps, and forced labour. More than six decades after independent India repealed the Act, the “denotified tribes” continue to suffer from stigma and systemic disadvantage.

The Act was one strand of a web of colonial laws that dehumanised communities and ways of life. The colonial administrators were particularly concerned about nomadic and itinerant communities, which by virtue of their movements and lifestyle were difficult to track, surveil, control, and tax. Through laws such as the Criminal Tribes Act, and other legal weapons such as vagrancy laws, the regime attempted to destroy these patterns of life, by using criminal laws to coerce communities into settlements and subjecting them to forced labour.

Independence brought with it many changes, but also much continuity. Despite the birth of a Constitution that promised liberty, equality, fraternity, and dignity to all, independent India’s rulers continued to replicate colonial logic in framing laws for the new republic. They continued to treat individuals as subjects to be controlled and administered, rather than rights-bearing citizens. One of the most glaring examples of this is the Bombay Prevention of Begging Act. The Begging Act was passed in 1959 by the State of Bombay, and has continued to exist in as many as 20 States and two Union Territories. But last week, in a remarkable, landmark and long overdue judgment, the Delhi High Court struck it down as inconsistent with the Constitution.

What does the Begging Act do? It criminalises begging. It gives the police the power to arrest individuals without a warrant. It gives magistrates the power to commit them to a “certified institution” (read: a detention centre) for up to three years on the commission of the first “offence”, and up to 10 years upon the second “offence”. Before that, it strips them of their privacy and dignity by compelling them to allow themselves to be fingerprinted. The Act also authorises the detention of people “dependant” upon the “beggar” (read: family), and the separation of children over the age of five. Certified institutions have absolute power over detainees, including the power of punishment, and the power to exact “manual work”. Disobeying the rules of the institution can land an individual in jail.

From its first word to the last, the Begging Act reflects a vicious logic. First, there is the definition of “begging”. The Act defines it to include “soliciting or receiving alms, in a public place whether or not under any pretence such as singing, dancing, fortune telling, performing or offering any article for sale” and “having no visible means of subsistence and wandering about or remaining in any public place in such condition or manner, as makes it likely that the person doing so exist soliciting or receiving alms.”

Not only do these vague definitions give unchecked power to the police to harass citizens but they also reveal the prejudices underlying the law. The pointed reference to “singing, dancing, fortune telling, performing or offering any article for sale” makes it clear that the purpose of the Act is not simply to criminalise the act of begging (as commonly understood), but to target groups and communities whose itinerant patterns of life do not fit within mainstream stereotypes of the sedentary, law-abiding citizen with a settled job. And the reference to “no visible means of subsistence and wandering about” punishes people for the crime of looking poor — but it also

reflects the lawmakers' desire to erase from public spaces people who look or act differently, and whose presence is perceived to be a bother and a nuisance. The Begging Act encodes into law the vicious prejudice that recently saw a prominent institution putting up spikes outside its Mumbai branch, to deter rough sleeping (they were removed after public outrage).

Once individuals fall within its clutches, the Begging Act effectively renders them invisible, by confining them to "certified institutions" after a truncated, summary judicial procedure. Like the poorhouses of 19th century Europe, it is based on a philosophy of first criminalising poverty, and then making it invisible by physically removing "offenders" from public spaces. Effectively, it places a cordon sanitaire around the poor and the "undesirable", keeping them from accessing spaces reserved for the use of "respectable" citizens. For these people, the constitutional guarantees of pluralism and inclusiveness do not exist.

The authorities have not hesitated to use the Begging Act as a weapon. Just before the 2010 Commonwealth Games, the Delhi government was engaged in combing operations to take beggars off the street, lest their presence embarrass the nation in the eyes of foreigners. Such operations are also a regular part of preparing for national events, such as Independence Day and Republic Day.

In its judgment delivered last week (*Harsh Mander v. Union of India* and *Karnika Sawhney v. Union of India*), a Bench of the Delhi High Court presided over by the Chief Justice, held that the Begging Act violated Article 14 (equality before law) and Article 21 (right to life and personal liberty) of the Constitution. In oral argument, the government conceded that it did not intend to criminalise "involuntary" begging. The High Court noted, however, that the definition of begging under the Act made no such distinction, and was therefore entirely arbitrary. More importantly, it also held that under Article 21 of the Constitution, it was the state's responsibility to provide the basic necessities for survival — food, clothing, shelter — to all its citizens. Poverty was the result of the state's inability — or unwillingness — to discharge these obligations. Therefore, the state could not turn around and criminalise the most visible and public manifestation of its own failures — and indeed, penalise people who were doing nothing more than communicating the reality of their situation to the public.

The Delhi High Court's judgment marks a crucial step forward in dismantling one of the most vicious and enduring legacies of colonialism. It is as significant and important as a judgment delivered by the same court more than nine years ago, when it decriminalised homosexuality (*Naz Foundation v. NCT of Delhi*). It is perhaps fitting that this judgment comes just a few days before the Supreme Court is likely to vindicate Naz Foundation after a 10-year legal battle. Both *Naz Foundation* and *Harsh Mander* recognise that our Constitution is a transformative Constitution, which seeks to undo legacies of injustice and lift up all individuals and communities to the plane of equal citizenship.

However, it remains only one step forward. Hopefully, other High Courts will follow suit and the constitutionality of vagrancy laws as well as other provisions in the Indian Penal Code that criminalise status will also be called into question. Nonetheless, it is important to remember one thing: a court can strike down an unconstitutional law, but it cannot reform society. Poverty — as the Chief Justice recognised in her judgment — is a systemic and structural problem. The Delhi High Court has done its job in striking down a vicious law that criminalised poverty. But it is the task of the Legislative Assembly and the government to replace the punitive structure of the (now defunct) Begging Act with a new set of measures that genuinely focusses on the rehabilitation and integration of the most vulnerable and marginalised members of our society.

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