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A BLOW AGAINST PUNITIVE CONSTITUTIONALISM

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

Two centuries of colonial rule visited many cruelties upon Indians. One form that this took was the criminalisation and stigmatisation of entire populations that did not “fit in” to a certain, narrow way of life. Through laws such as the Criminal Tribes Act, for example, indigenous peoples were deemed criminals by birth and herded into concentration camps, where families were separated and forced labour was the norm.

While Independence and the Constitution were supposed to herald a new dawn, the reality turned out to be different. The post-colonial Indian state replicated many of the worst excesses of the British regime. One glaring example of this is the “beggary law”, which was enacted in Bombay in 1958, and later extended to many States and Union Territories. These draconian laws criminalise itinerant and nomadic communities, i.e., effectively anyone who does not fit the state’s definition of a “normal” citizen. And in establishing a system of “certified institutions” that are little better than detention centres, they facilitate the continued stigmatisation and incarceration of some of the most vulnerable and marginalised segments of society.

Last month, however, in a landmark verdict, the Jammu and Kashmir High Court struck down that state’s iteration of the Beggary Act. In a detailed judgment, its Chief Justice Gita Mittal identified the colonial origins of the law and found it to be a gross violation of human dignity, equality, and freedom. The Chief Justice’s reasoning serves as a powerful reminder of the colonial vestiges that remain with us, seven decades after the birth of the constitutional republic. And, more importantly, it shows us a path to reach that ‘something of freedom that is yet to come’.

What do India’s beggary laws say? The first striking thing is how broad the definition of “begging” is. Among other things, “begging” is defined as “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 exists by soliciting or receiving alms”. Thus, beggary laws go substantially beyond criminalising the act of begging; rather, they criminalise people who are “wandering about” and who look like they might need to beg at some point. It is evident that the purpose of such provisions is not to protect public peace or prevent crimes, but to effectively “cleanse” these spaces of individuals who appear poor or destitute. It is the legislative equivalent of shops putting up “spikes” outside their doors and windows to prevent rough sleeping.

The substance of these laws is worsened by the process. People found “begging” can be arrested without a warrant, and after a summary procedure, thrown into “Beggars’ Homes” for anything between a year and three years. Upon a “second offence”, the punishment could extend up to seven years. More specifically, the Jammu and Kashmir Prevention of Beggary Rules, framed under J&K’s version of the Act, authorised forced medical examinations of “beggars” taken in police custody, “shaving” of hair and “removal of clothing” in order to undertake the euphemistically-phrased “cleansing” of the body.

The petitioner before the High Court, Suhail Rashid Bhat, challenged the Beggary Law, on the grounds discussed above. The government, on the other hand, defended the law on the ground that it was necessary to make “good citizens” out of “beggars”, and that it was necessary to maintain public order. The government also argued that “beggars” caused annoyance to tourists, and that it was essential to crack down on “organised begging.”

In a careful and detailed judgment, the court responded to each of these contentions. The Chief Justice began by discussing the origins of beggary statutes in England. Under the belief that people without settled — and visible — means of sustenance were a threat to society, a number of "vagrancy statutes" were enacted and served as precursors to the beggary laws. In India, begging was first criminalised in the 1920s, as part of a colonial logic that sought to "subjugate certain communities by imputing criminality to them."

The High Court then made the crucial observation that "begging and homelessness are indicators of abject, chronic poverty." And poverty, the court noted further, had social causes: "Beggary is a manifestation of the fact that the person has fallen through the socially created net. It is evidence of the fact that the State has failed to ensure that all citizens have even the basic essential facilities." The court, therefore, rejected the pernicious world view according to which poverty is a consequence of individual failings, and recognised that the primary failing was that of the state.

Having established this, the court then addressed the question of fundamental rights. As "begging" was a peaceful method by which a person sought to communicate their situation to another, and solicit their assistance, it was protected under Article 19(1)(a)'s freedom of speech guarantee. The government's stated justification for criminalising "begging" — that of turning people into "good citizens" — was vague and undefined; nor was it demonstrated how incarcerating "beggars" into homes would transform them into "good citizens". The constitutional violation, thus, could not be justified. The court also noted that by criminalising "wandering about" in public spaces, the law effectively attempted to exclude the poor and the marginalised from places that, by definition, were meant "for the enjoyment of every member of the public without exception." Thus, the law also violated the constitutional guarantee of the freedom of movement.

Additionally, the court noted that there existed a large number of itinerant communities such as the Gujjars and the Bakarwals, whose very nature of existence — moving from place to place, and displaying none of the "conventional means of subsistence" — would bring them within the ambit of the beggary law. As the court pointedly asked: "Does 'visible means of subsistence' envisage waving your economic prosperity in public spaces? Or is it sufficient to have a hefty bank balance?"

And finally, the Chief Justice observed that by effectively criminalising poverty, the beggary law violated basic human dignity. The legislation, it noted, was "steeped in prejudice against poverty and premised on an absolute presumption of potential criminality of those faced with choicelessness, necessity and undeserved want of those who have no support at all, institutional or otherwise and are bereft of resources of any kind". This, coupled with the draconian processes under the Act, violated the right to life and personal liberty under Article 21 of the Constitution.

Recent years have seen the rise of a phenomenon that can best be described as "punitive constitutionalism". Punitive constitutionalism seeks to submerge individual rights to a grand yet often undefined national project by holding that an individual may be stripped of their rights if they do not do their bit to contribute to this project. For example, laws barring political participation to those who have more than two children (thus submerging the right to participate to the imperatives of population control), or who lack formal education, effectively make freedom and equality conditional upon the state's vision of what a "good citizen" should be like. Rights, then, are no longer about being human, but about earning the right to be treated as a human.

The beggary laws belong within this same family of punitive constitutionalism. The Jammu and Kashmir High Court's judgment, therefore — which is explicitly premised upon the

unconstitutionality of “invisiblising” a social problem by criminalising it (as though it is a matter of individual fault) — shows us the exact way in which our Constitution rejects this harsh world view. For that, it must be applauded.

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