Vimukta Day Lecture by Justice KV Viswanathan

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[Note: This transcript is edited for clarity and coherence of the reader. Please refer to the lecture (video) available in case of doubt or to quote.]

At the outset, let me convey my thanks to the Criminal Justice and the Police Accountability Project (CPA Project) for inviting me to share my thoughts on the 71st anniversary of repealing the Criminal Tribes Act (CTA). Even spelling out the name of this Act is very jarring.

Through the course of this conversation, we will see how horrendous the Act was, which attributed criminality at the very birth with regard to certain tribes. It mandated registration, provided for surveillance and even enabled resettlement apart from subjecting them to compulsory fingerprints. All this was beyond judicial review, because this pre-constitutional Act said that 'nothing of this could be called in question in any court of law.'

Before we get to the core of this lecture, we need to understand what this statute provided for, and how the clarion call from some visionaries led to the repealing of the Act. We will then analyse the fate of this Act, had it been tested before the constitutional courts. We will also see the social impact it had even after the denotification of the communities. We will then get to the post-constitution and post-repeal scenario where concerns that the ghost of the CTA is still haunting are expressed, based on reports and empirical data. Finally, we will address the suggestions within the legal legislative framework to address this. In this background, we can first briefly see the historical reasons behind this Act and the studies on them by reading the Shri Bhiku Ramji Idate Commission's report.

Shri Idate says that 'the category of criminal tribes were born out of the colonial British government's misguided attempt to control crime in India by enactment of the Criminal Tribes Act, 1871. Through this Act, the British branded nearly 150 communities as being criminal by birth. They were placed under constant surveillance and their movement regulated. This led to harassment, loss of livelihood, and the denial of even the basic rights enshrined by law. The creation of the category of criminals was a product of colonial modernity and the strengthening of the various apparatuses of the nation state. By 1860, due to the emergence of the new working class in the post-industrial revolution of Britain, the state was at odds in trying to control its citizens. It was out of this necessity that the government began to differentiate between the industry's working classes and the criminal working classes.' This gave birth to the Act 1869, which was amended in 1911 and 1924, which was the ultimate Act which came to be repealed in 1952.

When this theory of hereditary criminality and the prevalent caste system in India came together, it was a fertile ground to enact this legislation. Contextually, on the history part, we also need to remember that apart from the colonial government's obsession to order the Indian society, and the racist approach which was then prevalent, branding a person to be born a criminal and

treating it as a hereditary phenomenon was debunked by Dr. Mazumdar, who proved that crime is not hereditary, it is a product of a bad environment and poor economic conditions. But by then it was too late, the Act was enacted.

The Act presumed criminality not just on an individual, but on an entire community. Under Section 3 of CTA, if the executive has a reason to believe that any tribe, gang, or class of persons is addicted to the systematic commissioning of non-bailable offences, they can be branded as the criminal tribe. A mere subjective satisfaction by the local government was enough. A recommendation would go by the local executive head that 'this tribe has to be notified'; thereafter the notification would follow the procedure for registration, fingerprinting, surveillance, and power to resettle them. Through a single notification under the CTA, communities were tarnished and painted criminals. Presumption of criminality was formulated against any member belonging to such a tribe. Even children were not spared, as a consequence of a mere biological accident of being born to parents who belonged to a particular community. The notification could not be challenged in the court of law.

According to me it is a serious affront to the dignity of not only the tribes in question, but to the dignity of every well-meaning, right-thinking individual, who inhabits a civilised territory. If we were to juxtapose this Act alongside our Constitution, it would fail on several grounds.The Constitution was adopted in 1949 and the Act was repealed in 1952. There was no occasion for the court to strike it down. However, straight away a constitutional student would tell you that the Act was a serious affront to the concept of dignity, enshrined under Article 21. Apart from being overbroad in its classification, irrespective of whether someone was involved in a crime or not, it put everyone under its classification merely based on birth. This was manifestly arbitrary and violative of Article 14. If you were to test the collection of fingerprinting done without any judicial oversight today, it is a serious invasion of the right to privacy according to the Puttaswamy judgement.

It is usual to commemorate the advent of something like the Constitution, or the Magna Carta. However, today we are commemorating, and it is important to commemorate repealing of the CTA, which is hard to imagine once existed.

The Act also left a permanent scar on the societal structure of our country and has since deeply affected the way in which members of the denotified tribes (DNTs), as they are now called, are viewed by the other members of the society. The Ananthasayanam Ayyangar committee records that "Members of the tribes who are working in several establishments were turned out by their management upon finding that they belong to tribes, which are branded criminals under the CTA." The society as a whole viewed them with suspicion and treated them with humiliation. Innocent members of the whole communities were not allowed to integrate with other members of the society and several generations were made to carry this tag as a birthmark. So, this was the impact this statute had.

Now, it is time for us to recollect some of those unsung heroes who clamoured for the repeal of the Act. Firstly, Sri Raghaviah, a member of the Legislative Assembly from the Madras province, circulated a pamphlet. It appears because under the Act, the tribes had to report to the police station and it also gave power to do surveillance, the executive machinery would, in the middle of the night, go for surveillance, which included two roll calls. Now let's look at what Sri Raghaviah had to say about this in the pamphlet. "The illiterate registered member who has no knowledge of the correct time and who wishes to avoid the inconvenience of keeping awake the whole night, as well as the risk involved in passing through the village and being apprehended at the dead of night, on some suspicion or the other, preferred to sleep at the police station itself or at the residence of the village patil, often on the roadside and in the dust, exposing himself to the rigours of the weather."

This is equally graphically brought out by Dr. Pattabi, who spoke during his intervention in Parliament where he stated that "Once I was lodged in the police station, I saw there early in the morning about 40 or 50 corpse-like bodies lying flat on the background without even a mat, and when I enquired what the matter was, they said that they were members of the criminal tribes who under the law had to sleep in the compound of the police station. The very pigs and dogs are not treated like that."

Now if this is bone chilling, this part of Dr. Pattabi's speech is actually blood curdling. Dr. Pattabi says, "Apart from this, a very peculiar custom prevails in the jails. There the work of scavenging is not allotted to all prisoners irrespective of their caste. It is only assigned to Harijans and to members of the criminal tribe. Whenever they feel a paucity of scavengers in jail, all that the superintendent of jail has to do is to inform the superintendent of the police and immediately a batch of these people are convicted and sent to jail so that they could do the business. They have gotten so accustomed to free service from these people that somehow or the other they get these people to do their work at home, always free." So this is how in practice it operated when the act was invoked.

These are only two, among the countless instances of such bone chilling and blood curdling abuse of human rights and dignity of the people belonging to the oppressed communities particularly the persons belonging to the DNTs. Now, this led to the constitution of the Dr. Ayyangar committee and the Act was recommended to be repealed. When the Act was repealed, Sri Velayudhan had an important intervention in parliament. He said "I have studied the thing. The Act will certainly affect the life of the criminal tribes, that is what is going to happen. Let not the house go away with the impression that 4 million people have been liberated by the repeal of the Act. The Act may come in another form later on."

This is the concern highlighted in well-informed quarters now. Now that act has gone away, today we have the Habitual Offenders Act (HOA) enacted in around 9 different states, that being a state subject. Even though there is no central Act, the provisions are scattered across the law. There are provisions in the CrPC, in Section 110, under which the executive magistrate is

empowered to order security to be furnished by a habitual offender (hereafter HO) residing within his jurisdiction. The CrPC itself does not define the term HO. The definition is drawn from the respective state statutes or depends on the discretion of the enforcing machinery.

Orders under section 110 are considered to be convictions. There are still statutory manuals which deem the DNTs as HOs. One such clause is in the Madhya Pradesh jail manual which has been highlighted in studies. Rule 411 (iv) of the Madhya Pradesh Prison Rules, 1968 explicitly provides that HOs would include within its ambit any scheduled tribe subject to the discretion of the state government concerned. This is part of a CPA Project's study, and is of concern. If it is a statutory instrument it has to be immediately addressed. We will later see how a similar statutory provision in Rajasthan was eviscerated after the suo moto intervention of the High Court. The lack of clarity in defining HOs, leads to, as shown by the studies, identification of the members of the DNTs, and are subjected to movement restrictions and directed to provide security for good behaviour. It is time that it is taken note of.

An informative article written by members of the CPA Project says, "Police stations across India maintain registers of HOs, also called history sheeters in their jurisdictions with extensive details of their lives and daily movements. While their identification may not explicitly be based on caste, collective police action overwhelmingly identifies members of DNT communities as habitual offenders." If it were only a statement or an ipse dixit, one could have ignored it. But this is based on a record which they have seen in a particular police station in the capital of Madhya Pradesh. They go on to say, "So pervasive is the fear of having one's daily life recorded in police registers that Rana, much like other Pardhis, identified as a habitual offender, rethinks every activity of his life, including something as mundane as going to the local tea stall with friends. These records shackle the Pardhi community's lives, freedoms and dignities. Arguably, the most important section of the habitual offenders register is an informal record, that is maintained and which the officer must sign to attest that they have personally trailed or surveilled the habitual offender at least once every fortnight to investigate whether he or she had, despite extensive surveillance, managed to outwit the police to commit the theft." And they refer to the Bhopal's Govindpura police station for having shown them this register. If this is true, this needs to be investigated.

The Ankush Maruti Shinde vs. State of Maharashtra 2019 is very telling in this matter, where the court allowed the review petitions of the accused belonging to nomadic tribes while noting that roping in of persons from such tribes was a common occurrence in investigation. The review petition was allowed and the accused persons who were not involved were acquitted.

This is the core area of concern, as to how the ghost of the CTA is still haunting. This is a fear expressed by people seriously involved in a study and it is time that it is addressed. The two reports, which have been released by the CPA Project, the one dealing with the MP Excise Act and the other with Wildlife Protection Act, both the studies related to bearing on the traditional occupation, which the members of these communities were resorting to, there is a concern

expressed that the existing legislation doesn't provide for considering certain customary occupations, which the members of the communities have from time immemorial, having been pushed into the forest, as we saw earlier. That has become the means of livelihood and is being mistaken for a grave offence under the existing statutes. They suggest a certain tailoring of those statutes. The Shri Balakrishna Sidram Renke Commission (hereafter Renke commission) also echoes similar sentiments.

Due to the impact of industrialisation and urbanisation, several of these traditional occupations have gone out of vogue. Renke Commission says, "The changes are mostly due to colonial globalisation, modernisation, urbanisation, technological advancement, changes in agricultural practices, market intervention and commercialisation." The Renke Commission also says the changes in laws, particularly the Forest Act, the Wildlife Protection Act and the Excise Act, has affected the denotified nomadic and semi-nomadic communities by denying them access to the resources to which they have traditional rights and deprived them of their livelihoods. In fact, it made them criminals overnight without offering them any sustainable alternatives.

The study by the CPA Project also gives statistics based on the arrest of an analysis as to what percentage are from these erstwhile denotified tribes in Madhya Pradesh under the Excise Act. They say 7% of the arrests of the 56.35%, which is overall of the oppressed communities, are from members of the DNTs, a percentage which they feel based on their experience and studies so large that it is a violation.

In the context of the Wildlife Protection Act, there is a concern expressed that a lot of complaints are registered based on unidentified informants known as Mukhbirs and it appears 86% was based on unidentified informants. So, the suggestion is that the traditional occupations should be put beyond the purview, but these are policy matters on which it would be difficult to comment concretely. The policy makers will definitely be keeping an eye on this and there is no reason to doubt that it will be addressed.

All that is urged by the studies and the commissions is that certain statutes, which may appear facially neutral, are in the manner of its operation targeting the DNTs. They perhaps feel based on data that they are seen as low-hanging fruits, easy targets, easy pickings for persecution.

I had mentioned about the suo moto intervention by the Rajasthan High Court earlier. The court took suo moto cognizance of the Rajasthan Prison Manual in 2020, which allowed the jail authorities to identify castes and allot jobs such as cleaning toilets and sweeping based on their caste. The Rajasthan government amended the prison rules as a sequel to the suo-moto cognizance and did away with caste-based classification.

Now the conversation would be incomplete unless some suggestions are left for you to mull over. One is to sensitise the enforcement machinery. The heads of the states, the chief secretaries could have an inclusive committee, which will sensitise the law enforcing agencies to the

literature that is already available, the background, so that wittingly or unwittingly the tentacles of the CTA are not allowed to permeate the present administration of the criminal justice.

Being a former member of the National Legal Services Authority, I would also want the District Legal Services Authority to play a more active role. If at the pre-litigation stage the legal aid would be ensured and I would think it is a constitutional obligation for the executive to not just follow the procedure and the documentation that the CrPC prescribes, but also positively inform the accused of their rights. In Vijaysinh Chandubha Jadeja (vs State Of Gujarat) case, the court said that there is a right to be informed. There is no dispute that the CTA was not just draconian, but a horrendous and grotesque statute. The liberation by repealing the act should not just be in letter, it should operate in its true spirit.

I would also want a greater proactive role for the state's Human Rights Commission as already recommended by the Shri Renke Commission. Prejudicial laws that mirror the CTA, if existent, like the one we saw in Madhya Pradesh, the Rajasthan provisions, should be reviewed. The DLSA and the state human rights commissions should be allowed to audit the HO register till such time a final solution is found. It is better that if any offence is reported, a certain great sensitivity is shown while reporting so that the prejudice is not revived. Equally for the civil society so that they are also sensitised to it. I think that is where conversations like this would prove to be an eye opener, like it was an eye opener for me on various aspects.

I think it has to be addressed on a comprehensive scale from all the institutions to the well-meaning citizens. And I congratulate the CPA Project for launching these conversations.