Sukanya Shantha vs Union Of India on 3 October, 2024

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Bench: Dhananjaya Y Chandrachud

2024 INSC 753 Reportable

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

Writ Petition (C) No. 1404 of 2023

Sukanya Shantha …Petitioner

Versus

Union of India & Ors. …Respondents

 PART I & II I. The Writ Petition 1 The petitioner, Sukanya Shantha, a journalist, wrote an article "From Segregation to Labour, Manu's Caste Law Governs the Indian Prison System", which was published on 10 December 2020. The article highlighted caste-based discrimination in the prisons in the country. The petitioner has sought directions for repeal of the offending provisions in State prison manuals. By an order dated 10 July 2024, judgment was reserved. We have heard a broad diversity of viewpoints from across India. Besides counsel for the petitioner and the intervenor, the Additional Solicitor General (ASG) of India appeared for the Union of India. The States of Jharkhand, Uttar Pradesh, West Bengal, Maharashtra, Orissa, Karnataka, Andhra Pradesh, and Tamil Nadu appeared through counsel.

II. Submissions 2 Dr. S. Muralidhar, Senior Advocate, appearing for the petitioner highlighted the issue of caste-based discrimination in the prisons in India. It was argued that various State prison manuals sanction blatantly unconstitutional practices, which are violative of Articles 14, 15, 17, 21, and 23 of the Constitution of India. Ms. Disha Wadekar referred to a chart of provisions from different State prison manuals/rules to highlight various forms of discrimination in the prisons. She highlighted that caste-based discrimination continues to persist in the prisons in the country with respect to: (i) The division of manual labour; (ii) Segregation of barracks; and (iii) Provisions that discriminate against prisoners belonging to Denotified tribes and "habitual offenders". She further argued that the Model Prison Manual, 2016 does not address the impugned provisions related to caste discrimination inside prisons other than the PART II discrimination in kitchens, and that it is not "model" when it comes to addressing caste discrimination. In the written submissions, the petitioner's side has further submitted that the Home Departments of the Respondent States may also be directed to clarify the definition of "Habitual Offenders" in their respective prison manuals so as to prevent its misuse against the denotified tribes in prisons. 3 Ms. Aishwarya Bhati, Learned ASG, submitted a written note arguing that the Ministry of Home Affairs prepared the Model Prison Manual for the Superintendence and Management of Prisons in India, 2003 and The Model Prison Manual, 2016, and circulated it to all States and Union Territories (UTs) in May 2016 explicitly prohibiting caste and religion based discrimination practices. She also referred to the Advisory dated 26 February 2024 issued by the Ministry of Home Affairs, through the Deputy Secretary (PR & ATC) to the Principal Secretary (Home/Jails) of all states and UTs and the DG/IG Prisons of all States and UTs to ensure that the State Prison Manual/Prison Act should not contain any discriminatory provisions. She further argued that "prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein" as a subject fall under the domain of the States under Entry 4, List II of the Seventh Schedule of the Constitution.

4 Ms. Ashtha Sharma, counsel for the State of West Bengal, stated that the discrimination on the basis of caste/creed/ religion as envisaged in the provisions of West Bengal Jail Code Rules, 1967 (Rules No. 741, 793, 860 and 1117) are not in force/ practice within the Correctional Homes of West Bengal since long, and that a proposal for deletion/alteration/ amendment of the four Rules has been already sent to the appropriate authority. Mr. Anuj Saxena, counsel for the intervenor, has prayed PART III for deletion of "caste" column and any references to caste in undertrial and/or convicts' prisoners' registers.

III. Constitutional Interpretation

5 As we deal with the present petition, we must refer to the values of the Constitution and the interpretation we must adopt. After all, the impugned provisions of the various prison manuals, highlighted in this petition, demonstrate that the values of the Constitution are at stake.

6 The Constitution reflects the vision of its founders to give India a collective future based on the values of liberty, equality, and fraternity. The Constitution mandates a more just and inclusive society, where every citizen has the opportunity to thrive. It envisages that the values embedded in its provisions are not just aspirations but lived realities. Any interpretation of the Constitution must be reflective of the blueprint laid down by its founders. The Constitution is – as Granville Austin put it— a "social document" and a "modernizing force", with its provisions embodying "humanitarian sentiments". 1 7 The interpretation of the Constitution is not static. It has evolved with time to give recognition to a broader spectrum of rights to the citizens, as well as to impose additional safeguards against excesses of the State or even private entities, as the case may be. Over the last seventy-five years, the Supreme Court has recognized new rights such as the right to education, 2 the right to privacy, 3 and the right against the adverse impact of climate change, 4 among others. These rights, though not 1 Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1999), at pages 50, xii-xiii 2 Unni Krishnan v. State of Andhra Pradesh, (1993) 1 SCC 645 3 Justice (Retd.) K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 4 K Ranjitsinh v. Union of India, 2024 INSC 280 PART III explicitly mentioned in the original text, have been interpreted as inherent to the broader principle of the right to life which the Constitution enshrines. The Constitution must serve as a robust framework for safeguarding the rights of citizens and maintaining the delicate balance between authority and individual freedom. 8 The Constitution recognizes the dignity and individual autonomy inherent in all citizens and their right to life and personal liberty. Liberty and autonomy advance the cause of human dignity. 5 Individual autonomy is the ability to make decisions on matters that impact one's life. 6 When individuals are granted the freedom to make choices about their own lives, they are empowered to take control of their destinies, and express their identities, in the "pursuit of happiness" 7 without undue interference. This freedom fosters a sense of self-worth and respect, thereby recognizing individual dignity. By safeguarding these principles, we ensure that the intrinsic worth of every human being is recognized and upheld. The right to life cannot be restricted except through a law which is "substantively and procedurally fair, just and reasonable". 8 9 Our interpretation of the Constitution must fill the silences in its text. The framers of the Constitution could not have anticipated every situation that might arise in the future. They also intentionally left certain decisions to the discretion of future generations. However, the choices we make today must align with the broader constitutional framework and values. In filling the gaps, whenever they arise, our interpretation must enhance the foundational values of the Constitution such as equality, dignity, liberty, federalism and institutional accountability. Our interpretation must adhere to the postulate that "civil and political rights and socio-economic rights 5 Common Cause v. Union of India, (2018) 4 SCALE 1 6 Justice (Retd.) K S Puttaswamy v. Union of India (2017); Common Cause v. Union of India (2018). 7 American Declaration of Independence,

original transcript available at https://www.archives.gov/founding- docs/declaration-transcript 8 Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368 PART III do not exist in a state of antagonism." 9 Our analysis must be based on a holistic reading of the provisions of the Constitution. 10 10 The Constitution envisages that courts act as institutions which discharge the responsibility of protecting constitutionally entrenched rights. Courts are neutral institutions, whose primary function is to apply the law fairly and consistently. Transparency in processes also enhances public confidence in the system. 11 In their role as neutral institutions, courts also act as a check on the other branches of government, ensuring that their actions conform to constitutional and legal standards. 11 The Constitution mandates that laws enacted in the colonial era should align with its provisions. 12 Constitutional interpretation emphasizes the "need to reverse the philosophy of the colonial regime, which was founded on the subordination of the individual to the state". 13 The "assumptions which lay at the foundation of colonial rule have undergone a fundamental transformation for a nation of individuals governed by the Constitution". 14 By recognizing the injustices in the colonial and pre-colonial era, "we can certainly set the course for the future". 15 "In the transformation of society" against colonial and pre-colonial ideology, the Constitution "seeks to assure the values of a just, humane and compassionate existence to all her citizens". 16 12 Criminal laws of the colonial era continue to impact the postcolonial world. As a scholar noted, "while the pre-determined and codified nature of the diverse criminal 9 Justice (Retd.) K S Puttaswamy v. Union of India (2017) 10 Maneka Gandhi v. Union of India, 1978 INSC 16 11 CPIO, Supreme Court of India v. Subhash Chandra Agarwal, 2019 (16) SCALE 40 12 Article 13(1) of the Indian Constitution provides: "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void." 13 Kalpana Mehta v. Union of India, [2018] 4 S.C.R. 1 14 Ibid 15 Navtej Singh Johar v. Union of India, 2018 INSC 790 [Justice Chandrachud] 16 Ibid PART IV justice rules provided the moral superiority and political legitimacy to colonial rule, the Imperial power was safeguarded by their coercive content, particularly in procedural matters." 17 Criminal laws in modern times thus, as "the strongest expression of the State's power" must "ensure that they do not deny equality before the law and the equal protection of laws". 18 Criminal laws must not endorse colonial or pre-colonial philosophy.

13 In a post-constitutional society, "the law must take affirmative steps to achieve equal protection of law to all its citizens". 19 Any discussion on the Constitution must therefore take a conscious view of the lived realities of citizens. It requires evaluating how constitutional provisions translate into meaningful outcomes in their lives. We must discuss this aspect of the Indian Constitution further, before we examine the impugned provisions.

IV. The Constitution of Emancipation, Equality, and Dignity 14 The Constitution of India is an emancipatory document. It provides equal citizenship to all citizens of India. The Constitution is not just a legal document, but in India's social structure, it is a quantum leap. In one stroke, it gave a dignified identity to all citizens of India. On 26 January 1950, the Constitution eliminated the legality of caste-based discrimination, thereby raising the human dignity of our marginalised communities.

15 Describing the vision of the framers, constitutional historian Granville Austin stated:

17 B.B. Pande, “Expanding Horizons of Criminal Procedure Law”, SCC Journal (2021), https://www.scconline.com/blog/post/2021/07/07/expanding-horizons-of-criminal-procedure-law/ 18 Navtej Singh Johar v. Union of India, 2018 INSC 790 [Justice Chandrachud] 19 Ibid PART IV “India’s founding fathers and mothers established in the Constitution both the nation's ideals and the institutions and processes for achieving them. The ideals were national unity and integrity and a democratic and equitable society. The new society was to be achieved through a social-economic revolution pursued with a democratic spirit using constitutional, democratic institutions. I later came to think of unity, social revolution, and democracy as three strands of a seamless web. The founders believed that none of these goals was to be pursued, nor could any be achieved, separately. They were mutually dependent and had to be sought together.” 20 Marc Galanter noted in this regard:

> “Independent India embraced equality as a cardinal value against a background of elaborate, valued and clearly perceived inequalities. Her constitutional policies to offset these proceeded from an awareness of the entrenched and cumulative nature of group inequalities.” 21 The Constitution mandates the replacement of fundamental wrongs with fundamental rights. 22 Through its provisions, it displaced a centuries-old caste-based hierarchical social order “that did not recognize the principle of individual equality”. 23 It negated the ideals of social hierarchy. The Constitution is the embodiment of the aspirations of the millions of caste-oppressed communities, which hoped for a better future in independent India. To summarize, the “Constitution, by its very existence, was a social revolutionary statement.” 24 20 Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1966), p. xi 21 Marc Galanter, Law and Society in Modern India, Oxford University Press (1989), 2018 Reprint, p. 185 22 Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1966), p. xii 23 Granville Austin, Working A Democratic Constitution: The Indian Experience, Oxford University Press (1999), p.
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> 24 Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1966), p. xii PART IV

16 Some of the speeches in the Constituent Assembly give expression to this vision. On behalf of the Adivasi community, Jaipal Singh Munda shared the following sentiments and expectations from the Constitution:

> “Mr. Chairman, Sir, I rise to speak on behalf of millions of unknown hordes-yet very important-of unrecognised warriors of freedom, the original people of India who have variously been known as backward tribes, primitive tribes, criminal tribes and everything else, Sir, I am proud to be a Jungli, that is the name by which we are known in my part of the country... Sir, if there is any group of Indian people that has been shabbily treated it is my people. They have been disgracefully treated, neglected

for the last 6,000 years... You cannot teach democracy to the tribal people; you have to learn democratic ways from them. They are the most democratic people on earth... We want to be treated like every other Indian." 25 H.J. Khandekar, a leader from the Dalit community, raised the plight of the so-called "criminal tribes":

"We have been given according to this Constitution freedom of speech and freedom of movement and so on. But there is no freedom of movement for one crore of unfortunate people in this country. That is, the Criminal Tribes. Nothing is said about them in this Constitution. Will the Government repeal the Criminal Tribes Act and give every freedom to the Criminal Tribes?" 26 Dakshayani Velayudhan, the lone Dalit woman in the Constituent Assembly, noted:

"The working of the Constitution will depend upon how the people will conduct themselves in the future, not on the actual execution of the law. So I hope that in course of time there will not be such a community known as Untouchables and that our delegates abroad will not have to hang their heads in shame if 25 Constituent Assembly Debates (19 December 1946) 26 Constituent Assembly Debates (21 November 1949) PART IV somebody raises such a question in an organisation of international nature." 27 Dr Ambedkar, as Chairman of the Drafting Committee, remarked in his last address to the Constituent Assembly:

"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? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up." 28 The vision laid down by Dr. Ambedkar, Jaipal Singh Munda, H.J. Khandekar, and Dakshayani Velayudhan, among others, emphasizes that there shall be no discrimination in the country. The Constitution envisions a society where there is no room for anyone to feel superior to another citizen.

17 The chapter on fundamental rights places the provisions on equality, non- discrimination, equality of opportunity, affirmative action, abolition of untouchability, freedom of speech and expression, right to life, and prohibition of forced labour together. This has been done for a special reason. The framers of the Constitution conceptualized that without the provisions on the prohibition of discrimination, abolition of untouchability, and prohibition on forced labour, the imagination of broader rights 27 Constituent Assembly Debates (29 November 1948) 28 Constituent Assembly Debates (25 November 1949) PART IV such as equality before law, freedom of speech and expression, and the right to life would remain incomplete. The Constitution thus complements the

basic principles of constitutionalism with provisions designed specifically to address India's social problems.

18 This underlying philosophy of the Constitution has been highlighted by this Court in several judgments. Chief Justice S.M. Sikri, in his opinion in Kesavananda Bharati v. State of Kerala, 29 held that the objective of various provisions of the Constitution is to build "a welfare State and an egalitarian social order in our country", and "to bring about a socio-economic transformation based on principles of social justice". Referring to Part III of the Constitution, the judgment stated that the founders were "anxious that it should be a society where the citizen will enjoy the various freedoms and such rights as are the basic elements of those freedoms without which there can be no dignity of individual".

19 Justice Krishna Iyer in his concurring opinion in State of Kerala v. N.M. Thomas 30 called the Constitution "a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy". In Indian Medical Association v. Union of India, 31 the Court held that "various aspects of social justice, and an egalitarian social order, were also inscribed, not as exceptions to the formal content of equality but as intrinsic, vital and necessary components of the basic equality code itself".

29 (1973) 4 SCC 225 30 (1976) 2 SCC 310 31 (2011) 6 SCALE 86 PART IV 20 This Court held in Justice K.S. Puttaswamy v. Union of India 32 that the "vision of the founding fathers was enriched by the histories of suffering of those who suffered oppression and a violation of dignity both here and elsewhere". One of us (Justice DY Chandrachud) authored the plurality opinion, holding that the interpretation of the Constitution must keep evolving to facilitate justice for the citizens. 21 In Navtej Singh Johar v. Union of India, 33 the Court while dealing with the validity of a colonial provision (Section 377 of the Penal Code), held that the Constitution envisages that "every person enjoys equal rights which enable him/her to grow and realize his/her potential as an individual". 34 The Court also acknowledged that "throughout history, socio-cultural revolts, anti-discrimination assertions, movements, literature and leaders have worked at socializing people away from supremacist thought and towards an egalitarian existence."35 In that backdrop, the Indian Constitution "was an attempt to reverse the socializing of prejudice, discrimination, and power hegemony in a disjointed society". 36 22 The Court, in Indian Young Lawyers Association v. State of Kerala, 37 described the anti-caste vision of the Constitution. One of us (Justice DY Chandrachud) wrote a concurring opinion, noting that:

> "Besides the struggle for independence from the British rule, there was another struggle going on since centuries and which still continues. That struggle has been for social emancipation. It has been the struggle for the replacement of an unequal social order. It has been a fight for undoing historical injustices and for righting fundamental wrongs with fundamental rights. The Constitution of India is the 32 (2017) 10 SCC 1 33 2018 INSC 790 34 Ibid [Chief Justice Dipak Misra and Justice Khanwilkar] 35 Ibid [Justice Chandrachud] 36 Ibid 37 (2019) 11 SCC 1 PART IV end product of both these struggles. It is the foundational document, which in text and spirit, aims at social transformation, namely, the creation and preservation of an

> equal social order. The Constitution represents the aspirations of those, who were denied the basic ingredients of a dignified existence. It contains a vision of social justice and lays down a roadmap for successive governments to achieve that vision. The document sets out a moral trajectory, which citizens must pursue for the realisation of the values of liberty, equality, fraternity and justice. It is an assurance to the marginalised to be able to rise to the challenges of human existence…" The Court emphasized the need to scrutinize social practices to keep them in consonance with the egalitarian values of the Constitution:
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> "The Constitution embodies a vision of social transformation. It represents a break from history marked by the indignation and discrimination attached to certain identities and serves as a bridge to a vision of a just and equal citizenship. In a deeply divided society marked by intermixing identities such as religion, race, caste, sex and personal characteristics as the sites of discrimination and oppression, the Constitution marks a perception of a new social order. This social order places the dignity of every individual at the heart of its endeavours… Existing structures of social discrimination must be evaluated through the prism of constitutional morality. The effect and endeavour is to produce a society marked by compassion for every individual." (emphasis added)

23 The Constitution thus stands as a testament to the fight against historical injustices and for the establishment of an egalitarian social order. It aims to prevent caste-based discrimination. This commitment is not limited to preventing discriminatory actions by the State alone. It extends to the actions of citizens and private entities as well. It empowers the State to enact appropriate legislation or take PART IV executive measures to tackle caste-based discrimination. At the same time, it mandates the decision-makers to take every step to end discrimination in Indian society. The pervasive influence of caste necessitates continuous efforts to ensure equality and justice for all citizens. The manifestations of caste are too numerous to exhaustively enumerate. 38 They can manifest in various forms and across different sectors of society, from education and employment to social interactions and access to resources. As has been observed:

> "Continued to be attributed typically to the rural hinterlands and assumed to be limited only to the discussions on reservation policy and electoral politics, caste has mutated and diversified during the past three decades. Today, its presence is visible in urban housing, its markets and businesses, higher educational institutions, and public sector offices as well as the private sector working spaces, which were projected to be secular and privilege class over caste, and the various socio-economic and political institutions that interface with everyday lived experiences." 39 The fight against caste-based discrimination is not a battle that can be won overnight;
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> it requires sustained effort, dedication, and the willingness to confront and challenge societal norms that perpetuate inequality. When faced with practices of caste-based discrimination, this Court must take an active stand. In entertaining the current petition, this Court is making its contribution to the ongoing struggle to dismantle

caste-based discrimination.

24 Based on this constitutional philosophy, we shall now refer to constitutional provisions under which the impugned provisions have been challenged. 38 Isabel Wilkerson, Caste: The Origins of Our Discontents, Penguin Random House (2020), p. 167 39 Rahul Choragudi, et al, Caste Matters in Public Policy: Issues and Perspectives, Routledge (2024), Reprint, p. 2 PART V V. The Contours of Article 14 25 Article 14 guarantees that the "State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Equality is a crucial aspect of the constitutional vision. Immediately after the adoption of the Constitution, this Court laid down the standard to test the validity of laws against Article

14. In a Constitution Bench decision in Chiranjit Lal Chowdhuri v. Union of India, 40 Justice B.K. Mukherjea articulated that a classification under Article 14 "should never be arbitrary". It was held that such classification must always "rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made". If a classification is "made without any substantial basis", it should be "regarded as invalid". The principle of classification was reiterated in a subsequent Constitution Bench decision in State of Bombay v. F. N. Balsara. 41 26 Later, a seven-judge Bench decision in State of West Bengal v. Anwar Ali Sarkar 42 solidified the requirement of the twin test under Article 14. Speaking for the Court, Justice S.R. Das held:

> "In order to pass the test, two conditions must be fulfilled, namely (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia, which is the basis of the classification, and the object of the act are distinct things, and what is necessary is that there must be a nexus between them. In short, while the Article forbids class legislation in the sense of making improper discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly 40 1950 SCR 869 41 1951 SCR 682 42 (1952) 1 SCC 1 PART V situated in relation to the privileges sought to be conferred or the liability proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense I have just explained.."

27 Adding to the above principles, Justice S.R. Das, in Ram Krishna Dalmia v. Justice S.R. Tendolkar, 43 held that the classification "may be founded on different bases, namely, geographical, or according to objects or occupations or the like", but it needs to have a reasonable nexus with the object of the statute. It was held that "Article 14 condemns discrimination not only by a substantive law but also by a law of procedure". Furthermore, the Court "may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation". The Court further reiterated that:

> "A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the court will strike down the law as an instance of naked discrimination..." 28 Subsequently, in E.P. Royappa v. State of Tamil Nadu, 44 a Constitution Bench of this Court added a crucial principle of non-arbitrariness to the discourse of equality under Article 14. The Court was adjudicating the validity of an administrative order.

The Court held that:

> "Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits.
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> 43 1959 SCR 279 44 (1974) 4 SCC 3 PART V From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14..." 29 The principle of non-arbitrariness and reasonableness was then emphasized in the seven-judge Bench decision in Maneka Gandhi v. Union of India. 45 It was held:
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> "Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied." 30 To test the validity of laws, the twin test of intelligible differentia and reasonable nexus held ground. Whether the test of arbitrariness is a valid principle under Article 14 led to a conflicting set of decisions. 46 In Shayara Bano v. Union of India, 47 in testing the validity of Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 which validates the triple talaq, Justice R.F. Nariman endorsed the test of manifest arbitrariness. It was held:
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> "The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, 45 (1978) 1 SCC 248 46 The conflicting judgments have been summarized in Association for Democratic Reforms v. Union of India, 2024 INSC 113 47 (2017) 9 SCC 1 PART V therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such

> legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14." 31 A formalistic understanding of the classification test was then critiqued by this Court in Navtej Singh Johar v. Union of India. 48 The Court was dealing with a challenge to the constitutionality of Section 377 of the Indian Penal Act, 1860, to the extent that it criminalized consensual sexual conduct between adults. In his concurring opinion, one of us (Justice DY Chandrachud) held:
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> "Equating the content of equality with the reasonableness of a classification on which a law is based advances the cause of legal formalism. The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so, the test of classification risks elevating form over substance. The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights. Legal formalism buries the life-giving forces of the Constitution under a mere mantra. What it ignores is that Article 14 contains a powerful statement of values—of the substance of equality before the law and the equal protection of laws. To reduce it to a formal exercise of classification may miss the true value of equality as a safeguard against arbitrariness in State action. As our constitutional jurisprudence has evolved towards recognising the substantive content of liberty and equality, the core of Article 14 has emerged out of the shadows of classification. Article 14 has a substantive content on which, together with liberty and dignity, the edifice of the Constitution is built. Simply put, in that avatar, it reflects the quest for ensuring fair treatment of the individual in every aspect of human 48 (2018) 10 SCC 1 PART V endeavour and in every facet of human existence." The judges declared that Section 377 is manifestly arbitrary. The doctrine of manifest arbitrariness was also adopted in the Constitution Bench decision in Joseph Shine v.

Union of India. 49 32 Referring to the decisions in Shayara Bano, Navtej Johar, and Joseph Shine, a Constitution Bench in Association for Democratic Reforms (ADR) v. Union of India 50 summarized the doctrine of manifest arbitrariness in the following words:

> "Courts while testing the validity of a law on the ground of manifest arbitrariness have to determine if the statute is capricious, irrational and without adequate determining principle, or something which is excessive and disproportionate. This Court has applied the standard of "manifest arbitrariness" in the following manner:
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> a. A provision lacks an "adequate determining principle" if the purpose is not in consonance with constitutional values. In applying this standard, Courts must make a distinction between the "ostensible purpose", that is, the purpose which is claimed by the State and the "real purpose", the purpose identified by Courts based on the available material such as a reading of the provision; and b. A provision is manifestly

> arbitrary even if the provision does not make a classification." The Constitution Bench further elucidated the standards of manifest arbitrariness to test the validity of a plenary legislation with those of subordinate legislation:
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> 49 (2019) 3 SCC 39 50 2024 INSC 113 PART V "The above discussion shows that manifest arbitrariness of a subordinate legislation has to be primarily tested vis-a-vis its conformity with the parent statute. Therefore, in situations where a subordinate legislation is challenged on the ground of manifest arbitrariness, this Court will proceed to determine whether the delegate has failed "to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution." In contrast, application of manifest arbitrariness to a plenary legislation passed by a competent legislation requires the Court to adopt a different standard because it carries greater immunity than a subordinate legislation. We concur with Shayara Bano (supra) that a legislative action can also be tested for being manifestly arbitrary.

However, we wish to clarify that there is, and ought to be, a distinction between plenary legislation and subordinate legislation when they are challenged for being manifestly arbitrary." 33 The Court recently in State of Punjab v. Davinder Singh 51 dealt with whether sub-classification among the Scheduled Castes is permissible under Article 14. The seven-judge bench reiterated that the State is allowed to classify in a manner that is not discriminatory. The Court summarized the twin-test of classification as follows:

> "The Constitution permits valid classification if two conditions are fulfilled. First, there must be an intelligible differentia which distinguishes persons grouped together from others left out of the group. The phrase "intelligible differentia" means difference capable of being understood. The difference is capable of being understood when there is a yardstick to differentiate the class included and others excluded from the group. In the absence of the yardstick, the differentiation would be without a basis and hence, unreasonable. The basis of classification must be deducible from the provisions of the statute; surrounding circumstances or matters of common knowledge. In making the classification, the State is free to recognize degrees of harm. Though the classification need not be mathematical 51 2024 INSC 652 PART VI in precision, there must be some difference between the persons grouped and the persons left out, and the difference must be real and pertinent. The classification is unreasonable if there is "little or no difference". Second, the differentia must have a rational relation to the object sought to be achieved by the law, that is, the basis of classification must have a nexus with the object of the classification."

34 The constitutional standards laid down by the Court under Article 14 can be summarized as follows. First, the Constitution permits classification if there is intelligible differentia and reasonable nexus with the object sought. Second, the classification test cannot be merely applied as a mathematical formula to reach a conclusion. A challenge under Article 14 has to take into account the substantive content of equality which mandates fair treatment of an individual. Third, in

undertaking classification, a legislation or subordinate legislation cannot be manifestly arbitrary, i.e. courts must adjudicate whether the legislature or executive acted capriciously, irrationally and/or without adequate determining principle, or did something which is excessive and disproportionate. In applying this constitutional standard, courts must identify the "real purpose" of the statute rather than the "ostensible purpose" presented by the State, as summarized in ADR. Fourth, a provision can be found manifestly arbitrary even if it does not make a classification. Fifth, different constitutional standards have to be applied when testing the validity of legislation as compared to subordinate legislation.

VI. Non-Discrimination under Article 15 35 Clauses 1 and 2 of Article 15 provide that:

"Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.— (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of PART VI birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public." Article 15(1) imposes an enforceable obligation on the State to not discriminate against citizens on any of several grounds, including "caste". If the State itself discriminates against a citizen under any of the mentioned grounds, then it is discrimination of the highest form. After all, the State is expected to prevent discrimination, not perpetuate it. That is why our Constitution prohibits the State from discriminating against any citizen. Besides, Article 15(2) was adopted to specifically prohibit the discrimination faced by certain marginalized communities in accessing public services and resources. Historically, the so-called untouchable community was not allowed to use public resources such as water tanks and wells. This provision has a unique imprint of Dr Ambedkar, as he consistently advocated for such a provision for decades. 52 Not only does Article 15(2) prohibit the State from discriminating, it also restricts the citizens or private entities from discriminating against other citizens on the grounds mentioned therein.

36 Discrimination is prohibited, because it has several repercussions on human lives. Discrimination arises due to a feeling of superiority/inferiority, bias, contempt, or 52 Anurag Bhaskar, The Foresighted Ambedkar: Ideas that Shaped Indian Constitutional Discourse, Penguin (2024), pp. 68-87.

PART VI hatred against a person or a group. In history, such feelings have led to the genocide of certain communities. Discrimination also lowers the self-esteem of the person being discriminated against. It can lead to unfair denial of opportunities and constant violence against a set of people. Discrimination can also be done by continuously ridiculing or humiliating someone, who is on the weaker side of the social spectrum. It can cause trauma to a person with which they may be affected

their entire life. Discrimination also includes stigmatizing the identity or existence of a marginalized social group. Discrimination can also happen based on certain stereotypes against a marginalized group. As a society that divided people into a hierarchy, we must remain conscious of the forms and kinds of discrimination against marginalized groups. Discriminatory laws enacted before the Constitution of India came into force need to be scrutinized and done away with.

37 In India, there have been several instances of laws being enacted based on certain stereotypes against certain groups of people. Our citizens have brought challenges before the constitutional courts against the validity of such laws. In Anuj Garg v. Hotel Association of India, 53 the validity of Section 30 of the Punjab Excise Act, 1914 was challenged. The provision prohibited the employment of women and men under the age of 25 years in premises where liquor or other intoxicating drugs were consumed by the public. In adjudicating the case, this Court applied the principle that "[l]egislation should not be only assessed on its proposed aims but rather on the implications and the effects". It struck down the provision, holding that it "suffers from incurable fixations of stereotype morality and conception of sexual role." It was held 53 (2008) 3 SCC 1 PART VI that "[n]o law in its ultimate effect should end up perpetuating the oppression of women".

38 In National Legal Services Authority v. Union of India, 54 this Court recognised hijras, eunuchs, apart from binary gender, as "third gender" and extended the protection of Articles 15 and 16 to them. It was held that discrimination on the ground of "sex" under Articles 15 and 16 includes "discrimination on the ground of gender identity". The Court declared that the expression "sex" used in Articles 15 and 16 "is not just limited to the biological sex of male or female, but intended to include people who consider themselves to be neither male or female." This Court concluded that "discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution".

39 However, the judgment of a two-judge bench in Rajbala v. State of Haryana 55 rejected a challenge founded on the claim of discriminatory impact. A state legislation introduced conditions to contest panchayati elections, as a result of which, a significant section of Scheduled Castes was debarred from contesting elections. The Bench held that a statute cannot be held unconstitutional on the ground that it is "arbitrary". The Court held, "If it is constitutionally permissible to debar certain classes of people from seeking to occupy the constitutional offices, numerical dimension of such classes, in our opinion should make no difference for determining whether prescription of such disqualification is constitutionally permissible unless the prescription is of such nature as would frustrate the constitutional scheme by resulting in a situation where holding 54 (2014) 5 SCC 438 55 2015 INSC 912 PART VI of elections to these various bodies becomes completely impossible". However, this reasoning prima facie is contrary to the decisions in Shayara Bano, Navtej Singh Johar, and Joseph Shine, which upheld manifest arbitrariness as a ground to strike down a law. At the same time, the impact of the law on the Scheduled Caste population is an example of "indirect discrimination", a constitutional test which has been applied by the Court in subsequent decisions.

40 In Karma Dorjee v. Union of India, 56 the Court emphasized that "[t]he Governments, both at the centre and the states have a non-negotiable obligation to take positive steps to give effect to

India's commitment to racial equality". The Court was hearing a public interest petition seeking guidelines to be set down to curb acts of discrimination against persons from the north-eastern states. It directed the Union Government to take "proactive steps to monitor the redressal of issues pertaining to racial discrimination faced by citizens of the nation drawn from the north-east". 41 A Constitution Bench in Navtej Singh Johar 57 gave a broader interpretation to Article 15, while striking down Section 377 of the Indian Penal Code insofar as it decriminalizes homosexual intercourse amongst consenting adults, on the ground that it was discriminatory. In a concurring opinion written by one of us (Justice DY Chandrachud), it was held that discrimination, whether direct or indirect, "founded on a stereotypical understanding of the role of the sex" is prohibited by Article 15. The Court held, "If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate." It was further held that a provision challenged as being ultra vires the prohibition of discrimination 56 (2017) 1 SCC 799 57 (2018) 10 SCC 1 PART VI on the grounds only of sex under Article 15(1) "is to be assessed not by the objects of the State in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights". The Court discussed the principle that even if the law or action by the State is facially neutral, it "may have a disproportionate impact upon a particular class". Though facially neutral, the effect of Section 377 was seen to target members of the LGBTQIA+ community.

42 Another Constitution Bench in Joseph Shine 58 struck down Section 497 of the Indian Penal Code, which related to adultery. It was held that the premise of "Section 497 is a gender stereotype that the infidelity of men is normal, but that of a woman is impermissible", and hence, it violates the non-discrimination principle embodied in Article 15. The provision, the Court held, "builds on existing gender stereotypes and bias and further perpetuates them", by giving "legal recognition to socially discriminatory and gender-based norms". The Court held that a "provision of law must not be viewed as operating in isolation from the social, political, historical and cultural contexts in which it operates".

43 In Indian Young Lawyers Association v. The State of Kerala 59, this Court dealt with the validity of a rule excluding menstruating women between the ages of 10 and 50 from entry in a temple in Kerala, based upon a custom. In his concurring opinion, Justice Nariman held that the said rule is hit by Article 15(1), as it "discriminates against women on the basis of their sex only". One of us (Justice DY Chandrachud) who was also a part of the judgment held, "Exclusion of women between the age groups of ten and fifty, based on their menstrual status, from entering 58 (2019) 3 SCC 39 59 2018 INSC 908 PART VI the temple in Sabarimala can have no place in a constitutional order founded on liberty and dignity".

44 In Secretary, Ministry of Defence v. Babita Puniya, 60 a two-judge Bench upheld the claims of women engaged on Short Service Commissions in the Army to seek parity with their male counterparts in obtaining Permanent Commissions. It was held that "Arguments founded on the physical strengths and weaknesses of men and women and on assumptions about women in the social context of marriage and family do not constitute a constitutionally valid basis for denying equal opportunity to women officers." The Court gave several directions to the Union Government to grant Permanent Commission to women officers in the Army and consequential benefits. 45 The

issue of Permanent Commissions to women officers once again came before the Court in Lt. Col. Nitisha v. Union of India. 61 The petitioners challenged the evaluation criteria applied by the Army as unjust and arbitrary as "the women officers who are in the age group of 40-50 years of age are being required to conform to the medical standards that a male officer would have to conform to at the age of 25 to 30 years, among other factors". In deciding the case, the Court discussed the principles of substantive equality, indirect discrimination, and anti-stereotyping under Articles 14 and 15(1). The Court defined indirect discrimination as follows:

> "We must clarify here that the use of the term 'indirect discrimination' is not to refer to discrimination which is remote, but is, instead, as real as any other form of discrimination. Indirect discrimination is caused by facially neutral criteria by not taking into consideration the underlying effects of a provision, practice or a criterion." 60 2020 INSC 198 61 (2021) 15 SCC 125 PART VI The Court distinguished between direct and indirect discrimination in the following formulation:
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> "... as long as a court's focus is on the mental state underlying the impugned action that is allegedly discriminatory, we are in the territory of direct discrimination. However, when the focus switches to the effects of the concerned action, we enter the territory of indirect discrimination. An enquiry as to indirect discrimination looks, not at the form of the impugned conduct, but at its consequences. In a case of direct discrimination, the judicial enquiry is confined to the act or conduct at issue, abstracted from the social setting or background fact-situation in which the act or conduct takes place. In indirect discrimination, on the other hand, the subject matter of the enquiry is the institutional or societal framework within which the impugned conduct occurs. The doctrine seeks to broaden the scope of antidiscrimination law to equip the law to remedy patterns of discrimination that are not as easily discernible." The Court however held that "[i]n order to conceptualize substantive equality, it would be apposite to conduct a systemic analysis of discrimination that combines tools of direct and indirect discrimination", and not just the claim of either of the two. To evaluate the claim of discrimination, the Court laid down the following test:
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> "A particular discriminatory practice or provision might often be insufficient to expose the entire gamut of discrimination that a particular structure may perpetuate. Exclusive reliance on tools of direct or indirect discrimination may also not effectively account for patterns arising out of multiple axles of discrimination. Therefore, a systemic view of discrimination, in perceiving discriminatory disadvantage as a continuum, would account for not just unjust action but also inaction. Structures, in the form of organizations or otherwise, would be probed for the systems or cultures they produce that influence day-today interaction and decision- making. The duty of constitutional courts, when PART VI confronted with such a scheme of things, would not just be to strike down the discriminatory practices and compensate for the harm hitherto arising out of them; but also structure adequate reliefs and remedies that facilitate social redistribution by providing for positive entitlements that aim to negate the scope of future harm... Therefore, an

> analysis of discrimination, with a view towards its systemic manifestations (direct and indirect), would be best suited for achieving our constitutional vision of equality and antidiscrimination. Systemic discrimination on account of gender at the workplace would then encapsulate the patriarchal disadvantage that permeates all aspects of her being from the outset, including reproduction, sexuality and private choices which operate within an unjust structure." Applying the above principles, the Court concluded that the process adopted by the Army to grant Permanent Commissions to women officers "did not redress the harms of gendered discrimination that were identified by this Court in Babita Puniya". The Court found the evaluation process to be an instance of "indirect discrimination" and "systemic discrimination", which "disproportionately affects women". "This discrimination", it was held, "has caused an economic and psychological harm and an affront to their dignity".

46 The petitioner in Nipun Malhotra v. Sony Pictures Films India (P) Ltd, 62 was aggrieved by the manner in which persons with disabilities have been portrayed in a movie and approached the Court seeking directions for the inclusion of an expert on disability within the Central Board of Film Certification and its advisory panel constituted under Sections 3 and 5 of the Cinematograph Act, among other reliefs. This Court recapitulated "the impact of stereotypes on discrimination and the enjoyment of fundamental rights". It reiterated that the anti-discrimination code under 62 2024 INSC 465 PART VI Article 15 prevents stereotyping. Regarding the safeguards against stereotyping of persons with disabilities, the Court held:

> "... language that disparages persons with disabilities, marginalises them further and supplements the disabling barriers in their social participation, without the redeeming quality of the overall message of such portrayal must be approached with caution. Such representation is problematic not because it offends subjective feelings but rather, because it impairs the objective societal treatment of the affected groups by society. We believe that representation of persons with disabilities must regard the objective social context of their representation and not marginalise persons with disability..." 47 The jurisprudence evolved by this Court shows that discriminatory laws have no place in our democracy. Discriminatory laws based on stereotypes against a social group were stuck down in judgments like Anuj Garg, Navtej Johar, Joseph Shine, and Indian Young Lawyers Association. Through judgments like NALSA and Babita Puniya, this Court recognized the dignity and aspirations of social groups which have traditionally faced exclusion from equal rights. This Court recognized indirect discrimination and systemic discrimination in Lt. Col. Nitisha, emphasized the responsibility of the State to curb discrimination in Karma Dorjee, and provided safeguards against discriminatory stereotypes in Nipun Malhotra.
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> 48 Based on the analysis of the judgments, certain anti-discrimination principles emerge under Article 15(1). First, discrimination can be either direct or indirect, or both.

Second, facially neutral laws may have an adverse impact on certain social groups, that are marginalized. Third, stereotypes can further discrimination against a marginalized social group. Fourth, the State is under a positive obligation to prevent discrimination against a marginalized social group. Fifth, discriminatory laws based on PART VII stereotypes and causing harm or disadvantage against a social group, directly or indirectly, are not permissible under the constitutional scheme. Sixth, courts are required to examine the claims of indirect discrimination and systemic discrimination; and seventh, the test to examine indirect discrimination and systemic discrimination has been laid down in judgments of the Court such as Lt. Col. Nitisha.

VII. The Ban on Untouchability in Article 17

49 Article 17 of the Constitution provides that: ""Untouchability" is abolished and

its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law." This provision has a special place in the Constitution. It puts an end to the socially discriminatory practice of "untouchability".

50 Dr Ambedkar described the impact of "untouchability" as follows:

> "The word untouchable is an epitome of their ills and sufferings. Not only has untouchability arrested the growth of their personality but also it comes in the way of their material well-being. It has also deprived them of certain civil rights... The untouchable is not even a citizen." 63 Untouchability and caste discrimination led to "severe social and economic disabilities and cultural and educational backwardness" of the untouchables. 64 Throughout history, "the oppressive nature of the caste structure has denied to those disadvantaged castes the fundamentals of human dignity, human self-respect and even some of the attributes of the human personality". 65 As a system, it enforced 63 B.R. Ambedkar, "Evidence Before the Southborough Committee", in Dr Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 256 64 Soosai v. Union of India, 1985 Supp SCC 590 65 Ibid PART VII "disabilities, restrictions, conditions and prohibitions on Dalits for access to and the use of places of public resort, public means, roads, temples, water sources, tanks, bathing ghats, etc., entry into educational institutions or pursuits of avocation or profession which are open to all and by reason of birth they suffer from social stigma." 66 Article 17 is a constitutional sanction against discrimination. It "strikes at caste-based practices built on superstitions and beliefs that have no rationale or logic." 67

51 Article 17 has several components. 68 It abolishes the practice of "untouchability". At the same time, it prohibits "its practice in any form". Furthermore, "enforcement of any disability" arising out of "Untouchability"" is a criminal offense as per the "law". The meaning of "law" is any legislation enacted to tackle any practice or disability arising out of "untouchability". 69 It is a provision that can be implemented both against the State and non-state actors such as the citizens. 70 Moreover,

the framers of the Constitution did not refer to any religion or community in the text of the provision. 71 "The injunction against untouchability under Article 17" is further "strengthened by taking away the subject-matter from State domain and placing it as an exclusive legislative head to Parliament." 72 52 In his concurring opinion in State of Karnataka v. Appa Balu Ingale, 73 Justice K. Ramaswamy discussed the basis of Article 17. "The thrust of Article 17", it was held, "is to liberate the society from blind and ritualistic adherence and traditional beliefs 66 State of Karnataka v. Appa Balu Ingale, 1995 Supp (4) SCC 469 67 Adi Saiva Sivachariyargal Nala Sangam v. State of Tamil Nadu, (2016) 2 SCC 725 68 Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1 [Justice Chandrachud] 69 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 70 Kaushal Kishor v. State of Uttar Pradesh, (2023) 4 SCC 1 71 Janhit Abhiyan v. Union of India, (2023) 5 SCC 1 [Dissenting opinion of Justice Ravindra Bhat on behalf of Chief Justice Lalit and himself] 72 Ibid 73 1994 SCC (Cri) 1762 PART VII which lost all legal or moral base". Furthermore, Article 17 "seeks to establish a new ideal for society — equality to the Dalits, on a par with general public", which would give them "a sense of being a participant in the mainstream of national life". 74 53 The constitutional vision behind Article 17 and its impact was extensively discussed in the concurring opinion authored by one of us (Justice DY Chandrachud) in Indian Young Lawyers Association v. State of Kerala. 75 It was held that Article 17 was made a part of fundamental rights to fulfil the constitutional mandate of equality:

> "Article 17 is the constitutional promise of equality and justice to those who have remained at the lowest rung of a traditional belief system founded in graded inequality... It has been placed on a constitutional pedestal of enforceable fundamental rights, beyond being only a directive principle, for two reasons. First, "untouchability" is violative of the basic rights of socially backward individuals and their dignity. Second, the Framers believed that the abolition of "untouchability" is a constitutional imperative to establish an equal social order. Its presence together and on an equal footing with other fundamental rights, was designed to "give vulnerable people the power to achieve collective good". Article 17 is a reflection of the transformative ideal of the Constitution, which gives expression to the aspirations of socially disempowered individuals and communities, and provides a moral framework for radical social transformation." The judgment stated that "untouchability" is "a symptom" of the "caste system" and the interconnected notions of "purity and pollution", which are rejected by Article 17. It was noted:
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> "While the top of the caste pyramid is considered pure and enjoys entitlements, the bottom is considered polluted and has no entitlements. Ideas 74 1994 SCC (Cri) 1762 75 (2019) 11 SCC 1 PART VII of "purity and pollution" are used to justify this distinction which is self-perpetuality. The [so-called] upper castes perform rituals that, they believe, assert and maintain their purity over lower castes.

Rules of purity and pollution are used to reinforce caste hierarchies. The notion of "purity and pollution" influences who people associate with, and how they treat and are treated by other people." Article 17 rejects such notions of purity and pollution. It strikes at the heart of the caste system, which manifests in discriminatory practices based on the notions of purity and pollution. It

was further held:

> "The incorporation of Article 17 into the Constitution is symbolic of valuing the centuries' old struggle of social reformers and revolutionaries. It is a move by the Constitution makers to find catharsis in the face of historic horrors. It is an attempt to make reparations to those, whose identity was subjugated by society. Article 17 is a revolt against social norms, which subjugated individuals into stigmatised hierarchies. By abolishing "untouchability", Article 17 protects them from a repetition of history in a free nation. The background of Article 17 thus lies in protecting the dignity of those who have been victims of discrimination, prejudice and social exclusion. Article 17 must be construed from the perspective of its position as a powerful guarantee to preserve human dignity and against the stigmatization and exclusion of individuals and groups on the basis of social hierarchism." The concurring opinion examined the Constituent Assembly Debates to conclude that the framers deliberately left the term "untouchability" in Article 17 undefined, as they wanted to give the provision a broad scope:
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> "The Constitution has carefully eschewed a definition of "untouchability". The draftspersons realised that even a broadly couched definition may be restrictive. A definition would become restrictive if the words used or the instances depicted are not adequate to cover the manifold complexities of our social life through which prejudice and discrimination PART VII is manifest. Hence, even though the attention of the Framers was drawn to the fact that "untouchability" is not a practice referable only to the lowest in the caste ordering but also was practised against women (and in the absence of a definition, the prohibition would cover all its forms), the expression was designedly left undefined... The Constitution as a constantly evolving instrument has to be flexible to reach out to injustice based on untouchability, in any of its forms or manifestations. Article 17 is a powerful guarantee against exclusion. As an expression of the anti-exclusion principle, it cannot be read to exclude women against whom social exclusion of the worst kind has been practised and legitimised on notions of purity and pollution." Article 17 was interpreted broadly to declare that the practice of excluding menstruating women from visiting the temple is based on the notions of purity and pollution, which arise from the caste system, and the practice was thus unconstitutional.
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> 54 Article 17 enunciates that everyone is born equal. There cannot be any stigma attached to the existence, touch or presence of any person. By way of Article 17, our Constitution strengthens the equality of status of every citizen. From time to time, to implement the mandate of Article 17, Parliament has enacted several legislations such as the Untouchability (Offenses) Act, 1955 (later renamed as Protection of Civil Rights Act, 1955), Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter "PoA Act"), Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, and Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013. This Court, in a number of

cases, has upheld the validity of these laws. 76 It has held that offences enumerated under PoA 76 State of M.P. v. Ram Kishna Balothia, (1995) 3 SCC 221; State of Maharashtra v. Union of India;

Prathvi Raj Chauhan v. Union of India, (2020) 4 SCC 727 PART VII Act "arise out of the practice of 'untouchability'." 77 The Court also held that the practice of "manual scavenging" prohibited under the 2013 Act is "squarely rooted in the concept of the caste-system and untouchability." 78 The laws enacted under Article 17 aim to provide dignity to the affected individuals.

VIII. Article 21: Of Life and Dignity

55 Article 21 provides that "[n]o person shall be deprived of his life or persona

liberty except according to procedure established by law". In a number of judgments, the Court has expanded the meaning of "life". It has been held that the right to life enshrined in Article 21 "cannot be restricted to mere animal existence" and "means something much more than just physical survival". 79 It includes the right to live with dignity. 80 In fact, dignity forms a part of the basic structure of the Constitution. 81 The "references" to dignity are "found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article

21)." 82 Thus, dignity is the "core" which "unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence". 83 In that sense, human dignity is a constitutional value and a constitutional goal. 84 56 The Court has authoritatively ruled, "[t]o live is to live with dignity". 85 Human dignity is intrinsic to and inseparable from human existence. 86 Implicit in this right under Article 21 is "the right to protection against torture or cruel, inhuman or degrading 77 State of M.P. v. Ram Kishna Balothia, (1995) 3 SCC 221 78 Safai Karamchari Andalon v. Union of India, [2014] 4 S.C.R. 19; See also Balram Singh v. Union of India, 2023 INSC 950 79 Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608 80 Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 81 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 82 K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (Privacy-9J.) 83 Ibid 84 Jeeja Ghosh v. Union of India, (2016) 7 SCC 761 85 Ibid 86 M. Nagaraj v. Union of India [M. Nagaraj v. Union of India, (2006) 8 SCC 212 PART VIII treatment". 87 There also exists "a close relationship between dignity and the quality of life". 88 Dignity of human existence is fully realized only when one leads a quality life. 89 57 Dignity under Article 21 is an integral aspect of life, which requires sustenance of one's being to the fullest. 90 One can truly embrace their identity, whether on the basis of caste, race, gender, sexual orientation, or ethnicity, only if they are given dignity. An individual's dignity is fundamental to their sense of self and autonomy. Thus, the right to dignity "encapsulates the right of every individual to be treated as a self- governing entity having intrinsic value". 91 Above all, "there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity." 92 A nation must prioritize human dignity—ensuring that every person, regardless of their background or identity, is able to live with respect, equality, and freedom. Thus, human dignity forms the bedrock of social justice and a just, compassionate society.

58 The right to live with dignity extends even to the incarcerated. Not providing dignity to prisoners is a relic of the colonizers and pre-colonial mechanisms, where oppressive systems were designed to dehumanize and degrade those under the control of the State. Authoritarian regimes of the pre-constitutional era saw prisons not only as places of confinement but as tools of domination. This Court, focusing on the changed legal framework brought out by the Constitution, has recognized that even prisoners are entitled to the right to dignity.

87 Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608 88 Common Cause v. Union of India, (2018) 5 SCC 1 [Justice Chandrachud] 89 Ibid 90 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 91 X2 v. State (NCT of Delhi), (2023) 9 SCC 433 92 National Legal Services Authority v. Union of India, (2014) 5 SCC 438 PART VIII 59 A Constitution bench of this Court in Sunil Batra (I) v. Delhi Administration 93 took serious note of the treatment meted out to undertrials, convicts, and those awaiting the death penalty. Justice Krishna Iyer, in his opinion, expounded: "The humane thread of jail jurisprudence that runs right through is that no prison authority enjoys amnesty for unconstitutionality, and forced farewell to fundamental rights is an institutional outrage in our system where stone walls and iron bars shall bow before the rule of law." He emphasized the need to re-look at the prison conditions:

> "A prison is a sound-proof planet, walled from view and visits regulated, and so, rights of prisoners are hardly visible, checking is more difficult and the official position of the repository of power inspires little credibility where the victims can be political protesters, unpopular figures, minority champions or artless folk who might fail to propitiate arrogant power of minor minions." Justice Krishna Iyer advocated for a humane system within prisons:
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> "In every country, this transformation from cruelty to compassion within jails has found resistance from the echelons and the Great Divide between pre-and- post Constitution penology has yet to get into the metabolism of the Prison Services. And so, on the national agenda of prison reform is on-going education for prison staff, humanisation of the profession and recognition of the human rights of the human beings in their keep." The Court admonished the usage of iron fetters and held that the practice of solitary confinement and cellular segregation as inhuman and irrational:
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> "I hold that bar fetters are a barbarity generally and, like whipping, must vanish. Civilised consciousness is hostile to torture within the walled campus. We hold that solitary confinement, cellular segregation and marginally modified editions of the same process are inhuman and irrational. More dangerous are these expedients when imposed by the unturned and untrained power of a jail superior who has, as 93 (1978) 4 SCC 494 PART VIII part of his professional equipment, no course in human psychology, stressology or physiology, who has to depend on no medical or psychiatric examination prior to infliction of irons or solitary, who has no obligation to hear the victim before harming him, whose "reasons" are in English on the history-

tickets and therefore unknowable and in the Journal to which the prisoner has no access... The law is not abracadabra but at once pragmatic and astute and does not surrender its power before scary exaggerations of security by prison bosses... Social justice cannot sleep if the Constitution hangs limp where its consumers most need its humanism." 60 In Charles Sobraj v. Supdt., Central Jail, 94 this Court upheld the constitutionally guaranteed fundamental rights of prisoners against the undue harshness of prison practices. Justice Krishna Iyer observed:

> "a prison system may make rational distinctions in making assignments to inmates of vocational, educational and work opportunities available, but is constitutionally impermissible to do so without a functional classification system. The mere fact that a prisoner is poor or rich, high-born or ill-bred, is certainly irrational as a differentia in a 'secular, socialist republic'... The reason is, prisoners retain all rights enjoyed by free citizens except those lost necessarily as an incident of confinement. Moreover, the rights enjoyed by prisoners under Articles 14, 19 and 21, though limited, are not static and will rise to human heights when challenging situations arise."

61 In Sunil Batra (II) v. Delhi Administration, 95 this Court emphasized that a person in prison does not cease to be a human being or lose all human rights, and that it is the duty of the State to take care of justifiable needs and requests. It was held that "in the eye of law, prisoners are persons, not animals", and that courts must "punish the deviant 'guardians' of the prison system where they go berserk and defile the dignity of the human inmate". Speaking for the Court, Justice Krishna Iyer held:

> 94 (1978) 4 SCC 104 95 (1980) 3 SCC 488 PART VIII "Prison houses are part of Indian earth and the Indian Constitution cannot be held at bay by jail officials "dressed in a little, brief authority", when Part III is invoked by a convict. For when a prisoner is traumatized, the Constitution suffers a shock... Whether inside prison or outside, a person shall not be deprived of his guaranteed freedom save by methods "right, just and fair"... Prisoners are peculiarly and doubly handicapped.

For one thing, most prisoners belong to the weaker segment, in poverty, literacy, social station and the like. Secondly, the prison house is a walled-off world which is incommunicado for the human world, with the result that the bonded inmates are invisible, their voices inaudible, their injustices unheeded. So it is imperative, as implicit in Article 21, that life or liberty, shall not be kept in suspended animation or congealed into animal existence without the freshening flow of fair procedure." The Court also noted down various injustices which may be committed against a prisoner:

> "Inflictions may take many protean forms, apart from physical assaults. Pushing the prisoner into a solitary cell, denial of a necessary amenity, and, more dreadful sometimes, transfer to a distant prison where visits or society of friends or relations may be snapped, allotment of degrading labour, assigning him to a desperate or tough gang and the like, may be punitive in effect. Every such affliction or abridgment is an infraction of liberty or life in its wider sense and cannot be

sustained unless Article 21 is satisfied."

62 The Court in Kishore Singh Ravinder Dev v. State of Rajasthan 96 reiterated that the infliction of physical torture on the undertrial prisoner is a violation of Article

21. It was held that "the State must re-educate the constabulary out of their sadistic arts and inculcate a respect for the human person — a process which must begin more by example than by precept if the lower rungs are really to emulate". The Court ruled 96 (1981) 1 SCC 503 PART VIII that if any escort policemen are found guilty of misconduct, the authorities must not allow a sense of police solidarity or internal camaraderie to shield the wrongdoing. There is no greater harm to our constitutional values than a State official acting recklessly and violating fundamental rights. The Court expressed hope that the root causes enabling police brutality will be addressed by the government with the seriousness it deserves. The Court posed the question: "Who will police the police?" 63 In Francis Coralie Mullin v. Administrator, Union Territory of Delhi, 97 the Court struck down a rule which regulated the right of a detenu to have interviews with a legal adviser of his choice as violative of Articles 14 and 21. The Court held that "as part of the right to live with human dignity" and "as a necessary component of the right to life", a detenu "would be entitled to have interviews with the members of his family and friends" and "to have interview with his legal adviser at any reasonable hour during the day after taking appointment from the Superintendent of the Jail". Such appointment, it was held, "should be given by the Superintendent without any avoidable delay." Correspondingly, when Sheela Barse, 98 a freelance journalist, sought permission to interview prisoners, this Court held that the press and citizens are entitled to interview prisoners in order to ensure the availability of their rights under Article 21, subject to reasonable restrictions. It was noted, "Prison administrators have the human tendency of attempting to cover up their lapses and so shun disclosure thereof... Interviews become necessary as otherwise the correct information may not be collected but such access has got to be controlled and regulated." 97 (1981) 1 SCC 608 98 Sheela Barse v. State of Maharashtra, (1987) 4 SCC 373 PART VIII 64 In Nilabati Behera v. State of Orissa, 99 this Court emphasized "great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life". While confinement inherently restricts a person's liberty, the limited freedom they retain becomes all the more valuable. The State has a strict duty of care in such situations, without exception. This Court declared that if a person in police custody is deprived of life, except according to the procedure established by law, the wrongdoer is held accountable, and the State is ultimately responsible.

65 This Court laid down guidelines on arrest and detention in D.K. Basu v. State of West Bengal, 100 while highlighting the constitutional violations caused due to custodial violence and deaths in police lock-ups. It noted, "If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism". In Mehmood Nayyar Azam v. State of Chhattisgarh, 101 it was noted that a person in custody has "his basic human rights" and human dignity, and that the police officers cannot treat him in an inhuman manner. It was held that even "any treatment meted out to an accused while he is in custody which causes humiliation and mental trauma corrodes the concept of human dignity". 66 In Shabnam v. Union of India, 102 this Court elucidated the principle that human dignity should be preserved even when a prisoner is sentenced

to death. The Court held, "the process/procedure from confirmation of death sentence by the highest court till the execution of the said sentence, the convict is to be treated with human dignity 99 (1993) 2 SCC 746 100 (1997) 1 SCC 416 101 (2012) 8 SCC 1 102 (2015) 6 SCC 702 PART IX to the extent which is reasonable and permissible in law". Similarly, in 'X' v. State of Maharashtra, 103 the Court while holding that "post conviction severe mental illness will be a mitigating factor" in commuting the death sentence, emphasized that the "right to dignity of an accused does not dry out with the Judges' ink, rather, it subsists well beyond the prison gates and operates until his last breath". 67 Thus, the jurisprudence which emerges on the rights of prisoners under Article 21 is that even the incarcerated have inherent dignity. They are to be treated in a humanely and without cruelty. Police officers and prison officials cannot take any disproportionate measures against prisoners. The prison system must be considerate of the physical and mental health of prisoners. For instance, if a prisoner suffers from a disability, adequate steps have to be taken to ensure their dignity and to offer support.

IX. Article 23: Prohibition of Forced Labour and Human Trafficking 68 Article 23 provides that:

> "Prohibition of traffic in human beings and forced labour.— (1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
>
> (2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them." Article 23(1) provides an enforceable fundamental right against social and economic exploitation. It aims to prohibit human trafficking, "begar", and "other similar forms of 103 (2019) 7 SCC 1 PART IX forced labour". Like Articles 15(2) and 17, it is enforceable both against the State and non-state actors. At the same time, the scope of the provision is wide, as it has left the term "begar" undefined, and supplemented by the phrase "other similar forms of forced labour". The "other similar forms" can be many. The framers of the Constitution consciously left the terms undefined so that future interpretation is not restrictive.

69 Interestingly, the foundations of Article 23 were laid even prior to the discussions in the Constituent Assembly. In his work titled "States and Minorities" (1947), 104 Dr Ambedkar conceptualized the interlinkages between one's economic condition and their ability to exercise fundamental rights. He wrote, "The fear of starvation, the fear of losing a house, the fear of losing savings if any, the fear of being compelled to take children away from school, the fear of having to be a burden on public charity, the fear of having to be burned or buried at public cost are factors too strong to permit a man to stand out for his Fundamental Rights." 105 In his view, "The unemployed are thus compelled to relinquish their Fundamental Rights for the sake of securing the privilege to work and to subsist." 106 Dr. Ambedkar proposed that the rights of individuals should be protected from exploitation by adopting a favourable constitutional framework. 107 The intellectual background of Article 23 lies in what Dr Ambedkar was explaining – to facilitate the citizens in exercising their fundamental rights. 108 Exploitative socio-economic practices can hinder the right

to live a dignified life.

104 B.R. Ambedkar, “States and Minorities”, in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 393, https://www.mea.gov.in/Images/CPV/Volume1.pdf [See Article II, Section I, Clause 9]. 105 Ibid, pp. 409-410 106 Ibid, p. 410 107 Ibid 108 Anurag Bhaskar, The Foresighted Ambedkar: Ideas That Shaped Indian Constitutional Discourse, Penguin (2024), pp. 176-191.

PART IX 70 In adopting Article 23(1) in the Constitution, the framers were conscious of oppressive practices such as Slavery in the United States as well as domestic practices of exploiting labour of the Bahujan castes and poor sections of society. 109 Several members of the Constituent Assembly, who came from the Scheduled Caste communities expressed their support for Article 23, as they believed that such a provision would prevent economic exploitation of their community. V.I. Muniswamy Pillai stated, “If there is any labour required for common purposes in the village, this most unfortunate fellow, the Harijan [Scheduled Caste], is always caught hold of to do all menial and inferior service.” 110 By the provision, he was confident that the country would be “elevating a community that has been outside the pale of society”. S. Nagappa gave examples of how “begar” was imposed on the Scheduled Castes:

> “Sir, whenever cattle die; the owner of the cattle wants these poor Harijans to come and remove the dead cattle, remove the skins, tan them and make chappals and supply them free of cost. For this, what do they get? Some food during festival days. Often, Sir, this forced labour is practised even by the government. For instance, if there is any murder, after the postmortem, the police force these people to remove the dead body and look to the other funeral processes. I am glad that hereafter this sort of forced labour will have no place. Then, Sir, this is practised in zamindaries also. For instance, if there is a marriage in the zamindar’s family, he will ask these poor people, especially the Harijans, to come and white wash his whole house, for which they will be given nothing except food for the day... ... whenever the big zamindar’s lands are to be ploughed, immediately he will send word for these poor people, the Harijans, the previous day, and say:
>
> “All your services are confiscated for the whole of tomorrow; you will have to work throughout the day and night. No one should go to any other work.” In return, the zamindar will give one morsel of food to these poor fellows. Sir, this sort of forced labour is in 109 B. Shiva Rao, Framing of India’s Constitution, Vol. 5, pp. 249-257. 110 Constituent Assembly Debates (8 November 1948) PART IX practice in the 20th century in our so called civilised country.” 111 (emphasis added)

71 Another member from the Scheduled Caste community, H.J. Khandekar, expressed his happiness “to see in the Constitution that begar and forced labour are abolished and the curse on untouchables from whom the begar and forced labour were taken has gone”. 112 Raj Bahadur also gave examples how “begar” was practiced:

> "I know how some of the Princes have indulged in their pomp and luxury, in their reckless life, at the expense of the ordinary man, how they have used the down-trodden labourers and dumb ignorant people for the sake of their pleasure. I know for instance how for duck shooting a very large number of people are roped in forcibly to stand all day long in mud and slush during cold chilly wintry days. I know how for the sake of their game and people have been roped in large numbers for beating the lion so that the Princes may shoot it. I have also seen how poor people are employed for domestic and other kinds of labour, no matter whether they are ailing or some members of their family are ill. These people are paid nothing or paid very little for the labour extorted from them." He stated that Article 23 will free "downtrodden millions" from the handcuffs of exploitation. T.T. Krishnamachari said that "some form of forced labour does exist in practically all parts of India, call it 'begar' or anything like that and in my part of the country, the tenant often times is more or less a helot attached to the land and he has certain rights and those are contingent on his continuing to be a slave."

72 While the framers did not define the term "begar", they largely referred to those practices, where the workers were either unpaid or paid very little for their jobs. "Begar" 111 Constituent Assembly Debates (3 December 1948) 112 Constituent Assembly Debates (21 November 1949) PART IX or bonded labour was entrenched in India's social system, against which Article 23 makes a blow. Over the years, this Court has taken a strict view against bonded labour in existence in society.

73 The Court in People's Union for Democratic Rights v. Union of India 113 considered the scope of the terms "begar" and "forced labour" under Article 23(1). The Court entertained a letter as a writ petition, which sought compliance with the provisions of labour laws in relation to workmen employed in the construction work of projects connected with the Asian Games. The petitioner contended that the labourers were also not paid their minimum daily wages, and were not provided with proper living conditions. The Court observed that the issue related to a "breach of a fundamental right" under Article 23.

74 The judgment noted that the framers of the Constitution adopted Article 23 to put an enforceable obligation on the State to end bonded labour, which was "the relic of feudal exploitative society" and "incompatible with the new egalitarian socio- economic order". It was further stated that the term "begar" is of Indian origin, referring loosely to "labour or service which a person is forced to give without receiving any remuneration for it". The judgment held that the phrase "forced labour" is of wide amplitude and would cover instances "where a person provides labour or service to another for remuneration which is less than the minimum wage". "Forced labour" may manifest in many forms. It was held that labour provided as a result of any kind of force or compulsion would be counted as "forced labour" under Article 23(1). It was held:

> "What Article 23 prohibits is "forced labour" that is labour or service which a person is forced to provide and "force" which would make such labour or service "forced labour" may arise in several ways. It may be 113 (1982) 3 SCC 235 PART IX physical force which may compel a person to provide labour or service to another or it may be

> force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as "force" and if labour or service is compelled as a result of such "force", it would be "forced labour". Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him. And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly "forced labour".

It was held that non-payment of minimum wage to workmen in the Asian Games project was a violation of their fundamental right under Article 23. The judgment also laid down an important constitutional principle that when fundamental rights such as under Articles 17 or 23 are violated by private individuals, then "it is the constitutional obligation of the State to take necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same".

75 The interpretation of Article 23 laid down in PUDR was relied upon in a subsequent decision in Sanjit Roy v. State of Rajasthan. 114 A writ petition was filed 114 (1983) 1 SCC 525 PART IX seeking payment of minimum wages to women workers belonging to Scheduled Castes, who were engaged in a construction project of the Rajasthan government, under the Minimum Wages Act, 1948. It was argued by the State government that the construction project was a famine relief work, and payment of minimum wages in such projects was exempted by the Rajasthan Famine Relief Works Employees (Exemption Act from Labour Law) Act, 1964. The Court declared the Exemption Act, in so far as it excluded the applicability of the Minimum Wages Act 1948 to workmen employed on famine relief work and permitted the payment of less than the minimum wage to such workmen as violative of Article 23. It was held:

> "The State cannot be permitted to take advantage of the helpless condition of the affected persons and extract labour or service from them on payment of less than the minimum wage. No work of utility and value can be allowed to be constructed on the blood and sweat of persons who are reduced to a state of helplessness on account of drought and scarcity conditions. The State cannot under the guise of helping these affected persons extract work of utility and value from them without paying them the minimum wage." Justice Pathak wrote a concurring opinion, holding the Exemption Act to be violative of Article 14. The Court directed the State government to pay the arrears of the difference between the minimum wage and the actual wage paid to the

construction workers.

> 76 It was pointed out to this Court in Labourers Working on Salal Hydro Project v. State of Jammu & Kashmir 115 that a large number of migrant workmen from different States working on a hydro-electric project were denied the benefit of labour laws and were exploited by the contractors. This Court directed the Union government

115 (1983) 2 SCC 181 PART IX to ensure that its senior officers carry out thorough inspections of the project at regular intervals to verify whether the labour laws are being properly followed, particularly concerning workmen employed, either directly or indirectly, by the contractors or sub-contractors.

77 In Bandhua Mukti Morcha v. Union of India, 116 the petitioner had highlighted the issue of bonded labourers in stone quarries of Faridabad district and and their inhuman living conditions. Referring to the provisions of the Bonded Labour System (Abolition) Act 1976, the judgment discussed the meaning of "bonded labour". According to the Act, a bonded labourer is someone who has incurred or is presumed to have incurred a bonded debt. 117 A bonded debt refers to an advance received or presumed to have been received by a bonded labourer under or in pursuance of the bonded labour system. 118 The inference of this definition, according to the State government, was that bonded labourers must first prove that they are providing forced labour in consideration of an advance or other economic consideration received by them. The Court rejected this reasoning, stating that it would be "cruel to insist" that a bonded labourer "should have to go through a formal process of trial with the normal procedure for recording of evidence." It was further observed that "a bonded labourer can never stand up to the rigidity and formalism of the legal process due to his poverty, illiteracy and social and economic backwardness and if such a procedure were required to be followed, the State Government might as well obliterate this Act from the statute book". The Court also noted that statistically, "most of bonded labourers are members of Scheduled Castes and Scheduled Tribes or other backward classes". 116 (1984) 3 SCC 161 117 Section 2(f), Bonded Labour System (Abolition) Act 1976 118 Section 2(d), Bonded Labour System (Abolition) Act 1976 PART IX 78 The judgment held that whenever a labourer is made to provide forced labour, the presumption would be that it is consideration of an advance or other economic consideration received by him, and he is thus a bonded labourer. This presumption may, however, be rebutted by the employer or the State Government by providing satisfactory material. The Court reiterated the constitutional obligation of the Union government and the State government to ensure observance of various social welfare and labour laws enacted for the benefit of the workmen. The State government was directed "to take up the work of identification of bonded labour as one of their top priority tasks and to map out areas of concentration of bonded labour". The concurring opinion regarded Article 23 as "a vital constituent of the Fundamental Rights". 79 Pursuant to this Court's decision in Bandhua Mukti Morcha, 135 bonded labourers were released from bondage in stone quarries of Faridabad district, under the provisions of the Bonded Labour System (Abolition) Act, 1976. However, they were not rehabilitated even after a lapse of several months. This inaction of the State government was brought before this Court in Neeraja Chaudhary v. State of Madhya Pradesh. 119 The Court directed the State government to provide rehabilitative assistance to these 135 freed bonded

labourers within one month. It noted with compassion, “They have waited too long; they cannot wait any longer”. This Court also directed the State government to ascertain within its territory whether there were any more bonded labourers or not, by applying the principle laid down in Bandhua Mukti Morcha. It was reiterated, “Whenever it is found that any workman is forced to provide labour for no remuneration or nominal remuneration, the presumption would be that 119 (1984) 3 SCC 243 PART IX he is a bonded labourer unless the employer or the State Government is in a position to prove otherwise by rebutting such presumption.” 80 The issue of bonded labourers in stone quarries in several districts of Andhra Pradesh was highlighted before this Court in P. Sivaswamy v. State of Andhra Pradesh. 120 The Court emphasized on “effective rehabilitation” of bonded labourers. It was stated, “Uprooted from one place of bonded labour conditions the persons are likely to be subjected to the same mischief at another place”. The Court appealed for “requisite social consciousness”, where it is “the obligation of every citizen to cooperate” to bring an end to bonded labour.

81 In State of Gujarat v. Hon’ble High Court of Gujarat, 121 a three-judge Bench dealt with the question whether prisoners, who are required to do labour as part of their punishment should be paid minimum wages for such work. This Court held that jail authorities are “enjoined by law to impose hard labour” on convicted prisoners who were sentenced to rigorous imprisonment, irrespective of “whether he consents to do it or not”. However, undertrials, detainees with simple imprisonment, or even detenus who are kept in jails as preventive measures cannot be “asked to do manual work during their prison term.” Justice KT Thomas, speaking for the Court, held that “a directive from the court under the authority of law to subject a convicted person (who was sentenced to rigorous imprisonment) to compulsory manual labour gets legal protection under the exemption provided in Clause (2) of Article 23 of the Constitution, as it “serves a public purpose” of reforming the convict and rehabilitating them in future with savings earned from such labour. The Court held that a prisoner “should be paid equitable wages for the work done by them”. It directed the State to fix the quantum of 120 (1988) 4 SCC 466 121 AIR 1998 SC 3164 PART IX equitable wages payable to prisoners, which would be calculated after deducting the expenses incurred for food and clothes of the prisoners from the minimum wage rates. 82 However, in his concurring opinion, Justice D.P. Wadhwa differed with Justice Thomas’ invocation of Article 23. According to him, “there will be no violation of Article 23 if prisoners doing hard labour when sentenced to rigorous imprisonment are not paid wages”. He, however, observed that the State is free to enact legislation for granting wages to prisoners subject to hard labour under courts’ orders, for their beneficial purpose or otherwise. Justice M.M. Punchhi, in his concurrence with Justice Thomas, made no comment on the application of Article 23. The inference of this judgment, however, is not that imposing mandatory labour on convicts is entirely immune from the operation of Article 23. Reading Article 23 with Article 21 and the decision in Sunil Batra (II), 122 a convict cannot be subjected to “allotment of degrading labour”.

83 In Public Union for Civil Liberties v. State of Tamil Nadu, 123 when the issue of bonded labourers and their exploitation was again brought to the notice of this Court, a two-judge Bench issued a fresh set of directives to the State. Among other directions the bench directed proper and effective implementation of the Minimum Wages Act, the Workmens’ Compensation Act, the Inter-State Migrant Workmen Act, and the Child Labour (Prohibition and Regulation) Act.

84 A three-judge Bench of this Court in Gujarat Mazdoor Sabha v. State of Gujarat124 adjudicated a challenge to two notifications issued by the Gujarat 122 1979 INSC 271 123 (2013) 1 SCC 585 124 (2020) 10 SCC 459 PART IX government under section 5 of the Factories Act, 1948, during the COVID19 pandemic. These notifications exempted factories from observing some of the obligations which employers have to fulfil towards the workmen employed by them. According to the notifications, among other provisions, all factories registered under the Act were exempted "from various provisions relating to weekly hours, daily hours, intervals for rest, etc. for adult workers". One of us (Justice DY Chandrachud) authored the judgment, declaring that the notifications issued by the government during the pandemic were ultra vires and against the fundamental rights of labourers. The Court stated that "[t]o a worker who has faced the brunt of the pandemic and is currently laboring in a workplace without the luxury of physical distancing, economic dignity based on the rights available under the statute is the least that this Court can ensure them." It was held that "[t]he notifications, in denying humane working conditions and overtime wages provided by law, are an affront to the workers' right to life and rights against forced labour that are secured by Articles 21 and 23 of the Constitution." 85 What emerges from the above discussion is that the broad scope of Article 23 can be invoked to challenge practices where no wages are paid, non-payment of minimum wages takes place, social security measures for workers are not adopted, rehabilitation for bonded labour does not happen, and in similar unfair practices. The State shall be held accountable even in cases where the violation of fundamental rights such as Article 23 is done by private entities or individuals. Article 23 can also be applied to situations inside prisons, if the prisoners are subjected to degrading labour or other similar oppressive practices.

86 Having analysed the philosophy of the Constitution and the principles under Articles 14, 15, 17, 21, and 23, we must now reflect on the patterns of discrimination against the Scheduled Castes, Scheduled Tribes, and Denotified Tribes. This exercise PART X is necessary to examine and understand the systemic discrimination based on caste against these communities, of which the impugned provisions are an instance. The counsel for the petitioner has argued that the impugned provisions are an example of State-sanctioned caste-based discrimination. Analysing the systemic discrimination not only requires looking at the colonial era, but also the pre-colonial era. Doing so will present before us the exact patterns of discrimination against Scheduled Castes, Scheduled Tribes, and Denotified Tribes over the course of history, which the Constitution seeks to remedy.

X. A History of Discrimination in the Pre-Colonial Era 87 The history of India has witnessed centuries of discrimination towards the oppressed castes. Violence, discrimination, oppression, hatred, contempt, and humiliation, towards these communities were the norm. The caste system entrenched these social injustices deeply within society, creating an environment where the principles of natural justice were blatantly disregarded. In this hierarchical system, neutrality was virtually non-existent, and there was an inherent and pervasive bias against those belonging to the oppressed castes. This bias manifested in numerous ways, including exclusion from social, economic, and political opportunities. The caste system ensured that the oppressed castes remained marginalized and deprived of their basic rights and dignity.

88 The foundational principle of equality for all individuals was absent in the social framework defined by caste. The caste system operated as a mechanism that thrived on the labour of Bahujan

communities, ultimately eroding their identity. In other words, the story of the caste system is, therefore, a story of enduring injustice. It is a narrative of how millions of Indians, relegated to the bottom of the social ladder, faced relentless PART X discrimination and exploitation. The lower castes were systematically denied access to education, land and employment, further entrenching their disadvantaged position in society.

89 The caste system led to harrowing practices of discrimination and subjugation, rooted in the notions of purity and pollution, where some communities were deemed impure, and their presence was considered contaminated. The penal sanctions and discriminatory practices under the caste system have been well-documented in several scholarly works. Dr. Ambedkar referred to this as the "law of caste" in his writings. 125 90 The caste system was based on four varnas or groupings. Dr. Ambedkar described the caste system in the following words:

> "One striking feature of the caste system is that the different castes do not stand as an horizontal series all on the same plane. It is a system in which the different castes are placed in a vertical series one above the other... the Brahmin is placed at the first in rank. Below him is the Kshatriya. Below Kshatriya is the Vaishya. Below Vaishya is the Shudra and Below Shudra is the Ati-Shudra (the Untouchables). This system of rank and gradation is, simply another way of enunciating the principle of inequality.... This inequality in status is not merely the inequality that one sees in the warrant of precedence prescribed for a ceremonial gathering at a King's Court. It is a permanent social relationship among the classes to be observed— to be enforced—at all times in all places and for all purposes...." 126 125 B.R. Ambedkar, "Castes in India", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 16; B.R. Ambedkar, "Annihilation of Caste", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 54. 126 B.R. Ambedkar, "Philosophy of Hinduism", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 3, pp. 25-
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> 26.

PART X In his classic "Annihilation of Caste", Dr. Ambedkar stated that:

> "the Varnavyavastha is like a leaky pot or like a man running at the nose. It is incapable of sustaining itself by its own virtue and has an inherent tendency to degenerate into a caste system unless there is a legal sanction behind it which can be enforced against every one transgressing his Varna." 127 Castes were considered "self-enclosed units", 128 which could not be changed. That is, was assigned to individuals at birth, with each caste linked to a specific profession, and all castes organized into a hierarchical structure.

91 Dr Ambedkar also theorized that an essential aspect of the caste system was the control over the sexuality of women. In "Castes in India", he stated: "Sati, enforced widowhood and girl marriage are customs that were primarily intended to solve the problem of the surplus man and surplus woman in a caste and to maintain its endogamy. Strict endogamy could not be preserved without these

customs, while caste without endogamy is a fake." 129 92 Scholars have also stated that "the idea of criminal tribe" 130 existed even before the British colonisers. Anthropologist Anastasia Piliavsky noted, "while colonial uses of the stereotype add up to a lurid history of violence against people branded as congenital criminals in colonial law, the stereotype itself has a history stretching back far beyond British colonialism." 131 127 B.R. Ambedkar, "Annihilation of Caste", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 86 128 B.R. Ambedkar, "Castes in India", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 18 129 B.R. Ambedkar, "Castes in India", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 14 130 Anastasia Pilavsky, "The 'Criminal Tribe' in India before the British", Comparative Studies in Society and History 57, no. 2 (2015): 323–54, at p. 327 131 Ibid, p. 325 PART XI 93 The caste system permeated itself in several ways. First, it was based on a hierarchy of four caste-based groupings, where the Shudras occupied the lowest level. Second, the castes outside these four groupings were treated as "untouchables". Third, the caste system controlled the sexuality or agency of women to maintain the sanctity of caste. Fourth, the caste structure considered certain castes and tribal communities as professional criminals. Fifth, penal sanctions were imposed on those who violated the "law of caste".

94 The rules of caste continued in medieval history. The law of caste manifested in several ways– with each manifestation causing a form of violence against the oppressed communities.

XI. The Colonial Suppression of Marginalized Castes and Tribes 95 The colonial history indicates that the British reproduced the systems of social hierarchy in their legal framework. Following several revolts from indigenous communities in India, in particular their participation in the 1857 revolt, the British focused on restricting their activities. The British increased surveillance upon them by the Thuggee Act (XXX of 1836) and Dacoity Act (XXIV of 1843). 96 Reference must be drawn to the statement of J. F. Stephen, legal member of the Viceroy's Council, who in the early 1870s, stated:

> "The caste system is India's distinguishing trait. By virtue of this system, merchants are constituted in a caste, a family of carpenters will remain a family of carpenters for a whole century from now, or five centuries from now, if it survives that long. Let us bear that in mind and grasp quickly what we mean here by professional criminals. We are dealing here with a tribe whose ancestors have been criminals since the very dawn of time, whose members are sworn by the laws of their caste to commit crime...
>
> PART XI for it is his vocation, his caste, I would go to the extent of saying his faith, to commit crimes (from Fourcade 2003: 146)." 132 These caste-based stereotypes were given the form of the Criminal Tribes Act of 1871.

i. Criminal Tribes Acts

97 The legislation of 1871 empowered the government to declare any community

as “criminal tribe”. 133 The Act provided for the “registration, surveillance and control” of “criminal tribes” and “eunuchs”. The major part of the Act operated in the North-

Western province, Punjab and Oudh. 134 The Act allowed the local government, with due permission of the Governor General in Council, to designate any “tribe, gang or class of persons” as “criminal tribes” if they were deemed to be “addicted to systematic commission of non-bailable offences”. 135 The local government needed to give a comprehensive report to the Governor General giving reasons for declaring any tribe as criminal and also provide a manner in which these tribes would earn their livelihood. 136 98 The Act authorized the local government to term a “wandering tribe” having no fixed place of residence as criminals, except in cases where they can identify a “lawful occupation” of the tribe. 137 The government was allowed to settle such tribes in a specified place. 138 Subsequently, with the authorization of the Governor General, the local government will publish the declaration of criminal tribes in the local gazette in form of a notification. 139 Such notification acted as conclusive proof of the applicability 132 Anastasia Pilavsky, “The ‘Criminal Tribe’ in India before the British”, Comparative Studies in Society and History 57, no. 2 (2015): 323–54, at p.326 133 Section 2, Criminal Tribes Act 1871.

134 Section 1, Criminal Tribes Act, 1871. 135 Section 2, Criminal Tribes Act, 1871. 136 Section 3, Criminal Tribes Act, 1871. 137 Section 4, Criminal Tribes Act, 1871. 138 Section 4, Criminal Tribes Act, 1871. 139 Section 5, Criminal Tribes Act, 1871.

PART XI of the provisions of the Act on the tribe and debarred any judicial review irrespective of any procedural non-compliance. 140 99 Members of the designated criminal tribes were required to mark their presence in a register made by the magistrate, failing which they were subjected to penalties in accordance with the provision of the Indian Penal Code. 141 Such a register was kept in the custody of the District Superintendent of Police. 142 A person aggrieved by any entry in the register could request alteration by filing a complaint before the Magistrate, who had the final say. 143 The designated criminal tribes were forced to either settle or move to another place chosen by the local government, 144 or could be moved to any reformatory settlement. 145 Headmen, village-watchmen and landowners or occupiers of the village were informed about the designated criminal tribes. 146 They were subjected to frequent checks, and their movements were closely monitored. 147 The local government could restrict their movement within a territorial limit. 148 The designated criminal tribes required permission to move from one place to another.149 They were mandated to carry “passes” which had permission to move to another specified place. 150 The Act allowed the government to employ the individuals from designated criminal tribes “placed in a reformatory settlement”. 151 100 The Act included provisions for punitive measures against members of the criminal tribes, including rigorous imprisonment extending from six months (in first 140 Section 6, Criminal Tribes Act, 1871.

141 Section 9, Criminal Tribes Act, 1871.

142 Section 10, Criminal Tribes Act, 1871.

143 Section 12, Criminal Tribes Act, 1871.

144 Sections 13, 14, Criminal Tribes Act, 1871.

145 Section 17, Criminal Tribes Act, 1871.

146 Section 18(ii), Criminal Tribes Act, 1871.

147 Section 18 (viii), Criminal Tribes Act, 1871.

148 Section 18 (iv), Criminal Tribes Act, 1871.

149 Section 18(v), Criminal Tribes Act, 1871.

150 Section 18(v), Criminal Tribes Act, 1871.

151 Section 18(xii), Criminal Tribes Act, 1871.

PART XI breach) to one year (in second breach), whipping, or fine, if they were found violating the Act's provisions. 152 It gave extensive powers to any police officer, or village watchman to arrest without warrant a person of a designated criminal tribe, if they move beyond any prescribed limits of residence without a pass. 153 The Act mandated "every village-headman and village-watchman", and "every owner or occupied of land" to inform the police about the absence of a person from a designated criminal tribe or the arrival in the village of such persons "who may reasonably be suspected of belonging" to a criminal tribe. 154 101 The Act also mandated creation of "a register of the names and residence of all eunuchs residing" in the territorial jurisdiction of the Act, "who are reasonably suspected of kidnapping or castrating children, or of committing offences under section [377] of Indian Penal Code, or of abetting the commission of any of the said offences". 155 The "eunuchs" were required to give information of their property. 156 The Act further provided for arrest and punishment, including imprisonment up to two years, or fine, or both, of a "eunuch", "who appears dressed or ornamented like a woman, in a public street" or even in a private space visible from a public street, or "dances or plays music, or takes part in any public exhibition, in a public street or place of for hire in a private house". 157 The Act imposed a penalty on a "eunuch", if a boy under 16 years of age was found in his house or "under his control". 158 The Act also prohibited "eunuchs" of "being or acting as guardian to any minor", "making a gift", "making a will", or "adopting a son". 159 152 Section 19, Criminal Tribes Act, 1871.

153 Section 20, Criminal Tribes Act, 1871.

154 Section 21, Criminal Tribes Act, 1871.

155 Section 24(a), Criminal Tribes Act, 1871.

156 Section 24(b), Section 30, Criminal Tribes Act, 1871. 157 Section 26, Criminal Tribes Act, 1871.

158 Section 27, Criminal Tribes Act, 1871.

159 Section 29, Criminal Tribes Act, 1871.

PART XI 102 The provisions of the CTA were based on a stereotype which considered several marginalized communities as born criminals. By declaring them as born criminals and assuming that they are addicted to the commission of a crime, the Act restricted their life and identity in a negative way. The Act imposed unnecessary and disproportionate restrictions on their movement. It also took away the opportunity from them to settle in a place, as it was prescribed that they could be forced to move to another place decided by the government. This was forced nomadism. The Act, further, subjected the criminal tribes to heightened surveillance, as their movements were frequently and closely monitored. It also led to social discrimination, as it imposed a stigma of born criminality. At the same time, it gave extensive powers to local village headmen (generally higher caste) to collaborate with the police to report their movements. The Act was also based on a stereotype and further reinforced that "eunuchs" are suspected of kidnapping or castrating children. Thus, the impact of CTA was discriminatory and punitive.

103 The Act was first amended in 1876 to extend its operation to Bengal. 160 The agents of landowners were also given the duty to inform the police about the presence or absence of any individual from a criminal tribe. 161 The Act was then modified in 1897 to make the penalties more stringent Penalties for second and third convictions of individuals from the designated criminal tribes for specified offenses were imposed. 162 The amendment also empowered the local governments "to separate children of the Criminal Tribes between the ages of 4 and 18 years from their irreclaimable parents" and "place them" in specially established "reformatory settlements". 163 160 Criminal Tribes (Lower Provinces) Act Extension Act, 1876 161 Ibid 162 The Criminal Tribes Enquiry Committee Report (1949-50), https://ia802807.us.archive.org/11/items/dli.csl.944/944.pdf, p. 5 163 Ibid PART XI 104 In 1908, the Criminal Tribes Settlement Act was passed, "permitting the various provincial governments of India to make plans whereby tribes suspected of living by crime could be registered and supervised by the police, and those members of criminal tribes which had been convicted could be placed in settlements."164 105 The Criminal Tribes Act 1911 repealed the earlier Act of 1871 and the amendments of 1876 and 1897. The application of the Criminal Tribes Act was extended to the whole of British India. 165 The Act amended the law relating to the registration, surveillance, and control of criminal tribes. It strengthened the power of the local government to declare any community as a "criminal tribe" without having to seek permission of any higher authority. 166 However, the local government was still required to take orders from the Governor General if it wanted to restrict the movements of any criminal tribe to any specified area or settle them in any place of residence. 167 106 The 1911 amendment gave additional powers to the district magistrate or any officer to order finger-impressions of a registered member of the designated tribe. 168 The individuals belonging to such tribes were required to inform "any change or intended change of residence and any absence or intended absence from his residence". 169 Further, the 1911 Act reinforced the provisions for the registration of the members of the designated criminal tribes with

the authorities 170 and regular 164 John Lewis Gillin, Taming the Criminal: Adventures in Penology, Macmillan Company (1931), p. 110 165 Section 1(2), Criminal Tribes Act, 1911.

166 Section 3, Criminal Tribes Act, 1911.

167 Section 11, Criminal Tribes Act, 1911.

168 Section 5(c), Section 9, Criminal Tribes Act, 1911. 169 Section 10 (b), Criminal Tribes Act, 1911.

170 Section 5, Criminal Tribes Act, 1911.

PART XI reporting. 171 Similarly, the Act reiterated the "duty" of "every village-headman and village-watchman" and landowners to check the activities of these individuals. 172 107 The Act also provided that the criminal tribes could be placed in any "industrial, agricultural, or reformatory settlements" to restrict their movements. 173 The local government was also allowed to "separate and remove" children (between 6 and 18 years of age) from their parents or guardians and place them in any "established industrial, agricultural or reformatory schools". 174 These children were deemed as "youthful offenders" under Reformatory Schools Act, 1897. 175 Furthermore, the adults working in industries or children in reformatory schools could be transferred to any other similar establishment in any part of British India. 176 A person of a criminal tribe found beyond the prescribed territorial limit or having escaped from an industrial, agricultural or reformatory settlement or school was liable for punishment. 177 108 Moreover, the Act introduced stringent penalties for non-compliance with its provisions as well as rules framed by the local government. 178 This included imprisonment that extended to three years in certain cases, and fines extending to five hundred rupees, which was significantly high at that time. Additionally, in case of a previous conviction for offences under the Schedule of the Act, punishment could vary from seven years to transportation of life. 179 The Act also prescribed punishment to an individual of a designated criminal tribe, if the court was satisfied that "he was about 171 Section 14, Criminal Tribes Act, 1911.

172 Section 26, Criminal Tribes Act, 1911.

173 Section 16, Criminal Tribes Act, 1911.

174 Section 17 (3), Criminal Tribes Act, 1911.

175 Under the Reformatory Schools Act, 1897, "youthful offender" means any boy who has been convicted of any offence punishable with transportation or imprisonment and who, at the time of such conviction, was under the age of fifteen years.

176 Section 19, Criminal Tribes Act, 1911.

177 Section 25, Criminal Tribes Act, 1911.

178 Section 21, 22, Criminal Tribes Act, 1911.

179 Section 23, Criminal Tribes Act, 1911.

PART XI to commit, or aid in the commission of, theft or robbery" or "was waiting for an opportunity to commit theft or robbery". 180 Like the previous Act, courts had no jurisdiction to decide on the validity of the notifications issued by the local government. 181 109 In 1919, based on the requests of local governments, the "Indian Jails Committee" was appointed by the Government of India to analyze the working of settlements constituted under the 1911 Act and make recommendations for better administration. The Committee stated that "the ultimate aim of the settlements should be the absorption of the settlers into the general body of the community". 182 Thereafter, the Act was amended in 1923 to make certain additions. The criminal tribes notified by the local government of a province could be restricted or settled in another province with the approval of the government of that province. 183 Before the internment of any criminal tribe in a settlement, a formal enquiry was required to ascertain the necessity of restricting that tribe in the settlement. 184 The amendment also empowered the local government to deport criminal tribes to any princely states, provided the states consented and appropriate arrangements were made to restrict the movements of the criminal tribes. 185 110 The law relating to criminal tribes was then consolidated as the Criminal Tribes Act of 1924. 186 Another amendment to the Act happened in 1925 to clarify that if an individual from a designated criminal tribe moved to another district in the same 180 Ibid.

181 Section 28, Criminal Tribes Act, 1911.

182 The Criminal Tribes Enquiry Committee Report (1949-50), https://ia802807.us.archive.org/11/items/dli.csl.944/944.pdf, 6 183 Section 6, Criminal Tribes (Amendment) Act 1923 https://164.100.163.187/repealedfileopen?rfilename=A1923-

1.pdf 184 Section 8, Criminal Tribes (Amendment) Act 1923 185 Section 12, Criminal Tribes (Amendment) Act 1923 PART XI province or to another province, he shall still be treated as a criminal tribe in that district or province. 187 111 Several Indian States of pre-independent India had enacted their own local laws for the surveillance of criminal tribes. According to the Criminal Tribes Manual of Gwalior, an individual from a criminal tribe could be convicted with rigorous imprisonment up to one year, if he kept an arm or "means of locomotion such as horses, ponies, camels, donkeys, bicycles". 188 The general public was prohibited from selling any arms or means of locomotion to the criminal tribes, giving shelter to an individual from a criminal tribe not having a valid pass, or lending any cash to them. 189 Absence of an individual of a criminal tribe from his specified residence without a pass was punishable with rigorous imprisonment from one to two years or whipping with 20 to 30 stripes. 190 Other States' manuals also prohibited criminal tribes from possessing any means of locomotion. 191 The Rewa Wandering Criminal Tribes Act, 1925, applied in Vindhya Pradesh, required members of wandering criminal tribes to report at all nearest police stations in their way of travel. 192 Failure to do so was punishable with whipping and rigorous imprisonment upto three months. 193 The Bhopal government compelled both men and women from criminal tribes settled in different colonies to answer the roll call and give attendance to a police constable four times at night— 6 PM, 12 midnight, 4 AM, ad 6 AM. 194 187 Criminal Tribes (Amendment) Act, 1925.

188 The Criminal Tribes Enquiry Committee Report (1949-50), https://ia802807.us.archive.org/11/items/dli.csl.944/944.pdf, p. 71 189 Ibid 190 Ibid 191 Ibid, 72-73.

192 Ibid, 79 193 Ibid 194 Ibid, p. 80 PART XI 112 The Act notified around 150 tribes and castes in India as criminals. This provided an affirmation of the State that any person who belonged to such a tribe was born as a criminal. Between the period 1871 and 1949, a large number of communities were registered as "criminal tribes".

113 The separation of children from their families led to the destruction of their childhood and deprived them of their innocence. They were considered as young offenders. The criminal tribes were subjected to inhuman living conditions, as they were required to mark their attendance even during late nights. The idea of rehabilitation of the so-called criminal tribes also led to the exploitation of their labour. Ostensibly meant to "reform", the settlements provided for institutionalized incarceration. The compulsive stay in "settlement camps" led to many nomadic groups leaving their traditional livelihoods involuntarily. These camps, created by the Act, distanced the criminal tribes from mainstream society. Harsh provisions on punishment for members of the criminal tribes were imposed. 114 American sociologist John Lewis Gillin travelled across India to document the situation of settlement camps. He noted:

> "There are four types of settlements besides the institutions for children and loose women: (a) Industrial settlements near some large industrial plant such as a cotton mill, railroad shops, or a large tea plantation; (b) agricultural settlements. In these settlements lands are provided by the government which the settlers are allowed to cultivate at a certain rental; (c) forest settlements where the settlers work in the woods getting out timber and reforesting land either for the government or for private owners. So far as the Bombay Presidency and the Punjab are concerned, these are mostly government forests; (d) reformatory settlements. The last are intended for those who cannot be trusted and who attempt to escape... In 1919 all of British India had settlements for criminal tribes except Burma, Assam, the Central PART XI Provinces, and the Northwest Frontier Province. It is uncertain from the reports whether all of the native states have them. In the Punjab in 1919 there were twenty-six settlements besides the reformatory settlement at Amritsar. Of these, twelve were industrial, one semi-agricultural, three old agricultural, and seven new agricultural, together with three old settlements which had no supervising staffs." 195

ii. Caste Discrimination in Colonial India

115 Several leaders led the fight against caste discrimination in colonial India. These included Jotiba Phule, Babasaheb Ambedkar, E.V. Ramasami 'Periyar', Narayan Guru, among many others. They challenged the system of caste and exploitation from multiple fronts.

116 In his submissions before the Southborough Committee in 1919, Dr Ambedkar highlighted how the "untouchables" faced the worst form of social disabilities:

> "The untouchables are usually regarded as objects of pity but they are ignored in any political scheme on the score that they have no interests to protect. And yet their interests are the greatest. Not that they have large property to protect from confiscation. But they have their very persona confiscated. The socio religious disabilities have dehumanized the untouchables and their interests at stake are therefore the interests of humanity. The interests of property are nothing before such primary interests."196 195 John Lewis Gillin, Taming the Criminal: Adventures in Penology, Macmillan Company (1931), pp. 115-16, 122. 196 B.R. Ambedkar, "Evidence Before the Southborough Committee (1919)", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 255 PART XI He described how "untouchability" is a form of slavery:
>
> "If one agrees with the definition of slave as given by Plato, who defines him as one who accepts from another the purposes which control his conduct, the untouchables are really slaves. The untouchables are so socialized as never to complain of their low estate. Still less do they ever dream of trying to improve their lot, by forcing the other classes to treat them with that common respect which one man owes to another. The idea that they have been born to their lot is so ingrained in their mind that it never occurs to them to think that their fate is anything but irrevocable. Nothing will ever persuade them that men are all made of the same clay, or that they have the right to insist on better treatment than that meted out to them." 197 He then explained how "untouchability" led to the denial of civil and political rights of the caste-oppressed communities:
>
> "The right of representation and the right to hold office under the State are the two most important rights that make up citizenship. But the untouchability of the untouchables puts these rights far beyond their reach. In a few places they do not even possess such insignificant rights as personal liberty and personal security, and equality before law is not always assured to them. These are the interests of the untouchables. And as can be easily seen they can be represented by the untouchables alone. They are distinctively their own interests and none else can truly voice them." 198

117 Before the Simon Commission in 1928, Dr Ambedkar raised the demand of representation of caste-oppressed communities in government services. Dr Ambedkar also confronted the British government in the Round Table Conferences during 1930-

32. He stated that there was no change in the material condition of the oppressed castes in the colonial period. He thundered:

> 197 Ibid, pp. 255-256 198 Ibid, p. 256 PART XI "When we compare our present position with the one which it was our lot to bear in Indian society of the pre-British days, we find that, instead of marching on, we are only marking time. Before the British, we were in the loathsome condition due to our untouchability. Has the

> British Government done anything to remove it ? Before the British, we could not enter the temple. Can we enter now ? Before the British, we were denied entry into the Police Force.

Does the British Government admit us in the Force?

Before the British, we were not allowed to serve in the Military. Is that career now open to us? To none of these questions can we give an affirmative answer... there is certainly no fundamental change in our position. Indeed, so far as we were concerned, the British Government has accepted the social arrangements as it found them, and has preserved them faithfully... Our wrongs have remained as open sores and they have not been righted, although 150 years of British rule have rolled away." 199 (emphasis added) In his classic "Annihilation of Caste", he stated:

> "Caste System is not merely division of labour. It is also a division of labourers. Civilized society undoubtedly needs division of labour. But in no civilized society is division of labour accompanied by this unnatural division of labourers into water-tight compartments. Caste System is not merely a division of labourers which is quite different from division of labour—it is an heirarchy in which the divisions of labourers are graded one above the other." 200 118 Like Dr Ambedkar, other scholars have documented how the British reinforced the caste system by not interfering in the matters of caste-based customs. While in enacting the Criminal Tribes Act, the British directly applied the logic of caste, in courts, 199 "Dr. Ambedkar at the Round Table Conferences", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 2, p. 504 200 B.R. Ambedkar, "Annihilation of Caste", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 47 PART XI they facilitated caste oppression directly or directly. In this regard, Marc Galanter noted:

> "... from the early days of the "British" legal system a group of matters that might roughly be described as family law - marriage and divorce, adoption, joint family, guardianship, minority, legitimacy, inheritance, and succession, religious endowments - were set aside and left subject to the laws of the various religious communities; i.e., the applicable law in these fields was "personal" rather than territorial. In these family and religious matters Hindus were ruled by dharmasastra not by the ancient texts as such, but as interpreted by the commentators accepted in the locality. At first the courts relied on Brahmin pundits or sastris to advise them on the applicable rules and their interpretation..." 201 He highlighted the practice of British non-interference as follows:

> "The cases show widespread acquiescence by local authorities in the enforcement of these disabilities and suggest that active governmental support of these practices at a local level was at least not uncommon. It should be emphasized however, that these prescriptive rights and disabilities received their greatest governmental support not from direct judicial enforcement but from the recognition of caste autonomy i.e., from the refusal of the courts to interfere with the right of caste groups to apply

sanctions against those who defied these usage." 202 119 Galanter also highlighted how caste discrimination received direct support from British courts in certain cases:

"Caste groups did enjoy active support of the courts in upholding their claims for precedence and exclusiveness. Courts granted injunctions to restrain members of particular castes from entering temples 201 Marc Galanter, "Law and Caste in Modern India", Asian Survey (1963), Vol. 3, No. 11, pp. 544–59, at p. 545. 202 Ibid, at p. 548 PART XI

- even ones that were publicly supported and dedicated to the entire Hindu community. Damages were awarded for purificatory ceremonies necessitated by the pollution caused by the presence of lower castes; such pollution was actionable as a trespass on the person of the higher caste worshippers. It was a criminal offence for a member of an excluded caste knowingly to pollute a temple by his presence." 203 British criminal law became intertwined with pre-colonial notions of who should be disciplined and punished.

iii. Repeal of Criminal Tribes Act

120 When the Objectives Resolution was placed in the Constituent Assembly, HJ

Khandekar stated, on 21 January 1947:

"One thing is wanting in the Resolution, and, if the mover agrees, it can be modified. The Resolution promises safeguards and rights to all the minorities.

But unfortunately there are 10 million people in India who, without any fault on their part, are described as criminal tribes from their very birth. Hundreds of thousands of men and women in India were declared as criminal tribes according to the current law. To deprive them of their rights they are declared so. No matter whether they are criminals or not, from their very birth they are made criminals. Some provision to abolish this law must be embodied in this Resolution." Khandekar raised the concerns of the persons who were declared as criminal tribes. 121 In 1947, an amendment to the Act abolished the punishment imposed on criminal tribes for second and third convictions under specified offences. 204 As some provinces had concurrent jurisdiction on this issue, they could amend or repeal the Act 203 Marc Galanter, "Untouchability and the Law", Economic and Political Weekly (1969), Vol. 4, No. 1/2, pp. 131– 170, at p. 131.

204 The Criminal Tribes Enquiry Committee Report (1949-50), https://ia802807.us.archive.org/11/items/dli.csl.944/944.pdf, p. 7 PART XI in its application to their territories. 205 The Madras government enacted the Criminal Tribes (Madras Repeal) Act, 1947 to end the application of the Act in its territory. Similarly, the Bombay government also repealed the application of the Act to its territory in 1949. 206 122 By a resolution dated 28 September 1949, the Government of independent India appointed "The Criminal Tribes Act Enquiry

Committee" under the chairmanship of Ananthasayanam Ayyangar. The resolution stated:

> "There has been a persistent demand in the Central Legislature in recent years that the Criminal Tribes Act, 1924, should be repealed as its provisions which seek to classify particular classes of people as Criminal Tribes, are inconsistent with the dignity of free India. Some of the Provinces have already repealed the Act in its application to their areas and replaced it by other legislation, e.g., Habitual Offenders' Acts. The Government of India consider that the question whether the Act should be modified or repealed altogether on an all-India basis should be considered after an enquiry into the working of the Act in the Provinces." 207

123 The Committee submitted its report in 1951, after the Constitution of India came into force. After doing field inspections of several regions, the Committee concluded that "[e]xcept a few hardened criminals the other persons, belonging to these tribes, are as good as the people belonging to other communities of the same economic and social status, and desire to live an honourable life."208 The Committee further noted, "Wherever we went we heard one single cry from all the criminal tribes that whereas India obtained freedom, they continue to be in bondage and their demand for setting 205 ibid 206 Ibid, p. 8 207 Ibid, p. 1 208 Ibid, p. 81 PART XI them free by repealing the Act was insistent". 209 The stigma attached to a community declared as a criminal tribe was highlighted. 210 124 The Committee noted that "criminality is not hereditary". 211 It was observed that the stigma and discrimination against communities declared as criminal by birth was violative of the equality framework adopted in the Indian Constitution in 1950. It was stated:

> "Untouchability proved oppressive and its practice is now made illegal under the Constitution, as it involves social injustice and perpetuates discrimination. More so is the stigma of criminality by birth. Under section 3 of the Criminal Tribes Act, 1924, any tribe, gang or class of persons or any part of a tribe, gang or class who is addicted to the systematic commission of non-bailable offences can be notified to be a Criminal Tribe. As a result of this, many tribes or parts of tribes including families who have never criminal, have been notified as criminal tribes. The children born in these notified tribes automatically become members of the criminal tribes so notified, and the members of such tribes, who may never have committed or aided in commission of any offence or even suspected of having done so, as well as newly born children of these people are thus branded as criminal and denied equality before the law and thus a discrimination is imposed against them on the ground that they belong to a tribe or a part of a tribe, which has been notified as a Criminal Tribe. In this respect, this section would appear to go against the spirit of our Constitution... Moreover, this section gives powers to the executive to declare any tribe, part of tribe or gang or part of gang or a class of persons as a Criminal Tribe and it is provided in section 29 of this Act that no court shall question the validity of any notification issued under section 3 and that every such notification shall be a conclusive proof that it has been issued in accordance with law. We feel that it is not proper to give such wide powers to the executive. The Act also gives powers to restrict the movements of the Criminal Tribes or to place them in settlements to the executive

> and by making suitable rules under the Act to take work from settlers on pain of punishment. This would virtually amount to "begar" or forced labour which is an offence under the Indian Penal Code and is opposed also to Article 23 of the Constitution."212 209 Ibid 210 Ibid 211 Ibid, p. 82 212 Ibid, p. 82 PART XII

125 The Committee recommended the repeal of the Act:

> "The Criminal Tribes Act, 1924, should be replaced by a Central legislation applicable to all habitual offenders without any distinction based on caste, creed or birth and the newly formed States included in Parts B and C of the First Schedule of the Constitution, which have local laws for the surveillance of the Criminal Tribes, should be advised to replace their laws in this respect by the Central legislation for habitual offenders, when passed." 213 The Act was repealed in 1952. The criminal tribes were then denotified, as a result of which they were known as "Denotified Tribes".

126 It must be noted under the Criminal Tribes Act, several marginalized "castes" were also declared as criminal "tribes". It is for this reason Article 341(1) of the Constitution employs the words "castes" and "tribes" while defining the Scheduled Castes. 214 After the repeal of the Act, some of the castes earlier declared as criminal tribes, have been accordingly notified as Scheduled Castes. XII. Jurisprudence on Social Protection in Post-Independence India 127 Parliament enacted legislation to prevent discrimination and atrocities against the Scheduled Castes and the Scheduled Tribes. In State of Karnataka v. Appa Balu Ingale, 215 Justice Ramaswamy noted that Parliament enacted the stringent provisions of the PoA Act, 1989 when "the mandate of Article 17 was being breached with impunity, and commission of atrocities on Dalits and Tribes continued unabated". 213 Ibid, p. 104 214 Article 341(1) provides: "The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be." 215 AIR 1993 SC 1126 PART XII 128 The Court in State of Madhya Pradesh v. Ram Krishna Balothia 216 held that the offences under PoA Act "constitute a separate class and cannot be compared with offences under the Penal Code". These offences are "committed to humiliate and subjugate members of Scheduled Castes and Scheduled Tribes with a view to keeping them in a state of servitude", and "prevent them from leading a life of dignity and self- respect". The Court quoted the Statement of Objects and Reasons of the Act to highlight that "when members of the Scheduled Castes and Scheduled Tribes assert their rights and demand statutory protection, vested interests try to cow them down and terrorise them" if they are on anticipatory bail. For this reason, the Court dismissed a challenge to Section 18 of the PoA Act, which debarred the opportunity to seek anticipatory bail in respect of offences committed under the Act. 129 In Safai Karamchari Andolan v. Union of India, 217 the Court noted that "the practice of manual scavenging has to be brought to a close". Making a "member of a Scheduled Caste or a Scheduled Tribe to do manual scavenging or employing or permiting the employment of such member for such purpose" is a criminal offence under the PoA Act. 218 The Court took a step further, and held that "entering sewer lines without safety gears should be made a crime even in emergency situations". The Court declared that for a death in sewer lines, "compensation of Rs. 10 lakhs should be given to the family of the deceased". It

was emphasized that "Persons released from manual scavenging should not have to cross hurdles to receive" compensation or rehabilitation "due under the law".

216 1995 INSC 99 217 2014 (11) SCC 224 218 Section 3(j), Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 PART XII 130 The Court showed a deep concern about non-implementation of the PoA Act in National Campaign on Dalit Human Rights v. Union of India. 219 It remarked that "there has been a failure on the part of the authorities concerned in complying with the provisions" of the PoA Act. Calling out the "indifferent attitude of the authorities", the Court directed the State and the Union governments to strictly do their role in implementing the Act.

131 These rulings emphasized that the PoA Act is a significant legislative measure designed to protect the fundamental rights and freedoms of the Scheduled Castes and Scheduled Tribes, ensuring their dignity and safety against discrimination and violence. However, the subsequent judgment in Subhash Kashinath Mahajan v. State of Maharashtra 220 marked a departure from this protective stance. 132 Dealing with a criminal appeal, the judgment in Subhash Mahajan expressed a "concern that working of the Atrocities [PoA] Act should not result in perpetuating casteism which can have an adverse impact on integration of the society and the constitutional values". It held that there is "no absolute bar against grant of anticipatory bail" by the concerned court "in cases under the Atrocities [PoA] Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide". The Court issued the following guidelines:

> "(iii) In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the S.S.P. which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention;
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> 219 AIR 2017 SC 132 220 2018 INSC 248 PART XII
>
> (iv) To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated;

(v) Any violation of direction (iii) and (iv) will be actionable by way of disciplinary action as well as contempt." 133 The directions in Subhash Mahajan were later recalled in the review petition in Union of India v. State of Maharashtra. 221 In doing so, the Court noted that the Scheduled Castes and the Scheduled Tribes "are still making the struggle for equality and for exercising civil rights in various areas of the country". It remarked that there is "no presumption that the members of the Scheduled Castes and Scheduled Tribes may misuse the provisions of law as a class". Instead, "members of the Scheduled Castes and Scheduled Tribes due to backwardness hardly muster the courage to lodge even a first information report, much less, a false one". The Court further declared that treating the Scheduled Castes and the Scheduled Tribes as "prone to lodge false reports under the Scheduled Castes and Scheduled Tribes Act for taking revenge" or monetary gain, especially

when they themselves are victims of such offenses, contradicts fundamental principles of human equality. 134 The review judgment also observed that guidelines issued in Subhash Mahajan "may delay the investigation of cases". The judgment termed the directions as "discriminatory", as "it puts the members of the Scheduled Castes and Scheduled Tribes in a disadvantageous position", compared to complaints lodged by members of upper castes, where no such preliminary investigation is required. The Court also found the directions to be "without statutory basis", as they are in conflict with PoA Act, 221 2019 INSC 1102 PART XII and amounts to "encroaching on a field which is reserved for the legislature". The Court however clarified that "if prima facie case has not been made out attracting the provisions" of PoA Act, "the bar created under section 18 on the grant of anticipatory bail is not attracted".

135 Before the review judgment was delivered, Parliament amended the PoA Act, undoing the effect of the guidelines issued in Subhash Mahajan. The amendment was unsuccessfully challenged in Prathvi Raj Chauhan v. Union of India. 222 136 The hurdles faced by the Scheduled Castes and the Scheduled Tribes were highlighted by this Court in Hariram Bhambhi v. Satyanarayan. 223 The Court cancelled the bail of an accused on the ground that the statutory requirement of Section 15A 224 of PoA Act was not fulfilled in the case. Authoring the judgment, one of us (Justice DY Chandrachud) noted:

> "Scheduled Castes and Scheduled Tribes specifically suffer on account of procedural lapses in the criminal justice system. They face insurmountable hurdles in accessing justice from the stage of filing the complaint to the conclusion of the trial. Due to the fear of retribution from members of upper caste groups, ignorance or police apathy, many victims do not register complaints in the first place. If victims or their relatives muster up the courage to approach the police, the police officials are reluctant to register complaints or do not record allegations accurately. Eventually, if the case does get registered, the victims and witnesses are vulnerable to intimidation, violence and social and economic boycott. Further, many perpetrators of caste based atrocities get away scot-free due to shoddy investigations and the negligence of prosecuting advocates. This results in low conviction rates under the SC/ST Act giving rise to the 222 (2020) 4 SCC 727 223 2021 INSC 701 224 Section 15A(5) of the Act provides: "A victim or his dependent shall be entitled to be heard at any proceeding under this Act in respect of bail, discharge, release, parole, conviction or sentence of an accused or any connected proceedings or arguments and file written submission on conviction, acquittal or sentencing." PART XII erroneous perception that cases registered under the Act are false and that it is being misused. On the contrary, the reality is that many acquittals are a result of improper investigation and prosecution of crime, leading to insufficient evidence. This is evident from the low percentage of cases attracting the application of the provisions of the Penal Code relating to false complaints as compared to the rate of acquittals." (emphasis added) The Court observed that the provisions of the PoA Act, in particular Section 15A, "enable a member of the marginalized caste to effectively pursue a case and counteract the effects of defective investigations".

137 In Patan Jamal Vali v. State of Andhra Pradesh, 225 this Court expanded the scope of jurisprudence relating to Section 3(2)(v) of the PoA Act. The case dealt with the offence of rape of a woman from the Scheduled Caste community, who was blind by birth. Prior to the amendment in 2016, Section 3(2)(v) provided, "Whoever not being a member of a Scheduled Caste or Scheduled Tribe ... commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine". The Court observed that in such cases, "an intersectional lens enables us to view oppression as a sum of disadvantage resulting from multiple marginalized identities." It was held that "A true reading of Section 3(2)(v) would entail that conviction under this provision can be sustained as long as caste identity is one of the grounds for the occurrence of the offence." The Court observed:

> 225 2021 INSC 272 PART XII "To deny the protection of Section 3 (2) (v) on the premise that the crime was not committed against an SC & ST person solely on the ground of their caste identity is to deny how social inequalities function in a cumulative fashion. It is to render the experiences of the most marginalized invisible. It is to grant impunity to perpetrators who on account of their privileged social status feel entitled to commit atrocities against socially and economically vulnerable communities."

138 In Dr. Balram Singh v. Union of India, 226 while dealing with the Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, the Court directed the Union government to take "appropriate measures" and "issue directions, to all statutory bodies, including corporations, railways, cantonments, as well as agencies under its control, to ensure that manual sewer cleaning is completely eradicated in a phased manner". The Court also instructed that guidelines and directions should be issued to prevent the need for individuals to enter sewers, even when sewer cleaning work is outsourced or carried out by contractors or agencies. The Court held that "where minimum protective gear and cleaning devices are not provided to hazardous workers, the employment of hazardous workers amounts to forced labour", prohibited under the Constitution. Hence, the Court held that "the provisions for protective gear and cleaning devices are not mere statutory rights or rules, but are entitlements" guaranteed under the Constitution. 139 On a number of occasions, this Court has expressed concern about the non- implementation of the PoA Act and the legislation prohibiting manual scavenging. The Court has also expressed concern about the false implication of people from nomadic/denotified tribes in criminal cases. In NALSA, the Court noted that the 226 2023 INSC 950 PART XII colonial-era Criminal Tribes Act "deemed the entire community of Hijras as innately 'criminal'". In Ankush Maruti Shinde v. State of Maharashtra, 227 the High Court confirmed the conviction and death penalty of six accused for the offence of rape and murder. Their appeal was previously dismissed by this Court. However, in a review petition, the Court restored the appeal and acquitted all the accused, finding that they were falsely implicated. Taking account of the fact that the accused belonged to nomadic tribes, the Court noted that "there was no fair investigation and fair trial" and the "serious lapse on the part of the investigating agency". As five of the accused spent 16 years in jail on false implication and all "were facing the hanging sword of death penalty", the Court granted them monetary compensation for violating their rights under

Article 21.

140 In a recent decision in Amanatullah Khan v. The Commissioner of Police, Delhi, 228 the petitioner sought "quashing of opening/approval of the History Sheet declaring him as bad character and consequential entries in the Surveillance Register being exercised" by the respondents. The Court reiterated that "History Sheet is only an internal police document and it shall not be brought in public domain". Further, it emphasized that "extra care and precaution", needs to be observed "by a police officer while ensuring that the identity of a minor child is not disclosed as per the law". It directed that Delhi Police "shall periodically audit/review the contents of the History Sheets and will ensure confidentiality and a leeway to delete the names of such persons/juveniles/children who are, in the course of investigation, found innocent and are entitled to be expunged from the category of "relations and connections'" in a History Sheet".

227 2019 INSC 305 228 2024 INSC 383 PART XII 141 The crucial aspect of the above decision is that the Court exercised its suo motu powers to give directions to the police in other states to not act arbitrarily against the marginalized communities. It noted:

> "Having partially addressed the grievance of the appellant, we now, in exercise of our suo motu powers, propose to expand the scope of these proceedings so that the police authorities in other States and Union Territories may also consider the desirability of ensuring that no mechanical entries in History Sheet are made of innocent individuals, simply because they happen to hail from the socially, economically and educationally disadvantaged backgrounds, along with those belonging to Backward Communities, Scheduled Castes & Scheduled Tribes. While we are not sure about the degree of their authenticity, but there are some studies available in the public domain that reveal a pattern of an unfair, prejudicial and atrocious mindset. It is alleged that the Police Diaries are maintained selectively of individuals belonging to Vimukta Jatis, based solely on caste-bias, a somewhat similar manner as happened in colonial times... We must bear in mind that these pre- conceived notions often render them 'invisible victims' due to prevailing stereotypes associated with their communities, which may often impede their right to live a life with self-respect." (emphasis added) The Court expected that the State governments "take necessary preventive measures to safeguard such communities from being subjected to inexcusable targeting or prejudicial treatment". It directed all the States/Union territories to revisit their policies to adopt a "periodic audit mechanism overseen by a senior police officer" to scrutinize the entries made in history sheets. It was noted that "[t]hrough the effective implementation of audits, we can secure the elimination of such deprecated practices PART XII and kindle the legitimate hope that the right to live with human dignity" will be protected.

142 The Court has also warned the police on misusing the power to arrest. In Arnesh Kumar v. State of Bihar, 229 a three-judge Bench adverted to the misapplication of the provision for arrest by the police. It was noted:

> "Arrest brings humiliation, curtails freedom and cast scars forever. Law makers know it so also the police. There is a battle between the law makers and the police and it seems that police has not learnt its lesson; the lesson implicit and embodied in the Code of Criminal Procedure. It has not come out of its colonial image despite six decades of independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive." (Emphasis added)

143 In Mallada K. Sri Ram v. State of Telangana, 230 the Court, speaking through one of us (Justice DY Chandrachud), highlighted the constitutional mandate to prevent arbitrary exercise of prevention detention:

> "the personal liberty of an accused cannot be sacrificed on the altar of preventive detention merely because a person is implicated in a criminal proceeding. The powers of preventive detention are 229 2014 INSC 463 230 2022 INSC 386 PART XII exceptional and even draconian. Tracing their origin to the colonial era, they have been continued with strict constitutional safeguards against abuse. Article 22 of the Constitution was specifically inserted and extensively debated in the Constituent Assembly to ensure that the exceptional powers of preventive detention do not devolve into a draconian and arbitrary exercise of state authority." The exercise of the power to arrest or detain may become reflective of a colonial mindset, if not exercised with caution. The misuse of the power of arrest not just violates rights, but it can prejudice generations of innocent citizens, especially marginalized communities such as the Denotified Tribes. Arrests can create a stigma of criminality if not done diligently. Innocent people, if arrested on the grounds of stereotypes and mere suspicion, may face barriers in securing employment and earning a dignified livelihood. Entering the mainstream becomes impossible when those who have suffered incarceration find themselves unable to secure livelihoods, housing, and the necessities of life.

144 Discrimination against the Scheduled Castes, Scheduled Tribes, and Denotified Tribes has continued in a systemic manner. Remedying systemic discrimination requires concrete multi-faceted efforts by all institutions. In discharge of their role, courts have to ensure that while there should be proper implementation of the protective legislation such as the PoA Act, there should not be unfair targeting of members from marginalized castes under various colonial-era or modern laws. With this nuanced approach, we shall now examine the prison manuals.

XIII. Impugned Provisions

(i) Prison Act

145 At the outset, we must clarify that the Prison Act 1984 is not under challenge.

Accordingly, we shall not be dealing with the validity of the Act. We are referring to its provisions to understand the background of prison manuals/rules. 146 The Act was enacted to amend the law relating to prisons and to provide for the regulation of prisons. The Statement of Objects and Reasons stated that four different Acts were in force for the regulation of prisons, which were different on important points such as the enumerated jail offences and their punishments, and were thus resulting in divergent jail management systems across provinces, non-uniform enforcement of sentences, and lack of administrative uniformity.

147 The Act provided for various aspects of prison administration including maintenance of prisons, officers of prisons, duties of prison officers, admission, removal and discharge of prisoners, discipline, food and other amenities for civil and non-convicted prisoners, employment of prisoners, health of prisoners, visits to prisons, and prison offences. Chapter II provides for the duties of prison officers. All officers are supposed to obey the directions of the Superintendent and act in accordance with the directions of the Jailer (and sanctioned by the Superintendent) and in line with the rules under Section 59 of the Act. The officers are proscribed from dealing with the prisoners, or to have an interest in the contracts for supply of the prison. The Superintendent is responsible for managing the prison in matters relating to discipline, labour, expenditure, punishment and control, subject to the orders of the Inspector General. 231 The Chapter further provides for provisions regarding jailers, 231 Section 11, Prisons Act, 1894.

PART XIII medical officers and subordinate officers, including convict officers. Chapter V of the Act contains provisions regarding ‘Discipline of Prisoners’. It provides for separation of prisoners based on gender, age, conviction and civil or criminal imprisonment 232 and the confinement of convicts in association or by segregation. The Act further provides for employment of prisoners under Chapter VII. It provides that civil prisoners may be permitted to follow any trade or profession and that certain safeguards need to be observed in engaging criminal prisoners in labour. 233 Chapter VIII and IX pertain to the health of prisoners and visits to prisoners respectively. Chapter X and XI provide for offences in relation to prisons and prison offences respectively. The miscellaneous chapter contains provisions regarding extramural custody, control and employment of prisoners, confinement in irons for safe custody, and the power to make rules. 148 In a constitutional set-up, the Act is governed by constitutional principles. Though the Act was enacted in the colonial era, its provisions and subsequent manuals/rules enacted therein are subject to constitutional provisions.

(ii) Prison manuals/rules 149 The impugned prison manuals and rules are listed below:

> The Uttar Pradesh Jail Manual, 2022 ☐158. Remission to convicts on scavenging duty - Subject to good work and conduct in jail, convicts of the scavenger class working as scavengers in jails, or convicts who on administrative grounds it is not found expedient to promote to the grades of convict officers, shall, though they may not be appointed convict officers, be titled to receive ordinary remissions at the scales sanctioned in the preceding paragraph for convict night watchmen and convict 232 Ibid, Section 27 233 Ibid, Section 34.

PART XIII overseers, respectively, with effect from the first day of the month following the one on which they would, but for this rule, be eligible for promotion to those grades.

☐267. Classification necessary in the case of every convict- The Superintendent shall see that every convicted prisoner has been classified as habitual or casual in accordance with the form of classification furnished by the convicting court.

☐269. In a jail where prisoners of more than one class are confined, the Superintendent shall make arrangements, as far as possible, for the complete segregation of different classes in separate circles, enclosures or barracks in accordance with the requirements of section 27 of the Prisons Act, 1894 and the rules contained in this chapter.

☐270. Segregation of casual from habitual prisoners - Casual convicts shall as far as possible, be kept separate from habitual convicts.

☐271. There shall, as far as possible, be separate wards for nonprofessional and professional sub-categories of habitual prisoners. Prisoners belonging to the latter sub-category should be kept entirely separate from all other categories of prisoners. ☐289. Rules for observance - A convict sentenced to simple imprisonment, -(a) shall rise and retire to rest at such hours as may be prescribed by the Superintendent ;(b) shall be permitted to wear his own clothes, which if insufficient for decency or warmth shall be supplemented by such jail clothing, not exceeding the scale provided for convicts sentenced to rigorous imprisonment, as may be necessary to make up the deficiency, but shall wear the ordinary convict's clothing if he elects to labour and is employed on extra-mural labour;(c) shall clean his own cell, barrack or yard and keep his bedding and clothing in a clean and orderly condition;(d) shall, with the approval of the Superintendent, be allowed to possess and use his own books and periodicals in addition to those available from the prison library;(e) shall not be allowed to purchase his own food;(f) shall not be shaved unless PART XIII he desires it or under the orders of the Medical Officer on grounds of health;(g) shall not be called upon to perform duties of a degrading or menial character unless he belongs to a class or community accustomed to perform such duties; but may be required to carry water for his own use provided he belongs to the class of society the members of which are accustomed to perform such duties in their own homes.

The West Bengal Jail Code Rules for Superintendence and Management of Jail in West Bengal, 1967 ☐404. Qualification for eligibility of a convict overseer for appointment as a night guard – A convict overseer may be appointed to be a night guard provided—

(a) that he has served as a convict overseer for three months;

(b) that he does not belong to any class that may have a strong natural tendency to escape, such as men of wandering tribes and those whose homes are outside India; and

(c) that his antecedents have been verified through the Superintendent of Police.

☐694. Non-interference with religious practices or caste prejudices-

(a) Interference with genuine religious practices or caste prejudices of prisoners should be avoided. But no relaxation of the working rules shall be allowed. Prisoners shall be permitted to perform their devotions at suitable times and in suitable places. Care should be taken to see that this principle is not made the cloak for frivolous complaints or for attempts to escape from jail labour or discipline. If the Superintendent feels any doubt as to the validity of any plea advanced by a prisoner on the grounds of caste or religion he should refer the matter for the orders of the Inspector General whose decision shall be final.

☐741. Sickness in cells - In case of sickness immediate notice shall be given by the guard to the Head Warder on duty by passing the ward from sentry to sentry. The Head Warder shall at once report PART XIII the case to the Medical Subordinate, who shall visit the cell, and, if necessary, remove the prisoner to hospital, and inform the Superintendent, Medical Officer and Jailor of the circumstance at their next visit. Two prisoners shall, under no circumstances whatever, be confined in one cell except in the case of female prisoners condemned to death. If male condemned prisoners or dangerous lunatics have to be watched by convicts, they must remain outside the grated door of the cell. Convict sweepers, cooks and watermen may enter the cells when necessary, accompanied by a warder. Food shall be cooked and carried to the cells by prisoner-cooks of suitable caste, under the superintendence of a jail officer.

☐793. percentage of prisoners employed as jail servants - The total number of prisoners employed regularly in essential jail services as cooks, barbers, water-carriers, sweepers, etc., shall not exceed 10 per cent. of the whole number of prisoners in Central and 1st or 2nd class District jails and 12 percent. in 3rd class District jails. (For the proportion of cooks, sweepers and hospital attendants to the number of prisoners to be attended to, see Rule 789.) The appointment of cooks is regulated by Rule 1117. The barber should belong to the A class. Sweepers should be chosen from the Mether or Hari caste, also from the Chandal or other castes, if by the custom of the district they perform similar work when free, or from any caste if the prisoner volunteers to do the work. Hospital attendants should be selected from prisoners passed for light work or those who have completed at least half their sentences. Hospital attendants shall wear a plain square red badge, 5 cm. x 5 cm., on the left breast of the kurta. Prisoners in the "convalescent and infirm" gang may be put to this duty under the Medical Officer's orders. If there is a large number of serious cases in hospital, the proportion of one attendant to 10 patients may be temporarily exceeded; with this exception, Superintendents must see that no more than the authorised percentage of prisoners is employed as jail servants or as convict officers. If any convict employed in an PART XIII essential jail service has not enough work to occupy his whole time, he should be placed upon some other work for the

remainder of his time.

☐1117. Selection of cooks - The cooks shall be of the A class except at the Presidency Jail where well-behaved 'B' class prisoners may be employed as such. Any prisoner in a jail who is of so high a caste that he cannot eat food cooked by the existing cooks shall be appointed a cook and be made to cook for the full complement of men. Individual convicted prisoners shall under no circumstances be allowed to cook for themselves exception being made in the cases of Hindu widows who, if they desire it, may be allowed, at the discretion of the Superintendent, to cook for themselves if it does not interfere with their work and discipline. Madhya Pradesh Jail Manual, 1987 ☐36. Latrine Parade - While the latrine parade is being carried out, the mehtars attached to each latrine shall be present, and shall call the attention of the convict overseer to any prisoner who does not cover up his dejecta with dry earth. The mehtars shall empty the contents of the small receptacle into large iron drums and replace the receptacles in the latrine after having cleaning them. ☐411. Habitual and non-habitual criminals - 411. All convicted criminal prisoners shall be classified and placed in one or other of the following categories, namely:- (a) Habitual Criminals. (b) Non- habitual Criminals. Note.-For Convenience of reference, prisoner falling in the first of the above categories are referred to as "habitual'', and those falling in the second category are described as "non-habitual" or "casuals". The following persons shall be liable to be classified habitual criminals-(i) Any person convicted of an offence whose previous conviction, or convictions under Chapters XII, XVI, XVII or XVIII of the lndian Penal Code taken by themselves or with the facts of present case show that he habitually commits in offence or offences punishable under any or PART XIII all of those Chapters;

(ii) Any person committed to or detained in prison under section 123 (read with section 109 or section 110) of the Code or Criminal Procedure;

(iii) Any person convicted of any of the offences specified in (i) above when it appears from the facts of the case. Even although no previous conviction has been proved that he is by habit member of a gang of dacoits, or of thieves or a dealer in slaves or in stolen property.

(iv) Any member of denotified tribe subject to the discretion of the State Government concerned.

(v) Any person convicted by a Court or tribunal acting outside India under the general or special authority of the Government of India of an offence which should have rendered him liable to be classified as a habitual criminal if he had been convicted in a court established in India.

Explanation.- For the purpose of these definition the word "conviction" shall include an order made under section 118 read with section 110 of the Criminal Procedure Code.

☐563. Cooking of food, cleanliness of vessels etc. – The cooks shall perform all preparations and processes necessary after issue of the daily supplied to them, and shall cook the food with due care and attention. The dough for chapaties shall be 'slowly and thoroughly kneaded and then rolled to a uniform thickness on a table by a rolling pin, not patted by hands; a circular curter shall be used to make the cakes of one size; and the cooking must be done slowly on a gently heated plate; so as not to burn the outside whilst the inner part remains Uncooked. All cooking utensils must be kept

scrupulously clean and bright, and the cook-house and feeding places as clean and tidy as it is possible to make them. Any breach of this rule shall subject the cooks to such punishment, within the limits fixed by these rules, as the Superintendent may after due and proper enquiry award.

PART XIII Andhra Pradesh Prison Rules, 1979 □217. Definition of habitual – The following persons shall be liable to be classified as "habitual criminals" , namely:— (i) Any person convicted of an offence punishable under chapters XII, XVII and XVIII of the Indian Penal Code whose previous conviction or convictions, taken in conjuction with the facts of the present case, show that he is by habit a robber, housebreaker, dacoit, thief or receiver of stolen property or that he habitually commits extortion, cheating, counterfeiting coin, currency notes or stamps or forgery;

ii) Any person convicted of an offence punishable under Chapter XVI of the Indian Penal Code, whose previous conviction or convictions taken in conjunction with the facts of the present case, show that he habitually commits offences against the person;

(iii) Any person committed to or detained in prison under section 122 read with section 109 or section 110 of the Code of Criminal Procedure;

(iv) Any person convicted of any of the offences specified in i) above when it appears from the facts of the case, even though no previous conviction has been proved, that he is by habit a member of a gang of dacoits, or of thieves or a dealer in stolen property;

(v) Any habitual offender as defined in the Andhra Pradesh Habitual Offenders Act, 1962;

(vi) Any person convicted by a court or tribunal acting outside India under the general or special authority of the Central Government or any State Government of by any court or tribunal which was before the commencement of the constitution acting under the general or special authority of an offence which would have rendered him liable to be classified as a habitual criminal if he had been convicted in a court established in India.

EXPLANATION:- For the purpose of this definition the word "conviction" shall include an order mate under section 117, read with section 110 of the Criminal Procedure Code.

PART XIII □440. Allowance for caste prejudice – The prison tasks including conservancy work shall be allotted at the discretion of the Superintendent with due regard to capacity of the prisoner, his education, intelligence and attitude and so far as may be practicable with due regard to his previous habits.

□448. Restrictions on extramural employment of convicts– (1) Without the sanction of the Inspector General, no convict shall, at any time, be employed on any labour outside the walls of the prison, or be permitted to pass out of the prison for employment of the purpose of being so employed:—

(a) Unless he has undergone not less than one-fourth of the substantive term of imprisonment to which he has been sentenced;

(b) If the unexpired term of substantive sentence together with imprisonment (if any) awarded in lieu of fine, still to be undergone, exceeds two years;

(c) If his appeal (if any) is undisposed of:

d) If any other charge or charges are pending against him or he has to undergo a period of police surveillance on the expiry of his sentence;

(e) If he is a resident of foreign territory; and

(f) If he is a member of a wandering or criminal tribe, or is of a bad or dangerous character, or has, at any time, escaped of attempted to escape from lawful custody.

(2) Not withstanding anything contained in sub-rule (1) of this rule, every prisoner, who has not more than twelve months of sentence remaining, may be employed on extramural labour irrespective of the portion of sentence already passed in prison.

(3) In every case in which a convict is employed on any labour outside the walls of the prison or is permitted to pass out of the prison for the purpose of being so employed, it shall be subject to the condition that the Superintendent has sanctioned his employment outside the prison and recorded the fact of his having done so in the Prisoner's History Ticket.

PART XIII NOTE:- When there are more prisoners eligible, for employment outside the prison than are actually required, casuals and men with the shortest unexpired terms should be selected in preference to others.

□1036. Classes of convicted prisoners and their treatment – (1): As mentioned in rule 216 supra, convicted prisoners are divided into three divisions namely classes A, B and C. (2) Prisoners shall be treated as “A” Class if-

(i) They are non-habitual prisoners of good character;

(ii) They by social status, education and habit of life have been accustomed to a superior mode of living; and

(iii) They have not been convicted of- (a) Offenses involving elements of cruelty, moral degradation or personal greed;

(b) Serious or premeditated violence;

(c) Serious offences against women and children;

(d) Serious offences against property;

(e) Offences relating to the possession of explosives, fire-arms and other dangerous weapons with the object of committing an offence or of enabling an offence to be committed;

(f) Abetment or incitement of offences falling within these sub- rules.

(3) Prisoners shall be treated as "B" Class if —(i) They, by social status, education and habit of life have been accustomed to superior mode of living; and

(ii) They have not been convicted of:

(a) Offences involving elements of cruelty, moral degradation or personal greed;

(b) Serious or premeditated violence;

(c) Serious offence against women and children;

(d) Serious offences against property;

(e) Offences relating to the possession of explosives, firearms and other dangerous weapons with the object of committing an offence or of enabling an offence to be committed

(f) Abetment or incitement of offences falling within these sub-

PART XIII rules.

NOTE:— Habitual prisoners may be included under this class or grounds of character and antecedents.

(4) (i) If no orders about classification are passed by the sentencing court, it should be assumed that a prisoner belongs to "C" Class. A reference should be made in doubtful cases but it should not be presumed in the absence of specific orders that the prisoner belongs to a class higher than "C".

Odisha Model Jail Manual Rules for the Superintendence and Management of Jails in Odisha, 2020 □3. Definitions - (t) "Habitual offender" means an offender who has been convicted in a particular offence for more than one occasion. □4. Criteria for establishment of prisons.— (1) The State Government shall as far as possible establish sufficient numbers of prisons and provide minimum needs essential to maintain standards of living in consonance with human dignity.

(2) Prison administration shall ensure that the prisoners human rights are respected.

(3) Prison administration shall ensure separation of the following categories of prisoners, namely :-- (a) Civil Prisoners; (b) Under- trials; (c) Female Prisoners; (d) Convicted Prisoners; (e) Young Offenders; (f) First Offenders; (g) Habitual Offenders; (h) High Security Prisoners; (i) Detenue; (j) Geriatric and infirmed prisoners;(k) Transgender Prisoners; (l) Psychiatric Prisoners;(m) Higher Division Prisoners; and(n) Political Prisoners (4) There shall be a separate prison for hig security prisoners. (5) The prisons' regime shall take care to prepare prisoners to lead a law-abiding, self supporting, reformed and socially rehabilitated life.

□515. Division of Police registered prisoners into two classes.— (1)The first class consists of prisoners who are to be transferred before release to the Jails of the districts in which their homes are PART XIII situated.

(2) This class shall be described in the Admission Register provided in Form No.17 and Release Diaries provided in Form No 23 as P.R./T Prisoners.

Explanation :— The letter P.R. standing for “Police Registered”, and the letter T, signifying ‘transfer’.

(3) The prisoners stated in sub-rule (2) shall include prisoners in respect of whom the sentencing court may have recorded an order under section 565 of the Code of Criminal Procedure, 1973 (2 of 1974)and any such prisoner shall be described in the Admission Register and Release Diaries as “Police Registered Transfer -565” prisoners.

(4) The second class consists of prisoners who are not to be transferred, but are to be released from the jails in which they are confined at the time of the expiry of their sentences and this class shall be described in the Admission Registers and Release Diaries as Police Registered prisoners.

(5) If any prisoner known to be a member of a criminal tribe is not police-registered, his case shall be brought to the notice of the Superintendent of Police.

(6) When intimation respecting a prisoner’s Police-registration is received from the police after his name has been entered in Admission Register and Release Diaries, the letter Police- Registered, Police-Registered/Transfer, Police Registered Transfer “565”, as the case maybe, shall be added in red ink. (7) Entries on the back of the P.R. form relating to the Finger Impression, viz., “F.I. taken” or “tested” shall be similarly added. (8) The police P.R. form intimating the fact that a prisoner is on the police register shall be attached to and kept with, the warrant, and sent with him to the jail to which he may be transferred.

(9) On the death or escape of a Police Registered Prisoner of either class, the Police P.R. form attached to his warrant shall be returned to the Superintendent of Police of his district with an endorsement, showing the date of his death or escape.

PART XIII (10) All other P.R. slips shall be sent to the Superintendent of Police of the district, a fortnight before the release is due. Note:— The number and name of P.R./T and P.R.T/565 prisoners shall be noted in red ink in the Release Diaries four months before the date of probable

release, any remission likely to be earned being taken into account.

□784. Prison Industries and Work Programmes.— (1) The work programmes shall also include essential institutional maintenance services like culinary, sanitary and hygienic services, prison hospital, other prison services, repairs and maintenance services... (25) Prisoners who have shown, or are likely to have, a strong inclination to escape or are members of a wandering or criminal tribe, even though eligible, shall not be employed on extramural work.

The Kerala Prison Rules 1958 □201. Definition of habitual criminals — The following persons shall be liable to be classified as "Habitual Criminals" namely:-

> (1) any person convicted of an offence punishable under Chapters XII, XVII and XVIII of the Indian Penal Code, whose facts of the present case, show that he is by habit a robber, house breaker, dacoit, thief or receiver of stolen property or that he habitually commits extortion, cheating, counterfeiting coin, currency notes or stamps or forgery;
>
> (2) any person convicted of an offence punishable under Chapter XVI of the Indian Penal Code, whose previous conviction or convictions taken in conjunction with the facts of the present case show that he habitually commits offences against the person;
> (3) any person committed to or detained in prison under Section 123 (read with Section 109 or Section 110) of the Code of Criminal Procedure;

(4) any person convicted of any of the offence specified in (i) above when it appears from the facts of the case, even though no PART XIII previous conviction has been proved, that he is by habit a member of a gang of dacoit, or of thieves or a dealer in slaves or in stolen property;

(5) any person of a Criminal tribe subject to the discretion of the Government.

Explanation.—For the purpose of the definition the word "conviction" shall include an order made under Section 118, .read with Section 110 of the Code of Criminal Procedure.

The Tamil Nadu Prison Rules, 1983 □214. Separation of categories – Subject to the availability of accommodation, the prisoners; shall be segregated as follows:

> (a) "A" class prisoners from "B" class prisoners;
>
> (b) Civil prisoner from Criminal prisoners;
>
> (c) Female prisoners from male prisoners;
>
> (d) Adult prisoners from adolescents;
>
> (e) Convicted prisoners from undertrial prisoners;

(f) Habitual prisoners from non-habitual prisoners;

(g) Prisoners suffering from communicable diseases;

(h) Prisoners suspected to be suffering from mental disorders;

(i) Homosexuals;

(J) Sex perverts;

(k) Drug addicts and traffickers in narcotics;

(l) Inmates having suicidal tendencies;

(m) Inmates exhibiting violent and aggressive tendencies;

(n) Inmates having escape discipline risks; and

(o) known bad characters.

☐219. Definition of habitual criminal – The following persons shall be liable to be classified as habitual criminals, namely:

(i) Any person convicted of an offence punishable under chapters XII, XVII, XVIII of the Indian Penal Code (Central Act XIIV of whose previous conviction or convictions taken in conjunction with the facts of the present case shows that he is by habit a robber, dacoit PART XIII thief or receiver of stolen property or that he habitually commits extortion cheating, counterfeiting coin, currency notes or stamps or forgery.

(ii) Any person convicted of an offence punishable under Chapter XVI of the Indian Penal Code (Central Act XIV (1860) or under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Central Act 104 of 1956) whose previous conviction or convictions, taken in conjunction with the facts of the present case, show that he habitually commits offences against the person or is habitually engaged in immoral traffic in women or girls;

(iii) Any person committed to or detained in prison under section 122 read with sections 109 or 110 of the Code or Criminal Procedure,1973 (Central, Act 2 of 1974);

(iv) Any person convicted of any of the offences specified in clauses (1) and (2) above when at appears from the facts of the case, even though no previous conviction has been, proved, that he is by habit a member of a gang of dacoits, or of thieves or a dealer in stolen property, or a tracker in women or girls for immoral purposes;

(v) Any person convicted of an offence and sentenced to imprisonment under the corresponding sections of the Indian Penal Code (Central Act XIV of 1860) and the Code of Criminal Procedure, 1973 (Central Act 2 of 1974).

(vi) Any person convicted by a Court or tribunal acting outside India, of an offence which would have rendered him liable to be classified as a habitual offender if he had been convicted in a Court established in India.

(vii) Any person who is a habitual offender under the Tamil Nadu Restriction of Habitual Offenders Act, 1948 (Tamil Nadu Act VI of 1948) or other corresponding Acts:

> (viii) If a prisoner was previously classified as habitual prisoner by a court he shall be continued to be classified as habitual prisoner whatever be the nature of offences for which he is later convicted.

Explanation.- For the purposes of this definition the word PART XIII conviction shall include an order made under section 117 read with 110 of the Code of Criminal Procedure,1973 (Central Act 2 of 1974).

□225. Classes of prisoners: (1) As mentioned in rule 217, convicted prisoners are divided into two divisions or classes, A and B.

(i) prisoners shall be eligible for class A, if they by social status, education or habit of life have been accustomed to a superior mode of living, Habitual prisoners may at the discretion of the classifying authority , be included under this class on grounds of character and antecedents.

(ii) Class B shall consist of prisoners who ate not classified in Class A.

(iii) Notwithstanding anything contained in sub-rule (i), any person convicted of an offence involving gross indecency or exhibiting grave depravity of character may not be placed in class A. The Rules for the Superintendence and Management of Jails in the Bombay State, 1954 □Chapter XLI, Section II: Rule 3: Habitual women prisoners; prostitutes and procuress and young women prisoners shall be segregated.

The Karnataka Prisons and Correctional Services Manual - □418. Classification of convicted prisoners – Convicted prisoners are divided into two classes as Class I(Class-A)and Class II(Class-B).– i. Prisoners will be eligible for Class I(Class-A) if.–

a) They are non-habitual prisoners of good character;

b) They by social status, education and habit of life have been accustomed to a superior mode of living; and

c) They have not been convicted of.–

1) Offences involving elements of cruelty moral degradation or PART XIII personal greed;

2) Serious premeditated violence;

3) Serious offence against women and children;

4) Serious offences against property;

5) Offences relating to the possession of explosives, fire arms and other dangerous weapons with the object of committing an offence or of enabling an offence to be committed;

6) An offence under the suppression of immoral traffic Act;

7) Abetment or incitement of offences;

ii. Class II(Class-B) will consist of prisoners who are not classified as Class I (Class-A) iii. Notwithstanding anything contained in any person convicted of an offence involving gross indecency or exhibiting gross depravity of character may not be placed in Class I (Class-A).

Rajasthan Prisons Rules, 2022 □681. Prison Industries and Work Programmes. Rule (22) Prisoners who have shown, or are likely to have, a strong inclination to escape or are members of a wandering or criminal tribe, even though eligible, shall not be employed on extramural work.

Prison Manual 2021 for the Superintendence and Management of the Jails in Himachal Pradesh □ 26.69. State Government shall lay down dietary scales for women prisoners keeping in view their calorie requirements as per medical norms. The diet shall be in accordance with the prevailing dietary preferences and tastes of the local area in which the prison is located. Cooked food shall be brought to the female enclosure by a convict-cook accompanied by a warder and placed outside the enclosure gate from where it shall be taken inside by the female warder or a female prisoner. The menial during shall, whenever possible, be performed by the female prisoners and the refuse etc., placed outside the enclosure, to be removed by paid PART XIV sweeper. If there are no females of suitable caste for conservancy work paid-sweepers shall be taken into the enclosure in charge of a wander and under the conditions laid down in paragraph 214. XIV. Prison Manuals and the Legacy of Discrimination 150 We shall begin the analysis of the manuals/rules by examining whether caste was a ground of classification before the Constitution came into force.

(i) History of “Caste” in Prison Manuals

151 According to the Committee on Prison Discipline 1836-38, to force a man of

‘higher caste’ to work at any trade would ‘disgrace him’ and his family, and would be viewed as cruelty. 234 Convicts from communities lower in the caste hierarchy were expected to continue with their customary occupations in jail. The caste hierarchy outside the prison was replicated within the prison.

152 The Committee's recommendations for including a common mess instead of food allowances for prisoners to cook their own meals, which was greater accommodation of caste, were shelved. In the 1840s, prisoners were granted food allowances and they could prepare their own meals, duly observing their caste practices. To replace this, a stricter mess system was introduced in some prisons. However, prisoners were divided along caste lines and each group was assigned a different prisoner cook. Among Europeans outside the prison system, "there was bewilderment, even rage, at the extent to which caste had been 'basely and indecently succumbed to in our Indian jails'". 235 234 Committee on Prison Discipline to the Governor General of India in Council, 1838, page 106. 235 David Arnold and David Hardiman (eds.), Subaltern Studies VIII: Essays in Honour of Ranajit Guha, Oxford University Press (1994), pp. 148-187, at p. 172 PART XIV 153 But the British prison administration broadly agreed that caste must be respected even inside prisons. An 1862 Report of the Inspector of Prisons in Oudh showed that in Lucknow Central Jail, these prejudices were entertained to the extent that Brahmin inmates would be allowed to bathe before they ate and to mark out a designated area where they would receive their food and where no one would be allowed to enter. 236 David Arnold wrote about the complexity of managing caste in Indian prisons and the administration's fears:

> "With regard to caste and community, the issue was more complex. Physical labour was the mark of the lowest Hindu castes (and their Muslim counter parts), while such ritually polluting tasks as shoemaking, which involved handling leather, or the removal of human urine and excrement, were regarded as the stigmatising occupations of the very lowest castes, the untouchables. Was it, therefore, legitimate penal practice to force high-caste Hindus, or well-born (ashraf) Muslims, to toil as if they were from labouring or untouchable castes? Was denial of caste status a morally justified attribute of prison life, even a fitting deterrent against further criminal acts? The British were particularly wary on this score because of the intense resistance to common messing in north Indian jails in the 1840s and 1850s, which, by denying high- caste prisoners the right to cook their own food, provoked fierce prison demonstrations and contributed to the rash of jailbreaks during the opening phase of the 1857–58 uprising. Colonial authorities also recognized the strength of Indian feeling against any measures (whether in the jails, the army, or the courts) that appeared to attack caste or favour the imposition of Christianity." 237

154 In line with their overall approach, the colonial administrators linked caste with prison administration of labour, food, and treatment of prisoners. They emboldened the occupational hierarchy with legal policy and imported the vice of caste-based 236 Report of the Inspector of Prisons, Oudh, 1826, p. 33 as cited in David Arnold (1994), p. 172. 237 David Arnold, "Labouring for the Raj: Convict Work Regimes in Colonial India, 1836–1939", in Christian G Vito and Alex Lichtenstein (eds), Global Convict Labour, Brill (2015), pp. 199-221, at p. 209. PART XIV allocation of labour into the prison, due to pressure from the oppressor castes. Responding to the doubts raised by Inspector General of Madras in 1871, the Government of India responded that prisoners shall not be put into labour that "really causes the loss of caste" and that the management should not give an impression that the government wished to destroy caste of the native inmates. 238 Similarly, the Madras Jail Manual, 1899 stated that "In allotting labour to convicts reasonable

allowance shall be made for caste prejudice, e.g., no Brahmin or caste Hindu shall be employed in chucklers' [cobblers'] work. Care shall, however, be taken that caste prejudice is not made an excuse for avoiding heavy forms of labour". 239 155 Thus, the supposedly polluting occupations were allocated to the communities placed lower in the caste hierarchy. Not only were certain communities expected to carry out their "hereditary trades" within prisons, the supposed higher caste prisoners' caste privileges were preserved.

156 The 1919-1920 Indian Jail Committee Report suggested classification in prisons should ensure that the young and inexperienced offenders were not contaminated by the influence of the more experienced, habitual offenders. This classification and resultant segregation were deemed essential primarily as a means of achieving sound prison administration. 240 157 Caste was used as a ground for differentiating prisoners. The nature of the Manuals could be seen from Rule 825 of the Uttar Pradesh Jail Manual, 1941 which 238 Secretary, India, Home (Judicial), to Chief Secretary, Madras, 8 July 1871, Madras Judicial Proceedings, no. 98, 24 October 1871] – as cited in David Arnold (2015), p. 210. 239 As cited in David Arnold (2015), p. 210 240 Report of The Indian Jails Committee, 1919-1920, at p. 34: "We are satisfied as to the evil influence which can be exercised in a prison by the habitual or professional criminal, and we regard the adoption of proper methods of classification and the provision of adequate means of separation as the third essential factor in sound prison administration." See https://jail.mp.gov.in/sites/default/files/Report%20of%20the%20%20Indian%20Jail%20Committee,%201919-1920.pdf PART XIV provided: "The Superintendent shall not inflict the punishment of whipping on a superior class convict except with previous permission of the State Government." Rule 719 provided, "Reasonable respect shall be paid to religious scruples and caste prejudices of the prisoners in all matters as far as it is compatible with discipline." 158 Even after independence, Rule 37 of the Rajasthan Prison Rules 1951, until recently, provided as follows: "Separate receptacles shall be provided in all latrines for solid and liquid excreta, and the use of them shall be fully explained to all prisoners by the members. The Mehtars shall put a layer of dry earth at least 1 inch thick Into each receptacle for solid excreta before it is used, and every prisoner after he uses a receptacle shall cover his dejecta with a scoopful of dry earth. Vessels for urine shall be one-third filled with water." Rule 67 provided, "The cooks shall be of the non- habitual class. Any Brahmin or sufficiently high caste Hindu prisoner from this class is eligible for appointment as cook. All prisoners who object on account of high caste to eat food prepared by the existing cooks shall be appointed a cook and be made to cook for the full complement of men. Individually criminal prisoners shall, under no circumstances, be allowed to cook for themselves".

159 In 1987, the RK Kapoor Committee made observations about the inadequacy of classification and segregation in prisons. It noted that while women, young offenders, criminal lunatics, and prisoners suffering from infectious diseases and even prisoners with 'better socio-economic background' were duly segregated, the rest of the prisoners were huddled together. The report noted that the classification into smaller groups was not along systematic lines. 241 It underlined the objective of classification as follows:

> 241 Report of The Group of Officers on Prison Administration, 1987, p. 156 ("RK Kapoor Committee").

PART XIV “11.4 ... The objective of classification should be not only to prescribe and pursue individualised treatment programmes for reformation and rehabilitation of inmates, but also to ensure effective management from the angle of security and discipline.

11.5 A prisoner should not be classified merely by his physical appearance or by the nature of the crime committed by him or the information/data, if any, furnished by the police about his activities. It is necessary to know and understand, as thoroughly as possible, each prisoner as an individual, soon after his admission. An in-depth study of his total personality is required. Personality means the whole background of the prisoner, i.e. his entire life history, and what he thinks, feels and acts by natural instinct and by habit of social conditioning. Hence, it is essential that each prisoner should be studied separately by a team consisting of experienced hail officials and of experts like psychiatrists, psychologists, trained social workers and medical officers. The officer-in-charge of industries, education and vocational training should also join this team which should be called the Classification Committee.

11.7 The recommendations of the classification committee should broadly fall under two heads: (a) classification in respect of security and control, and

(b) classification from the point of view of correction, reformation and rehabilitation. After studying a prisoner, in detail, and making its assessment the classification committee should make recommendations on the following points in regard to his needs.” 242 The Report thus suggested that first, the purpose of classification in prisons must be two-fold: prison security/discipline as well as reformation of the prisoner; second, classification should be based on the individual needs of the prisoner based on a studied assessment of their personality.

242 Ibid, pp. 157-160 PART XIV 160 It is clear from the above discussion that caste was used as a factor of classification in prisons. However, this does not have any effect on examining the validity of the impugned provisions. In fact, it suggests that the colonial administrators were open to even adopting discriminatory social practices to not upset the oppressor castes. The upholding of caste differences by the British inside the prisons reflected their overall support to legitimizing the law of caste. However, this Court cannot adopt the approach taken by the colonial administrators. The impugned provisions shall be examined on the basis of principles laid under the Constitution.

(ii) Can Caste be a Basis in Classification?

161 The petitioner has averred that the Prison Manuals violate Article 14 of the

Constitution of India in so far as they privilege a particular section of the society based entirely on its caste identity. They cast disparate burdens on prisoners based on their caste-identity.

162 A valid classification under Article 14 presupposes a definite yardstick to distinguish the classes created, and the difference must be real, pertinent and discernible. 243 The State is free to recognise degrees of harm as long as the basis of classification is not arbitrary, artificial, or evasive. The line

between the two classes must be clear and not illusory, vague, and indeterminate. 163 The impugned rules are challenged on the ground that first, they directly identify caste as a means to allocate intramural labour, food-duties; second, by using vague terms such as "suitable caste" or "superior method of living" and similar terms, they tend to advantage the so-called higher castes; and third, they target the members of denotified tribes. We will now discuss whether caste is an intelligible and rational 243 Murthy Match Works v. Asst Collector of Central Excise, 1974 4 SCC 428. PART XIV principle of classification and whether it has a rational nexus with the object of the classification.

164 Caste can be an intelligible principle of classification as it has been used to create protective policies for the marginalized castes. The Constitution recognises caste as a proscribed ground of discrimination under Article 15(1), and envisions a society free from caste-prejudices. Furthermore, the Constitution provides for the enumeration of certain castes and tribes as Scheduled Castes and Scheduled Tribes in order to facilitate protective discrimination and overall promote equitable distribution of resources. Article 15(4) allows the state to make special provisions for the advancement of socially and educationally backward classes of citizens, which includes Scheduled Castes and Scheduled Tribes. In that sense, caste can be ground for classification, as long as it is used to grant benefits to the victims of caste- discrimination.

165 However, as evident from the language of Article 15(1), caste cannot be a ground to discriminate against members of marginalized castes. Any use of caste as a basis for classification must withstand judicial scrutiny to ensure it does not perpetuate discrimination against the oppressed castes. While caste-based classifications are permissible under certain constitutional provisions, they are strictly regulated to ensure they serve the purpose of promoting equality and social justice. 166 In the context of prisons, valid classification must be a functional classification. 244 The classification of prisoners has been considered both from the point of view of security and discipline as well as reform and rehabilitation. 245 This has been the objective. However, there is no nexus between classifying prisoners based 244 Charles Sobraj v. Supdt., Central Jail, 1978 INSC 149 245 RK Kapoor Committee, pp. 157-160.

PART XIV on caste and securing the objectives of security or reform. Limitations on inmates that are cruel, or irrelevant to rehabilitation are per se unreasonable, arbitrary and constitutionally suspect. 246 Inmates are entitled to fair treatment that promotes rehabilitation, and classification of any kind must be geared towards the same. Courts have been enjoined with the duty "to invigorate the intra-mural man-management so that the citizen inside has spacious opportunity to unfold his potential without overmuch inhibition or sadistic overseeing". 247 Segregating prisoners on the basis of caste would reinforce caste differences or animosity that ought to be prevented at the first place. Segregation would not lead to rehabilitation.

167 The petitioner's counsel have brought to the notice the observations made by the Madras High Court in C. Arul v. The Secretary to Government. 248 One of the prayers in the writ petition was "not to discriminate the prisoners on the basis of the caste and forbearing the jail authority from confining Palayamkottai prison inmates on caste basis". The writ petition was not entertained, as the High Court accepted the explanation of the State government that "the inmates belonging to different castes are housed in different blocks, in order to avoid any community clash, which is

prevailing common in Tirunelveli and Tuticorin Districts". It was also noted that "there is rivalry between two groups on account of caste feeling, which is regular in the District and in order to avoid any untoward incident and put an end to such rivalry, the Prison Authority is compelled to house the inmates of different communities in different blocks". We cannot agree with the position taken by the High Court. It is the responsibility of the prison administration to maintain discipline inside the prison without resorting to extreme measures that promote caste-based segregation. 246 Sunil Batra (I) v. Delhi Administration, (1978) 4 SCC 494 247 Hiralal Mallick v. State of Bihar, (1977) 4 SCC 44.

248 W.P.(MD) No. 6587 of 2012 (Madras High Court, Order dated 28 October 2014) PART XIV Adopting the logic accepted by the High Court is similar to the argument which was given in the United States to legalize race-based segregation: separate but equal. 249 Such a philosophy has no place under the Indian Constitution. Even if there is rivalry between individuals of two groups, it does not require segregating the groups permanently. Discipline cannot be secured at the altar of violation of fundamental rights and correctional needs of inmates. The prison authorities ought to be able to tackle perceived threats to discipline by means that are not rights-effacing and inherently discriminatory.

168 Furthermore, the differentia between inmates that distinguishes on the basis of "habit", "custom", "superior mode of living", and "natural tendency to escape", etc. is unconstitutionally vague and indeterminate. These terms and phrases do not serve as an intelligible differentia, that can be used to demarcate one class of prisoners from the other. These terms have resultantly been used to target individuals from marginalized castes and denotified tribes.

169 The objective of classification for labour for treatment and for conferment of entitlements such as remissions has to be maximisation of the reformatory potential of prisons. Such classification should be based solely on the correctional needs of the individual prisoner. An objective assessment of these needs prior to the classification is a constitutional imperative. Only such classification that proceeds from an objective inquiry of factors such as work aptitude, accommodation needs, special medical and psychological needs of the prisoner would pass constitutional muster. Classification based on caste reduces the individual prisoner to a group identity and does not leave room for an objective assessment of their correctional needs. Their reformation is 249 For a broader history, see Michael Klarman, Unfinished Business: Racial Equality in American History, Oxford University Press (2007).

PART XIV stultified by the burdens of their group-identity and thereby, their presumed ability to discharge stereotypical occupational tasks. This classification bears no nexus with individual qualifications, abilities and needs. Such a classification does not aid reformation. It rather effaces the prisoner's individuality and deprives them of individualised assessment of their correctional needs. Such classification bears no rational nexus with either prison discipline or prison reform. It is also opposed to substantive equality within prisoners as a class as it deprives some of them of equal opportunity to be assessed for their correctional needs, and consequently, opportunity to reform. The classification on obsolete understanding of caste, based on pre- constitutional legislations and practices, lacks a rational nexus with the correctional objectives of classification in prisons.

170 Thus, Rules that discriminate among individual prisoners on the basis of their caste specifically or indirectly by referring to proxies of caste identity are violative of Article 14 on account of invalid classification and subversion of substantive equality.

(iii) The discriminatory manuals 171 On a reading of the impugned provisions, it is clear that the provisions discriminate against marginalized castes and act to the advantage of certain castes. By assigning cleaning and sweeping work to the marginalized castes, while allowing the high castes to do cooking, the Manuals directly discriminate. This is an instance of direct discrimination under Article 15(1).

172 The manuals/rules suffer from indirect discrimination by using broad terms which act to the disadvantage of the marginalized castes. Phrases such as “menial” jobs to be performed by castes “accustomed to perform such duties” may appear to be facially neutral, but refer to marginalized communities, given the history of systemic PART XIV discrimination against them. Such indirect usages of phrases, which target the so- called ‘lower castes’, cannot be permitted in our constitutional framework. The phrases, though neutral on their face, carry an embedded bias that disadvantages marginalized communities by reinforcing historical patterns of labour based on caste. Even if caste is not explicitly mentioned, phrases like “menial” and “accustomed” indirectly uphold traditional caste roles. These provisions disproportionately harm marginalized castes, perpetuate caste-based labour divisions and reinforce social hierarchies.

173 The manuals/rules are also based on and reinforce stereotypes against the marginalized castes. These stereotypes not only demean and stigmatize marginalized communities but also serve to maintain and legitimize a social hierarchy that goes against the constitutional values of equality. The persistence of such associations in official documents like the Manuals/Rules normalizes the idea that these tasks are somehow natural for marginalized communities, reinforcing harmful societal hierarchies. By assigning specific types of work to marginalized castes based on their supposed "customary" roles, the Manuals perpetuate the stereotype that people from these communities are either incapable of or unfit for more skilled, dignified, or intellectual work.

174 The manuals/rules also reinforce stereotypes against denotified tribes. Rule 404 of the West Bengal Manual provides that a convict overseer may be appointed to be a night guard provided that “he does not belong to any class that may have a strong natural tendency to escape, such as men of wandering tribes”. The Madhya Pradesh Manual permits the classification of habitual and non-habitual criminals, where habitual criminals are described as someone who “is by habit member of a gang of PART XIV dacoits, or of thieves or a dealer in slaves or in stolen property”, even if no previous conviction has been proved. Furthermore, any member of a denotified tribe may be treated as a habitual criminal, subject to the discretion of the State Government. 250 Similarly, Rule 217 of the Andhra Pradesh Manual, Rule 219 of the Tamil Nadu Manual, and Rule 201 of the Kerala Manual classify as “habitual criminals” those who are by “habit” a “robber, housebreaker, dacoit, thief or receiver of stolen property” or that he “habitually commits extortion, cheating, counterfeiting coin, currency notes or stamps or forgery”, even if “no previous conviction has been proved, that he is by habit a member of a gang of dacoits, or of thieves or a dealer in stolen property”. The Andhra Manual also paints “a member of a wandering or criminal tribe” with the

same brush of being “a bad or dangerous character, or has, at any time, escaped of attempted to escape from lawful custody”, and prohibits their employment on any labour outside the walls of the prison, or to be permitted to pass out of the prison for employment of the purpose of being so employed. 251 The Manual also describes “non-habitual prisoners of good character” as someone who “by social status, education and habit of life have been accustomed to a superior mode of living”. Conversely, habitual prisoners are accustomed to an inferior mode of living. 252 The Odisha Manual and Rajasthan Manual also prohibit employment on extramural work of “Prisoners who have shown, or are likely to have, a strong inclination to escape or are members of a wandering or criminal tribe”. The Odisha Rules 253 and Tamil Nadu Rules 254 prescribe the separation of habitual offenders from other prisoners. The Maharashtra Rules state that “Habitual 250 Rule 411, Madhya Pradesh Manual 1987 251 Rule 448, Andhra Pradesh Manual 1979 252 Rule 1036, Andhra Pradesh Manual 1979 253 Rule 4, Odisha Rules 2020 254 Rule 214, Tamil Nadu Prison Rules 1983 PART XIV women prisoners; prostitutes and procuress and young women prisoners shall be segregated.” 255 175 The tendency to treat members of denotified tribes as habitual to crime or having bad character reinforces a stereotype, which excludes them from meaningful participation in social life. When such stereotypes become a part of the legal framework, they legitimize discrimination against these communities. Members of the denotified tribes have faced the brunt of colonial caste-based undertones of discriminating against them, and the prison Manuals are reaffirming the same discrimination. Discrimination against denotified tribes is prohibited under the ground of “caste” in Article 15(1), as the colonial regime considered them as belonging to separate hereditary castes.

(iv) Whether a “practice” of untouchability?

176 At the risk of repetition, we must reproduce some of the impugned provisions.

Rule 289(g) of the Uttar Pradesh Manual provides: “A convict sentenced to simple imprisonment,... shall not be called upon to perform duties of a degrading or menial character unless he belongs to a class or community accustomed to perform such duties; but may be required to carry water for his own use provided he belongs to the class of society the members of which are accustomed to perform such duties in their own homes.” Rule 158 states: “Remission to convicts on scavenging duty - Subject to good work and conduct in jail, convicts of the scavenger class working as scavengers in jails...” 255 Chapter XLI, Section II: Rule 3, Maharashtra Rules PART XIV 177 Rule 694 of West Bengal Manual provides: “... Interference with genuine religious practices or caste prejudices of prisoners should be avoided”. Rule 741 states: “Food shall be cooked and carried to the cells by prisoner-cooks of suitable caste, under the superintendence of a jail officer...” Rule 793 provides: “The barber should belong to the A class. Sweepers should be chosen from the Mether or Hari caste, also from the Chandal or other castes, if by the custom of the district they perform similar work when free, or from any caste if the prisoner volunteers to do the work.” Rule 1117 states: “Any prisoner in a jail who is of so high a caste that he cannot eat food cooked by the existing cooks shall be appointed a cook and be made to cook for the full complement of men.” 178 Rule 36 of the Madhya Pradesh manual states: “While the latrine parade is being carried out, the mehtars attached to each latrine shall be present, and shall call the attention of the convict overseer to any

prisoner who does not cover up his dejecta with dry earth. The mehtars shall empty the contents of the small receptacle into large iron drums and replace the receptacles in the latrine after having cleaned them." Rule 26.69 of the Himachal Pradesh Manual states, "If there are no female of suitable caste for conservancy work, paid-sweepers shall be taken into the enclosure in charge of a warder and under conditions laid down in paragraph 214". 179 The notion that an occupation is considered as "degrading or menial" is an aspect of the caste system and untouchability. The caste system rigidly assigns certain tasks to specific communities based on birth, with the lowest castes, being relegated to tasks considered impure or unclean, such as manual scavenging, cleaning, and other forms of physical labour. That a person belonging to such a community is accustomed to performing menial tasks is a mandate of the caste system. Similarly, PART XIV the reference to "scavenger class" is a practice of the caste system and untouchability. No social group is born as a "scavenger class". They are forced to undertake certain jobs that are considered 'menial' and polluting based on the notions of birth-based purity and pollution.

180 Refusal to check caste practices or prejudices amounts to cementing of such practices. If such practices are based on the oppression of the marginalized castes, then such practices cannot be left untouched. The Constitution mandates an end to caste discrimination and untouchability. The provision that food shall be cooked by "suitable caste" reflects notions of untouchability, where certain castes are considered suitable for cooking or handling kitchen work, while others are not. Besides, the division of work on the basis of caste is a practice of untouchability prohibited under the Constitution.

181 As discussed, prison manuals allot tasks of a barber to individuals from a certain caste, while sweeping work is allowed to Mehtar/Hari/Chandal or similar castes. It is also provided that work shall be allotted on the basis of "attitude and sofar as may be practicable with due regard to his previous habits." This is a caste-based delegation of work based on the perceptions of the caste system that certain castes are meant to do jobs of "sweeping". The rule that a prisoner of a high caste be allowed to refuse the food cooked by other castes is a legal sanction by the State authorities to untouchability and the caste system.

182 Let us refer again to the impugned provisions which deal with "habits" of certain communities. Rule 440 of the Andhra Pradesh Manual states: "The prison tasks including conservancy work shall be allotted at the discretion of the Superintendent with due regard to capacity of the prisoner, his education, intelligence and attitude and PART XIV so far as may be practicable with due regard to his previous habits." Rule 784 of the Odisha Manual states, "Prisoners who have shown, or are likely to have, a strong inclination to escape or are members of a wandering or criminal tribe, even though eligible, shall not be employed on extramural work." Rule 201 of Kerala Manual defines "habitual criminals" as follows: "(1) any person convicted of an offence punishable under Chapters XII, XVII and XVIII of the Indian Penal Code, whose facts of the present case, show that he is by habit a robber, house breaker, dacoit, thief or receiver of stolen property or that he habitually commits extortion, cheating, counterfeiting coin, currency notes or stamps or forgery"; "(4) any person convicted of any of the offence specified in (i) above when it appears from the facts of the case, even though no previous conviction has been proved, that he is by habit a member of a gang of dacoit, on of thieves or a dealer in slaves or in stolen property"; "(5) any person of a Criminal tribe subject to

the discretion of the Government." 183 The provisions that "men of wandering tribes" or "criminal tribes" have a "strong natural tendency to escape" or are by "habit" accustomed to theft reflects a stereotype that has its basis in the colonial understanding of India's caste system. These stereotypes not only criminalize entire communities but also reinforce caste-based prejudices. They resemble a form of untouchability, as they assign certain negative traits to specific groups based on identity, perpetuating their marginalization and exclusion. By marking them as "criminal by birth," the law institutionalized a prejudiced view of these tribes, treating them as inherently dishonest and prone to theft. This stereotype—echoing elements of untouchability—reduced their humanity to a set of negative traits and perpetuated their exclusion from mainstream society. Once labelled a criminal tribe, individuals from these communities faced systematic discrimination in PART XIV employment, education, and social services. The stigma attached to these labels extended beyond legal frameworks and became a part of social consciousness 184 The provision that a "non-habitual" prisoner is "by social status" and "habit of life... accustomed to a superior mode of living" is another caste-based construct. This hierarchical view of social status plays into the caste-based division of labour and morality that has long been entrenched in Indian society. While those from higher castes or classes were perceived as refined and deserving of more lenient treatment (even within the colonial criminal justice system), those from lower castes or marginalized communities were viewed as having a natural tendency towards criminality or immorality. This was not only an injustice but also reinforced existing power structures, ensuring that marginalized groups were trapped in cycles of poverty and discrimination, unable to transcend the stigmatization they faced.

(v) The right to overcome caste prejudices under Article 21 185 The impugned rules foster the antiquated notions of fitness of a particular community for a certain designated job. These rules reinforce occupational immobility of prisoners who belong to certain castes. For instance, rules assigning sweeping work which stipulate that "sweepers shall be chosen from the Mehtar or Hari caste, also from the Chandal or other low castes, if by the custom of the district they perform similar work when free, or from the caste if the prisoner volunteers to do the work" designate the enumerated castes for the work in issue. The three castes enumerated in the Rule are Scheduled Castes and have historically been compelled to do manual scavenging. The only link between the caste so designated and the work in question is their historical, caste-based link with the profession. It does not regard their work capacity, health, education, and ability, based on an individualised assessment of the PART XIV individual. Effectively, such rules obviate any inquiry into the correctional needs of the inmate and how, if at all they may be furthered by the assignment of work. 186 Such rules are indifferent to the potential of the individual prisoner to reform. Such a state of affairs is entirely opposed to substantive equality, as it contributes to institutional discrimination, depriving inmates of an opportunity to reform, at par with the others over whom the pall of caste does not hang.

187 Article 21 envisages the growth of individual personality. Caste prejudices and discrimination hinder the growth of one's personality. Therefore, Article 21 provides for the right to overcome caste barriers as a part of the right to life of individuals from marginalized communities. The protection provided by Article 21 can be seen as a constitutional guarantee that individuals from marginalized communities should have the freedom to break free from these traditional social restrictions. It extends beyond mere survival to ensure that they can flourish in an environment of equality,

respect, and dignity, without being subjected to caste-based discrimination which stifles their personal growth.

188 When caste prejudices manifest in institutional settings, such as prisons, they create further restrictions on the personal development and reformation of individuals from marginalized communities. When Prison Manuals restrict the reformation of prisoners from marginalized communities, they violate their right to life. At the same time, such provisions deprive prisoners from marginalized groups of a sense of dignity and the expectation that they should be treated equally. When prisoners from marginalized communities are subjected to discriminatory practices based on caste, their inherent dignity is violated.

PART XIV

(vi) Caste-based division of labour/work: Whether forced labour? 189 Several provisions of different Prison Manuals impose a restriction on labour of certain communities. That is, these communities are allowed to undertake only one kind of labour. “Menial” jobs are prescribed to be performed by those communities who have been “accustomed” to performing such duties. The language used in such Manuals/Rules is rooted in a caste-based societal structure, where traditionally, certain communities were relegated to tasks considered impure or inferior, such as cleaning, manual scavenging, or other forms of servitude.

190 Again, at the risk of repetition, let us now refer to these impugned provisions. Rule 289 of the Prison Manual of Uttar Pradesh provides that a convict “shall not be called upon to perform duties of a degrading or menial character unless he belongs to a class or community accustomed to perform such duties”. Rule 741 of the West Bengal Prison Manual provides “Food shall be cooked and carried to the cells by prisoner-cooks of suitable caste, under the superintendence of a jail officer”. Rule 793 provides, “The barber should belong to the A class. Sweepers should be chosen from the Mehther or Hari caste, also from the Chandal or other castes, if by the custom of the district they perform similar work when free, or from any caste if the prisoner volunteers to do the work”. Rule 36 of the Madhya Pradesh Jail Manual 1987 provides, “While latrine parade is being carried out, the mehtars attached to each latrine shall be present. The Mehtars shall empty the small receptacles into large iron drums and replace the receptacles after having cleaned them”. Rule 563 provides, “The cook shall be of non-habitual class”. Rule 26.69 of the Himachal Pradesh Manual states, “If there are no female of suitable caste for conservancy work, paid-sweepers shall be taken PART XIV into the enclosure in charge of a warder and under conditions laid down in paragraph 214”.

191 Such provisions often lead to an unfair distribution of labour within the prison system, with persons from specific communities performing honourable tasks, while those from marginalized communities are forced into undesirable work. It perpetuates the idea that some individuals are inherently suited to low-status labour based solely on their birth, reinforcing deep-rooted caste inequalities. 192 The provision that “food” shall be cooked by prisoner-cooks of “suitable caste” empowers the jail officer to discriminate against the marginalized castes. At the same time, it takes away the opportunity from them to cook food. The imposition of cleaning latrines and sweeping

work to only “Mehtar, Hari caste or Chandal” or similar castes is forcing only a type of work, which is considered low-grade, upon them. Imposing labour or work, which is considered impure or low-grade, upon the members of marginalized communities amounts to “forced labour” under Article 23. The Court in Sunil Batra (II)256 had also held that “degrading labour” cannot be forced upon prisoners.

193 Being forced to undertake the menial tasks simply because of their caste background robs prisoners of the element of choice that other prisoners enjoy. Forcing marginalized caste inmates to perform tasks like cleaning latrines or sweeping, without providing them any choice in the matter and based purely on their caste, constitutes a form of coercion. These prison rules assign them degrading labour that other inmates are not required to perform. Prisoners from lower castes are systematically exploited 256 1979 INSC 271 PART XV and their vulnerability as marginalized individuals is used as justification for assigning them low-grade tasks.

194 This type of labour assignment, based on their caste, cannot be classified as voluntary. Forcing the members of oppressed castes to selectively perform menial jobs amounts to forced labour under Article 23. Dr Ambedkar had articulated that the socio- economic situation of oppressed communities should not be used to exploit their labour. Article 23 strikes at this philosophy. The said article is not a caste-ignorant provision, but a caste-conscious provision.

195 Article 23 was incorporated into the Constitution to protect the members of oppressed castes from exploitative practices, where their labour is taken advantage of, and without any adequate return. This is evident from the Constituent Assembly Debates. However, the prison rules, by exploiting the labour of the oppressed castes, perpetuate the same injustice to guard against which Article 23 was inserted into the Constitution. Assigning labour based on caste background strips individuals of their liberty to engage in meaningful work, and denies them the opportunity to rise above the constraints imposed by their social identity.

196 We therefore find that the impugned provisions are violative of Articles 14, 15, 17, 21, and 23. We shall now refer to the Model Prison Manual 2016, which has been cited by the Union government as a modern manual addressing all concerns.

XV. Model Prison Manual 2016: Whether Adequate?

197 Ms. Aishwarya Bhati, learned ASG, has submitted a brief note referring to the

Model Prison Manual for the Superintendence and Management of Prisons in India, 2003, and The Model Prison Manual, 2016. It is argued that the 2016 Manual explicitly PART XV prohibits caste and religion-based discrimination practices. The note refers to some of the relevant provisions:

> 2003 Manual a. The 2003 Manual in Para 2.15.1 states that “Management of kitchen or cooking of food on caste or religious places will be totally banned in prisons.” b. In Para 15.22 the Manual states that “any special treatment to a group of prisoners

belonging to a particular caste or religion is strictly prohibited." c. In Chapter XXIV, Para 24.02 Note (ii) states that "No classification of prisoners shall be allowed on grounds of socio- economic status, caste or class." d. Para 24.35 states that "Management of kitchen or cooking of food on caste or religious places will be totally banned in prisons for women." 2016 Manual a. The 2016 Manual in Para 2.12.4 states that "Management of kitchen or cooking of food on caste or religious places will be prohibited in prisons." b. In Para 17.22 the Manual states that "any special treatment to a group of prisoners belonging to a particular caste or religion is strictly prohibited." c. In Para 17.25 Note (ii) states that "No classification of prisoners shall be allowed on grounds of socio-economic status, caste or class." PART XV d. Para 24.35 states that "Management of kitchen or cooking of food on caste or religious places will be strictly banned in prisons for women." 198 The note submitted by Ms. Bhati also refers to the Advisory dated 26 February 2024 issued by the Ministry of Home Affairs, through the Deputy Secretary (PR & ATC) to the Principal Secretary (Home/Jails) of all states and UTs and the DG/IG Prisons of all States and UTs to ensure that the State Prison Manual/Prison Act should not contain any discriminatory provisions. The advisory further states that:

"It may be noted that the Constitution of India prohibits any kind of discrimination on the grounds of religion, race, caste, place of birth etc. The Model Prison Manual, 2016 prepared by the Ministry of Home Affairs and circulated to all States and UTs in May 2016 explicitly prohibits caste and religion- based discrimination of prisoners in management of kitchen or cooking of food on caste or religious basis. The manual also provides that any special treatment to a group of prisoners belonging to a particular caste or religion is strictly prohibited. It further provides that no classification of prisoners shall be allowed on grounds of socio-economic status, caste or class." 199 To the contrary, Ms. Disha Wadekar counsel for the petitioner, has argued that the Model Prison Manual 2016 is not adequate and that it does not address issues of caste-based division of labour, segregation, and discrimination against denotified tribes. A reference was made to the definition of "habitual offenders" to argue that it is misused against persons from denotified tribes in prison. It has been submitted that the Ministry of Home Affairs may be directed to incorporate and reform the Model Prison Manual, 2016, to address the highlighted issues.

200 The Model Prison Manual 2016 was prepared "to reflect the understanding behind constitutional provisions, Supreme Court directions on prison administration PART XV and international instruments". 257 It covers a range of aspects relating to prisons, including institutional framework, custodial management, medical care, education and training of prisoners, maintenance of prisoners, emergency situations, remission, parole, premature releases and inspection of prisons, among other things. The Model Prison Manual 2016 also focuses on "prison computerization, special provisions for women prisoners, focus on after care services, rights of prisoners sentenced to death, repatriation of prisoners from abroad, enhanced focus on prison

correctional staff". 258 New chapters on legal aid and inspection of prisons have been incorporated.

201 The Model Prison Manual 2016 suffers from several lacunae. The first issue to be noted with reference to the Manual is its classification of "habitual offenders". The Manual defines "habitual offender" as "a prisoner classified as such in accordance with the provisions of applicable law or rules". 259 "Casual prisoner" is defined as "a prisoner other than a habitual offender". 260 The Manual provides for "the setting up of separate institutional facilities for different categories of prisoners", including "maximum security prisons/annexes/yards for high-risk prisoners and hardened or habitual offenders". 261 The Manual mandates the classification of undertrial prisoners in three categories, wherein habitual offenders are tagged along with "Gangsters, hired Assassins, dacoits, serial killers/rapists/violent robbers, drug offenders, communal fanatics and those highly prone to escapes/ previous escapees/attack on police and other dangerous offenders/including those prone to self-harm/posing threat to public order". 262 The habitual offenders are tagged in the same category in relation to classification of high 257 Model Prison Manual 2016, p. 4, https://www.mha.gov.in/sites/default/files/PrisonManual2016.pdf 258 Ibid 259 Para 13 of Chapter I, Model Prison Manual 2016 260 Para 3 of Chapter I, Model Prison Manual 2016 261 Para 2.03 of Chapter II, Model Prison Manual 2016 262 Ibid, Para 24.01 PART XV risk offenders and for determination of the level of security for effective surveillance. 263 Similarly, regarding the women prisoners, it has been provided that "Habitual offenders shall be separated from casual prisoners" 264 and that "Habitual offenders, prostitutes and brothel keepers must also be confined separately". 265 202 In a previous section of this judgment, we highlighted that the phrase "habitual offender" in several prison manuals refers to people from denotified or wandering tribes. Therefore, this definition cannot be left to be interpreted and applied "in accordance with the provisions of applicable law or rules". Otherwise, what it will end up doing is to classify and separate people from denotified tribes in prisons without any basis.

203 Second, the Manual does not explicitly prohibit physical caste-based segregation of prisoners, except in prisons for women. Only the chapter on "Women Prisoners" provides that "[n]o classification of prisoners shall be allowed on grounds of socioeconomic status, caste or class". 266 This is concerning, as the Manual was prepared in 2016, when prison manuals in different States mandated caste-based division of prisoners, as indicated in our analysis in the previous section. The Manual of 2016 therefore should have adopted a specific provision prohibiting the classification of prisoners on the basis of caste for all prisoners, as it does in the case of women prisoners.

204 Third, the Manual does not prohibit division of work on the basis of caste, except in cooking. Para 2.12.4 provides that "Management of kitchen or cooking of food on 263 Ibid, Para 25.02 264 Ibid, Para 26.04 (ii) 265 Ibid, 26.04 (iii) 266 Ibid, Para

26.04 Note (ii) PART XV caste or religious basis shall be prohibited in prisons". Similarly, for women prisons, para 26.45 provides "Management of kitchens or cooking food on caste or religious basis should be strictly banned in prisons for women". In effect, prohibition of caste discrimination in kitchens shall also apply to allotment of work to cooks. 267 However, the Manual does not prohibit discrimination on the allotment of work other than cooking. As analysed, various prison manuals in different States specify different work to people on the basis of caste. The Model Manual 2016 should have taken into account such practices and provided specifically for their prohibition.

205 Instead, the Manual empowers the jail superintendent "for the execution of all orders regarding the labour of prisoners" and that they "shall assign to each prisoner his work on the recommendation of the classifying Committee constituted in each Central Prison for the purpose". 268 Furthermore, the medical officer shall "examine all newly admitted prisoners and record in the admission register and medical sheets particulars regarding their health, and the kind of labour they can perform in view of their health conditions". 269 If the medical opinion states that "the health of any prisoner suffers from employment of any kind or class of labour, he shall record such opinion in the prisoner's sheet and the prisoner shall not be employed on that labour". 270 Besides, the Manual penalizes any resistance by the prisoners to perform labour allotted to them. "Wilfully disabling himself from labour" is listed as a prison offence. 271 206 The above provisions prima facie may be essential to maintain prison discipline, but absent any provision prohibiting caste-based allotment of work, these provisions may be used to target prisoners from marginalized castes. It may create a scenario 267 See Paras 6.30 and 6.31.

268 Ibid, Para 4.08.

269 Ibid, Para 7.45 (xxiii).

270 Ibid, Para 7.67.

271 Ibid, Para 21.09 (xxxv).

PART XV where a prisoner from a marginalized caste may not be able to deny the work allotted to them on the basis of their caste, which would also be violative of the Articles 21 and 23 of the Constitution of India, which protects individual dignity and prohibits forced labour. In this regard, we may again refer to Sunil Batra (II) 272 which held that "allotment of degrading labour" in prisons is "an infraction of liberty or life in its wider sense and cannot be sustained" unless the procedure under Article 21 is satisfied. No such procedure which divides labour on the basis of caste can be sustained. This prohibition shall also apply to labour done in prison industries and skill development programmes under paras 15.30 and 15.31, work done by undertrial prisoners under paras 24.43 and 24.44, work done by high-risk offenders under paras 25.19, work done by women prisoners under paras 26.106 to 26.109, and labour done by young offenders under paras 27.32 and

27.33.

207 Fourth, the counsel for the petitioner have argued that the Manual does not refer to the provisions of the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013, which prohibit manual scavenging. Clauses 2.10 and 6.79 deal with toilets. We clarify that the Act has a binding effect even on prisons. In relation to toilets, manual scavenging 273 or hazardous cleaning 274 of a sewer or a septic tank inside a prison shall not be permitted.

208 Fifth, it has also been argued that caste-based privileges provided to certain prisoners are not forbidden, except in para 17.22. The said para states, "The main festivals of all religions should be celebrated. In these, every prisoner should be encouraged to participate. Any special treatment to a group of prisoners belonging to 272 1979 INSC 271 273 Sections 2(1)(g) and 5, The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 274 Ibid, Section 7 PART XVI a particular caste or religion is strictly prohibited". In addition, prison offences include "wilfully hurting other's religious feelings, beliefs and faiths"275 and "agitating or acting on the basis of caste or religious prejudices". 276 We clarify that no special treatment shall be given to any group of persons or individuals on the basis of caste in any scenario.

XVI. Model Prisons and Correctional Services Act, 2023 209 We now refer to the provisions of the "Model Prisons and Correctional Services Act, 2023". The Ministry of Home Affairs, in consultation with various stakeholders, prepared this draft legislation and forwarded it to all States and Union Territories in May 2023 for adoption in their respective jurisdictions. 277 The vision behind the preparation of the Model Act was to replace the previous colonial legislations, which have been "found to be outdated and obsolete", with "a progressive and robust Act which is in tune with contemporary modern day needs and correctional ideology". 278 According to the Ministry, the Model Act is "a comprehensive document which covers all relevant aspects of prison management, viz. security, safety, scientific & technological interventions, segregation of prisoners, special provision for women inmates, taking appropriate action against criminal activities of prisoners in the prison, grant of parole and furlough to prisoners, their education, vocational training and skill development, etc." 279 The Ministry also indicated that as "Prison" is a "State" subject, "it is for the respective State Governments to make use of the guidance provided in 275 Para 21.09 (xxxvii), Model Prison Manual 2016 276 Ibid, Para 21.09 (xxxviii) 277 Unstarred Question No. 3007 (Lok Sabha, dated 8 August 2023), available at https://www.mha.gov.in/MHA1/Par2017/pdfs/par2023-pdfs/LS-08082023/3007.pdf 278 Letter dated 10 May 2023 from Home Secretary, Government of India to Chief Secretaries, all States and UTs, available at https://www.mha.gov.in/sites/default/files/advisory_10112023.pdf 279 Unstarred Question No. 3007 (Lok Sabha, dated 8 August 2023), available at https://www.mha.gov.in/MHA1/Par2017/pdfs/par2023-pdfs/LS-08082023/3007.pdf PART XVI the Model Prisons and Correctional Services Act, 2023 and enact a suitable legislation on Prisons in their jurisdictions for bringing improvement in prison management and administration of prisoners." 280 210 The Model Act does not contain a reference to the prohibition of caste-based discrimination. This is concerning because the Act empowers the officer-in-charge of the prison to "utilize the services of prisoners" for "administration and management of the prisons". 281 Further, disabling from labour and continuously refusing to work is a prison offence. 282 The

officer-in-charge should not be given the liberty to discriminate against any group of prisoners on the basis of caste. While the Model Prison Manual 2016 refers to the prohibition of caste discrimination in prisons in several provisions, the Model Act of 2023 has completely avoided any such mention. A provision to that effect should be inserted in the Model Act. It should ban segregation or division of work based on caste.

211 The definition of "Habitual Offender" under Section 2(12) is also problematic. It states that, "Habitual Offender means a prisoner who is committed to prison repeatedly for a crime". The phrase "committed to prison repeatedly" is vague and over-broad. It can be used to declare anyone as a habitual offender, even if they have not been convicted for a crime. The Model Act also provides that "habitual offenders" may be housed in a high security prison. 283 In addition to the category of habitual offender, the Act creates a category of "recidivist", which means "any prisoner who is convicted for 280 Ibid 281 Section 60, Model Prisons and Correctional Services Act, 2023 282 Ibid, Section 39(v) and (vi) 283 Section 2(15), Model Prisons and Correctional Services Act, 2023 PART XVII a crime more than once". 284 "Habitual/recidivist prisoners" may be classified separately and segregated in prisons. 285 212 Chapter IX of the Model Act, dealing with "Protection of Society from Criminal Activities of High-Risk Prisoners, Habitual Offenders and Hardened Criminals", also seems to be over-broad. Section 27(1) states that the society needs to be protected from "habitual offenders, along with high-risk prisoners, and hardened criminals. The said category is prohibited for "parole, furlough, or any kind of prison leave in the normal course". 286 The Act provides that "the release of a high-risk/hardened/habitual offender convict on completion of sentence or an under-trial on bail or an inmate released temporarily on parole/furlough, etc. shall be informed to the Superintendent of Police of the concerned district, who shall keep a watch on the activities of such prisoners". 287 This provision gives wide powers to the police, which may be misused. XVII. The Continued Targeting of Denotified Tribes 213 The impugned provisions are also an instance of existing discrimination and targeting of the members of the Denotified Tribes. In a previous section of this judgment, we held that the impugned provisions discriminate against the Denotified Tribes. Dr. Muralidhar argued that the classification of "habitual offender" needs to be completely done away with. At this stage, it is necessary to discuss how the classification of "habitual offender" was initially conceptualized. 214 The classification of "habitual offender" emerged prior to the repeal of the Criminal Tribes Act. Several Provinces had enacted their habitual offender laws. The 284 Ibid, Section 2(29) 285 Ibid, Sections 5(3), 5(5), 6(3), 26(2), 26(3) 286 Ibid, Section 27(3) 287 Ibid, Section 28(5) PART XVII Madras Restriction of Habitual Offenders Act, 1948 applied to individual habitual offenders. 288 The Act neither required a notified offender to attend roll call to any authority nor provided for taking finger impressions of such offender. 289 However, once a person was notified under the Act to be a habitual offender, "no opportunity" was given to him "to defend himself against orders of restriction or internment in a settlement". Contrary to the Criminal Tribes Act or the Madras Restriction of Habitual Offenders Act, the Bombay Habitual Offenders Restriction Act, 1947 granted power to only competent courts to pass restrictive orders after necessary legal proceedings. Under the Madras law, such orders could be passed by government or officers authorised by them. 290 215 The Rajasthan Habitual Criminals (Registration and Regulation) Act, 1950 defined "habitual criminal" as "a person who being a member of a notified tribe" who within the prescribed period, has not "been declared by an order in writing of the District Magistrate as no longer a habitual criminal". Further, it included "a person, who whether he was a member of a

notified tribe or not, has within any period of ten years following the aforesaid date, been convicted not less than thrice of any of the offences specified". 291 The Rajasthan Act gave "too much discretion" to the District Magistrate. 292 A biased officer may never declare any members of a Criminal Tribe as "no longer habitual criminals" even if they may not have any convictions at all. 293 The Rajasthan Act was "hardly any improvement" from the Criminal Tribes Act. 294 288 The Criminal Tribes Enquiry Committee Report (1949-50), https://ia802807.us.archive.org/11/items/dli.csl.944/944.pdf, p. 92 289 Ibid, p. 93 290 Ibid, p. 94 291 Ibid 292 Ibid 293 Ibid 294 Ibid, p. 95 PART XVII 216 The Criminal Tribes Enquiry Committee, while recommending the repeal of the Criminal Tribes Act, suggested enactment of a central habitual offender legislation. However, it stated that "a person should not be branded as a habitual offender merely on grounds of suspicion". 295 In his oral evidence before the Committee, a deputy inspector general rank officer from Bihar stated, "In some of the democratic countries of the world, the surveillance kept over even hardened criminals is not done in the way in which we do it India, and a time should come when no criminal should know that he is really being followed or pursued". 296 The Committee recommended that "a person who has been convicted twice for any non-bailable offences under Chapters XII, XVI and XVII of the Indian Penal Code including an order under section 118 of the Criminal Procedure Code should be considered a habitual offender for the purposes of the new Act". 297 The Committee was of the view that provisions similar to sections 23, 24, 26, and 27 of the Criminal Tribes Act should not be included in the new Act. 298 217 After the repeal of the Criminal Tribes Act, several States enacted new habitual offender laws in their jurisdictions. Significantly, most States adopted an identical definition of "habitual offenders", referring to a person who has been sentenced on conviction for at least three occasion to "a substantive term of imprisonment" for any of more of the specified offences. 299 Similarly, the respective State legislations conferred power on the government to direct the District Collector to make a register of habitual offenders within his district by entering the names and prescribed 295 Ibid, p. 96 296 Ibid, p. 97 297 Ibid 298 Ibid, p. 100 299 Tamil Nadu Restriction of Habitual Offenders Act, 1948 (previously Restriction of Habitual Offenders Act1948); Madhya Bharat Vagrants, Habitual Offenders and Criminals (Restrictions and Settlement) Act, 1952; Orissa Restriction of Habitual Offenders Act, 1952; Uttar Pradesh Habitual Offenders Act, 1952; Rajasthan Habitual Offenders Act, 1953; Jammu and Kashmir Habitual Offenders (Control and Reform) Act, 1956; Bombay Habitual Offenders Act, 1959; Gujarat Habitual Offenders Act, 1959; Kerala Habitual Offenders Act, 1960; Karnataka Habitual Offenders Act, 1961; Andhra Pradesh Habitual Offenders Act, 1962; Himachal Pradesh Habitual Offenders Act, 1969; Goa, Daman and Diu Habitual Offenders Act, 1976; PART XVII particulars of such offenders. 300 These Acts also oust the jurisdiction of courts to review the validity of any direction or order issued under the Acts. 301 Furthermore, the District Collector or any officer authorised by him in this behalf may at any time order the finger and palm impressions, foot-prints and photographs of any registered offender to be taken. 302 Several of these Acts require the notified offenders to share their residential details, and may also restrict their movements. 218 The "habitual offender" legislations were enacted to replace the Criminal Tribes Act. However, in States such as Rajasthan, they were used to refer to members belonging to criminal tribes/denotified tribes. Applying that logic, several Prison Manuals/Rules have also referred to "habitual offender" to mean members of Denotified Tribes or wandering tribes. This cannot be accepted. A whole community ought not to have either been declared a criminal tribe in the past or a habitual offender in the present. It would not be wrong to say that the classification

of “habitual offender” has been used to target members of Denotified Tribes.

219 Various habitual offender laws enacted by States are not under challenge before us in the present. Hence, we shall not deal with their validity. However, the classification is constitutionally suspect, given the vague and broad language various laws and rules have employed, which is used to target the members of Denotified Tribes. The Criminal Tribes Enquiry Committee had noted that no person can be 300 Ibid 301 Section 19, Andhra Pradesh Habitual Offenders Act, 1962; Section 15, Tamil Nadu Habitual Offenders Act, 1948; Section 22, Goa, Daman and Diu Habitual Offenders Act, 1976; Section 22, Gujarat Habitual Offenders Act, 1959; Section 22, Bombay Habitual Offenders Act, 1959; Section 21, Himachal Pradesh Habitual Offenders Act, 1969; Section 23, Jammu and Kashmir Habitual Offenders (Control and Reform) Act, 1956; Section 18, Karnataka Habitual Offenders Act, 1961; Section 18, Kerala Habitual Offenders Act, 1960; Section 12, Orissa Restriction of Habitual Offenders Act, 1952; Section 14, Rajasthan Habitual Offenders Act, 1953 302 Section 6, Andhra Pradesh Habitual Offenders Act, 1962; Section 6, Goa, Daman and Diu Habitual Offenders Act, 1976; Section 6, Gujarat Habitual Offenders Act, 1959; Section 6, Bombay Habitual Offenders Act, 1959; Section 6, Himachal Pradesh Habitual Offenders Act, 1969; Section 9, Jammu and Kashmir Habitual Offenders (Control and Reform) Act, 1956; Section 6, Karnataka Habitual Offenders Act, 1961; Section 6, Kerala Habitual Offenders Act, 1960; Section 4, Rajasthan Habitual Offenders Act, 1953; PART XVIII declared as a habitual offender merely on ground of suspicion. But the same has happened, as the vague language employed leaves the discretion for the authorities to declare persons as habitual offenders merely on the ground of suspicion. We urge the State governments to reconsider the usage of various habitual offender laws, i.e. whether such laws are needed in a constitutional system. In the meantime, the definition of “habitual offender” in the prison manuals/rules shall be in accordance with the definition provided in the habitual offender legislation enacted by the respective State legislature, subject to any constitutional challenge against such legislation in the future. In case, there is no habitual offender legislation in the State, the references to habitual offenders directly or indirectly, as discussed in this judgment, are struck down as unconstitutional. The Union and the State governments are directed to make necessary changes in the prison manuals/rules in line with this judgment. XVIII. The Role of Legal Service Authorities in Prisons 220 In order to ensure that the fundamental rights of prisoners are not violated, the role of legal services authorities is crucial. The importance of free legal aid has been emphasized by this Court in several judgments.

(i) Right to Free Legal Aid

221 The Court, in Hussainara Khatoon v. Home Secretary, State of Bihar,

recognized the “right to free legal services” as “an essential ingredient” of “reasonable, fair and just” procedure under Article 21 for a person accused of an offence. 303 It is “a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or 303 Hussainara Khatoon v. Home Secretary, State of Bihar [1979] 3 S.C.R PART XVIII incommunicado situation”. 304 Later, in Sheela Barse v. State of Maharashtra, 305 regarding the plight of women prisoners in the jails of Maharashtra, the Court,

while emphasizing free legal assistance, expressed its concern on "the helpless condition of a prisoner who is lodged in a jail who does not know to whom he can turn for help in order to vindicate his innocence or defend, his constitutional or legal rights or to protect himself against torture and ill-treatment or oppression and harassment at the hands of his custodians".

222 The Court declared in Mohd. Hussain v. The State (Govt. of NCT) Delhi 306 that Article 39A "casts duty on the State to ensure that justice is not denied by reason of economic or other disabilities in the legal system and to provide free legal aid to every citizen with economic or other disabilities". In Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid v. State Of Maharashtra, 307 the Court held that the right to access to legal aid "flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced". The Court directed all the magistrates in the country to inform a person accused of committing a cognizable offence produced before their court, that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The Court clarified that "any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceeding".

304 Ibid 305 Sheela Barse v. State of Maharashtra, 1983 INSC 9 306 AIR 2012 SC 750 307 2012 INSC 357 PART XVIII

(ii) Inspection by Legal Services Authorities 223 Section 12 of the Legal Services Authorities Act, 1987, provides that all "persons in custody" are entitled to free legal aid. In 2015, NALSA wrote a letter to all State Legal Services Authorities (SLSAs) to constitute a prison legal aid clinic (PLAC) in every prison under their jurisdiction. 308 To further strengthen the functioning of PLACs, NALSA formulated the Standard Operating Procedures (SOP) on Access to Legal Aid Services to Prisoners and Functioning of the Prison Legal Aid Clinics, 2022. 224 Under this SOP, there are provisions for two types of inspection visits to the prisons. One shall be undertaken by the secretary of the DLSA, and the other is to be done by the chairperson of the DLSA, i.e., the district and sessions judge:

> "4. Monitoring of functioning of PLAC by DLSA 4.1 Periodicity of visits by DLSA Secretary: DLSA Secretary will visit and inspect the Prison Legal Aid Clinics at least once a month.
>
> 4.2 Role of the DLSA Secretary during prison visits:
>
> The following is the role:
>
> a) To ensure that legal aid lawyers have been appointed to represent all undertrials. In circumstances where any prisoner is found without legal representation during the visit by the DLSA, immediate steps to be taken towards ensuring appointment.
>
> b) To verify whether panel lawyers are meeting and interacting with prisoners including legal aid beneficiaries. In circumstances where panel lawyers are not interacting and communicating with the prisoners, the lawyer must be called to

> understand the concern and 308 NALSA Standard Operating Procedures on Access to Legal Aid Services to Prisoners and Functioning of the Prison Legal Aid Clinics, 2022, https://nalsa.gov.in/acts-rules/guidelines/nalsa-sop-functioning-of-prison-legal-aid-clinics-2022 PART XVIII best respond to it. If need be, where deemed appropriate by the Secretary, DLSA, the concern lawyer may be removed from the panel, and a fresh appointment initiated.

c) To check the prison conditions with respect to health, sanitation, food and hygiene in addition to access to legal representation. If any such concerns are raised, the same shall be shared with the Chairman of the DLSA, Member Secretary of SLSA as well as the Board of Visitors who have the authority to raise it to the appropriate authority.

d) To track whether there are any instances of non-production at court hearings, be it physical or virtual. If such instances are reported, take immediate steps to rectify such misgivings.

e) To ensure that concerns of vulnerable category of prisoners are heard and responded to.

f) To ensure and check the documentation and reporting practices of the Clinic.

g) To ensure that the PLVs and JVLs are able to perform their duties effectively, and have access to the prison at all times. They should ensure that no unnecessary hindrances are set forward from the prison officers, which may create hurdle in working of the PLAC.

4.3 Periodicity of visits by the Chairman, DLSA (District & Sessions Judge): The Chairman, DLSA (District & Sessions Judge) shall visit the Prison Legal Aid Clinics at least once in three months. He would also visit the premises of the prison to understand any concerns regarding prison conditions, and also enquire into the functioning of the PLAC. They may also interact with prisoners to received feedback for services provided.

4.4 Role of the Chairman, DLSA during prison visits:

> The Chairman DLSA would undertake to inspect the condition of the prisons, communicate with the PART XVIII inmates to understand their concerns with respect to their regimen, food, sanitation hygiene etc. in addition to access to legal representation. In circumstances where concerns are raised, the same may be raised in the meetings with the Secretary, DLSA to take measures to combat them. Specialized formats for documentation of prison visits by the Chairman may be prepared by the SLSA." 309 The inspections have to be undertaken every month by the Secretary, DLSA, and quarterly by the Chairperson, DLSA. During these inspections, the authority inspecting is supposed to look at the overall condition of the prisons.

225 Apart from this, a Board of Visitors is constituted, as per the Model Prison Manual 2016, at a district level. The Board comprises of:

"29.03 The Board of Visitors shall comprise the following official members:

a) The District Judge at the District level, or the Sub-

Divisional Judicial Magistrate exercising Jurisdiction, at Sub-Division level

b) The District Magistrate, at the District level or Sub- Divisional officer at Sub- Divisional level

c) District Superintendent of Police

d) The Chief Medical Officer of the Health Department, at the District level or the Sub-Divisional Medical Officer at Sub-Division level

e) The Executive Engineer, PWD at the District level, or Assistant Engineer PWD at Sub-Divisional level

f) The District Education Officer dealing with literacy programmes.

g) District Social Welfare Officer

h) District Employment Officer

i) District Agricultural Officer

j) District Industrial Officer The Board shall make at least one visit per quarter and for this purpose, presence of three members and the chairman shall constitute quorum.

309 Rule 4, NALSA Standard Operating Procedures on Access to Legal Aid Services to Prisoners and Functioning of the Prison Legal Aid Clinics, 2022, https://nalsa.gov.in/acts-rules/guidelines/nalsa-sop-functioning-of-prison- legal-aid-clinics-2022 PART XVIII 29.04 The Board of Visitors shall also comprise the following Non-Official Members:-

a) Three Members of the Legislative Assembly of the state of which one should be a woman.

b) A nominee of the State Human Rights Commission

c) Two social workers of the District/Sub-Division;

one of them shall be a woman having an interest in the administration of prisons and welfare of prisoners. 29.05 The District Judge shall be the Chairman of the Board of visitors at District level

and the Sub-

Divisional Judicial Magistrate shall be the Chairman at Sub-Division level. The Non-official visitors after their appointment must be sensitised and trained about their duties, roles and responsibilities." 226 The duties of the Board have been provided as follows:

> "29.22 All Visitors, official and non-official, at every visit shall:
>
> (a) examine the cooked food;
>
> (b) inspect the barracks, wards, work-sheds and other buildings of the prison generally;
>
> (c) ascertain whether considerations of health, cleanliness and security are attended to, whether proper management and discipline is maintained in every respect and whether any prisoner is illegally detained, or is detained for undue length of time while awaiting trial;
>
> (d) examine prison registers and records, except secret records and records pertaining to accounts;
>
> (e) hear and attend to all representation and petitions made by or on behalf of the prisoners;
>
> (f) direct, if deemed advisable, that any such representation or petition be forwarded to the Government;
>
> (g) suggest new avenues for improvement in correctional work." 310 The comments of the Board of Visitors are recorded in the visitors' book of the prison and are forwarded to the Inspector General (IG) of Prisons. Any action on the comments is at the discretion of the IG Prisons.

310 Rule 29.22, Model Prison Manual, 2016.

PART XIX 227 The Model Prisons and Correctional Services Act, 2023 also envisages inspection of prisons, including by a Board of Visitors headed by the district judge/additional district judge/sub-divisional judicial magistrate. 311 It also includes the provision for "free legal aid to the prisoners in accordance with the provisions of the Legal Services Authorities Act, 1987" and the relevant standard operating procedure. 312 XIX. The Future of Substantive Equality & Institutional Discrimination 228 What does the future hold for India? Dr Ambedkar had expressed this concern in his last address to the Constituent Assembly. The concern holds true even today. More than 75 years since independence, we have not been able to eradicate the evil of caste discrimination. We need to have a national vision for justice and equality, which involves all citizens. As Jamal Greene noted:

> "There is also such a thing as rights. Those individual people and families have hopes and fears that matter but that conflict with the fears and hopes of their fellow human beings. Their aspirations and worries don't depend on what Framers believed, or how Madison phrased the Bill of Rights, or whether some judicial opinion says "strict scrutiny" applies to a case. They depend on what people's expectations are, how they are treated by others, and why. We are bound to experience the rights we have differently than anyone else does—this is what makes them ours. The central challenge for any system of justice has always been that we dream alone but we live together." 313 311 Section 54 312 Section 56 313 Jamal Greene, How Rights Went Wrong: Why Our Obsession with Rights is Tearing America Apart, Mariner Books, 2022, p. 248 PART XIX Therefore, we need real and quick steps to identify the instances of existing inequalities and injustices in our society. Words, without action, would mean nothing for the oppressed. As Paulo Freire noted in the "Pedagogy of the Oppressed":
>
> "The oppressor is solidary with the oppressed only when he stops regarding the oppressed as an abstract category and sees them as persons who have been unjustly dealt with, deprived of their voice, cheated in the sale of their labor— when he stops making pious, sentimental, and individualistic gestures and risks an act of love. True solidarity is found only in the plenitude of this act of love, in its existentiality, in the praxis. To affirm that men and women are persons and as persons should be free, and yet to do nothing tangible to make this affirmative a reality, is a farce." 314 We need a compassionate approach, as Alan Paton had described:
>
> "It is my own belief that the only power which can resist the power of fear is the power of love. It's a weak thing and a tender thing; men despise and deride it. But I look for the day when [...] we shall realize that the only lasting and worth-while solution of our grave and profound problems lies not in the use of power, but in that understanding and compassion without which human life is an intolerable bondage, condemning us all to an existence of violence, misery and fear." 315

229 We need an institutional approach where people from marginalized communities could share their pain and anguish about their future collectively. 316 We need to reflect and do away with institutional practices, which discriminate against citizens from marginalized communities or treat them without empathy. We need to identify systemic discrimination in all spaces by observing patterns of exclusion. After all, the "bounds of caste are made of steel"– "Sometimes invisible but almost always 314 Paulo Freire, Pedagogy of the Oppressed (translated by Myra Bergman Ramos), Penguin 2017, p. 24 315 Alan Paton, Cry, The Beloved Country, Vintage Books, 2002 316 Bell Hooks, Salvation: black people and love, Harper Perennial, 2001; pp. 214-15 PART XX inextricable". 317 But not so strong that they cannot be broken with the power of the Constitution.

230 This petition highlighted an instance of institutional systemic discrimination. We appreciate the assistance provided by the lawyers in dealing with the issue.

XX. Conclusion and Directions

231 In light of the discussion, we issue the following directions:

(i) The impugned provisions are declared unconstitutional for being violative of Articles 14, 15, 17, 21, and 23 of the Constitution. All States and Union Territories are directed to revise their Prison Manuals/Rules in accordance with this judgment within a period of three months;

(ii) The Union government is directed to make necessary changes, as highlighted in this judgment, to address caste-based discrimination in the Model Prison Manual 2016 and the Model Prisons and Correctional Services Act 2023 within a period of three months;

(iii) References to "habitual offenders" in the prison manuals/Model Prison Manual shall be in accordance with the definition provided in the habitual offender legislation enacted by the respective State legislatures, subject to any constitutional challenge against such legislation in the future. All other references or definitions of "habitual offenders" in the impugned prison manuals/rules are declared unconstitutional. In case, there is no habitual offender legislation in the State, the Union and the State governments are directed to make necessary 317 Nusrat F. Jafri, This Land We Call Home: The Story of a Family, Caste, Conversions and Modern India, Penguin (2024), p. xv PART XX changes in the manuals/rules in line with this judgment, within a period of three months;

(iv) The "caste" column and any references to caste in undertrial and/or convicts' prisoners' registers inside the prisons shall be deleted;

(v) The Police is directed to follow the guidelines issued in Arnesh Kumar v. State of Bihar (2014) and Amanatullah Khan v. The Commissioner of Police, Delhi (2024) to ensure that members of Denotified Tribes are not subjected to arbitrary arrest;

(vi) This Court takes suo motu cognizance of the discrimination inside prisons on any ground such as caste, gender, disability, and shall list the case from now onwards as In Re: Discrimination Inside Prisons in India. The Registry is directed to list the case after a period of three months before an appropriate Bench;

(vii) On the first date of hearing of the above suo motu petition, all States and the Union government shall file a compliance report on this judgment;

(viii) The DLSAs and the Board of Visitors formed under the Model Prison Manual 2016 shall jointly conduct regular inspections to identify whether caste-based discrimination or similar discriminatory practices, as highlighted in this judgment, are still taking place inside prisons. The DLSAs and the Board of Visitors shall submit a joint report of their inspection to the SLSAs, which shall compile a common report and forward it to NALSA, which shall in turn file a joint status report before this Court in the above-mentioned suo motu writ petition; and

(ix) The Union government is directed to circulate a copy of this judgment to the Chief Secretaries of all States and Union territories within a period of three weeks from the date of delivery of this judgment.

PART XX 232 The writ petition is disposed of.

233 Pending application(s), if any, stand disposed of.

... ... CJI [Dr Dhananjaya Y Chandrachud] .....J [J B Pardiwala] .....J [Manoj Misra]
New Delhi;

October 03, 2024