DECONSTRUCTING POLICE DISCRETION AS BRAHMINISM

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Police violence is cast as a graphic, brutal spectacle of power on the bodies of the poor. This popular understanding is only the most visible form of routinised arbitrary violence perpetrated by the police. In this article, we study the scope and forms of police discretion in ordinary policing tasks informed by Criminal Tribes Act, 1871 to argue that the police frame criminality not through evidence-gathering but through the power of language and distorted narratives that are passed off as discoverable truths derived from the institution of caste. Through a study focused on alcohol policing under the Madhya Pradesh Excise Act, 1915, this article seeks to underscore that police discretion is constructed by caste, resulting in the criminalisation of oppressed caste communities.

I. INTRODUCTION

Discretion is the sine qua non of policing. It enables the police to evaluate situations in their full social context and choose the 'best' course of action to 'deter crime' and ensure the everyday disciplining of those deemed 'criminal'. Since policing occurs at the threshold of judicial process, before an accused is tried, and sometimes even before an offence is committed, all acts of policing entail the use of discretionary authority. The police not only fire at a gathering or arrest a drunken labourer, but also determine when a public gathering becomes unlawful and when a drunken labourer is a threat to public order.[1] In other words, the police do not simply enforce existing law, they also decide when to invoke state-sanctioned force to maintain 'law and order'. Despite its centrality to policing, discretionary powers of the police in India continue to remain understudied, particularly with regard to the police's function of maintaining law and order in light of the dominant social order of caste in India.

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[1] Radha Kumar, *Police Matters: The Everyday State and Caste Politics in South India, 1900–1975* (Cornell University Press 2021) 46.

Discretion has predominantly been seen as an 'abuse of power' resulting in the targeting of oppressed caste communities.[2] Yet, work tracing the genesis of police discretion in India, particularly within the casteist social fabric of Indian society, has been scant. This article attempts to locate the genesis of police discretion within the structure of caste. In order to do so, the article will rely on empirical analysis of alcohol policing carried out by the authors along with others in relation to the excise regime in Madhya Pradesh ('MP') through the MP Excise Act of 1915 ('Excise Act'), as part of a research undertaken by the Criminal Justice and Police Accountability Project ('CPA Project'). The study focused on the subjects of policing along with activities that contributed to framing narratives of criminality constructed through the excise regime. This article will veer away from the dominant discourse on policing and criminalisation, which only tangentially engages with caste and casteist criminalisation. While articulating the embeddedness of policing within the institution of caste, it will deconstruct the police function of law and order, and understand policing as both constructed by and an important tool for enforcing a Brahminical social order. Accordingly, this paper seeks to historically and empirically trace the evolution of discretion in policing in terms of situatedness within the institution of caste through the Criminal Tribes Act, 1871 ('CTA') and its subsequent legal formulations.

The CPA Project provides a contemporary understanding of everyday discretionary policing through a data-centred analysis of the criminalisation of oppressed caste groups and tribes under the Excise Act. However, this paper takes a different approach to examining discretion as casteist by taking a step back and providing a more systemic outlook to discretion. It looks at the system within which police discretion in India operates – namely caste, how this system came to be so, and why is it relevant to understand discretion in the context of caste. Thereby I foreground the CPA Project's study on the Excise Act and its present operation against this background.

Part I of the article traces the caste-based origins of the colonial institution of the police and provides an understanding of discretion as an instrument for maintenance of a caste-based order. Part II describes the journey from the use of caste as a marker for determination of criminality, specifically under the CTA, and its historical progression into present day policing systems and legislations. Part III, through empirical analysis of First Information Reports ('FIRs') and arrests made under the Excise Act in relation to police practices, demonstrates policing as Brahminism.

The Excise Act is a seemingly neutral legislation that regulates the import, export, sale, and possession of alcohol through a licensing regime. Excise policing has been a critical component of this exercise in

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[2] Criminal Justice and Police Accountability Project, 'Countermapping Pandemic Policing: A Study of Sanctioned Violence in Madhya Pradesh' (CPA Project, 2020) <https://www.indiaspend.com/wp-content/uploads/2020/11/Countermapping-Pandemic-Policing-CPAProject.pdf> accessed 6 May 2023 ('CPA Project').

social control since the British introduced excise laws in India. It formed over one-sixth of the total number of arrests in MP, and was second only to arrests pertaining to the Indian Penal Code ('IPC'), 1860.[3] A qualitative and quantitative analysis of police action, specifically FIRs, in this regard reveals how these are manifested through discretion.[4]Accordingly, we use Part III to demonstrate the casteist construction of narratives that are created and presented in police records, and how police discretion facilitates the criminalisation of oppressed caste groups.

The terms 'oppressed caste' and 'marginalised communities' in different contexts throughout the paper. The term 'marginalised communities' is used to denote oppression in a wider sense.[5] Similarly, we have also used administrative categories like Scheduled Caste ('SC'), Scheduled Tribe ('ST'), Denotified Tribes ('DNT'), and Other Backward Classes ('OBC') to refer to communities formerly known as untouchable castes, tribes, criminalised tribes, and other backward classes/tribes respectively, since the paper seeks to deconstruct seemingly neutral administrative categories in the context of policing. We have used terms of self-assertion like Dalit and Vimukta in addition to these aforementioned communities. Such state-formulated categories often constitute sites of dis-autonomy for the communities involved and of power formation and distribution by the state and are hence necessary for identification as such.[6]

Accordingly, we have utilised the terminologies of 'Brahmin' and 'Savarna' in relevant contexts in the paper. In addition, we also use the term 'dominant caste' for land-owning, formerly shudra castes, categorised as OBC caste groups.[7] In doing so, we also seek to push back against what Satish Deshpande terms as 'casteless' conceptualisation of the administrative 'general category' primarily comprising

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[3] National Crime Records Bureau, *Crime in India 2018 – Statistics* (2018), vol I.

[4] Importantly, this includes spaces that are both urban and those considered as peripheries (non-urban).

[5] See Jessica Hinchy, 'The Hijra Panic' in *Governing Gender and Sexuality in Colonial India: The Hijra, c.1850–1900* (Cambridge University Press 2019) 27-43. Hinchy describes ascription of 'bad profession' or hereditary professions of disrepute (like pimp; dancer, bard or performer; 'indefinite and non-productive'; and 'miscellaneous and disreputable') to hijra groups in various census records. In addition to their frequent appearance in caste and tribe lists, this demonstrates the application of the classificatory logic of *jati* to hijra groups as well.

[6] Gopal Guru, 'The Politics of Naming' (1998) 471 Seminar 14-18 <https://www.india-seminar.com/2018/710/710_gopal_guru.htm> accessed 5 May 2024. Guru expertly describes state formulated categories as:

> …through creating such categories the state promotes the myth of sponsored individual mobility and initiative. This dampens the possibility of creating an autonomous political identity and a discursive space which might help the SCs constitute a collective context to find solutions to their own substantive problems outside the state framework or even to interrogate this very framework. The state constituted categories are patronizing and hence acquire an ascriptive status like the category of harijan or asprustha.

[7] MN Srinivas, 'The Social System of a Mysore Village' in McKim Marriott (ed), *Village India* (University of Chicago Press 1955).

Brahmin and Savarna caste groups.[8] Further, we draw a structural distinction among Brahmins and Savarnas owing to the former's distinguished position within the caste system.

II. CASTE AT THE HEART OF POLICING – ORIGINS AND CONTINUANCE OF CASTEIST 'ORDER'

A. Origins of Policing

The British colonial authorities relied on the police to maintain their monopoly over resources, control the large colonised population, and prevent challenges to the empire's oppressive regime. Accordingly, they conferred a wide array of powers on the police.[9] The colonial government pursued two intertwined designs — establishing 'law and order' in the Indian society, and understanding the basis of such 'order' in the Indian society so as to appropriate it to the benefit of colonial power.[10]

After being introduced first in 1843 after the takeover of Sindh, the police in colonial India was modelled after the Irish paramilitary force intended to crush agrarian unrest and sporadic terrorism directed against British rule.[11] The police system can be viewed in the light of colonialism's need to establish a relationship of control, coercion, and surveillance over a subject population. Its structural and organisational features were helpful to a regime of exploitation and surplus appropriation. The British empire's colonial oppression of India, for capitalist accumulation of resources and wealth, was legitimised through the bluff of bringing civilisation, order, and morality to the 'savage' and 'lawless' people of India.[12]

As a whole, the creation of the police force was a response to two problems of colonial power: *first*, suppressing civil unrest, and *second*, consolidating economic interests.[13] The British had intended to free soldiers from police duties and focus on military activities; however, they required a 'civil' force that could ensure law and order and allow for industrial growth.[14] This was done for both financial and

[8] Satish Deshpande, 'Caste and Castelessness: Towards a Biography of the General Category' (2013) 48(15) Economic and Political Weekly 32.
[9] Aditya Mukherjee, 'Empire: How Colonial India Made Modern Britain' (2010) 45(50) Economic and Political Weekly 73.
[10] David Arnold, *Police Power and Colonial Rule: Madras 1859-1947* (Oxford University Press 1987) 138.
[11] KS Subramanian, 'The Sordid Story of Colonial Policing in Independent India' (The Wire, 20 November 2017) <https://thewire.in/government/sordid-story-colonial-policing-independent-india&sa=D&source=docs&ust=1680596106176272&usg=AOvVaw0MUPJO_g9eqnT9NKoEkMBG> accessed 4 April 2023.
[12] Srujana Bej, Nikita Sonavane and Ameya Bokil, 'Construction(s) of Female Criminality: Gender, Caste and State Violence' (2021) 56(36) Economic and Political Weekly <https://www.epw.in/engage/article/constructions-female-criminality-gender-caste-and&sa=D&source=docs&ust=1680596106152563&usg=AOvVaw3x9M55dmD2BuQhMJOXzLLh> accessed 4 April 2023.
[13] Arnold (n 10) 11, 13.
[14] Dilip K Das and Arvind Verma, 'The Armed Police in the British Colonial Tradition: The Indian Perspective' (1998) 21(2) Policing: An International Journal 354, 359.

organisational reasons. As posited by historians, the new model adopted was based on the Irish model of policing, i.e., created for a foreign land as a reserve force available during emergencies to quash disturbances, thereby prioritising 'order' over 'law.'[15]

The British had previously experimented with a police system involving pre-colonial village watchmen (*taliaris*). However, this was stopped after the emergence of widespread reports of use of torture for exacting confessions and demanding bribery.[16] This further culminated in the adoption of a system that involved policing through village headmen or 'respectable members of the community', according to the Indian Police Commission Report of 1902 prepared by the Fraser Commission constituted by the colonial government to recommend police reforms (the 'Fraser Commission Report').[17] These 'respectable members' were invariably landed individuals of dominant castes.

The Fraser Commission Report also suggested the abolition of village beats or patrols by the police and handed additional policing powers over to village headmen. Additionally, it removed fetters to their discretion in deciding matters of criminality by not prescribing any procedure for disposal of cases and allowing "local custom to settle the issue".[18] This naturally meant an increase in the ability of the village headmen, generally from landed upper caste groups, to exploit other communities. Subsequently, with the nationalist movement entering its extremist phase and the beginning of the First World War, the police increasingly became paramilitary and centralised.[19] Even in this context, the discussions around village police remained relevant and the village headmen continued to play an important role in rural policing even after independence.[20]

Another point of relevance was the inclusion of 'menial classes', or persons from oppressed castes in the village police, specifically as watchmen or *chowkidars*. As the Fraser Commission Report noted, "...the menial classes, as village servants, are more amenable to orders and ordinarily maintain better watch and ward than higher castes."[21] While recruitment of particular oppressed caste groups as village *chowkidars* seemed to marginally improve for a very brief period, statistics post 1902 show a steady decline. This was attributable primarily to the caste-based martial race theory and to the reduction of village *chowkidars*, as

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[15] ibid 355-357.
[16] Arnold (n 10) 21.
[17] Andrew HL Fraser, *Report of the Indian Police Commission 1902-03* (Government Central Printing Office 1903) ('Fraser Commission Report').
[18] ibid 22-36.
[19] Anand A Yang, *Crime and Criminality in British India* (University of Arizona Press 1985) 80; David H Bayley, *The Police and Political Development in India* (Princeton University Press 1969) 49.
[20] Bayley (n 19) 50.
[21] Fraser Commission Report (n 17) 33.

Kumar demonstrates.[22] Similarly, even in the context of lower caste informers employed by the police, or 'leading men' as in the case of the CTA, such informers functioned within a framework of coercion and necessity.[23] These 'leading men' were used by the colonial police as a means of control and submission over the communities. Policing functioned within a caste-based framework of control and coercion even when persons from oppressed caste groups were included.

B. Police Discretion as Maintenance of Caste 'Order'

In facilitating 'order' through the police, the colonial government's aim was twofold — to define what 'order' connotes, and to allow police forces to utilise their discretionary powers to secure such order. In seeking the basis of this 'order' in Indian society, British colonial authorities identified the caste system as the 'essence', and thereby the 'order', of Indian society.[24] The colonial government engaged in extensive ethnographic discourse to ascribe certain identifiable occupational and behavioural characteristics to each caste, which were deemed to fit into one another.[25] For instance, during colonial times, an unquestionable link was institutionalised between the Dalit (ex-untouchables) caste group Chamars and the profession of leather work and tanning, despite evidence that members of the caste group also practised other peasant professions such as agricultural labour.[26] Colonial discourse then engaged in deductive speculation to associate leather work (regarded as degraded or polluted work) with "questionable credentials".[27]

Using these knowledge practices, the police objectified colonial subjects based on their caste identity and occupation. The priest, warrior, or merchant castes were considered respectable, while occupations like hunting, which the wandering tribes engaged in, were considered suspicious.[28] Accordingly, the wandering tribes who engaged in such occupations were understood as thrifty, labouring, and litigious castes. The colonial police channelled their meagre resources to effectively police the broader rural population as well.[29] The problem of the limitedness of policing resources was overcome through an extensive surveillance regime, and a facade of order that pinned criminality on specific communities who

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[22] Vijay Kumar, 'The Chaukidari Force: Watchmen, police and Dalits from the 1860s to the 1920s in the United Provinces' (2020) 7(1) Studies in People History 65, 78.

[23] Jessica Hinchy, 'Gender, Family and Policing of the Criminal Tribes in Nineteenth Century North India' (2020) 54(5) Modern Asian Studies 1669.

[24] Jessica Hinchy, 'Conjugality, Colonialism and the 'Criminal Tribes' in North India' (2020) 36(1) Studies in History 20, 25.

[25] Yang (n 19) 114.

[26] Saurabh Mishra, 'Of Poisoners, Tanners and the British Raj: Redefining Chamar identity in colonial North India, 1850–90' (2011) 48(3) The Indian Economic and Social History Review 317.

[27] ibid.

[28] Arnold (n 10) 36.

[29] Kumar (n 1) 22.

were propped up as the "proper objects of policing" on account of their socio-economic vulnerability and the "consensus" among ruling castes about their "otherness" perceived as deviance.[30]

Thus, for the colonial government, establishing the facade of law and order meant focusing its policing resources on communities who were, within the logics and sanctions of the casteist order of Indian society, of 'questionable', 'deviant', 'immoral' characteristics, and therefore likely or predisposed to threaten law and order. Reliance of colonial police on native functionaries to ensure 'order', as discussed above, cemented discretionary policing within the logics of caste woven into 'routine', 'template', and official or customary police procedures.

It is also not such that the police always reaffirmed caste hierarchies, but rather that caste politics and policing were not independent or exclusive of each other.[31] Colonial policing employed the language of community in designating its objects, deeming certain communities to be more criminal than others.[32] Colonial authorities thus easily and readily relied on the caste system to propagate that "...people from time immemorial have been pursuing the caste system-defined job-positions…So there must have been hereditary criminals also who pursued their forefather's profession."[33] An embodiment of the operationalisation of this understanding was the CTA. The colonial police was the institution responsible for implementing the CTA. The reliance on village headmen and other local entities for policing waned through the creation of a police force.

III. <u>Policing Hereditary (Caste) Criminals - The Case of the CTA</u>

The notion of the hereditary criminal was pioneered in 18th and 19th century European criminology through pseudo-scientific notions of criminality as an innate and heritable biological trait.[34] The caste system only provided this 'science' the legitimacy and teleology for creating the sociological category of the 'criminal tribe' and branding entire communities as hereditary, born criminals.

In India, colonial goals, and consequently policies, prioritised prosperity for the 'metropolis' (England) at the cost of the resources of the colony (India).[35] Accordingly, this necessitated the regulation of society in a manner conducive to the promotion of trade, through the disruption of existing livelihoods and categorisation of certain practices related to such livelihoods as 'illegitimate' and 'undesirable'. This

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[30] Rajnarayan Chandavarkar, *Imperial Power and Popular Politics: Class, Resistance and the State in India, 1850–1950* (Cambridge University Press 1998) 238-240.
[31] Kumar (n 1) 27-28.
[32] ibid 241.
[33] Dilip D'Souza, 'Declared Criminal at Birth' (2001) 123 Manushi 1.
[34] Chandavarkar (n 30) 241.
[35] Arnold (n 10) 12-13.

naturally involved controlling and prosecuting 'nomadic' and the 'vagrant' communities. Colonial officials in India were highly suspicious of nomadic groups, likening them to thieves and robbers who harmed traders and travellers and thereby needed to be controlled. Erstwhile criminological ideas around vagrancy in Britain have described itinerancy as the "nursery of crime".[36] As has been conceived by scholars, notions of the criminality of itinerant groups that formed with respect to the Gypsies and the Irish nomads in the British territory were naturally transposed on nomadic traders and performing groups in India. As Dragomir argues, the 'Gypsy' terminology, and the connotations it carried, were superimposed on the itinerant groups in India.[37]

Nomadic and semi-nomadic communities, also falling outside the caste system, were particularly considered 'deviant' and 'disorderly' by the colonial state by virtue of the hegemonic caste system. Through their mobility, nomadic communities were capable of evading the Empire's imperial capitalist culture of 'modernity' and 'progress' — sedentarisation, state control, and taxation.[38] Nomadic communities also challenged the colonial usurpation of land and forests, and Brahminical notions of caste order through their unregulated livelihoods. Thus, the colonial government enacted the CTA to criminalise nomadic and semi-nomadic communities as hereditary criminals "addicted to the systematic commission of non-bailable offences".[39]

The CTA allowed the colonial government to focus its limited policing resources on disciplining and reforming 'hereditary criminals' and thereby establishing law and order in Indian society. As Radha Kumar argues, it was easier for the colonial government to identify a criminal and attribute criminality on the basis of membership of a caste group, than to prove evidence of criminality for each alleged crime.[40] The CTA's criminalisation of entire communities as hereditary criminals would not have been possible without the existence of the caste system and its central feature of hereditary occupations. Besides, the CTA offered the opportunity to address other concerns, such as, quelling the challenge to colonial usurpation of land and forests as well as deterring the challenge to colonial authority by raider-protector groups.[41] Simultaneously, the colonial machinery also constructed occupational or kin-based

[36] ibid 39-42.
[37] Christina Dragomir, 'Nomads, "Gypsies" and Criminals in England and India from the Seventeenth to the Nineteenth Century' (2019) 2(1) Critical Romani Studies 62, 73.
[38] Subir Rana, 'Nomadism, ambulation and the 'Empire': Contextualising the criminal tribes act XXVII of 1871' (2011) 2(2) Transcience: A Journal of Global Studies 2191.
[39] Criminal Tribes Act 1871, s 3; Raghaviah V, *The Problem of 'Criminal Tribes'* (Bharatiya Adimjati Sevak Sangh 1949) 6.
[40] Kumar (n 1) 33.
[41] Hinchy, 'Gender, Family and Policing of the Criminal Tribes in Nineteenth Century North India' (n 23).

hereditary criminalities such as thuggery, dacoity, petty offences, etc. by drawing legitimacy and logic from the caste system's rigid occupational hierarchy.[42]

The CTA extended to the whole of British India by 1911 and legitimised the forced settlement and mass surveillance of nomadic communities notified as criminal tribes.[43] The colonial police was the institution responsible for implementing the CTA.[44] Under the provisions of the CTA, the village police officials conducted regular 'roll-calls' for community members and surveyed their activities and movements to prevent and deter crime.[45] The CTA also institutionalised the police's practice of blanket surveillance and maintaining detailed registers of the branded communities to document their criminal 'habits' and 'criminal antecedents'. The CTA and colonial police regulations granted wide discretionary powers to the police over these communities, and (as provided in ethnographic accounts) the village police freely abused their powers to perpetuate violence, extortion, fraud, and bribery.[46]

Policing under the CTA was not isolated from other regular policing practices that extended to larger populations. The caste-objectified knowledge production process allowed larger categorisation of deviance/immorality or respectable orderliness to flourish. For instance, the *Julahas* (marginalised caste Muslim communities) who mobilised against the decimation of the indigenous handicraft industry were pejoratively stereotyped. They were termed as bigoted, backward, and despotic, primarily through caste-linkages.[47] Similarly, 'vagrant castes' were criminalised in Madras to preserve the colonial economy of developing trade relations with upper caste communities.[48] Thus, by inventing, discovering, and documenting the 'criminality' of these nomadic and marginalised caste communities, the police institutionalised and sanctified the criminality of such communities. It is important to note that in such cases, the police functioned as social actors with caste identities, even while serving as state functionaries.[49]

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[42] Chandavarkar (n 30) 238.
[43] Meena Radhakrishna, *Dishonoured by History: "Criminal Tribes" and British Colonial Policy* (Orient Blackswan 2001).
[44] Sarah Eleanor Gandee, 'The "Criminal Tribe" and Independence: Partition, Decolonisation and the State in India's Punjab, 1910s-1980s' (DPhil Thesis, University of Leeds, 2018) <https://etheses.whiterose.ac.uk/22408/1/Gandee_SE_History_PhD_2018.pdf> accessed 27 June 2022.
[45] ibid 33.
[46] Radhakrishna (n 43).
[47] Gyanendra Pandey, *The Construction of Communalism in Colonial North India* (first published 1990, OUP 2012) 71; Khalid Anis Ansari, 'Contesting Communalism(s): Preliminary Reflections on Pasmanda Muslim Narratives from North India' (2018) 1 Prabuddha: Journal of Social Equality 87 <https://prabuddha.us/index.php/pjse/article/view/17> accessed 7 April 2023.
[48] Kumar (n 1) 27.
[49] ibid 23.

A. **Repeal and Regurgitation – Transformation of the Criminal Tribe to the Habitual Offender**

In 1939, the Report of the Criminal Tribes Act Enquiry Committee set up by the Bombay Government noted that "after tribes are denotified, it would be necessary and desirable to deal with individual habitual or confirmed criminals", implying that in the event that the CTA is repealed, it would be necessary to enact a legislation aimed at criminal individuals who would have been notified under the CTA. Similarly, a 1937 meeting of the Congress Committee in Bombay and the United Provinces also proposed that the CTA should be repealed and two laws — one dealing with habitual criminals and another dealing with nomadic tribes or sections who have not permanently settled — should be formulated to check their movements.[50] Notably in 1947, only one voice in the Constituent Assembly, that of H.J. Khandekar, was prominent in demonstrating the injustice that would result by continuing to consider a community 'criminal' under the new Constitution of India, which envisaged rights against discrimination and the emancipation of various groups.[51] His argument, of such criminal tribal communities having a right to be treated equally, and for the abolition of the colonial CTA thereby 'denotifying' such communities as criminals, was met with resistance. Members including Deshbandhu Gupta and B.R. Ambedkar argued against the absolute provision of such equality, rather arguing for the state prerogative of maintaining order.[52] As Gandee notes in this regard, the rights bestowed by the Constitution remained subordinate to the exigencies of statehood, like the maintenance of law and order. Further, such order was still being posited on the control and surveillance of communities that were 'habituated' to crime.

The discussions around the repeal of the CTA by the newly-formed, post-independence government amply show that the perception of criminality of certain communities was directly derived from their itinerant or nomadic nature, similar to the colonial disposition (as discussed earlier in this section). In

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[50] Daxinkumar Bajrange, Sarah Gandee and William Gould, 'Settling the Citizen, Settling the Nomad: 'Habitual Offenders,' Rebellion, and Civic Consciousness in Western India, 1938–1952' (2019) 54 Modern Asian Studies 337.

[51] Constituent Assembly Debates (21 January 1947) <https://www.constitutionofindia.net/debates/21-jan-1947/> accessed 10 May 2024.

[52] Deshbandhu Gupta: "I would like to ask, why should not restrictions be imposed on the movement of the criminal-tribe people, when they are a source of danger to other law-abiding citizens? Could anyone be serious in saying that restrictions and conditions imposed on the criminal tribes should not have been imposed at all?"
B.R. Ambedkar: "For instance, if Mr. Kamath's proposition was accepted, that every citizen should have the fundamental right to bear arms, it would be open for thousands and thousands of citizens who are today described as criminal tribes to bear arms. It would be open to all sorts of people who are habitual criminals to claim the right to possess arms."
See Constituent Assembly Debates (2 December 1948) <https://www.constitutionofindia.net/debates/02-dec-1948/> accessed 7 April 2023.

Gandee's elaborate study of the discourse around the repeal of the Act, this is displayed in the attitudes of the numerous committees tasked with the mandate of determining the fate of the CTA.

As noted above, post-independence discussions around the repeal were already taking place based on the new vision of equality through constitutional mandate.[53] However, notions surrounding the 'criminal tribes' remained intact. Even the Ayyangar Committee, formulated by the Central Government to enquire into the reform and repeal of the CTA, relied on colonial knowledge and derived from ethnographical records to recommend the repeal of the CTA. Despite the assertion of the Committee that the categorisation of habitual offenders should not be contingent upon caste/tribe unlike the CTA, it retained the idea of inherent criminal proclivity[54] albeit not hereditary, but influenced by socio-economic factors, and further noted that there was a "large demand for some kind of control and restriction over the habitual offenders, to whatever community they may belong".[55] The Chief Commissioner of Delhi in his submissions to the Government in 1951 concerning the repeal of the CTA had noted that there are "ethnological and administrative grounds" to identify "every adult member of a criminal tribe" as a potential criminal and therefore subject to state control.[56] He had also argued that "real danger [was] the nomadic temperament of certain tribes as with such people, the normal provisions of the Criminal Procedure Code ('CrPC') usually fail [because] a person proceeded against might jump his bail and disappear for good before an order of restriction could be [made] final or effective", thereby requiring special legislation.[57]

The CTA was repealed in 1952, and nomadic and semi-nomadic communities were de-notified and began asserting their identity through the term 'Vimuktas'. However, independent India still retained the colonial policing model,[58] as demonstrated by the enactment of 'habitual offenders' legislations and other provisions under the Indian Police Act and Police Manuals. More importantly, these legislations, and the intent behind them, encapsulated similar logics of criminality against DNTs through policing. This is evident from the discussions that occurred in the period prior to independence, in the Constituent Assembly, and in jurisprudence from the time of India's independence till the repeal of the CTA in 1949.

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[53] Gandee (n 44) 164. For instance, the Ministry of Home Affairs noted in 1949 that: "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 certain classes of people as Criminal Tribes, are inconsistent with the dignity of free India."
[54] Gandee (n 44) 169.
[55] ibid; Ananthasayanam M Ayyangar Committee, *Report of the Criminal Tribes Act Enquiry Committee (1949-50)* (Criminal Tribes Act Enquiry Committee 1951) 90.
[56] 'Letter from Shankar Prasad to R N Philips, Ministry of Home Affairs, 30 April 1951' (1950) MHA/Police-I, File no. 19/9/50, NAI.
[57] ibid; Gandee (n 44) 158.
[58] Gandee (n 44) 4.

Thereby, the rhetoric around the maintenance of order led to percolation of such ideas associating criminality with nomadism, reminiscent of colonial penology, into the category of the 'habitual offender' and/or 'bad character,' which are ill-defined categories equating reputation with criminality. This shows that even though the constitutional project of equality[59] was apparently fulfilled and the specific compartmentalisation of the criminal tribe communities removed documentarily, the new categories — that of the 'habitual offender' directly derived its ethos from these erstwhile 'criminal' communities.

Today, several states have enacted legislations and executive regulations, notably the Habitual Offenders Acts, to preserve the institutionalised practice of community surveillance through categories of the habitual offender, some still preserving direct links to the CTA.[60]

The administrative classification of a habitual offender to be carried out by the police and bolstered by a broad legal framework makes police discretion the force for breathing life into this category. The colonial, caste-based 'hereditary criminal' has now been recast in the seemingly nebulous, neutral, objective administrative category of the 'history sheeter', 'habitual offender', and 'bad character.' Such a characterisation is reminiscent of colonial narratives describing marginalised castes as 'dangerous' and 'suspected offenders' by citing the lack of sufficient livelihood or susceptibility to drunkenness of such castes.[61] This is evident in present-day criminal laws, both 'special' and 'general',[62] which provide legal substantiation for the continuance of these practices.

An instance of this is the Model Police Manual, wherein the surveillance and check of 'bad characters' is the police officer's duty.[63] Sub-inspectors are required to maintain "effective surveillance of bad characters, anti-social elements, and rowdies of the area under his charge".[64] Among the chief duties of the police constable is the "surveillance over the history sheeter and other potential criminals as per orders."[65] 'History sheeters' and 'potential criminals' are not defined in the law, while 'bad characters' are very broadly defined as "offenders, criminals, or members of organised crime gangs or syndicates or

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59 ibid; see also *State of Madras v Champakam Dorairajan* AIR 1951 SC 226.
60 Kumar (n 1) 40.
61 Sanatana Khanikar, *State, Violence, and Legitimacy in India* (Oxford University Press 2018) 50-51.
62 Special law refers to legislations such as state-specific Excise Acts, the Wildlife Protection Act 1972, Prevention of Beggary Act 1972, and other legislations that create offences outside the Indian Penal Code. General criminal law relates to statues like the Criminal Procedure Code 1973, the Model Police Manual, and other legislations dealing with policing in general.
63 Model Police Manual, s 6(2)(b) <https://bprd.nic.in/WriteReadData/userfiles/file/6798203243-Volume%202.pdf> accessed 31 May 2022.
64 Model Police Manual, s 35.7.
65 Model Police Manual, s 38.

those who foment or incite caste, communal violence, for which history sheets are maintained and require surveillance."[66]

The MP Police Regulations also provide similar powers. Under Section 858, 'bad characters' may be subject to surveillance upon the executive order of a Superintendent of Police. Additionally, a magistrate is empowered under Section 839 to require a person to furnish security for good behaviour in the context of arrest of persons found "in a particular locality under such circumstances as to create a suspicion that they are there for the purpose of committing crime" and who are commonly reputed to be habitual criminals. It is important to underscore that conviction is irrelevant for the determination of an individual, including children, as a habitual offender. Mere accusation of an offence or suspicion of commission of one is sufficient.

Even under procedural laws like the CrPC, as it presently stands, provisions like Section 110[67] that requires security of good behaviour from habitual offenders, utilise a pernicious, and as Singha

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[66] Model Police Manual, s 193(III).

[67] Code of Criminal Procedure 1973, s 110 (Security for good behaviour from habitual offenders).

> When an Executive Magistrate receives information that there is within his local jurisdiction a person who—
> (a) is <u>by habit</u> a robber, house-breaker, thief, or forger, or
> (b) is <u>by habit</u> a receiver of stolen property knowing the same to have been stolen, or
> (c) <u>habitually</u> protects or harbours thieves, or aids in the concealment or disposal of stolen property, or
> (d) <u>habitually</u> commits, or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the Indian Penal Code (45 of 1860), or under section 489A, section 489B, section 489C or section 489D of that Code, or
> (e) <u>habitually</u> commits, or attempts to commit, or abets the commission of, offences, involving a breach of the peace, or
> (f) <u>habitually</u> commits, or attempts to commit, or abets the commission of—
> (i) any offence under one or more of the following Acts, namely: — (a) the Drugs and Cosmetics Act, 1940 (23 of 1940);
> (b) the Foreign Exchange Regulation Act, 1973 (46 of 1973);
> (c) the Employees' Provident Fund and Family Pension Fund Act, 1952 (19 of 1952);
> (d) the Prevention of Food Adulteration Act, 1954 (37 of 1954);
> (e) the Essential Commodities Act, 1955 (10 of 1955);
> (f) the Untouchability (Offences) Act, 1955 (22 of 1955);
> (g) the Customs Act, 1962 (52 of 1962);
> (h) the Foreigners Act, 1946 (31 of 1946); or
> (ii) any offence punishable under any other law providing for the prevention of hoarding or profiteering or of adulteration of food or drugs or of corruption, or

demonstrates, colonial method,[68] for proving whether an individual is a habitual offender. Section 116, which relates to inquiry as to truth of information for orders made in relation to Section 110, provides that: "For the purposes of this section the fact that a person is a habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise."[69]

As various scholars have concluded, these provisions are utilised disproportionately against marginalised groups, especially against members of the denotified and nomadic tribes.[70] Notably, Singha describes how provisions like Section 109 and 110 of the CrPC criminalise "bad-livelihood", which in practice has been aimed at individuals who are "taking precautions to conceal his presence. . . with a view to committing an offence" or with "no ostensible means of subsistence, or who cannot give a satisfactory account of himself…", inevitably meaning criminalisation of destitute and impoverished groups of people.[71] Thus, the present legal provisions systematically provide wide discretionary powers to the police to determine the objects of policing — the 'history sheeters', 'potential criminals', and 'bad characters.' The subsequent section demonstrates how the figure of the 'habitual offender' embodying the logic of the CTA is cultivated through the Excise Act.

IV. WHAT THE DATA SAYS — UNDERSTANDING CASTE AS DISCRETION

Following from the previous section, the narratives around control and order are intricately linked to reputational offences which, in turn, revolve around communities viewed as 'criminal', 'violent', or otherwise 'undesirable'. This understanding has led to the retention of police discretion reminiscent of colonial policing. Police practices like history sheeting still document the lives, habits, ancestry, movements, and 'criminality' or modus operandi of individuals who are habitually suspected of committing crimes. An individual's entry in these registers makes one perpetually suspect of committing

> (g) is so desperate and dangerous to render his being at large without security hazardous to the community, such Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit. (emphasis supplied)

[68] Radhika Singha, 'Punished by Surveillance: Policing 'dangerousness' in colonial India, 1872-1918' 49(02) Modern Asian Studies 241.

[69] Code of Criminal Procedure 1973, s 116(4).

[70] Nikita Sonavane and Aditi Pradhan, 'MP Moves to Commissionerate System, but Will It Make Police More Accountable?' (The Wire, 10 February, 2022) <https://thewire.in/government/madhya-pradesh-police-commissionerate-systemp-accountability> accessed 7 April, 2023; Shivangi Narayanan, 'Making of a Criminal, One Register at a Time' (*Detention Solidarity Network*, 25 April 2021) <https://detentionsolidarity.net/making-of-a-criminal-one-register-at-a-time-shivangi-narayan/> accessed 7 April, 2023.

[71] Singha (n 68) 241.

crimes and leaves one vulnerable to police surveillance, suspicion, indiscriminate arrests for petty or imagined offences, police extortion, and violence.[72]

Notably, post-independence laws that do not directly relate to policing, for example, laws regulating access to forests, cattle slaughter, wildlife protection, alcohol production and sale, gambling, etc. also allow for wide scope of discretion while retaining underlying pre-colonial casteist narratives. Such laws seek to criminalise oppressed caste groups, specifically historically criminalised communities like the DNTs comprising primarily nomadic tribes ('NTs') and semi-nomadic tribes ('SNTs') among others.[73] These laws predominantly criminalise the cultures and livelihoods of these communities, while also forming a bulk of offences legally characterised as 'minor/petty offences'. Everyday policing, comprising policing of streets, neighbourhoods, homes, and other spaces of oppressed caste communities, is characterised by the rationale of public order, i.e., the phenomenon of 'broken windows policing.'[74]

A review of the existing data on such legislations demonstrates that the aforementioned narratives of criminalisation continue to pervade police understanding in exercising discretion.[75] A prominent instance of this is the case of excise policing in India, a review of which helps us understand the substance of such discretion. Alcohol policing is one of the prominent fields of policing that affects tribal communities in India, specifically in terms of criminalisation of oppressed castes and tribal groups. In this regard, this article focuses on the state of MP, considering that it ranks foremost in the use of excise laws against citizens.

A. Historical Context — Brahminical Undesirability as Temperance

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[72] Shivangi Narayan, 'Guilty Until Proven Guilty' (2021) 5 Journal of Extreme Anthropology 112, 114.

[73] Criminal Justice and Police Accountability Project, 'Wildlife Policing in Madhya Pradesh: Report' (CPA Project, 2022) <https://cpaproject.in/wp-content/uploads/2023/02/WPA-FINAL-DRAFT.pdf> accessed 7 March 2023.

[74] J Philip Thompson, 'Broken Policing: The Origins of 'Broken Windows' Policy' (2015) 24 (2) New Labor Forum 42 <https://www.jstor.org/stable/24718595> accessed 7 April 2023; George L Kelling and James Q Wilson, 'Broken Windows' (*The Atlantic*, 1982) <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> accessed 7 April 2023; Sabina Yasmin Rahman, 'The Beggar as a Political Symbol: An Interactionist Reading of the Endurance of Anti-Begging Laws in India' (2021) 51(2) Social Change 206. The 'broken windows' justification to policing presupposes leniency towards minor offences such as littering, vagrancy, and beggary and even non-criminal behaviour. In the Indian context, as Rahman describes, this justification is regularly invoked prominently in support of anti-beggary laws.

[75] *See* Bhangya Bhukya, 'The Lost Ground: The Fate of the Adivasi Collective Rights' (2020) 55(14) Economic and Political Weekly 53; Criminal Justice and Police Accountability Project, 'Wildlife Policing: The Reign of Criminalisation in the forests of Madhya Pradesh' (CPA Project, 2023) <https://cpaproject.in/wp-content/uploads/2023/01/Report-Release-Draft_P-120th-jan.pdf> accessed 25 May 2023; Shomona Khanna, 'The draconian face of the Wildlife Protection Act, 1972' (The Leaflet, 10 June 2022) <https://theleaflet.in/the-draconian-face-of-wildlife-protection-act-1972/> accessed 27 May, 2023.

The manufacture, consumption, and sale of alcohol, more specifically native or *desi* liquor such as *mahua*, is heavily policed. Consequently, specific communities, who have produced and consumed such liquor as part of their cultural practices are predominantly impacted.[76] The notions of casteist undesirability are also inherent to the policing of such liquor as excise policing presupposes values such as temperance and views oppressed caste groups like Adivasis and DNT communities as 'uncivilised' and therefore undesirable. As evidenced from the discussion in the previous sections, these Brahminical ideas are reflected, and are criminalised in the exercise of police discretion under excise laws. Analysing policing of alcohol, or excise policing is important from the standpoint of its connection to oppressed caste communities, and also from the perspective of its utilisation of police discretion for the maintenance of the state's economic order by continuing the casteist criminalisation of individuals from marginalised groups, especially DNTs.

The policing of liquor has its roots in colonial administrative practices, where legislations like the Bombay Abkari Act, 1878 and the Mhowra Act, 1892 were enacted to centralise the excise regime and create an industry suitable to economic exploitation and benefit for the colonial state.[77] Parallelly, the nationalist movement also endorsed temperance in relation to alcohol. While tribal communities, who were impacted by colonial excise laws preferred abstinence as an escape, the nationalist movement, including leaders like Gandhi, rooted consumption of alcohol in the Brahminical scriptures and denounced such consumption as a sin.[78] Therefore, the resultant framework of law that emerged out of the predominant narratives effected a system of order for excise policing that imposed restrictions and criminalised offences based on primarily Brahminical notions of the 'sinfulness' of alcohol consumption. This not only led to the creation of a rigid and arbitrary structure of policing, but also impacted Adivasis and other communities, several of whom were already considered to have 'criminal tendencies' under the CTA.

B. Relevance of Analysing Excise-Related Arrest Data and FIRs

The CPA Project's study on excise policing has been conducted in the state of MP through analysis of police records and data in the form of arrest records and FIRs from 2018-2020. Police knowledge of

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[76] Anil Kumar Tiwari, 'How MP's New Excise Law Criminalises Traditional Liquor Brewers, Even Contains a Death Sentence' (*Article 14*, 5 May 2022) <https://article-14.com/post/how-mp-s-new-excise-law-criminalises-traditional-liquor-brewers-even-contains-a-death-sentence--62734cd9eae28> accessed 3 February 2023.

[77] Rohit De, *A People's Constitution: The Everyday Life of Law in the Indian Republic* (Princeton University Press 2018) 43.

[78] Criminal Justice and Police Accountability Project, 'Drunk on Power: A Study of Excise Policing in Madhya Pradesh' (CPA Project, 2021) <https://cpaproject.in/wp-content/uploads/2021/08/Drunk-on-Power-A-study-of-Excise-Policing-in-Madhya-Pradesh-CPA-Project-14-Aug-2021-1.pdf> accessed 22 March 2023, 14; Shivakumar Jolad and Chaitanya Ravi, 'Caste, Conservative, Colonial and State Paternalism in India's Alcohol Policies' (2022) 3(5) Indian Public Policy Review 87, 97-99.

such nature, including data and statistics, has been considered valuable to determine efficiency of policing, particularly within the colonial framework.[79] The study focuses on whether the exercise of discretionary power by police under the Excise Act, directed towards marginalised individuals, is "just, principled and non-discriminatory".[80] Records such as arrest data and FIRs signify the proportion of arrests made, the police resources spent, details about the identity of the accused and the investigating officer, and the offences involved. FIRs are especially important in this regard as they detail the specifics of each offence — age, gender, caste and religion of the accused, site of the offence, details regarding other individuals involved, police, witnesses, informants, the occurrence of seizure, arrest and bail, in addition to the reasons recorded by police about commission of a crime.[81]

The FIRs especially play an important role in the construction and solidification of criminal identities in the Indian criminal justice system. As the Fraser Commission on the Indian Police noted, the work of the Indian police is almost entirely judged by statistics — verifiable data like percentage of cases, detections, convictions, arrests, and prosecutions.[82] The FIRs, being the first recording of factual recollections concerning the commission of an offence, serve as initial institutional knowledge and are considered to fall in the empirical and objective realm. Their standardised format, originally implemented on the recommendations of the Fraser Commission, established their role as a formal, objective, bureaucratic exercise establishing the bare facts of a case. This has also provided it an evidentiary role – for establishing a 'relevant fact' in a criminal trial.[83] The standardisation of the FIR has, Kumar argues, ultimately led to the consideration of the FIR as an anonymous document that contains "portable, standardised data" answering evidentiary questions for the court regardless of context.[84] While the narratives contained in FIRs are eventually contestable and subjective, they instead appear as data. Significantly, as FIRs contain the grounds for criminalising and arresting an individual and are majorly relied upon throughout the criminal trial, they are a crucial site of negotiation of individual power and exercise of police power.

Generally, police practices like arrests are specifically predicated on the police functionary's power to exercise discretion, based on a 'reasonable belief', 'credible information', or 'reasonable complaint'.[85] The power of preventive arrest and custody under section 151 of CrPC can similarly be exercised by the police only "if it appears to the police officer that the commission of the offence cannot otherwise be

[79] Fraser Commission Report (n 17).
[80] CPA Project, 'Drunk on Power: A Study of Excise Policing in Madhya Pradesh' (n 78) 24.
[81] ibid 29.
[82] Fraser Commission Report (n 17) 130.
[83] Indian Evidence Act 1872, s 9.
[84] Kumar (n 1) 64.
[85] Code of Criminal Procedure 1973, s 54.

prevented." The powers of search under section 165 of the CrPC are invoked when the investigating police officer has "reasonable grounds for believing… that such thing cannot in his opinion be otherwise obtained without undue delay."

In contrast, the only time that the police are supposedly prevented from exercising discretion in the investigation and prevention of crime is during the registration of the crime. This has also been reaffirmed and mandated by the Supreme Court in *Lalita Kumari v. State of Uttar Pradesh*,[86] which requires the police to mandatorily register FIRs. However, even here, the police are seen to have the discretion to dictate the narrative of criminality in the content of the FIR itself. The study's analysis of the FIRs reveals that there are extraneous factors at play in context of the circumstances at the time of arrest and registration of the FIR. Considering that discretion is often wielded by the police as per their understanding of social norms and moral responsibilities, FIRs that are a description of events where the police determine an offence to have taken place, do not actually represent the number of times the law has been violated in reality, which may be lesser.

C. Templatisation of FIRs, Reliance on Anonymous Informants

An analysis of FIRs in excise cases reveals a template form: beginning with an informant's tip, police officers reaching the spot of the 'crime', and subsequently questioning the accused regarding the licence to sell alcohol.[87] Templatisation itself becomes problematic in the context of FIRs, presenting a veneer of objectivity over highly contested sites where power is negotiated by individuals with access to caste and state power, as Kumar demonstrates in her analysis.[88]

The excessive reliance on the informant (*mukhbir*) in excise policing also raises several concerns about policing and police discretion, given that the informant on whose information the police acts is anonymous. Further, since a substantial number of the informants are from the criminalised groups themselves, their work with the police to target fellow community members is likely to cause conflicts and tensions within the community.[89] This templatisation is concerning, as FIRs are required to have a factual version of events and are supposed to contain description of *particular* events.

Templatisation points to the possibility of a set version of events being presented in the FIR, rather than the realities of each instance in which an offence was allegedly committed. Such templates on close scrutiny may reveal other factors (the aforesaid negotiations) at work. For instance, where a person belonging to a Scheduled Caste was arrested by the police for allegedly getting drunk in 'public', the FIR

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[86] *Lalita Kumar v State of Uttar Pradesh* (2008) 14 SCC 337.
[87] CPA Project, 'Drunk on Power: A Study of Excise Policing in Madhya Pradesh' (n 78) 4.
[88] Kumar (n 1) 64-79.
[89] CPA Project, 'Drunk on Power: A Study of Excise Policing in Madhya Pradesh' (n 78) 5.

detailed the alcohol in question, medical examination, and the fact that the accused could not walk properly. However, closer analysis revealed that the 'public' place in question was the accused's address, the witnesses concerned were a police officer and a stock witness, in addition to the fact that the alcohol quantity seized was half a quarter and of merely Rs. 50 in value.[90] Further, the accused person's actions, namely, being drunk in 'public' and possessing alcohol, are neither offences under the Excise Act nor an offence in law. Thus, such descriptions in FIRs reveal the problematic nature of the construction of FIRs.

The construction of 'modern' criminality, as rooted in the enduring legacy of the CTA, can clearly be seen in the formulation of the FIRs. As per the CPA Project report, a majority of such FIRs had vague or no explicit allegations,[91] i.e., they did not detail specific subsections of the law being applied or specify the commission of an offence. A substantial number of FIRs even outlined lack of "license for possession" of alcohol as a ground for arrest.[92] Mere possession does not qualify as an offence under the excise law, which penalises possession of unlawfully manufactured alcohol, or possession in contravention of rules, regulations or licences, nor is there any licence provided for possession.[93]

D. Criminalisation of *Mahua*

These figures specifically apply to cases involving *mahua* liquor brewed by tribal and DNT communities from the *mahua* flower. The sale and consumption of *mahua* forms a significant part of the livelihood and culture of DNT communities. Arrest of individuals due to small quantities of *mahua* comprises 92% of the FIRs registered.[94] 87% of FIRs alleging sale or possession of *mahua* involve small quantities (between 1-10 litres) of liquor.[95] Further 13.7% FIRs provide vague descriptions of quantity, these contain descriptions like "***बोतल जिसमें कुछ शराब बची थी***" (*"botal jisme kuch sharaab bachi thi,"* which translates to a bottle with some alcohol left inside) and "***जो आधी से कम भरी हुई है***" (*"jo aadhi se kam bhari hui hai,"*

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[90] ibid 84.
[91] ibid 79.
[92] ibid 80.
[93] Madhya Pradesh Excise Act 1915, s 34(1). Section 34 [Penalty for unlawful manufacture, transport, possession, sale etc.] states that:

> (i) Whoever, in contravention of any provision of this Act, or of any rule, notification or order made or issued thereunder, or of any **condition of a licence**, permit or pass granted under this Act, —
> (a) manufactures, transports, imports, exports. collects or possesses any intoxicant;
> …shall subject to the provisions of sub-section (2), be punishable for every such offence with imprisonment for a term which may extend to one year and fine which shall not be less than five hundred rupees, but which may extend to five thousand rupees…
> (emphasis supplied)

[94] CPA Project, 'Drunk on Power: A Study of Excise Policing in Madhya Pradesh' (n 78) 89.
[95] ibid 90.

which translates to what is less than half-full).[96] This is in contrast with popular imagination, bolstered through media portrayal of excise policing, which assumes that excise offences concern high volumes of liquor and police raids on liquor mafia and crime syndicates.

In 73% FIRs relating to *mahua,* criminalisation of individuals took place in non-commercial spaces, such as parks, temples*,* and grocery stores in and around neighbourhoods of marginalised communities. Further, in 25% FIRs, these spaces were the private spaces of individuals from such marginalised communities.[97] Notably, in the sample of 60 FIRs utilised in the report from the Ghamapur district of MP, 33 individuals from the Kuchbandhiya community (a DNT community), were accused of intending to sell or possession of alcohol. Neither were any of the accused found to be actually selling the same, nor were there any reported buyers, and all of them possessed alcohol merely within the 2-5 litre range.[98] Ghamapur police station is within half a kilometre of the Kuchbandhiya neighbourhood, whose members culturally produce and consume alcohol, and who become familiar targets for police, as reflected in our analysis.

Such crackdowns on *mahua*, which often utilises the portrayals of liquor barons monopolising the trade, rely on mischaracterisation. The report shows that the majority (87%) of FIRs relating to *mahua* concerned alcohol in the range of 1-10 litres, significantly lower than commercial quantities. This illustrates the low-level curbs that are actually imposed by the police, disproportionately impacting oppressed caste groups. Therefore, the aforementioned popular imagination of excise-related arrests, is dispelled by the figures as clearly, excise policing is most concerned with small volumes, and smaller monetary values of alcohol. Importantly, it demonstrates that policing is concerned with what is targetable – the life and livelihoods of oppressed caste groups.

E. 'Discretionary' Policing of Oppressed Caste Groups

The study found that excise related arrests formed over one-sixth of the total number of arrests in MP and were second only to arrests pertaining to the Indian Penal Code, 1860. The casteist nature of criminalisation under the excise legislation was starkly evident: 56.35% of those arrested belonged to marginalised groups - SC (9.87%), ST (21.53%), OBC (15.64%), and DNT communities (6.86%). Among the 562 accused persons in the FIRs, the SC, ST, OBC and DNT communities collectively constituted a majority of the accused, at 14%, 15%, 16%, and 11% respectively. For comparison, the Census of India lists the population of SC and ST groups in MP at 15.6% and 21.1%, respectively.[99] A majority of the

[96] ibid 90.
[97] ibid.
[98] ibid 71.
[99] Ministry of Home Affairs, 'Census of India' (2011). The Census does not provide specific data in relation to populations of OBCs and DNT groups in the state.

individuals, approximately 57% criminalised under the state's excise laws, belonged to DNT and other oppressed caste communities.[100]

The above figures reflect that the meaning of post-colonial criminality is still dictated by ideas of the 'undesirable' and the 'impure.' Further, the propensity of the police to criminalise individuals majorly from such communities displays an understanding rooted in the long-standing colonial narrative of criminality of individuals from oppressed caste communities, especially individuals belonging to DNTs. What follows is that the discretion provided to the police allows for transformation of such casteist criminal constructions to action against such individuals; this is in turn legitimised by the law (through processes like the FIRs) that prioritises such notions through the maintenance of 'order.'

The fact that Section 34 is utilised to criminalise possession simpliciter and public drinking also furthers the argument that mere vagueness of law does not provide scope for abuse through discretion; rather, discretion itself becomes its source, vagueness merely enabling it. The discretion granted to police for establishing order through determination of an offence is key in enabling such exploitation and further trapping persons from DNT communities, tribal groups, and other marginalised groups. This is especially because such 'determinations' often result in the victim gaining a label of a 'habitual offender', who is then caught up in a cycle of economic and social exploitation.[101]

This is evident in the case of criminalisation of the Kuchbandhiya community, especially women belonging to the community. In the case of Ghamapur police in Jabalpur district, out of the police FIRs analysed in the report, 57% involved the arrest of Kuchbandhiya individuals. In Ghamapur, women from the Kuchbandhiya community comprised 87% of the total women arrested by the police for excise offences. Certain women were arrested twenty-eight, twenty-six, and twenty-five times respectively in a span of 2 years leading to them being deemed habitual offenders. The criminalisation of women belonging to DNT communities is often couched within Brahminical tropes of 'easy', 'loose', and 'unscrupulous'. An analysis of bail orders passed the MP High Court in excise cases involving Kuchbandhiya women reveals that the grant of bail, which is primarily contingent upon judicial discretion, is denied or granted subjected to harsher bail conditions, and increased surety amounts citing that the accused woman is a habitual offender. The creation of the category of habitual offenders is an example of discretion reproduced as a firm of procedural violence.[102]

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[100] CPA Project, 'Drunk on Power: A Study of Excise Policing in Madhya Pradesh' (n 78) 12.
[101] ibid.
[102] Bej, Sonavane and Bokil (n 12).

Jashoda Bai, a woman from the Kuchbandhiya community was reportedly arrested half a dozen times for excise related offences, and who suffered economic exploitation and physical abuse from the police.[103] Procedural violence against women belonging to DNT communities often assumes physical or sexual forms obfuscated by the stigma of being branded as a 'criminal woman'.[104]

Similar to how the Fraser Commission Report called for discretionary determination of whether a crime was a "work of profession",[105] various Habitual Offender legislations and provisions like section 116,[106] that make determinations of habitual offending based on general repute, allow the police to rest determinations of criminality solely on their discretion.

V. CONCLUSION

This article deconstructs police discretion as being rooted in and shaped by the institution of caste. While 'brutal' forms of policing garner the highest traction in considering the questions of police discretion, far more attention must be paid to the routine, mundane, arbitrary, and insidious forms of policing. Among policemen and among the objects of their coercive gaze, caste is a particularly salient form of identity in the politics of public spaces.[107]

Everyday policing facilitates ways of maintaining Brahminical social order couched within the administrative justification of public order through discretion. It is correct to state that there is a lasting impact of colonial structures on policing framework in the post-independence era. However, the utilisation of police knowledge shaped by caste renders such a framework as Brahminical. Such notions are further noted as being accelerated in their tangible operation through the discretion provided to police functionaries to determine the perimeters of 'order' under various laws establishing criminality (general criminal laws like the CrPC and specific laws like excise legislations containing penal provisions).

This adoption of the foregoing understanding is clearly demonstrated by the analysis of excise policing in India, specifically in MP. The formulation and implementation of excise laws, intricately linked with cultural practices of certain oppressed caste groups, and inseparable from the notions of the 'undesirable' and 'criminal', reveal a stark contrast in the promises of equality to citizens at the time of independence in comparison with the present. Casteist narratives are discovered through close scrutiny of the manner,

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[103] CPA Project, 'Drunk on Power: A Study of Excise Policing in Madhya Pradesh' (n 78) 74.
[104] Bej, Sonavane and Bokil (n 12).
[105] Fraser Commission Report (n 17).
[106] Code of Criminal Procedure 1973, s 116(4); Section 116(4) provides that "For the purposes of this section the fact that a person is a habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of **general repute** or otherwise." (emphasis supplied)
[107] Kumar (n 1) 23.

form, and nature of arrests made by the police under excise laws in MP. In the quantitative sense, the figures emerging from the analysis clearly reflect the criminalisation of individuals from oppressed caste communities, especially DNTs. However, more importantly, narratives contained in FIRs, and accounts from individuals from oppressed caste groups, provide a contextual understanding of such arrests. The narratives reveal the exploitation of such individuals by police functionaries who are aided by the force of discretion provided to them under the law.

Therefore, it becomes imperative to be cognisant of police discretion, which is seen (particularly under the colonial model) as a vital requirement for maintenance of 'order'. This lends itself to the construction of casteist frameworks of criminalisation, and becomes a reflection of social order, which is Brahminical in nature. Laws that are constructed by Brahminism instrumentalise such models of policing for the maintenance of caste order through the criminalisation of oppressed caste communities like the DNTs. While this article limits its analysis to understanding policing as Brahminism and discretion as an embodiment of the same, the operationalisation of this framework is significant in evaluating and re-assessing existing frameworks of state control and disciplining.