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Editorial

The *Socio-Legal Review* is a student-run publication by the National Law School of India University, Bengaluru that is devoted to publishing writings from a socio-legal perspective, specifically on issues pertaining to South Asia. Over the past few years, our journal has been grappling with what we mean by 'socio-legal'. Volume 18 of the journal, which was published last year, experimented with expanded meanings of socio-legality. This year, in Volume 19(1), we have sought to expand our horizons of methodologies used in socio-legal studies. Each article in this Issue employs a different methodology to draw its conclusions, and most of them are rooted outside traditional legal doctrine. They offer insight into the many ways in which one can view, analyse, understand, and engage with the law. As lawyers-in-the-making, these diverse ways of thinking about the law are especially significant as they bring out facets of the law that are beyond the reach of traditional legal analysis.

Through this Issue, we have also attempted to seek out different ways of writing about the law. While we are familiar with a certain template of legal academic writing that centres the law, as a journal committed to a socio-legal, interdisciplinary approach, we have attempted to challenge this prism in this Issue. The first three writings of this Issue are long-form articles. The authors of these articles use the law, in its various forms (judgments, statutes, and the life of the law), as a way to interrogate, understand, critique, and theorise the politics of state institutions.

In our first article *Jurimetrics and Detention: Understanding the Supreme Court Through Detention Cases During the 1975 National Emergency*, Mr. Nitish Rai Parwani uses jurimetrical tools to statistically study reported and unreported judgments by the Supreme Court of India on arrests, bails, and preventive detentions during the 1975 National Emergency. He explores various reasons, especially administrative ones such as listing of cases and censorship of judgments, to make sense of a decline in the number of decisions during the Emergency, despite an increase in detentions. He also analyses the infamous judgment in the *Habeas Corpus* case[1] to show that the groundwork for this decision had been laid even prior to the Emergency, in seemingly innocuous cases. His conclusions highlight the need to more closely study the politics and working of the judicial institution.

In our second article *A Tribal Chief and a Colonial Legislation: The Excluded Areas Act of 1846*, Dr. Amrita Tulika uses governmental and legislative archival sources on the making of an exceptional/emergency legislation to understand the nature of colonial sovereignty as authoritarian and paternalistic. By studying 'official' records on the life of a Bhil tribal chief, whose rebellion motivated the making of a special law to govern tribal areas, she theorises the colonial state's use of the law as a tool to maintain 'order',

[1] *ADM, Jabalpur v Shivkant Shukla* (1976) 2 SCC 521.

and to consolidate and preserve state power. This understanding of colonial law-making counters civilisational justifications and liberal understandings of the law as a guarantor of rights, freedom, and due process. It rather brings to the forefront the legalisation of state violence through the exercise of executive power and discretionary authority.

Our third article by Ms. Nikita Sonavane is *Deconstructing Police Discretion as Brahmanism*. She explores the violence of executive authority, specifically by deconstructing the Brahmanical nature of police discretion. Her paper traces the continuities between colonial and post-colonial methods of police governance by historically demonstrating how narratives of criminality are informed and justified by caste. She studies the entrenched effects of the now-repealed Criminal Tribes Act, 1871 that institutionalised policing through caste, in juxtaposition with policing in postcolonial India. Specifically, through empirical data on FIRs filed under the Madhya Pradesh Excise Act, 1915, she highlights not only the disproportionate impact of the law on oppressed caste communities, but also shows how the exercise of police discretion is rooted in casteist underpinnings. The article significantly shifts focus away from a graphic and evident spectacle of police power to more subtle, pervasive, and systemic forms of state violence against oppressed caste communities.

Mr. Dhruva Gandhi, in *Janhit Abhiyan: Where Does It Lead Us?* comments on the judgment of the Supreme Court of India upholding the constitutionality of the 103rd Constitutional Amendment, which introduced reservations for economically weaker sections.[2] He generatively reads the judgment to put forth its implications in laying the groundwork for recognising 'poverty' or 'economic class' as a protected marker in discrimination law. He also argues how the judgment brings out the need to clarify certain aspects of equality and discrimination law. *First*, whether Article 15(1) is an absolute prohibition against classification on the grounds listed in it, and *second*, the conflicting judicial decisions on whether the 50% ceiling on reservations can be circumvented in any situation. In doing so, he locates the judgment within the broader contours of anti-discrimination and affirmative action theory and jurisprudence.

The final piece is a book review of *Pamela Cox and Sandra Walklate (eds), Victims' Access to Justice: Historical and Comparative Perspectives (Routledge: 2022)* by Prof. Radhika Chitkara. Through a thematic review of this edited collection of essays on the place of victims in criminal justice systems across countries, she highlights the contributions of the book and underscores the need for a deeper scrutiny into the relationship between the state, victims, and the accused, particularly in the South Asian context.

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2 *Janhit Abhiyan v Union of India* (2023) 5 SCC 1.

Along with the articles in this Issue, it is essential to also include the significant scholarship produced by the *Review* through its online *Forum*. In our online series *Queering the (Court)Room: SLR Special Series on the Marriage Equality Debate in India*, the editorial board put together five interviews to explore the implications of the widely-publicised courtroom hearings in the marriage equality case,[3] beyond the law and constitutional rhetoric. The interviews are by queer activists and academicians, located both within and outside India, and each of them brings out a different perspective on queerness as identity and activism, the law, and the state.

I would like to extend my sincere and heartfelt gratitude to all our authors, who were extremely patient and kind while working and engaging with our editorial board. As student editors, we have learnt a great deal on various methodologies of socio-legal writing through the editorial process for this Issue. I would also like to thank all our peer-reviewers for their immense intellectual and emotional labour in reviewing these articles. I must also thank Ms. Nishtha V, and our faculty advisor and Vice-Chancellor Prof. (Dr.) Sudhir Krishnaswamy, for their support and guidance. Lastly, I acknowledge all the work put in by the Editorial Board of 2022-23, and thank them for their sustained efforts. I hope that this Issue generates thought, discussion, and further writing in the socio-legal space in India, and look forward to feedback on and responses to these articles in upcoming volumes of our journal and on the online forum.

Apoorva Nangia,
Editor-in-Chief,
Socio-Legal Review,
New Delhi, May 2024.

[3] *Supriyo v Union of India* 2023 SCC OnLine 1348.

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Jurimetrics and Detention: Understanding the Supreme Court Through Detention Cases During the 1975 National Emergency

Nitish Rai Parwani[*]

Abstract

This paper employs the lens of jurimetrics to empirically analyse patterns in decision-making by the Supreme Court while deciding cases concerning personal liberty between 1974-1977, with the 1975 National Emergency as the point of reference. The paper investigates and analyses the functioning of the Supreme Court in this period by examining the numerical trends in the number of reportable and unreportable judgments in preventive detention matters during the 1975 Emergency, by contrasting it with the period immediately before the proclamation and after the revocation of the Emergency. First, the paper introduces the period of study and delineates its methodology, along with setting the legislative, political, and judicial context to these judgments. Second, the paper shows a decline in the number of reportable and unreportable judgments in such matters during the 1975 Emergency and explores various reasons for the same. Third, the paper analyses the Court's jurisprudence on the maintainability of habeas corpus petitions against preventive detentions during this period, with specific focus on ADM Jabalpur v. Shivkant Shukla (Habeas Corpus case). The paper shows how the Supreme Court had laid the groundwork for this decision even prior to the 1975 Emergency, and analyses the subsequent cases that reiterate its position of law. To conclude, the paper raises questions on the extent of judicial independence and accountability during the 1975 National Emergency and underscores the need to further study the working of the Supreme Court more closely and rigorously, for a better understanding of judicial decision-making.

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I. INTRODUCTION

It is an immutable fact that the personal and ideological biases of legislators influence their official functions (which often gets them votes as well), while judges and judicial officers — ostensibly far away from political passions, table thumping debates, and popular gaze — seem to be anonymous adjudicators who decide on merits.[1] These adjudicators, who are viewed as "virtually faceless litigation-admitting, decision-emitting institutions",[2] are often, as admitted by several members of the legal fraternity, bound within certain walls, lines, and limits that are unseen by the layman.[3] The identity of a judge, especially in India, remains largely discreet from the public. Hence, seldom does one, except of course in court bar-rooms, come to comprehend the impact of values and prejudices of individual judges on the decisions they make.[4] However, realist scholars,[5] especially in jurisdictions where judges are elected, focus on the role of 'prediction of law' by analysing the judicial behaviour of judges. Nonetheless, in the Indian context, studies in this area are scant. To understand the theoretical framework of 'life of law', the statute books and juristic interpretations are sufficient;[6] but to comprehend 'law in

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1 Although judges are isolated from the political wings of the State and are equipped with the power of judicial review, they are also under "psychodynamic kind of pressures" — primarily in the form of criticism from the Bar, academic critiques, and dissenting opinions from brother and sister judges. See Upendra Baxi, 'Introduction' in KK Mathew, *Democracy, Equality and Freedom* (Eastern Book Company 1978) v-vi.

2 George H Gadbois, 'Indian Judicial Behaviour' (1970) (3-4-5) Economic and Political Weekly 149.

3 HR Khanna, 'Law and Men of Law' (1976) 4 SCC (Jour) 17.

4 With the advent of social media and alternative modes to conventional media, judges are also becoming subjects of popular discussion; albeit this phenomenon is quite recent and is still limited to the areas with exposure to social and legal institutions. In the period of study in this paper (1974-1977), the judiciary and judicial decision-making largely remained beyond popular gaze and discussions, particularly when compared to the popular exposure of political players of the legislature and executive.

5 The realist approach in jurimetrics is a perspective that focuses on empirically analysing and predicting judicial behaviour by examining how judges make decisions in practice, rather than solely relying on legal doctrine or theory. It seeks to understand how external factors, such as political influences or personal backgrounds, impact judicial decisions. Realist analysis often involves quantitative methods, data analysis, and statistical models to identify patterns in judges' decisions. This approach aims to provide a more comprehensive understanding of the judicial decision-making process and its real-world implications. For further discussion, see Neil Duxbury, 'Law and Prediction in Realist Jurisprudence' (2001) 87 Archives for Philosophy of Law and Social Philosophy 402.

6 Upendra Baxi, 'The Little Done and the Vast Undone' (1967) 9 Journal of Indian Law

action',[7] the conduct and opinion behaviour of judges provide certain insights. Apart from analysing judicial behaviour and judgment patterns of decision-makers, which is the traditional jurimetrical approach, this paper also takes into account the matrices and milieu in which these decisions are made.

Though the occupants of judicial benches are generally reticent, it is the task of a scholar to catch words from zipped lips and decipher their minds. This is done through analysing judicial pronouncements in light of contemporary circumstances in judicial trends, political circles, social values, and personal and career positions of judges. As a scientific method of investigating legal problems, jurimetrics takes into account, inter alia, the trends of judicial pronouncements, behavioural patterns of judges, and a quantitative analysis of their judicial behaviour through application of mathematical logic and socio-political factors to understand judicial decisions and the bearing of extraneous influences on them.[8]

In this study, the jurimetrical tool is adopted to study detention jurisprudence[9] of the Supreme Court of India from January 1974 to December 1977 ('study period'), with the period of the 1975 National Emergency viz. from June 26, 1975 to March 21, 1977, as the 'period of reference'. A period preceding this reference period is also considered in this study for the following reasons: *first,* to compare general trends of decision making during the reference period vis-à-vis the period preceding it;[10] *second,* though the period of the National Emergency of 1975 is generally highlighted the most by legal and political-science scholars but another National Emergency, which was invoked in 1971 and was in force until its revocation in 1977, was already in operation when the Emergency of 1975 was invoked.

However, detentions in the 1971 Emergency were qualitatively different than those in the 1975 Emergency. The 1971 Emergency was proclaimed because of external threat, i.e., a war. On December 3, 1971, amidst the

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Institute 374.

7 JR Cades, 'Jurimetrics and General Semantics' (1965) 22(3) A Review of General Semantics 279.

8 L Loevinger, 'Jurimetrics, the Next Step Forward' (1949) 33 Minnesota Law Review 455; Perry Meyer, 'Jurimetrics: The Scientific Method in Legal Research' (1966) 44 Canadian Bar Review 1; Rashesh Vaidya, 'Jurimetrics: An Introduction' (*Academia Letters*, 2021) <https://www.academia.edu/50139590/Jurimetrics_An_Introduction> accessed 18 December 2023.

9 Here, the cases of detention arising out of preventive detention statutes including Maintenance of Internal Security Act, 1971 and Defence of India Rules, 1971 (as they stood after the Thirty Ninth Constitutional Amendment), and also the matters for release from detention including regular bail, default bail and benefit of probation, are analysed. For preventive detention jurisprudence, also see PK Tripathi, 'Preventive Detention: The Indian Experience' (1960) 9 American Journal of Comparative Law 219.

10 The preceding period has been chosen instead of the period after the revocation of the Emergency as most of the judges who constituted the Court during the Emergency were there at the Supreme Court before the Emergency and decided some landmark cases; albeit many of them retired (resigned in case of Justice Khanna) during or immediately after the Emergency.

Bangladesh-Liberation movement escalating in the East Pakistan, an airstrike mission named 'Operation Changez Khan' was launched by Pakistan on several airbases in North India. Following this, a war was declared between India and Pakistan; and consequently, a National Emergency under Article 352 was invoked by the Indian government. This war culminated with the surrender of Pakistani forces on December 16, 1971, and the independence of Bangladesh on the same day. Though the war was over, the Emergency invoked on December 3, 1971 was never revoked.

The internal-political influence of this Emergency on the detentions carried out during this period was *perceivably* unheeding, as could be noted from the judgments. On the other hand, the National Emergency of June 1975 was followed by several preventive detentions, particularly with political underpinnings. The major focus of this study is on these detention matters, i.e., the liberty cases ensuing from these preventive detentions. In March 1977, both National Emergencies (of 1971 and of 1975) were revoked, fresh general elections were announced, and the arrested detenus were released. Hence, most of the detention matters were rendered infructuous after this period. Therefore, to draw a comparison of the Emergency ensuing from internal-politics vis-a-vis to that ensuing from external threat, and the period after the revocation of the Emergency, these three periods are considered.

While the first Emergency was declared in 1971, the period considered in this study is from January 1974 (i.e., 18 months prior to the proclamation of the 1975 Emergency). The 1973 criminal law reforms included the new Code of Criminal Procedure, 1973 ('CrPC'), which was operationalised from 1974. Hence, the criminal justice milieu of the period before 1974 was different from the reference period. To account for this difference, the period of study spans from January 1974 to December 1977.

For the purpose of this study, primary sources, including all the judgments of the Supreme Court of India, pronounced during the study period (1974 to 1977) on 'liberty matters'[11] of detention jurisprudence — which includes

[11] The concept of liberty, a vital tenet of modern democratic structures of State, is a concept which has been expanding since ages. The concept has exhibited a trajectory of expansion in the last few decades. Politically recognised as "the protection against the tyranny of political rulers" (Meany), the evolution of the concept has also been deeply influenced by philosophical, social, and legal developments, reflecting the multi-dimensional nature of liberty. As Berlin posited, liberty encompasses both negative liberty—which enshrines the traditional political view as discussed above—denoting freedom from external constraints; and positive liberty, signifying the ability to realise one's potential through self-determination. Over time, this conceptual dynamism has manifested in legal interpretations, particularly in the context of the Supreme Court of India as well. The Indian judiciary has adopted a nuanced approach, recognising liberty as an inalienable right enshrined in the Constitution of India. This interpretation has evolved, with the Court acknowledging economic and social rights, including privacy, livelihood, information, etc. as integral facets of liberty. The Court's jurisprudence has also encompassed diverse dimensions, such as personal liberty, religious freedom, and economic well-being. However, of particular note are instances where the Court has deliberated arrest and detention practices, underscoring their pivotal role as indicators of liberty. The Court's

judgments on preventive detention, regular and default bail, and probation of offenders[12] —have been analysed.[13] Initially, there was an impediment to this analysis, as there were scant judgments which were categorised as 'reportable' during this period (a discussion on this aspect forms part of the main argument of the paper as well). Thus, many pronounced judgments never appeared on the pages of any publicly circulated law report. I am highly grateful to the Judges' Library of the Supreme Court of India, from where I could access the antique chronicles containing judgments of the Court, delivered during the study period, which were classified as 'unreportable'. Therefore, I was able to complete the study with exhaustive primary data of the judgments pronounced during the study period.

The paper analyses the judges and their judgments in liberty matters during the study period by also referring to secondary sources, including interviews, biographies and autobiographies, lectures, and articles by these judges. I have also referred to the works of George Gadbois, including his paper titled 'Indian Judicial Behaviour',[14] published in the Economic and Political Weekly in 1970 and his book, *Judges of the Supreme Court of India: 1950-1989*.[15] In his 1970 paper, Gadbois had analysed the judicial patterns of the 35 judges of the Supreme Court of India who served the institution between 1950 to 1969. Based upon his findings that were rooted in factors including individual opinions of the judges, dissents, and distinct designs of decisions, he categorised these judges under four labels, viz., modern conservative, modern liberal, classical conservative, and classical liberal. He analysed all 12,338 appearances by these judges in all the 3,273 reported judgments of the Supreme Court of India in the research period of his study.

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interventions in matters pertaining to preventive detention, habeas corpus petitions, and safeguards against arbitrary arrest reflects its acknowledgment of these aspects as crucial facets of liberty. In this vein, while admitting the limitations in analysing the whole trajectory of evolution of liberty, the metrics of liberty or the evolution of detention jurisprudence, this paper deals with the realm of arrest and detention—particularly as reflected through the judgments of the Apex Court during the period of National Emergency — as vital indicators of the intricate interplay between liberty and legal jurisprudence. The term 'liberty matters' is deployed in this paper to refer to liberty through the indicators of arrest and detention.

See Paul Meany, 'An Introduction to John Stuart Mill's on Liberty' (Libertarianism, 20 March 2020) <https://www.libertarianism.org/columns/introduction-john-stuart-mills-liberty> accessed 12 January 2024; Isaiah Berlin, 'Two Concepts of Liberty' in *Four Essays on Liberty* (Oxford University Press 1969) 118-172.

12 Probation is a reformatory system that facilitates re-education of the offender, without removing him from his natural surroundings. The offender is not incarcerated, to provide a chance of rehabilitation in society. See *Arvind Mohan Sinha v Amulya Kuma Biswas* (1974) 4 SCC 222.

13 The cases that are analysed in this paper are exhaustive, i.e., each case, whether classified as 'reportable' or 'non-reportable' has been included in this study. Nevertheless, as will be discussed in the following part of the paper, the probability of censoring judgments during the study period cannot be completely ruled out.

14 Gadbois (n 2).

15 George H Gadbois, *Judges of the Supreme Court of India: 1950-1989* (Oxford University Press 2011).

Though the enormous data collected by Gadbois was not of much help in the present study, the inspiration was derived from the tools employed and academic rigour displayed in that work. His book, which is based on a series of interviews with 93 sitting and retired judges of the Supreme Court of India, provided an insight to the career graphs and a glance into the ideological leanings of these judges, some of whom were part of the bench during the period of this present study as well. Another secondary source which was referred to for this study was Abhinav Chandrachud's *Supreme Whispers*.[16] In this work, Chandrachud carried forward Gadbois's work, and included several anecdotes and contemporary events to introduce these former judges to a larger audience.

A. Political and Legislative Context-Setting

Coming to the present paper, its study is plotted in the setting where India had just ended a war after assisting East Pakistan in its struggle for liberation from West Pakistan, which led to the constitution of a sovereign nation, Bangladesh; and the concomitant international pressures in the diplomatic sphere.[17] A new Criminal Procedure Code was in operation from April 1974. The National Emergency imposed during the war of 1971 was still in operation,[18] although it was dormant. The Union Legislature had treasury benches which were occupied by members of the party having more than a two-third majority in the House of the People; and they were continuously trying to amend the Constitution, especially with respect to the right to property. The Supreme Court had introduced a caveat to this amending power by way of the basic structure doctrine;[19] and therefore, the position of the Chief Justice of India ('CJI'), perhaps in consequence to the executive's desire of a 'committed judiciary',[20] was occupied by an individual who superseded three of his senior

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16 Abhinav Chandrachud, *Supreme Whispers: Conversations with the Judges of Supreme Court of India - 1980-89* (Penguin Random House 2018).

17 Pakistan (West Pakistan), being a strategic partner of the United States, was receiving assistance from NATO powers. The United States leadership indicated international sanctions against India for its role in assisting East Pakistan. Despite mounting pressure during PM Indira Gandhi's visit to the US in November 1971, India assisted East Pakistan in its struggle for liberation. This started a full-fledged war between India and Pakistan — on the Eastern as well as Western fronts of India.

18 The second National Emergency under Article 352 was proclaimed on December 3, 1971, on the verge of the India-Pakistan war. This Emergency was never formally revoked until 1977, when the Emergency of 1975 was also revoked.

19 *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

20 'Committed judges' is a phrase that was framed by contemporary scholars and political players. This was the concept which was moved by the Union ministers of the day, suggesting that the judges must assist the government furthering their policy, and hence there must be a 'committed judiciary' — committed to support the government. Some of the members of the judicial fraternity accepted and advocated this concept. Talking about the judge who served as the CJI during the reference period, Justice Bhagwati, in his interview to Gadbois, remarked that Chief Justice Ray was an honest man, and he sincerely believed that Ms. Gandhi was the saviour of the nation. See Chandrachud (n 16) 20.

colleagues. Several works, including those which have been referred to in this paper, have suggested the influence of these circumstances on judicial appointments to the Supreme Court. As far as the constitution of benches and listing of the matters is considered, the practices seemed opaque, similar to what some notable jurists and judges of the Apex Court have urged in recent times.[21] However, the hold of the CJI remained strong — a fact which is buttressed from the listing of sensitive cases, including that of *I. Jagadeeswara v. Union of India* ('*I. Jagadeeswara* case') (discussed later, in detail), which was listed to reconsider the landmark *Kesavananda Bharati v. State of Kerala* ('*Kesavananda Bharati*') judgment. Overall, the independence of the judiciary was tracing an insidious graph, but the public at large was unaware of this. Concerns regarding the same were raised, in a limited manner, at the bar, in legal conferences, and academic circles only.[22]

Against this backdrop, certain legislations, including the Maintenance of Internal Security Act ('MISA') and Defence of India Act ('DOIA') were enacted in 1971. Both these laws provided for detention "in certain cases for the purpose of maintenance of internal security and matters connected therewith."[23] The MISA provided for preventive detention in cases where a person was suspected of committing an act prejudicial to:

> the defence of India, the relations of India with foreign powers, or the security of India; or the security of the State or the maintenance of public order; or the maintenance of supplies and services essential to the community; or with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India.[24]

Though the purpose of MISA was to operationalise the provision of preventive detention under Article 22 of the Indian Constitution, it also contained procedural safeguards including the constitution of an 'Advisory Board'[25] where a detenu could contest his detention. However, the right to approach a court of law at the first instance was barred.[26] For a major part of

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Wherever the connotation 'committed judiciary' is used henceforth, this concept is to be referred. The author borrows the term for this paper, without making any value judgment on the same.

21 Fali S Nariman, *God Save The Hon'ble Supreme Court of India* (Hay House 2018) 39-70.

22 JP Goyal, *Saving India from Indira: Untold Story of the Emergency* (Rama Goyal ed, Rupa Publications 2019) Appendix II, 176.

23 The Maintenance of Internal Security Ordinance was promulgated on May 7, 1971. The Parliament passed the MISA a couple of months later, which became effective from July 2, 1971.

24 MISA 1971, s 2.

25 MISA 1971, s 9.

26 The detenu could still approach constitutional courts under writ jurisdiction. However, this was also curtailed during the Emergency with the suspension of Fundamental Rights, and this was endorsed by the Supreme Court in April 1976, as discussed later.

the first three years of its operation, as data reveals,[27] detentions under MISA were to prevent impediments to essential services and supplies. However, the prima facie innocuous judicial pronouncements in these cases proved detrimental to the fundamental rights of detenus at later times, particularly during the reference period of this study.

On the political side, an election matter, which was long forgotten due to the aforementioned events in national life, resurfaced again. Then Prime Minister Indira Gandhi's election as a Member of Parliament was challenged by Raj Narain, a candidate of the Samyukta Socialist Party, who alleged the use of governmental machinery and corrupt practices by Ms. Gandhi. This case was adjudicated by the Allahabad High Court. On June 12, 1975, Justice Jagmohan Lal Sinha, vide judgment in *Raj Narain v. Indira Gandhi* in Election Petition no. 5 of 1971, held Ms. Indira Gandhi guilty of corrupt electoral practices on two counts, and disqualified her for a period of 6 years. The vacation bench of the Supreme Court refused to grant a complete stay on the judgment. The order dated June 24, 1975 by the Apex Court allowed Ms. Gandhi to continue as Prime Minister, but debarred her from casting a vote in the Parliament. This increased the political pressure on her and there were demands for her to resign on moral grounds.[28] On the intervening night of June 25 and 26, 1975, Ms. Gandhi wrote a letter[29] to the then President, Mr Fakhruddin Ali Ahmed, requesting him to issue a proclamation under Article 352(1) of the Indian Constitution, to declare another National Emergency.

The President of India, as per Article 352 of the Indian Constitution as it stood before the 44th amendment, was empowered to declare and proclaim Emergency if he was satisfied that a "grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance".[30] It is pertinent to note that the letter sent by the then Prime Minister Ms. Gandhi mentioned "internal disturbance" as a ground for imminent danger to the security of

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27 See Annexure 1.

28 Kunja Medhi, 'Protecting Civil and Political Rights in India: Mrs Gandhi's Emergency and Thereafter' in David P Forsythe (ed), *Human Rights and Development* (Palgrave Macmillan 1989).

29 The letter read as follows:

> Dear Rashtrapati ji,
>
> As explained to you a little while ago, information has reached us which indicates that there is an imminent danger to security of India being threatened by internal disturbances. The matter is extremely urgent, I would have liked to have taken this to the cabinet but unfortunately this is not possible today. I am therefore condoning or permitting a departure from the Government of India (Transaction of Business) Rule 1961….

See Goyal (n 22).

30 The term "internal disturbance" was replaced with "armed rebellion" by the 44th Amendment to the Indian Constitution, which was enacted in 1978, after the revocation of the Emergency in 1977.

India. However, there was no description of this "internal disturbance", nor was there any report by any state government that would indicate that the law and order situation was out of control. The economic situation was also not close to alarming. The Governors of the states, in their reports to the President, had also not made any adverse remarks;[31] and even the Union Cabinet of Ministers was unaware of the proclamation until the following morning.[32] Moreover, since one National Emergency (of 1971) was already in operation, it can be inferred that this new Emergency was to suppress political dissent against the incumbent government and political milieu by curtailing the liberty of dissenters.

From the early hours of June 26, 1975, a series of political detentions commenced. Leaders of opposition parties, social leaders, and press personnel were arrested and placed in custody through the invocation of powers under Section 151 of the CrPC and under the preventive detention provisions of MISA, DOIA, and the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ('COFEPOSA').[33]

The new legislations and amendments which followed the proclamation not only insulated Ms. Gandhi from the consequences ensuing from the election petitions,[34] but also made several penal and preventive detention safeguards obsolete.[35] For instance, the period for referring a detention to the Advisory Board under MISA, which was earlier within 30 days, was amended to 3 months from the date of detention. This meant that the police could arrest or detain someone under MISA, without producing the detenu before any judicial authority for up to 3 months. The maximum period of detention which was earlier 12 months from the date of detention was increased to 3 years or until the expiry of the Emergency, whichever was later. Further, Section 17A was inserted in MISA, which provided for detention for a period not exceeding 2 years without obtaining any opinion of the Advisory Board, on certain grounds specified in the section.[36]

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31 ibid.

32 This fact can be inferred from the letter of Ms. Gandhi to the President where she mentions that the matter has not been taken to the 'cabinet'.

33 Gyan Prakash, *Emergency Chronicles: Indira Gandhi and Democracy's Turning Point* (Princeton University Press 2019).

34 The Constitution (Thirty-ninth amendment) Act, 1975, which was passed by the Parliament on August 10, 1975, barred the jurisdiction of courts from entertaining election petitions challenging the elections of the President, Vice-President, Prime Minister, and Lok Sabha Speaker.

35 The MISA and DOIA were amended, and these Acts were also put in the IX Schedule of the Constitution by way of 39th Amendment. Thus, they were placed outside the purview of judicial review.

36 Christophe Jaffrelot and Pratinav Anil, *India's First Dictatorship: The Emergency, 1975 -1977* (Hurst 2020).

B. Judicial Context-Setting

The judiciary, which had already determined the constitutional validity of MISA in 1974,[37] and laid down precedents on this statute, was a mere spectator to these political and legislative changes. In the past, several detentions under MISA were validated. The Court laid down jurisprudence under MISA while assessing preventive detentions for disruption of supply of goods and services.[38] However, this room for preventive detention provided a position of law that the government could use to suppress and curtail liberty under the garb of "internal security". The Apex Court had earlier decided that it was not mandatory for the government or the Advisory Board to pass a speaking order while approving or advising continuance of detention (in aforementioned cases of preventive detention for supplies), and only "a brief expression of principal reason was desirable".[39] This enabled the government to detain an individual on broad and vague grounds, and not present them before an advisory board for a long period, thereby transgressing their personal liberty in the sheerest sense.

It is in light of these events that the paper analyses the working of the Supreme Court of India. The Court, at that time, had rendered decisions against the government in at least two contemporaneous instances: one in *R.C. Cooper v. Union of India* (*'Bank Nationalisation case'*),[40] where the Twenty-Fifth Constitutional Amendment Act was declared unconstitutional; and in *Kesavananda Bharati*,[41] where the Parliament's power to amend the Constitution was limited and the basic structure doctrine was evolved to check its constitutional authority to amend. Within three days of the verdict in *Kesavananda Bharati*, the three senior-most judges of the Court were superseded and the next judge, Justice A.N. Ray, who dissented in both the aforementioned cases, was appointed as CJI.[42] As CJI, he was the "first amongst the equal judges" and the master of the roster of the Supreme Court till January 1977, i.e., almost throughout the reference period, before Justice M.H. Beg superseded Justice H.R. Khanna to become the next CJI.

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37 *Haradhan Saha v State of West Bengal* AIR 1974 SC 2154.

38 This jurisprudence evolved through the decisions of the Supreme Court of India vide unreported cases bearing cases numbers W.P. No. 473 of 1972; W.P. No. 657 of 1972; W.P. No. 573 of 1974; and W.P. No. 332 of 1974.

39 *Bhut Nath Mete v State of West Bengal* (1974) 1 SCC 645 *('Bhut Nath Mete')*.

40 *R.C. Cooper v Union of India*, AIR 1970 SC 564.

41 *Kesavananda Bharati* (n 19).

42 Referring to Chief Justice Ray's sole dissent in RC Cooper (Bank Nationalisation case) and minority opinion in Kesavananda Bharti, C.K. Daphtary, a former Attorney General of India, remarked on the floor of the Parliament: "the boy who wrote best essay got the first prize". See Arghya Sengupta and Ritwika Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability and Independence* (Oxford University Press 2018) 16.

In total, there were 18 judges in the Supreme Court during the period of study. Out of these judges, Justices P.J. Reddy and D.G. Palekar retired before the start of the 'reference period' (i.e., before the 1975 Emergency), and Justices P.N. Shinghal, Jaswant Singh, and P.S. Kailasam were appointed during the operation of the 1975 National Emergency. The appointment of judges to the Supreme Court was not free from political interference.[43] The present paper deals with how these judges of the Supreme Court interpreted the afore-discussed detention laws and how these laws were applied in cases.

The *first* section of the study is titled as '(Un)reportings', where I have quantitatively analysed the 'reportable' and 'non-reportable' judgments during the study period. In this section, I also ponder upon the reasons for the decline in the number of liberty matter adjudications during the reference period. The *second* section of the study is titled 'Maintainability of Habeas Corpus', where I have analysed the pronouncements of the Supreme Court on the maintainability of writ petitions against detentions during the Emergency period. In this section, I will also show how the grounding for the infamous judgment in *A.D.M. Jabalpur v. Shivkant Shukla*[44] (famously known as the '*Habeas Corpus* case') was laid down a few years before its pronouncement.

II. (UN)REPORTINGS

The present study began with searching for all the judgments on liberty matters that were pronounced by the Supreme Court during the period of study. It was observed that only 19 cases pertaining to liberty matters, which included preventive detention, bail, and probation, were reported from January 1974 to December 1977. Generally, the number of liberty matters listed before a single bench of the Supreme Court, before and after the study period, were more than this number, as is reflected by the data of matters disposed of by the Court. Therefore, to understand this gap, the judgments of the Supreme Court that were classified as 'unreported' were searched. Generally, the authoring judge has the discretion to classify a judgment as 'reportable' or 'unreportable'. The journals and reporters, including Supreme Court Reporter ('SCR'), All India Reporter ('AIR'), and Supreme Court Cases ('SCC'), which publish the Supreme Court judgments, only publish those judgments that are classified as 'reportable'. The 'non-reportable' judgments are preserved, at least by the Supreme Court itself, in the form of bound chronicles.[45] The author found 56 such 'non-reportable' judgments pertaining to the study period.

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[43] See Nitish Rai Parwani, 'Judicial Appointments and Judicial Delays: The inordinate delay in appointing the Judges adversely impacting the justice delivery system' (2020) 2(1) Lex Jura Law Journal for a more detailed exposition.

[44] (1976) 2 SCC 521.

[45] The author was able to access these judgments at the library of the Supreme Court of India as an LL.M student at the National Law University, Delhi.

It is difficult to comprehend that in a span of 3 years, when the State was detaining individuals at a frequent rate, the Supreme Court delivered only 75 judgments on liberty matters. There could be four probable reasons which could justify this figure: *first,* the detenus preferred approaching the High Courts rather than the Supreme Court under writ jurisdiction. This probability is analysed and refuted in the later portion of this part of the study. *Second,* liberty matters were not even listed for hearing during this period. *Third,* the Supreme Court dismissed the writ petitions and special leave petitions at the stage of admission itself, thereby not delivering any judgment on it. *Fourth,* reporting of Supreme Court judgments was censored and they were not even preserved by the court registry. In order to arrive at a more concrete reasoning to justify this data, a comparative analysis of judgments of the study period and the reference period is helpful.

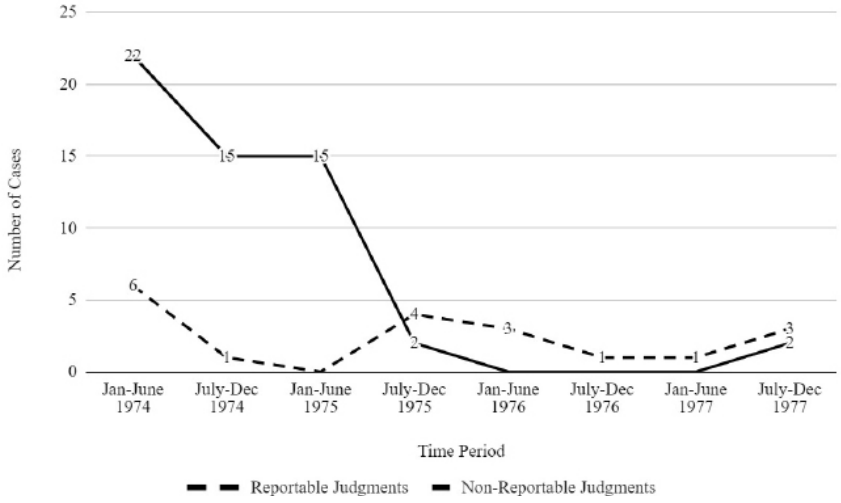
Period [HY]	Reportable Judgments	Non-reportable Judgments
Jan-June 1974	6	22
July-Dec 1974	1	15
Jan-June 1975	0	15
July-Dec 1975	4	2
Jan-June 1976	3	0
July-Dec 1976	1	0
Jan-June 1977	1	0
July-Dec 1977[46]	3	2
Total	**19**	**56**[47]

From January 1974 to June 1975 (the period before the 1975 Emergency), the Supreme Court decided (at least) 59 judgments on liberty-matters, out of which 57 were dealing with preventive detention alone. While the 'reportable' judgments during this period (7 out of 59) constituted 11.8% of the total number of judgments delivered on 'liberty matters', there were 52 judgments that were classified as 'non-reportable'. The gap between the two is wide, but at least the judgments were preserved, irrespective of their classification, in the internal records of the Court. The curve of liberty matter judgments dropped suddenly after June 1975. There were only 11 judgments on liberty matters during the whole reference period (July 1975 to June 1977), which includes 2 unreportable and 9 reportable judgments (a significant change in the ratio of 'non-reportable' and 'reportable' judgments also raises questions, which we

[46] By this time, the Emergency was revoked (on March 21, 1977) and MISA was repealed (on July 2, 1971). Hence, the only liberty matters that came up for hearing were regular and default bail matters under the CrPC.

[47] Annexure-1 contains the list of all the unreported judgments on detention decided by the Supreme Court of India during the study period and reference period.

discuss later). The curves of judgments delivered during the study period, in the slots of six months, are plotted in the following graph:



Trend of reportable and non-reportable judgments on liberty matters from January 1974 to December 1977

A perusal of the graph reflects that the curve of the judgments, whether reportable or non-reportable, followed a downward slope from 1974 to 1977. Though there was a vast inter-se gap between the number of reportable and non-reportable judgments, the graphs also indicate that the number of pronouncements on liberty matters declined from the 1971 National Emergency to the reference period. The number of non-reportable judgments which were 22, 15, and 15 for the three half-yearly (HY) terms (January 1974 – June 1975) abruptly fell to 2 judgments in HY June to December 1975, i.e., during first half yearly term after the proclamation of the 1975 Emergency, and subsequently remained at 0 for the next 3 HY terms, till the Emergencies were revoked.

The same trend is observed in reportable judgments, with one exception of a peak of 4 judgments in HY July to December 1975. Now, when we analyse the nature of these 4 judgments, we find that none of them concern preventive detention. 2 of these judgments are on parole, 1 on probation, and 1 set aside the dismissal order of a regular bail application by a High Court.[48] Hence, there were no reportable judgments on preventive detention during the first HY term (July to December 1975) after the proclamation of the 1975 Emergency, when the greatest number of political dissenters were detained.

[48] *Suresh Chandra v State of Gujarat* (1976) 1 SCC 654; *Krishan Lal v State of Delh*i (1976) 1 SCC 655; *Mohamed Aziz Mohamed Nasir v State of Maharashtra* AIR 1976 SC 730; *Munir Sayed Ibna Hussain v State of Maharashtra* (1976) 3 SCC 548.

In the following HYs during the reference period, the number of reportable judgments stood at 3, 1 and 1 respectively, which included the infamous *Habeas Corpus* case[49] and *Union of India v. Bhanudas Krishna Gawde* ('*Bhanudas*'),[50] which are analysed in the next part of this study. Interestingly, each of these judgments had at least one writ petition tagged to it that was filed by a political stalwart; and any unreasoned or non-speaking order by the Court would have led to outrage by the opposition. In the *Habeas Corpus* case, an appeal challenging the release of Atal Bihari Vajpayee from preventive detention was tagged.[51] Similarly, in *Bhanudas,* the appeal challenging the release of Lal Krishna Advani was tagged.[52]

The afore-discussed trend of judgments on detention matters seems uncanny, especially in light of the fact that the MISA was in operation and was already declared intra-vires the Constitution by the Apex Court in August 1974,[53] and it was not until April 1976 in the *Habeas Corpus* case that the Supreme Court held that writ petitions against preventive detentions are not maintainable during the Emergency.[54] Hence, the number of writ petitions challenging the preventive detentions on the facts should have increased in this period, and consequently, there should have been a rise in the curve; however, the graph signifies exactly the opposite. The graph followed a stable curve from when the MISA was declared constitutional to the proclamation of the 1975 Emergency, as the Court pronounced 25 non-reportable judgments from August 1974 to June 1975. However, these declined abruptly after June 1975.

A primary reading also indicates that the reportable judgments have consistently been disproportionately lower than the non-reportable judgments during the study period.[55] The highest number of reportable judgments during the study period were 6, 4, and 3 in HY January to June 1974 (6), HY July

[49] *Habeas Corpus case* (n 44).

[50] *Union of India v Bhanudas Krishna Gawde* AIR 1977 SC 1027 *('Bhanudas')*.

[51] *Union of India v Atal Bihari Vajpayee* C.A. no. 1845-1849 of 1975.
It is pertinent to note that Mr. Vajpayee went on to become the Foreign Minister of India after the Emergency was revoked and a new government was elected. He also became the first person from a political party other than the Indian National Congress to complete full five-year tenure as the Prime Minister of India (1999-2004). He also led the Indian government as the Prime Minister in 1996 and 1998.

[52] *Union of India v Lal Krishna Advani* C.A. no. 434 of 1976.
Mr. Advani became the Information and Broadcasting Minister in 1977, and later served as the Home Minister and Deputy Prime Minister of India.

[53] *Haradhan Saha* (n 37).

[54] *Habeas Corpus case* (n 44).

[55] There is no clear answer to explain this anomaly. The discretion to categorise a judgment as reportable or un-reportable is within the authority of the judge authoring the judgment. There is no concrete explanation to the question that whether the Supreme Court of that time, as an institution, was reticent in reporting detention matters in general, or there were some unobtrusive reasons during the study period which impacted the reporting of the detention. However, this paper does analyse certain speculations and explanations on further drop of reportable as well as non-reportable judgments during the reference period.

to December 1975 (4), and HY January to June 1976 (3) and HY July to December 1977 (3) respectively; whereas no judgment was reported in HY January to June 1975, and 1 judgment was reported in HY July to December 1974, July to December 1976, and January to June 1977 each. Regarding the non-reportable judgments, there were 22 in HY January to June 1974 and they gradually declined to 2 in HY July to December 1975, and then remained at zero during the rest of the period of the National Emergency. This data indicates that though reportable judgments were low before as well as during the Emergency, the non-reportable judgments also treaded a downward path, and there were only 2 non-reportable judgments during the reference period of the 1975 Emergency.

The overall judgments in liberty and detention matters, whether reported or unreported, were low during the study period and followed a further downward trend during the reference period of this study. There were certain speculations in legal circles to understand this phenomenon. One of the prime speculations indicated a malice involved in the registry or the administrative side of the Court.[56] This malice was suspected to be in the nature of non-listing of these matters or censoring of the judgments. Neither of these two possibilities can be ruled out. There were instances where several cases, owing to their potent political repercussions, were never reported,[57] either as 'reportable judgments' or in the publication comprising 'non-reportable judgments'. Even the judgment of Allahabad High Court, which convicted the then Prime Minister, Ms. Gandhi, of corrupt electoral practices, was not reported, though its copy is preserved by the Allahabad High Court registry and its true copy can be obtained.[58]

There were even certain instances when some of the judges, especially Chief Justice Ray, who was the master of roster, got matters listed and de-listed out of their turn. For instance, he constituted a 13-judge bench on November 10,

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[56] Goyal (n 22).

[57] There are several instances where written orders of the courts were censored. In a courtroom exchange between Nani Palkhivala and Justice Krishna Iyer, the former had pointed out, inter alia, an instance of non-publication of a Delhi High Court judgment on habeas corpus. This courtroom exchange is reproduced in the biography of Nani Palkhivala in the following words:

> The Delhi High Court's judgement on the habeas corpus petition of Mr. Nayar was not allowed to be published. It was BBC which reported parts of it, which I am saying now also will not be reported in tomorrow's newspapers due to censorship. If I say anything about the recent amendments in public, I shall probably be arrested. In fact, the only place where there is any freedom of speech in this country is the few hundred square feet of various courtrooms. In fact, I am very grateful to the government for giving me the opportunity of expressing my views in the court.

See Soli Sorabjee and Arvind Datar, *Nani Palkhivala: The Courtroom Genius* (Lexis Nexis 2012) 155.

[58] The matter titled *Raj Narain v Indira Nehru Gandhi* was heard by the Allahabad High Court as Election Petition no. 5 of 1971.

1975 to reconsider the ratio of the *Kesavananda Bharati*,[59] which had laid down the 'basic structure doctrine' to restrict the Parliament's Constitution amending power. This new matter, which was titled as *I. Jagadeeswara Rao v. Union of India,* involved a challenge to the Thirty-Second Constitutional Amendment Act, which pertained to service conditions of civil servants. There was no urgency to list the matter, and the petitioners had alternative remedies available. However, the matter was listed and a 13-judge bench that comprised 4 judges who penned the minority opinions in *Kesavananda Bharati* was constituted; it was most likely that the basic-structure doctrine would be reconsidered and over-ruled by this bench.[60] As things would have it, the oral-arguments were started by Mr. Nani Palkhivala who appeared for interveners, and he was able to establish the position that no case was made out to reconsider *Kesavananda Bharati*, that too at a time when the National Emergency was in operation.[61] The interference with the independent functioning of registry surfaced when, after the dissolution of the bench in *I. Jagadeeswara* on November 12, 1975, Justice Khanna questioned the reference pursuant to which this bench of 13-judges was constituted. Chief Justice Ray observed that a mentioning was made by the Advocate General of Tamil Nadu, Mr. Govind Swaminathan. He refuted, and likewise all the advocates appearing in this matter or in the connected matters to it refused to have made any mentioning.[62] It was also found that this matter was not even referred by any of the smaller benches of the Court.[63] Eventually, when the deputy registrar of the Apex Court was confronted, it came to light that there was no order as to the reference, and the matter was listed before a bench of 13-judges on the oral instructions of Chief Justice Ray.[64]

These anecdotes buttress the probability that either there were some extraneous factors interfering with the listing of matters, especially detention matters, or there was censoring of judgments in these matters, during the study period. If either or both of these reasons were the impetus behind the

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59 *Kesavananda Bharati* (n 19).

60 Prime Minister Indira Gandhi wanted the ratio of *Kesavananda Bharati* to be over-ruled, and the Parliament to have a right to amend any part of the Constitution. Since Chief Justice Ray was perceived as "Chief Justice of Indi(r)a", it was believed that he got this matter listed. When it was questioned in Court as to on whose mentioning this matter was listed and a 13-judge bench constituted, the Chief Justice had no answer. See Goyal (n 22) 126-128.

61 This bench, which was equal in strength to the bench which had delivered Kesavananda Bharati, was constituted to decide the question of whether Kesavananda Bharati required reconsideration, and whether a new (and larger) bench must be constituted to reconsider the same.

62 Goyal (n 22); Adil Rustomji, 'The review that wasn't: Forty years after Kesavananda Bharati vs the State of Kerala' (First Post, 22 December 2015) <https://www.firstpost.com/india/the-review-that-wasnt-forty-years-after-kesavananda-bharati-vs-the-state-of-kerala-2555020.html> accessed 12 January 2024.

63 As per practice and procedure, even if the validity of the Amendment Act was to be challenged, the matter should have been listed before a five-judge Constitution Bench at first instance, which would have, if the case was made out, referred it to a larger bench.

64 Prashant Bhushan, *The Case that Shook India* (Vikas Publishing 1978) 256.

fall in curve of liberty matter judgments during the reference period, it raises suspicions over the accountability and independence of judiciary during that period.

As has been accepted by the judiciary, "Judicial independence and accountability go hand in hand as accountability ensures and is a facet of judicial independence."[65] The vast inter-se gap between 'reportable' and 'non-reportable' judgments in and of itself, and the fall in the number of judgments on liberty matters as a whole, is indicative of the fact that the independence of the judiciary was thwarted during the 1975 Emergency.

III. The Maintainability of Habeas Corpus Petitions

On June 28, 1975 (two days after the proclamation of the Emergency), Article 359 of the Indian Constitution, which provide(d) for suspension of enforcement of fundamental rights conferred under Part III during the Emergency, became operational. When detenus began approaching constitutional courts through writ petitions, the courts were in dilemma on whether they must decide these cases or not, especially with regard to habeas corpus cases, where detenus challenged their detention as being based on vague or no grounds. Whether the constitutional courts could issue a writ of habeas corpus during the operation of the Emergency was a question that left judges, especially of the High Courts, perplexed.

There were 9 High Courts that ruled that the writ petitions challenging detentions were maintainable and that constitutional courts could issue the writ of habeas corpus; while other High Courts either maintained a contrasting view or did not decide this question of law themselves. The Supreme Court finally decided this question in April 1976 in the *Habeas Corpus* case, but the foundation for the ratio of this case was laid down more than a year prior to the invocation of the 1975 National Emergency.

In May 1974, a Constitution Bench of 5-judges of the Supreme Court, headed by Chief Justice Ray decided a case on preventive detention under MISA, titled *Fendan Naha v. State of West Bengal*.[66] The detenu in this case was detained in March 1973 till the expiration of Emergency.[67] The period of detention was challenged on the ground that it was indefinite. The bench headed by the CJI dismissed the writ petition and upheld the detention in the light of Section 6(d) of the DOIA, which permitted preventive detention for a period of 12 months or until the expiration of DOIA, whichever is later. This single-page judgment, delivered as a unanimous verdict, did not seem to pose

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[65] *CPIO, Supreme Court of India v Subhash Chandra Aggarwal* (2020) 5 SCC 481.

[66] *Fendan Naha v State of West Bengal* (1975) 3 SCC 30.

[67] During the Emergency of 1971, which was revoked only in 1977, along with the 1975 Emergency.

any major threat to liberty at that time, since most of the preventive detentions till June 1975 were to prevent any impediments to the supply of service and goods only. There were no 'political arrests' as preventive detentions[68], at least none that were contested before the Supreme Court (a claim that could be established by perusing the reported as well as unreported judgments of the Court).

Further, in 1973, in *Prabhu Dayal Deorah v. DM Kamrup*,[69] Justice M.H. Beg, who later sided with the majority opinion in the *Habeas Corpus* case, while writing a separate and dissenting opinion, watered down the scope of judicial review by the Supreme Court in preventive detention cases. He held that even if some grounds of detention are vague, the detention is not to be vitiated. If the detenu believes that some grounds are vague, he can approach the Advisory Board, but the Supreme Court shall not interfere in these matters. The majority decision by Justices Mukherjee and Mathew saved the jurisdiction of the Supreme Court to entertain these matters under Article 32 of the Constitution, and prevented the opinion of Justice Beg from forming the ratio. However, Justice Beg referred to his minority opinion in *Prabhu Dayal* while writing his concurring judgment in the *Habeas Corpus* case, to reiterate and reaffirm his stance, which then became part of the ratio and limited the scope of judicial review in preventive detention matters.

These two propositions were supplemented by the ratio in *Fagu Shaw v. State of West Bengal*,[70] where the Court held that the Parliament was not obliged to provide a maximum term of detention in the preventive detention statute (speaking in the context of MISA only). It supplemented, in the context of a maximum period of detention, that "(there) is no limit to that period, except in case of its reasonableness".[71] The question of personal liberty was limited at that point in time; but post June 1975, when preventive detentions to curb dissent increased, the ghost of the precedents bound other judges too. The impact of these precedents was amplified in and after the *Habeas Corpus case* that came two years later, by a bench headed by the same Chief Justice, where even the judicial review of detention during the period of Emergency was barred.

Although the judges were constantly petitioned and forewarned of the effect of suspension of fundamental rights during Emergency and were apprised of the apprehension that detention may become perpetual if the Emergency remains a constant fact of Indian constitutional life, the Court shrugged its judicial shoulders. The ball was passed to the political court (i.e., to legislation and executive action) by stating this matter to be "outside the

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68 See Annexure 1.

69 *Prabhu Dayal Deorah v DM Kamrup* (1974) 1 SCC 103.

70 *Fagu Shaw v State of West Bengal* AIR 1974 SC 613.

71 ibid [158].

orbit of judicial control and wandering into the para-political sector."[72] The Court, while displaying judicial restraint, refuted the argument that their act is a display of "constitutional-taboo", by terming the conduct as a "pragmatic response of the court to the reality of its inadequacy in deciding such issues",[73] owing to the constitutional scheme of separation of powers. The country was engulfed in the mindset of the Emergency, and true to Cardozo's words, this tide and current did not pass the judges idly by.[74] Be it the political executive or the judiciary, the language of rosy jargon was never renounced, even in this period; albeit the practice was nowhere near enough to realise these ideals.

There were certain judges who believed that "no amount of verbal praise and encomium for the rule of law by some votaries of law and intellectual theorists would win the respect of the masses for rule of law unless in its actual working the rule of law satisfies the quest for justice in concrete terms".[75] But these judges were not assigned cases where the arbitrary curtailers of liberty may face embarrassment;[76]and therefore, whenever they got an opportunity to register their views, they did not hesitate to remark that "history will, we hope, serve the administration as a reminder of unwitting misuse while exercising near-absolute power".[77]

On April 28, 1976, a 5-judge Constitutional bench of the Supreme Court of India decided 9 appeals — these being against the judgments of the High Courts of Allahabad, Bombay, Madhya Pradesh, Karnataka, Delhi, Punjab, and Rajasthan, where the High Courts had issued the writ of habeas corpus. These appeals were tagged and pronounced as a judgment titled *Additional District Magistrate, Jabalpur v. Shivkant Shukla*.[78] The Court, by a majority of 4:1, held that an order of detention during the period of Emergency cannot be judicially reviewed even if the orders were sans authority of law or with mala-fide intention to detain. The Chief Justice went on to elucidate that: "Liberty is confined and controlled by law, whether common law or statute… It is not an abstract or absolute freedom… Liberty is itself the gift of the law and may by the law be forfeited or abridged."[79]

In his concurring opinion, Justice Y.V. Chandrachud, who later went on to become the longest serving CJI, endorsed the view of Chief Justice Ray, and concluded his remarks by observing:

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72 *Bhut Nath Mete* (n 39).

73 ibid.

74 HR Khanna, Role of Judges' (1979) 1 SCC (Jour) 17.

75 HR Khanna, 'Rule of Law' (1977) 4 SCC (Jour) 11.

76 For instance, Justice Krishna Iyer was not assigned more than 4 liberty matters during the reference period, while he decided more than 20 cases on preventive detention in the period of January 1974 to June 1975. Similarly, Justice Khanna — who was the senior most associate judge of the Court — was assigned only 2 liberty matters during the reference period.

77 *Golam Hussain v Commissioner of Police, Calcutta* (1974) 4 SCC 530 (Khanna J).

78 *Habeas Corpus* case (n 44).

79 ibid [33]-[35].

> Counsel after counsel expressed the fear that during the emergency, the Executive may whip and strip and starve the detenu and if this be our judgment, even shoot him down. Such misdeeds have not tarnished the record of Free India and I have a diamond-bright, diamond-hard hope that such things will never come to pass.[80]

Similar observations were made by the other two judges, Justices M.H. Beg and P.N. Bhagwati, while concurring with the majority judgment.

It was Justice Hans Raj Khanna who registered the sole dissent in this judgment, while siding with liberty and right to life. He refuted the view of Chief Justice Ray by observing:

> Sanctity of life and liberty was not something new when the Constitution was drafted. It represented a facet of high values which mankind began to cherish in its evolution from a state of tooth and claw to a civilized existence. Likewise, the principle that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution. It was a necessary corollary of the concept relating to the sanctity of life and liberty, it existed and was in force before the coming into force of the Constitution.[81]

This dissent costed Justice Khanna his Chief-justiceship[82]. The 16 judges of those 9 High Courts who had earlier reflected the same views as Justice Khanna and had upheld the maintainability of habeas corpus petitions were

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80 ibid [421].

81 ibid [528].

82 Justice Khanna anticipated this while penning his judgment. In his autobiography, he mentions a conversation with his sister a few days before the pronouncement of this judgment, where he mentions that this dissent would cost him Chiefship. But Justice Khanna was ready for it. His conviction was strong; in one of his judgments, he had observed: "Abnegation in matters affecting one's own interest may sometimes be commendable but abnegation in a matter where power is conferred to protect the interest of others against measures which are violative of the Constitution is fraught with serious consequences." See *State of Punjab v Khan Chand* (1974) 1 SCC 549.

Justice Khanna was ready to abnegate the position of Chief Justice in order to prevent the consequences of allowing the arbitrary curtailment of individual liberty of the citizens. In his farewell speech, which he gave before the Supreme Court Bar Association and other Bar Associations on March 4, 1977, he stood with his stance and reflected no regret on losing out on the position. He noted:

> Law, it has been said, knows no finer hour than when it cuts through the formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution…. A [Judge] has to put aside the ambitions which drives the politician to search for power and the thinker to the construction of abstract system.

See 'Farewell Speech' (1977) 1 SCC (Jour) 9.

transferred from their respective High Courts,[83] and several of them who were still ad-hoc judges were not made permanent judges of the High Courts.[84]

The majority decision of *Habeas Corpus* case reflected how the "Emergency had a crippling effect on the decisional independence of the judges of higher judiciary."[85] This judgment also serves as the indicator of how the innocuous trend of previous judgments of the Supreme Court on detention matters, which served as impetus for judicial deferral on liberty and detention matters, culminated as a complete bar on judicial review in detention matters under preventive detention laws during the Emergency period. The judgment in the *Habeas Corpus* case was not a sudden withdrawal from judicial scrutiny by the court; but a crafted denouement of the narrative that began being framed from much before. While the spirits of *Fendan Naha* and *Fagu Shaw* judgments were retained in this judgment, sans their explicit reference, the minority view of Justice Beg in *Prabhu Dayal Deorah* was reiterated by him in the *Habeas Corpus* case; and this time, it became part of the ratio and thus limited the scope of judicial review in preventive detention matters.

Bhanudas is another case, though lesser discussed, which was decided by the Supreme Court during the reference period and which had a similar ratio. A three-judge bench, led by Chief Justice Ray and having Justices Beg and Jaswant, in January 1977 (just three days before the Union government decided to deprive Justice Khanna of his due Chief-justiceship, and appoint Justice Beg as the CJI) reiterated its stance in the *Habeas Corpus* case and held that a writ petition challenging the detention is not maintainable during the period of Emergency.

In *Bhanudas*,[86] the bench observed that the proclamation of Emergency has imposed a "blanket ban on every judicial enquiry into the validity of an order depriving a person of his personal liberty irrespective of whether it stems from the initial order directing his detention or from an order laying down the conditions in his detention."[87] This case, which had clubbed nine appeals that challenged the provisions of COFEPOSA and had sought a direction of the Court, inter alia, to allow detenus to get treatment by private doctors,

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[83] Senior Advocate and jurist H.M. Seervai observed in his commentary on the Indian Constitution that "these sixteen judges were transferred not for doing anything wrong, but for doing right to all manner of people according to the constitution and law." See HM Seervai, *Constitutional Law of India* (Law and Justice Publishing Company 2008) 2802.

[84] Granville Austin, *Working a Democratic Constitution: A History of Indian Constitution* (Oxford University Press 2003) 344.

[85] Sengupta and Sharma (n 42).

[86] *Bhanudas* (n 50).

[87] ibid [24].

permission to perform religious ceremonies, and obtain home cooked food, was dismissed by the Court, and it was elucidated that:

> In all the cases now before us, the application considered by the High Court was for grant of a direction or order against the State or its officers, acting in the performance of their purported duties. The remedy sought against them was clearly covered by the Presidential inhibition which operates, under the Constitution, which is supreme, against the High Courts. Hence, whatever may be the grievances of the detenus, with regard to the place of their confinement, the supply of information to them, their desire to get treatment by their own private doctors or to obtain some special or additional food required by them from their own homes, or to leave the place of their confinement temporarily to go to some other place to perform some religious ceremony or other obligation, for which they had erroneously sought permission and directions of the court subject to any conditions, such as that the detenus could be accompanied by the police or remain in the custody of the police during the period, are not matters which the High Court had any jurisdiction to consider at all. It was, therefore, quite futile to invite our attention to the allegations of petitioners about supposed conditions of their detention. Indeed, on the face of it, the nature of the claims made was such that they are essentially matters fit to be left to the discretion and good sense of the State authorities and officers. It is not possible to believe, on bare allegations of the kind we have before us, that the State authorities or officers will be vindictive or malicious or unreasonable in attending to the essential needs of detenus. These are not matters which the High Court could consider in petitions under Article 226 of the Constitution, whatever be the allegations made on behalf of detenus so as to induce the High Court to interfere. The High Courts can only do so under Article 226 of the Constitution if they have authority or power to do it under the Constitution. Devoid of that power, the directions, which may be given by a High Court after such enquiries as it makes, would be useless as they will not be capable of enforcement at all during the Emergency under the law as we find it in our Constitution.[88]

The afore-cited judgments of the Supreme Court reflect the degree of sympathy and independence which was left in the 'independent judiciary'. The Court became a spectator to arbitrary infringement of individual liberty by the State, while perpetually observing that "their (Court's) power to proceed with a habeas petition against executive authorities of the State is itself

[88] ibid [47]. (emphasis added)

impaired"[89] and "the suspension of the right to enforce the right conferred by Article 21 means and implies the suspension of the right to file a habeas corpus petition or to take any other proceeding to enforce the light to personal liberty conferred by Article 21."[90]

IV. CONCLUSION

In this comprehensive analysis, I have examined the intricate interplay of unobtrusive and political influences on the judiciary while focusing on detention jurisprudence by the Supreme Court of India from January 1974 to December 1977. This study sheds light on the hitherto unexplored influences on judicial decision making, providing a nuanced understanding of how the law operates in practice. During this period, India grappled with the aftermath of the 1971 war, a lingering state of emergency, and political developments that raised questions regarding the independence of the judiciary. The legislative changes and amendments introduced after the proclamation of the Emergency significantly enhanced the government's powers, particularly in matters of preventive detention. These changes curtailed personal liberty and challenged the judiciary's role in upholding individual rights.

My research relied on a jurimetrical approach, examining judicial behaviour and the quantitative analysis of judgments. Additionally, I considered socio-political factors, career trajectories of judges, and the impact of extraneous influences on judicial decisions to unveil the layers of complexity that influence court judgments. This piece comprised two sections, exploring different facets of the judiciary's response to the evolving legal landscape during the specified period. The first section examined quantifiable data, providing insights into reporting and non-reporting of judgments, while probing into reasons for the decline in the number of liberty-related cases adjudicated during the reference period. While examining the judgments on liberty matters by the Supreme Court from January 1974 to June 1977, this section underscored a distinct decline in the number of judgments, particularly following the declaration of the National Emergency in June 1975. The significant drop in reported as well as non-reported judgments in this category prompts a closer inquiry into the circumstances surrounding this phenomenon. Speculations regarding non-

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89 *Habeas Corpus* case (n 44).

90 In the *Habeas Corpus* case, Justice Y.V. Chandrachud observed the aforementioned remark. Forty-five years after this observation, an observation by a Supreme Court judge presented a contrasting view on the Court's responsibility in liberty matters. See *Arnab Manoranjan Goswami v Union of India*, 2020 SCC OnLine SC 964. Here, Justice D.Y. Chandrachud observed:

> The doors of this Court cannot be closed to a citizen who is able to establish prima facie that the instrumentality of the State is being weaponized for using the force of criminal law. Our courts must ensure that they continue to remain the first line of defense against the deprivation of the liberty of citizens. Deprivation of liberty even for a single day is one day too many. We must always be mindful of the deeper systemic implications of our decisions.

listing and potential censorship warrant a meticulous investigation as they raise critical questions regarding the judiciary's autonomy and accountability during this turbulent period. This section also underscored the need for a rigorous analysis of the factors contributing to listing and reporting of matters, particularly with implications for understanding the legal landscape of that era, and generally as well.

The second section delved into the Supreme Court's pronouncements on the maintainability of habeas corpus writ petitions during the Emergency period. These judgments demonstrate how the Emergency profoundly affected the judiciary's independence and its role in safeguarding individual liberties, representing a departure from established principles of justice and freedom. The consequences of these decisions underscore the profound challenges faced by India's judicial system during this tumultuous period. An insidious pattern was observed where judicial functioning was influenced by the political executive, selective decision-makers were preferred by the executive through appointments and by the judiciary itself through listing of matters and constitution of benches. The pattern also indicated how seemingly innocuous judicial decisions, like *Fendan Naha*, *Prabhu Dayal Deorah*, and *Fagu Shaw* gradually prepared a base for deferring discretion to the political executive and curtailing judicial review, which culminated in the infamous *Habeas Corpus* case.

In conclusion, the analysis uncovers nuanced patterns of judicial decisions during the study period. It reveals the influence of certain (potentially) political factors at play. These findings contribute to a deeper understanding of the functioning of the Supreme Court during this critical time and raise the need for a more rigorous and systematic analysis in these areas for other courts and periods as well.

Annexure: List of Unreported Judgments in Detention Matters from January 1974 to December 1977

	Case Number	*Description of matter (in head-note format)*	*Decision (and any other observation)*	*Month and year of decision*
1.	WP 1972 of 1973	WP - MISA - supply of food services	WP dismissed	February 1974
2.	WP 20 of 1973	WP - MISA - single act of daring removing instruments	WP dismissed	February 1974
3.	Criminal Appeal no. 23 of 1974	MISA - preventive detention order where prosecution already going on same facts	Detention upheld	February 1974
4.	WP 508 of 1972	WP - MISA - supplies	WP allowed	February 1974
5.	WP 1678 of 1973	WP - MISA - supply of tele service	WP allowed (no body is born as veteran or habitual criminal)	February 1974
6.	WP 555 of 1972	WP - MISA - disrupt in supply- long duration of detention-state to consider	WP dismissed	February 1974
7.	WP 603 of 1972	WP - MISA - failure to communicate grounds	Detention invalidated	February 1974
8.	WP 26 of 1973	WP - MISA - detention on material not communicated	WP allowed	February 1974
9.	WP 657 of 1972	WP - MISA - Cutting communication line	Detention upheld	February 1974
10.	WP 506 of 1972	WP - MISA - single activity which required skills	Detention upheld	February 1974
11.	WP 344 of 1972	WP - MISA - detention on 7-month-old acts	Detention invalidated	February 1974
12.	WP 1857 of 1973	WP - MISA	Detention upheld	February 1974
13.	WP 1995 of 1973	WP - MISA - communication	Detention upheld	February 1974

	Case Number	*Description of matter (in head-note format)*	*Decision (and any other observation)*	*Month and year of decision*
14.	WP 1856 of 1973	WP - Habeas corpus - Art 22 - no communication of instances	Detention invalidated	February 1974
15.	WP 1679 of 1973	WP - MISA - vague grounds -single instance	WP allowed	February 1974
16.	WP 613 of 1972	WP - MISA - single ground communicated	Detention invalidated	February 1974
17.	WP 473 of 1972	WP - MISA - disruption of service	WP dismissed	February 1974
18.	WP 2023 of 1973	WP - MISA	Detention upheld	March 1974
19.	WP 527 of 1972	WP - MISA - authority to explain the delay	Detention invalidated	March 1974
20.	WP 961 of 1974	WP - MISA - previous detention order revoked - new order	Detention invalidated	April 1974
21.	WP 1466,1500, etc of 1973	WP - MISA - revocation of revocation order	Liberty granted to all detenus	May 1974
22.	WP 2053 of 1972	WP - MISA - detention till expiration of emergency - whether valid	Detention upheld	May 1974
23.	WP 30 of 1974	WP - MISA - order of police commissioner - valid grounds	Detention upheld	August 1974
24.	WP 801 of 1973	WP - MISA - discharge/ acquittal by criminal court does not affect the detention if detaining authority satisfied	Detention upheld	September 1974
25.	WP 292 of 1974	WP - MISA - adulteration	WP allowed	October 1974
26.	WP 278 of 1974	WP - MISA - language of grounds	Detention upheld	October 1974
27.	WP 380 OF 1974	WP - habeas corpus - preventive detention under MISA	Detention upheld	November 1974

	Case Number	*Description of matter (in head-note format)*	*Decision (and any other observation)*	*Month and year of decision*
28.	WP 319 of 1974	WP - MISA - all grounds not revealed to DM	WP allowed	November 1974
29.	WP no. 332 of 1974	WP - habeas corpus - Preventive detention under MISA - accused in possession of material that may hamper telegraph lines and thus the communication system	Dismissed the WP after appreciating the evidence	November 1974
30.	Writ Petition 453 of 1974	MISA - detention where the facts show that person could have been prosecuted under ordinary law - preventing essential commodities being served	Detention set aside after appreciating evidence	December 1974
31.	WP 407 of 1974	Habeas corpus - MISA	WP dismissed	December 1974
32.	WP 481 of 1974	MISA - Habeas corpus - Hoarding	WP dismissed	December 1974
33.	WP 318 of 1974	MISA - Detention without explaining reasons for arrest and without mentioning the name of associates involved in alleged offence	Dismissed WP (Held: though detenu illiterate, grounds were explained in Hindi)	December 1974
34.	WP 231 of 1974	WP - MISA	WP dismissed	December 1974
35.	WP 573 of 1974	WP - MISA - Hoarding	WP dismissed	December 1974
36.	WP 446 of 1974	WP - MISA - delay in detention order and arrest - one month delay	WP dismissed	December 1974

	Case Number	*Description of matter (in head-note format)*	*Decision (and any other observation)*	*Month and year of decision*
37.	WP 463 of 1974	WP - MISA - Justification of continuance of detention - grievance seems justified but court cannot decide whether detention to be continued	WP dismissed	December 1974
38.	WP 307 of 1974	WP - MISA - Detention	WP dismissed	January 1975
39.	WP 458 of 1974	WP - MISA - 2 incidents -detention	WP dismissed	January 1975
40.	WP 508 of 1974	WP - MISA - stealing railway equipment, armed with weapons and bombs which they hurled at police	WP dismissed	January 1975
41.	WP 447 of 1974	WP - MISA - Stealing fish plates from railway tracks	WP dismissed	January 1975
42.	WP 538 of 1974	WP - MISA - Ground that witness was afraid to give evidence - incredulous	Detention invalidated	January 1975
43.	WP 444 Of 1974	WP - MISA - Section 15 MISA - temporary release	Upheld detention (observed that humanist provision of temporary release under s.15 MISA should not rust in statute books, but should be used by the government to humanise fellow men)	January 1975

	Case Number	*Description of matter (in head-note format)*	*Decision (and any other observation)*	*Month and year of decision*
44.	WP 374 of 1974	WP - MISA - detention order can be issued while the detenu is in custody in a trial	Upheld detention (Held Court cannot decide whether the detenu committed dacoity or not)	January 1975
45.	WP 476 of 1974	WP - MISA - public disorder - grounds conveyed had direct nexus to it	Upheld detention	January 1975
46.	WP 456 of 1974	WP - MISA - Detention on solitary incident	WP dismissed	January 1975
47.	WP307 of 1974	WP - MISA - Detention	WP dismissed	January 1975
48.	WP 522 of 1974	WP - MISA - Infringement of procedural safeguards, approval communicated before it was granted	Detention invalidated	January 1975
49.	WP 389 of 1974	WP - MISA - Detention on single ground where grounds shown are dangerous, organised loot of coal from train after breaking open the coach	WP dismissed	February 1975
50.	WP 568 of 1974	WP - MISA - Single instance of dacoity in a house insufficient to construe public order breach	WP allowed	March 1975
51.	WP 556 of 1974	WP - MISA - Grounds having no nexus with activity	WP allowed	March 1975
52.	Criminal Appeal 359 of 1974	Benefit of statutory bail under S.167 CrPC - investigation pending before April 1974 - benefit of provision cannot be taken	Appeal dismissed	April 1975

	Case Number	*Description of matter (in head-note format)*	*Decision (and any other observation)*	*Month and year of decision*
53.	Criminal appeal 129 of 1971	Supreme Court bound to take notice of Probation of Offenders Act, even though not brought to notice of TC or HC.	Benefit of bail granted to accused in offence under S.379/34 IPC	September 1975
54.	Criminal Appeal 172 of 1971	S.439 CrPC - appeal by State against HC giving relief to applicant	Appeal dismissed, bail upheld	October 1975
55.	Criminal appeal 100 of 1977	Probation of Offenders Act	Sentence remitted, probation granted	August 1977
56.	Cr. Misc. Petition 1907 of 1976	Bail - appeal admitted by SC but not likely to be heard soon	Bail granted	September 1977

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A Tribal Chief and a Colonial Legislation: The Excluded Areas Act of 1846

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Abstract

This article explores the nature of colonial sovereignty from a Hobbesian lens of 'state necessity' by taking the example of the Excluded Areas Act of 1846. This Act was a special law that placed the Bhil tribes of the Khandesh and Ahmadnagar districts (in present-day Maharashtra) outside the purview of the general laws in the Bombay Presidency. By drawing from archival sources, including records of the East India Company and legislative proceedings, the paper contrasts pre-colonial tribal autonomy with authoritarian and paternalistic colonial rule by a British Agent under the Act. First, the paper locates its argument on colonial rule in an 'unruly' tribal periphery through exceptional/emergency legislation in the larger body of work on colonial sovereignty. Second, it sets out the nature of tribal autonomy and the role of the hill chiefs in these regions. Third, it uses primary material to elaborate on Kuar Vasava's (a Bhil tribal chief) interactions with and rebellion against the East India Company state. Fourth, it briefly explains the law-making process in early colonial India. Fifth, it analyses the promulgation of the Excluded Areas Act of 1846 and the powers of the executive under the Act as direct consequences of Kuar Vasava's rebellion, and argues that the law was used as a tool to undermine tribal autonomy and impose colonial rule. A short conclusion follows.

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I. INTRODUCTION

> …[I]t may be that the history of law has no separate existence except as the history of jurists; but this is not a bad sort of existence for a branch of the sciences of man. Understood in this sense, the history of law sheds some glimmers of light upon phenomena which are extremely diversified, yet subject to a common human activity, and these glimmerings, if necessarily limited in their scope, are very revealing.[1]

In the above quotation, the great historian Marc Bloch comments on the limited "glimmerings" that the history of law may shed upon social phenomena. However, the connection between law and society, which he draws our attention to, has been of abiding interest to historians. This article contributes to the discussion on the social history of the law as it documents the history of the Excluded Areas Act of 1846, a legislation that originated in the Bombay Presidency and was passed by the Government of the East India Company. The Act of 1846 was part of a long series of legislations pertaining to the tribal areas in the hill-forest regions of the subcontinent. These exceptional laws resulted in the creation of a special jurisdiction for tribal groups, who were thereby exempted from civil and criminal jurisdiction of the courts in colonial India and were placed under the direct control of a British Agent.

This paper explores what occasioned the framing of such special laws. As this paper illustrates, the rebellion of a tribal chief led to the passage of the Act of 1846. While tracking the career of the Bhil chief, Kuar Vasava, this article provides an account of a prolonged conflict between the chief and the early colonial state. The co-option of the chief as the head of a police establishment under Company rule proved to be short-lived. The chief crossed the line and took up arms against the new regime. The act of rebellion, as it was construed by the modern colonial state, and the violation of his chiefly rights and privileges, as understood by the chief himself, takes us to a discursive field that opens a window into the pre-colonial past wherein lies the reason for the chief's rebellion. The article provides a glimpse into that past to underscore the enormity of the situation for the chief whose political power and authority were being severely undermined. The colonial sovereign's response to the Bhil rebel was to remove him, and other hill chiefs, from the normal regulations of the Bombay Presidency and place them under a special law.

While there is a rich body of work on legal exceptions in the colony, this article proposes to tease out an aspect that is implicit in much of the scholarship but is usually not the focus of study, namely, the Hobbesian nature of colonial sovereignty. As Mithi Mukherjee has argued, the East India Company's government had its own notion of sovereignty that derived from

[1] Marc Bloch, *The Historian's Craft* (Manchester University Press 1992).

the idea of 'state necessity'. This was grounded in the idea of self-preservation of the State. The colonial philosophy of the state viewed the law more as an instrument of enforcing order and exacting obedience, rather than a guarantee of rights and freedom.[2] This characterisation of the colonial state of the East India Company ties in with observations made by other scholars. Nasser Hussain has argued that the rule of law in a regime of conquest often amounted to rule *by* law.[3] Further, Lauren Benton has argued that the imperial rule of law represented a political and legal project that involved the definition of rules about rule.[4]

This article foregrounds the political necessities of rule that were the very reason for the passage of the special legislation. It also draws attention to the outcome of such a legislation, i.e., the introduction of a paternalistic and authoritarian rule of a British Agent in the tribal districts.

The early colonial records of the East India Company in the holdings of the Maharashtra State Archives, Mumbai and Pune, and the National Archives of India, New Delhi, as well as a few legislative proceedings of the Government of India in the colonial period, now available on digital platforms, constitute the primary sources for this article.

The article is divided into six sections. Section 1 surveys the historiography on legal exceptions in colonial India. Section 2 elaborates on the theme of tribal autonomy in the pre-colonial period. Section 3 describes how early administrative interventions resulted in a significant attenuation of the powers of tribal chiefs while retaining a semblance of the older structure. Section 4 tracks the career of Kuar Vasava, the tribal chief who rebelled against the Company Government. Section 5 sketches out the institutional framework of law-making under Company rule. Section 6 focusses on the passing of the Excluded Areas Act of 1846.

II. Law and Its Exception

The governance of 'unruly' terrain posed a special challenge to colonial rulers. In a large body of work, historians of modern South Asia have documented the emergence of exceptional forms of rule in these difficult geographies.[5] More recently, the exceptional *legal* geographies of the empire

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2 Mithi Mukherjee, *India in the Shadows of Empire: A Legal and Political History 1774-1950* (Oxford University Press 2012) 58-60.

3 Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press 2003).

4 Laura Benton, 'Empires of Exception: History, Law, and the Problem of Imperial Sovereignty' (2007) 6 Quaderni di Relazioni Internazionali 54.

5 K Sivaramakrishnan, *Modern Forests: Statemaking and Environmental Change in Colonial Eastern India* (Oxford University Press 1999); Nandini Sundar, *Subalterns and Sovereigns: An Anthropological History of Bastar 1854-1996* (Oxford University Press 1997); Gunnel Cederlof, *Founding an Empire on India's North-Eastern Frontiers 1790-1840* (Oxford

have emerged as the focus of study.[6] It has been argued that oceans, islands, and hills and mountains, were configured as distinctive kinds of spaces in European imagination, and that they witnessed the shaping of a diverse array of legal regimes.[7] In these legally archaic zones, the European powers strived to construct and sustain metropolitan understandings of sovereignty. This project resulted in the "peculiar and enduring lumpiness of the imperial legal space".[8] While Benton's work foregrounds the connection between law and geography, colonial India offers many examples of legal exceptionalism arising not only due to the difficult geographies but also the presence of the native princes and their residual sovereignties.[9]

The tension between political exigencies and legal rule in the colony is a point that Nasser Hussain makes in his work.[10] He argues that there were competing visions of rule by sovereign decree and rule by law in colonial India. Benton proposes that the rule of law in the empire depends upon peculiar kinds of rules, what she calls "rules about rule".[11] The political hegemony and the coercive power of the colonial state are captured in some of these formulations.

Historians have commented on the proliferation of special legislations in colonial India. In the context of legislations pertaining to collective crime, Sandria Freitag argues that these arrangements grew as a covert legal structure forming an alternative to the overt legal structure.[12] In contrast, Radhika Singha argues that both these elements existed in the same body of law. Even if extraordinary measures were introduced, they eventually had to be integrated into the rule of law.[13] The violence residing at the very heart of the colonial order has been the concern of scholars working on frontier regions.[14] While documenting the history of the Murderous Outrages Act,

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University Press 2014).

6 Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge University Press 2010); Benton, 'Empires of Exception: History, Law, and the Problem of Imperial Sovereignty' (n 4) 54-67; Laura Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge University Press 2002).

7 Benton, *A Search for Sovereignty* (n 6) xi-xiii.

8 ibid xiii.

9 Sudipta Sen, 'Unfinished Conquest and Residual Sovereignty and the Legal Foundations of the British Empire in India' (2013) 9 Law, Culture and the Humanities 227, 233-4.

10 Hussain (n 3) 7

11 Benton, 'Empires of Exception: History, Law, and the Problem of Imperial Sovereignty' (n 4) 54-67.

12 Sandria Freitag, 'Crime in the Social Order of Colonial North India' (1991) 25 Modern Asian Studies 227, 227-231.

13 Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Oxford University Press 2000) 170.

14 Elizabeth Kolsky, 'The Colonial Rule of Law and the Legal Regime of Exception: "Frontier Fanaticism" and State Violence in British India' (2015) 120 The American Historical Review 1218; Reeju Ray, *Placing the Frontier in British North-East India: Law, Custom, and Knowledge* (Oxford University Press 2023) 6; Reeju Ray, 'Interrupted Sovereignties in the

Elizabeth Kolsky comments on the colonial rule of law and the legal regime of exception. She argues that the law and states of exception together defined and constituted imperial sovereignty.[15]

More recently, Milinda Banerjee has made a strong case for highlighting the 'sovereign' in the narrative of sovereignty-construction in modern India. Drawing attention to Carl Schmitt's work, Banerjee mentions the centrality of rulership ideas to the construction of modern notions of state sovereignty in Europe, and links it with monarchic thinking in modern South Asia.[16] While Banerjee's focus is the 'hybrid' sovereign figures in colonial and post-colonial India,[17] this article draws attention to the authoritarian character of the colonial sovereign. As pointed out earlier in this article, Mukherjee's argument about notions of colonial sovereignty deriving from ideas of 'state necessity', combined with the idea of the centre-staging of the sovereign in colonial India, helps underscore the supreme authority of the colonial sovereign.

While talking about the implications of rule of law in a regime of conquest, Hussain draws attention to certain features of colonial rule that were exceptional in themselves, such as a strong insistence on the discretionary authority of the central executive, the fact that the legislature was itself part of the executive, and the absence of an electoral process in the colony.

The extraordinary powers of the executive, we may argue, were an inescapable condition of colonial rule. It is important to note that both Hussain and Milinda Banerjee have referred to Carl Schmitt while commenting on the notions of sovereignty in the colony. Schmitt's definition of the sovereign "as he who decides on the exception" is particularly apt when we are discussing the rule of law and its countless exceptions in colonial India. The authoritarian origins of the modern state were ever so palpable in the colonial context.

In more recent scholarship, the interplay between law, power, and colonial sovereignty has been demonstrated through the passing of an exceptional law sanctioning judicial and summary punishment of whipping through Act No. 6 of 1864. Alastair McClure has argued that the application of judicial violence was part of an attempt to manage and police social hierarchies upon which colonial sovereignty depended.[18]

North East Frontier of India, 1787-1870' (2019) 53 Modern Asian 606.

15 Kolsky (n 14) 1245-1246.

16 Milinda Banerjee, *The Mortal God: Imagining the Sovereign in Colonial India* (Cambridge University Press 2018) 12-18.

17 Expanding the ambit of the term 'sovereign', Banerjee points to 'hybrid' sovereign figures of multi-sited provenance-God, as well as divine or historical human rulers, or the British monarch. He talks about shared and democratised programmes of rulership wherein disempowered groups are identified with divinity and regality. In sum, the figure of the sovereign, in elite and peasant politics alike, is the focus of his study. ibid 20-25.

18 Alastair McClure, 'Archaic Sovereignty and Colonial Law: The reintroduction of corporal punishment in colonial India, 1864-1909' (2020) 54 Modern Asian Studies 1217.

It is important to note that the growing body of scholarship on Northeast India is increasingly focusing on the pre-colonial forms of shared and layered tribal authority in this region, and the survival of these pre-modern forms of authority in the post-colonial period.[19] However, Reeju Ray has shown that the colonial administrators employed plural sovereignties and overlapping jurisdictions as strategies of governance in the frontier hills which de-centered the authority of the Chiefs and local rulers in Khasi polities.[20] In fact, this governing strategy helped further entrench colonial power in the frontier hills.[21] Thus, in light of the recent research on the Northeast, it can be argued that colonial authority was supreme in the Northeast as well, albeit in a different form. I would argue that the difference between indirect rule and direct rule seems to dissolve in the face of such evidence.[22] However, indirect rule lasted much longer in the northeast, and so did the political autonomy of the tribal chiefs. Climate, ecology, and topography were the factors that helped sustain this autonomy.[23]

Taking its cue from a large body of work that has drawn our attention to the co-existence of the normative legal rule and exceptional/emergency legislation, the latter weighing the scale in favour of the executive authority in the colony, this article looks at the archival evidence that shows similar processes at work in the Bombay Presidency. However, what we notice here is the constitution of a new kind of power and authority in the hill-forest tracts, one that is paternalistic in nature, which undermined tribal autonomy, and sought to integrate the tribal fringe into the colonial order.

The subject of this article is a tribal chief who crossed swords with the mighty Company *Sarkar* in early nineteenth century Western India. Kuar Vasava belonged to the powerful clan of Vasavas and was a member of the Bhil tribe. The term 'tribe' has been used in this article with full awareness of the colonial provenance of this term and the preference of the people so

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19 Jelle JP Wouters (ed), *Vernacular Politics in Northeast India: Democracy, Ethnicity, and Indigeneity* (Oxford University Press 2022); Banerjee (n 16). In global history scholarship, the prevalence of polycentric forms of power through much of human history has been noted, implying thereby that modern sovereign state form occupies only a narrow segment of human history. See, for example, David Graeber and David Wengrow, *The Dawn of Everything: A New History of Humanity* (Penguin Books 2022).

20 Ray, *Placing the Frontier in British North-East India* (n 14) 13-15.

21 ibid 14.

22 British conquest of India was a slow and gradual process that entailed multiple strategies of rule. Annexation of territories through military conquest brought them under direct British rule whereas a large part of India, mostly under princely and chiefly rule, was placed under the indirect rule of the East India Company, and then under the British Crown after 1857, through the treaty system. Michael Fisher has defined indirect rule in India as "the exercise of determinative and exclusive political control by one corporate body over a nominally sovereign state, a control recognised by both sides". See Michael Fisher, *Indirect Rule in India: Residents and the Residency System, 1764-1858* (Oxford University Press 1991) 6; Barbara N Ramusack, *The Indian Princes and Their States, The New Cambridge History of India,* vol III (Cambridge University Press 2005).

23 Cederlof (n 5).

described to be called *adivasis*. While the latter usage has been the marker of tribal political identity since early 1930s, the former carries with it the burden of the colonial past. [24]

III. Tribal Autonomy in the Pre-Colonial Setting

In South Asia's long historical past, tribal peoples' engagement with dominant state forms in the subcontinent was mostly conflictual, though at times accommodative.[25] In the early medieval period, the territorial expansion of Rajput power in western and central India was achieved at the expense of the erstwhile tribal settlements. Inscriptions speak of the suppression of the Sabaras, Bhillas, and Pulindas.[26] Further, Nandini Sinha Kapoor in her work on medieval Mewar has demonstrated that the Bhil chiefs of Oghna-Panarwa were integrated into the state structure. The Rajput Guhila State conferred the prestigious title of *Rana* to the Bhil chiefs of Panarwa. The chiefs paid tribute to the Guhilas, but enjoyed their independence.[27]

In his work on eighteenth century Maharashtra, Andre Wink discusses the place of tribal polities in the regional political economy. He points out that the Bhils, along with other tribals and petty autonomous chiefs, constituted a political sub-system that enjoyed autonomy vis-à-vis the Maratha rulers in the seventeenth and eighteenth centuries. These autonomous zones were called '*samsthans*' in Marathi. Wink uses the term 'co-sharers of the realm' for the semi-autonomous chiefs, rajas, and naiks. These *samsthans* enjoyed administrative as well as fiscal autonomy. They were not brought under the surveys for the assessment of state revenue demands. Their only obligation was the payment of tribute to the state.[28]

We now turn to an account of the rights and privileges (*haks/huks*) of the Bhil chiefs/naiks in the British district of Khandesh. Our Bhil chief, Kuar Vasava, resided in this district. Khandesh lay along the north-western

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[24] Scholars have argued that tribe is a colonial category and a product of colonial theories and practices. See Ajay Skaria, 'Shades of Wildness: Tribe, Caste and Gender in Western India' (1997) 56 Journal of Asian Studies 726; Sumit Guha, *Beyond Caste: Identity and Power in South Asia, Past and Present* (Leiden and Boston 2013). In reaction to this, many 'tribal' people assertively claimed to be adivasis, or 'original inhabitants'. See David Hardiman, 'Dalit and Adivasi Assertion' in Sumit Sarkar and Tanika Sarkar (eds), *Caste in Modern India: A Reader,* vol 2 (Permanent Black 2014) 413.

[25] Ajay Skaria, *Hybrid Histories: Forests, Frontiers and Wildness in Western India* (Oxford University Press 1999) ix.

[26] BD Chattopadhyaya, 'Origin of the Rajputs: The Political, Economic and Social Processes in Early Medieval Rajasthan' in *The Making of Early Medieval India* (Oxford University Press 2010) 62.

[27] Nandini Sinha Kapoor, *Reconstructing Identities: Tribes, Agro-Pastoralists and Environment in Western India (Seventh-Twelfth Centuries)* (Manohar 2008) 37-40.

[28] Andre Wink, *Land and Sovereignty in India: Agrarian Society and Politics under the Eighteenth-century Maratha Svarajya* (Cambridge University Press 1986) 191-192.

boundary of the Bombay Presidency.[29] The topographical features of this area and the political geographies, the two being inextricably linked, gave a distinct political and strategic advantage to the Bhil communities. The difficult terrain, hilly and forested, resulted in political autonomy for the clan brotherhoods and their chiefs.[30] Nestled in the mountains of the Satpuras and protected by the thick forest cover of the region, Bhil villages continued to be the outliers of the Maratha empire in the eighteenth century.[31]

The Mughal conquest of this area in the seventeenth century did not result in the subordination of powerful tribal chiefs. On the contrary, Shahjahan and Aurangzeb, the latter first in his capacity as the governor of the Deccan and later as the emperor, decided to bestow land grants and the right to collect custom duties/tolls on tribal chiefs while encouraging them to convert to Islam. These privileges were granted in exchange of some services that the imperial government demanded, namely, that the chiefs should function as the head of the district police, and that they should also guard the mountain passes that connected the arterial trade routes of the region.[32]

The political autonomy of these chiefs dates back to the seventeenth century, if not earlier. It also underscores the negotiated nature of this autonomy vis-à-vis the Mughal empire as well as the Maratha Swaraj in the eighteenth century. The ability of these chiefs to galvanise support from the clan brotherhood and the extended kin network, and make a *bund* (insurrection) against the *Sarkar,* accounted for their political power. Kingdoms and empires in the region often shared power with the chiefs due to their political and military eminence.[33]

IV. Colonial Transition and Chiefly Power

At this point, we leave behind the long historical past and focus on our narrow time-frame, the first half of the nineteenth century. We find that the early colonial state entered into negotiated settlements with these powerful chiefs. In keeping with the governing practices of the past, the British Government thought it prudent to continue the vested rights of some of these chiefs. So, the role of the head of the police, the warden of the passes, and the rights and privileges granted for these services continued, albeit with one difference, i.e., the granting authority was the British colonial government.[34]

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[29] Khandesh District Gazetteer, The Gazetteer of the Bombay Presidency, Vol XII, The Government Photozinco Press, Pune, 1985 (Originally Printed in 1880) 1.

[30] Letter from Briggs to Elphinstone, dated 24/09/1818, vol 172, Gen no 212, Deccan Commissioner Files (DCF), Maharashtra State Archives Pune (MSAP) 310-319.

[31] ibid 252-254.

[32] Letter from Briggs to Chaplin, dated 16/04/1825, Political Department Mixed (PDM), vol no 9/192 of 1825, Maharashtra State Archives Mumbai (MSAM) 477-478.

[33] Wink (n 28); Sumit Guha, *Environment and Ethnicity in India, 1200-1991* (Cambridge University Press 1999).

[34] DC Graham, 'Historical Sketch of the Bheel Tribes Inhabiting the Province of Khandesh', Selections from the Records of the Bombay Government (hereafter SRBG), No 26, New

The chiefs were now confronted with a modern form of state, a sovereign power, which ruled over its colonial subjects.[35] The British Government offered pensions in lieu of the traditional *haks* of the Bhil Naiks. Some of the naiks returned the pensions, others never entered into an agreement with the British. Khandesh continued to witness Bhil raids and rebellions for the first seven years of British rule.[36]

The Bhil rebellion in Bagalan (1825) was the high point of a long series of intermittent acts of plundering raids and insurrections. In Bagalan, a large assemblage of Bhils, about 1200 strong, plundered villages in the plains, killed a *bania* (merchant) and carried off the *shaikdar* (a petty revenue officer) and his wife to the hills. The crowning glory of this rebellion was the coronation of Sewram Singh, the mastermind of the insurrection, as the ruler of this area. It is important to note that Sewram Singh was a blacksmith by caste and he belonged to the neighbouring forested region, the Dangs. He claimed that he was commissioned by the Raja of Satara to organise a *bund* (insurrection) against the *Sarkar*.[37]

The Bagalan rebellion of 1825 was a wake-up call for the British, a rude reminder that the negotiated settlements had run their course. Post-Bagalan, we have the formation of the Bhil Corps and the Bhil Agencies, twin projects that were designed to bring the rebellious Bhils and their kin under the surveillance-net of the colonial state. A few chiefs, for example, Jiva Vasava and Gumani Naik, were still allowed to run their police establishments, but received their payments from the Government.[38] The co-sharers of the realm were thus reduced to paid functionaries of the state whose rights and privileges would now solely be determined by the British paramount power. The clan brotherhood and the kin network had already been subdued by this modern militarised state.[39] The tribal chiefs had lost the political leverage that they enjoyed in the pre-colonial period.

Series, Bombay 210-212, Appendix A (Synopsis of the Bheel Settlement in Khandesh from 1818-1843) 229-237.

35 Initially, under John Briggs, the East India Company Government tried to settle the Bhils by recognising their traditional haks and commuting these into pensions/monetary allowances and holding the Bhil chiefs and their retainers responsible for maintaining peace in the countryside. This approach was successful, only partially. The British had to resort to brute force to suppress recurrent rebellions and raids. For an account of these administrative experiments in the early years, see Arvind M Deshpande, John Briggs in Maharashtra: A Study of District Administration Under Early British Rule (Mittal Publications 1987) 70-115.

36 Graham (n 34) 210-212.

37 For a brief account of the Bagalan rebellion, see Amrita Tulika, 'Bhil life - worlds in the colonial transition' (2021) 740 Seminar 14, 15-16. For a detailed account, see Amrita Tulika, 'Bhils of Khandesh: A Historical Study c.1800-1900' (DPhil thesis, University of Delhi 2004) 73-89.

38 "Summary of all Proceedings respecting the Bheels in Candiesh", Foreign Political (FP), 06/03/1834, No. 1, National Archives of India (NAI) 1-29.

39 For the military reprisals against the Bhils, see ibid 1-29. Also see Tulika, 'Bhils of Khandesh: A Historical Study c.1800-1900' (n 37).

This thumbnail sketch of the historical context would allow us to tell the story of Kuar Vasava. Kuar was the son of Jiva Vasava. Early colonial reports offer a detailed account of Jiva's political and military eminence on the eve of British rule:

> Jeeva like other Bhil chiefs in this part has taken advantage of the time to establish his power and rights over the neighbouring fertile districts. His family land consists of 84 villages in Raj Peepla… he became the dread of the surrounding country, he levied tribute from several zemindars, made passengers and merchants pay toll for their free transit through the country and triumphantly boasted that at his whistle, he could command the service of 4000 bowmen.[40]

John Briggs, the author of this report, was the first political agent in Khandesh district. In the early days of the British acquisition of this territory, Briggs was the head of district administration. Clearly, Briggs' concern was political in nature.[41] The likes of Jiva Vasava posed a political threat to the nascent colonial state. However, in yet another report, Briggs gave an account of the role and functions of the Bhil *naiks* (chiefs) and other Bhils in the districts/villages of Khandesh in the pre-colonial period. The duties of the village Bhils were "…to show the road and to watch the proceedings of the strangers; to track thieves; to protect the threshing floor when the corn was lying in them; and in every point of view, to form the guard for the village protection."[42]

These Bhils were called *jaglia* (village watchmen). The duties were similar to those of the *taliaris* in South India.[43]A more comprehensive account of the role of the Bhils and their chiefs in the plains villages was given by Charles Ovans, the Bhil agent, who said "The Bhil naiks enjoyed 'huqs and inams as the hereditary superintendent of the police of the different Purganas of which they are the Wuttundars."[44]

Further,

> According to the immemorial usage of the Country, the Naik was considered answerable for the general police of the Purgana, the Jagleea for that of his particular village, and the Naik was also bound to see that the Jagleeas did their duty, the Naik originally

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40 Letter from Briggs to Elphinstone, dated 24/09/1818, vol 172, Gen No 212, Deccan Commissioner Files (DCF), Maharashtra State Archives Pune (MSAP) 318-319.

41 Deshpande (n 35).

42 Letter from Briggs to Chaplin, dated 16/04/1825, Political Dept Mixed (PDM), vol 9/192 of 1825, Maharashtra State Archives Mumbai (MSAM) 501.

43 ibid.

44 Letter from Ovans to Malcolm, dated 12/08/1830, Judicial Dept (JD), vol 3/196 of 1830, MSAM 15.

> seems to have had the right of appointing all the Jagleeas of his Purgana or district…For the performance of his duties, the Naik was paid by Hucks, chiefly in kind, on every village of which he was the Wuttundar, and the Jagleea received his…like the part of the Baruh Balote.[45]

The quotes above clearly demonstrate the duties and obligations of the naiks and their lesser brethren. "*Baruh Balote*" or *Bara Balute*, the twelve *Baluta* servants were part of the Maharashtrian village community. The twelve *balutas* or village artisans or servants were *vatan* holders and enjoyed a monopoly of their particular trade in the village. Under the *Balute* or grain-share system, a certain grain-share was paid every year by each farmer to all the village artisans at the time of the annual harvest. This payment was made not in cash but in kind. Ten occupational groups were almost regularly included in the list of *bara balute*: *sutar* (carpenter), *lohar* (blacksmith), *kumbhar* (potter), *chambhar* (leather worker), *mang* (ropemaker), *navi* (barber), *parit* (washerman), *joshi* (astrologer), g*urao* (Hindu shrine-keeper), and *mahar* (village watchman).[46] Bhils and Ramoshis, both hill-forest tribes, worked as watchmen only in those villages that were in close proximity to the hilly-forested tracts.

We now return to the case of the Vasavas. John Briggs, the chronicler of these turbulent times and the head of the district administration, arguably an authority on the "Bhil problem", wrote:

> In the vicinity of Nawapoor, Nandoorbar, and Sooltanpoor I found Jeeva Wussava, a Bheel chief with estates lying between those districts, and the Bheel Rajaships of Raj Peepla and Nandode. He had been one of the most powerful freebooters in that part of the country and had not only forcibly levied blackmail for several years on the neighbourhood but had dictated to merchants the terms on which they should pass his limits. I entered early into a commutation with this chief for the custom tolls, and other exactions which he had established on trade and travellers, and went so far as to take part of his horsemen and sebundies into our pay and enabled him to pay off and discharge others. The fidelity he evinced during his own lifetime by the sacrifice of one of his sons who lost his life, and by the exposure of his own, in the act of recovering the cattle which had been driven off on one occasion from our district, sufficiently proves that my confidence in this chief was not misplaced.[47]

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[45] ibid.

[46] Hiroshi Fukazawa, *The Medieval Deccan: Peasants, Social Systems and States, Sixteenth to Eighteenth Centuries* (Oxford University Press 1991) 202-210.

[47] Letter from Briggs to Chaplin, dated 16/04/1825, PDM, vol 9/192 of 1825, MSAM 477-78.

In this exculpatory retrospective, Briggs was recounting his dealings with Jiva and other chiefs. Administrative reports of the early colonial period frequently refer to the tribal chiefs as "freebooters" and label their activities as "blackmail." This article argues that the semantics here represent a near complete lack of understanding of the socio-political structures before colonialism.[48]

The boundaries between the hills and the plains, the forest and the farm, tribe and caste, 'wild' and 'civilised' were porous. It is important to note that the give and take between the two was not confined to exchange of material goods. It permeated through the fabric of society and the articulation of its polity. Thus, powerful Bhil chiefs and their followers would lend support to the Maratha *sardars* in times of crisis and would be rewarded with land grants, the right to collect revenue in plains villages, as well as the right to collect toll (*khunti*, in the local parlance) on the highways.[49] So, what the British called "blackmail" was viewed as "just" rights and claims by the tribal peoples.[50] More importantly, these vested or *vatani* rights originated from the services that hill folks provided to the caste Hindu villages as well as the kingdoms and empires of the subcontinent. Soldiering and policing would be their job description, to use more contemporary terms.[51]

So, Jiva Vasava was offered an annual payment of Rs. 3000 by Briggs. He was the head of the district police but the British Government was to maintain his troops, ten horsemen and four hundred foot-soldiers. The taxes that he earlier collected from his *vatani* villages would now be levied by the British Government and paid to him. The chief became a pensioner of the British Government.[52]

Kuar Vasava inherited his father's legacy. He was the *rakhwaldar* of Nandurbar taluka and of Zila Nawapoor. As the head of the police, he had to recruit men who would ensure that robbery did not take place in the area under his watch. The District Collector reported to the Secretary, Government of Bombay: "The manner in which the Police duties entrusted to him were performed, has been for years, the constant subject of dissatisfaction. Complaints were repeatedly made against him as aiding in the perpetration

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[48] Bodhisattva Kar has shown how the customary revenue claims of the hill chiefs of upper Assam were dubbed as 'blackmail' and commuted to monetary payments by the British authorities. While the posa recipients made an explicit demand for their joint proprietary right in the soil to be recognised, the British only agreed to grant a commuted payment in lieu of their revenue claims. Bodhisattva Kar, 'Nomadic capital and speculative tribes: A culture of contracts in the Northeastern Frontier of British India' (2016) 53 Indian Economic and Social History Review 41, 47-48.

[49] Wink (n 28); Guha, *Environment and Ethnicity in India, 1200-1991* (n 33).

[50] Guha, *Environment and Ethnicity in India, 1200-1991* (n 33) ch 6.

[51] Wink (n 28); Guha, *Environment and Ethnicity in India, 1200-1991* (n 33); CA Bayly, 'Knowing the Country: Empire and Information in India' (1993) 27 Modern Asian Studies 3.

[52] Letter from Boyd to Norris, (nd) April 1833, Foreign Political Dept (FPD), 06/03/1834, No 1, National Archives of India (NAI) 12.

of robberies, in the proceeds of which he was more than suspected of participating."[53]

So, the head of the police breaking the law with the help of those in his employ was the constant refrain of the colonial government. Moreover, there were complaints from the *sahukars* (moneylenders) in the area that Kuar owed them several thousand rupees. The working of this system of loans requires a longer explanation. The *sahukars* in Nandurbar, the district headquarters, were quite willing to lend money to Kuar Vasava. In his deposition to the Bhil Agent, the chief admitted that two *sahukars* and an Arab, probably a mercenary as well as moneylender, were his advisers. One of the *sahukars* had supplied him with clothes and food. Further, "when I had collected the revenues of my country which amounted to 90 Rupees he lent me that sum, which when the Government Karkoon (agent) came to collect the revenue, we distributed among the ryots, who gave up their shares to the Karkoon as if nothing had happened."[54]

Put simply, the moneylenders were helping Kuar in perpetrating a fraud on the British Government. The chief would collect the land revenue from the peasants on his estate as he had done in the past before the establishment of British rule. Clearly, Kuar was going against the terms of agreement with the British wherein the revenue was to be collected by the British Government and paid to the chief. The fraud referred to earlier could be committed only with the active collusion of local moneylenders who were only too willing to lend money to Kuar. It was this money that Kuar distributed among the ryots who, in turn, paid it to the agent/ clerk of the British Government "as if nothing had happened".[55] In effect, Kuar was receiving double the amount of revenue, once through direct collection which was not allowed by the Government, and the second time from the Government treasury.

Toll or transit duties (*khunti*) were an even larger share of the revenue that the Vasava was entitled to. This had been commuted into a money payment by the British in 1818. While receiving the stipulated amount from the British, Kuar established a *naka* (check-post) at his village of Kopur to collect transit duty, and he gave it out in contract to the family of a *sahukar* at Kokurmunda. The annual revenue from this illegal source amounted to Rs. 1200-1800 per annum![56]

To put these details in perspective, we may now look at the management of Kuar's finances by the British. The Government paid him Rs.735 every month to run the police establishment – Rs. 239 towards his personal salary and the rest for the pay and maintenance of a small contingent of horsemen

[53] Letter from Young to Malet, dated 24/07/1846, Political Dept (PD), vol 22/1903 of 1847, MSAM 133.

[54] Letter from Rose to Young, PD, vol 22/1903 of 1847, MSAM 151.

[55] ibid, Kuar Vasava's Deposition.

[56] Letter from Morris to Young, dated 18/06/1846, PD, vol 22/1903 of 1847, MSAM 165-166.

and armed soldiers.[57] Moreover, Kuar's revenue from his patrimonial estate amounted to Rs. 4300, Rs. 1300 from land revenue and Rs. 3000 from transit duties (*khunti*). This was an annual payment made by the British Government to this Bhil chief.[58] As we saw earlier, Kuar Vasava was still collecting both and even farming out the collection of transit duties to some of the *sahukars* while receiving the fixed allowance from the Government under these heads.

The debt stood at Rs. 18,674 in the year 1845 when Kuar's estate was sequestrated by the British Government for non-payment of debt. The list of creditors consisted twenty-three moneylenders belonging to Nandurbar, Kokurmunda, and Dhulia and his *karbhari* (the person who looked after the chief's affairs), Jadhoo Sing.[59] The British Government finally decided to pay the creditors, probably in instalments, out of the land revenues from his estate and the transit duties that had been commuted into money payment by the Government.[60]

The sequestration of the estate in May 1845 led to defiance/rebellion by the chief. Repeated summons from the District Collector and the Bhil Agent to appear in person and account for his many misdeeds fell on deaf ears. Kuar had raised the banner of revolt against the Company *Sarkar*. He would not allow any person from the local administration to enter his village. On one occasion, the Bhil Agent managed to enter by misleading his followers who were zealously guarding the entry to the village, only to discover that the chief had escaped. The Bhil Agent chased him on horseback, all the while entreating him to come and meet the District Collector and explain the reason for his defiance of British authority. While the vigorous pursuit of a political offender by an overzealous British officer must have been a sight to behold, it eventually ended in failure.

Kuar submitted his own list of grievances to the Collector:

> The Sirkar should restore my country and Khoontee or custom dues. From the scarcity of the current year, and the consequent dearness, man and horse suffer, so that the Sirkar should grant the release.
>
> I have not for the last four or five years received the amount of the liquor manufactory in my Jagheer villages… The same should be paid to me, as well as the amount of Land Revenue which is under attachment.

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57 Letter from Young to Malet (n 53) 139.

58 ibid 143.

59 Statement of the debts of the Kuar Vasava of Chikly, Appendix B, Letter from Young to Malet, dated 24/09/1846, PD, vol 22/1903 of 1847, MSAM 222.

60 Letter from Young to Malet (n 53) 141.

> I have certain rights upon people who resort to my country… for pasturing cattle and sheep; these rights are to be continued to me. Certain Horsemen and Sebundies (mercenary soldiers) are employed in the Sirkar on my part; my control over them should not be interfered with by anybody, and the power of their entertainment and discharge should be vested in me…
>
> In the event of robberies I shall follow up any real tracks or footprints, and trace and deliver up robbers, but the Sirkar takes into consideration the false accusations made by people…
>
> I have not received my allowance for five months. If that is paid, I shall make arrangements regarding my horse and men and wait upon your honor.
>
> I have for a length of time enjoyed stipend for the fulfillment of certain stipulations, this the Sirkar has diminished, so that it is not sufficient for the proper performance of the engagements as before. If the Sirkar makes a proper provision for my maintenance, I shall act up to the Sirkar's requisitions.
>
> People belonging to my purganah and family are in the habit of resorting to the mart at Kookurmoondah where they meet with obstruction. Your honor should enquire into the nature of such interruption as to whether it is offered upon Sirkar's authority or otherwise and effect such arrangement that they no longer meet with like treatment.[61]

Kuar was demanding restoration of his rights as the owner of an autonomous principality, rights he had been divested of unceremoniously by the British Government. Moreover, the allowance he was receiving for running the police establishment was not enough and he was demanding more resources to help improve the function of the police. Thus, the act of rebellion was probably a desperate attempt to renegotiate his settlement with the British Government.

Was Kuar being politically naïve in raising the banner of revolt against the British Government? Was he completely mistaken in the hope that the act of rebellion would force the British to offer better terms to him? The outcome of the rebellion points towards an answer in the affirmative. The rebellion was crushed by the Indo-British army, Kuar was taken captive, and tried in a court of law.[62] The next few months saw hectic parleys in the official circles to facilitate the passage of a new law, the Excluded Areas Act of 1846. But before

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[61] Translation of a letter from Koor Wussawah Bin Jeewah Wussawah of Chicklee Mawas Gungthe to Adam Campbell, Assistant Collector-in-charge Candeish, dated 11/02/1846, PD, vol 22/1903 of 1847, MSAM 336-341.

[62] Report by Capt Rose, SRBG, New series, No XXVI (1856) 239.

we begin tracking the passing of this legislation that forms the subject of this article, let us revisit the reasons for Kuar's rebellion.

Vasava was only following the old practice of making a *bund* against the Sarkar. A *bund* would have resulted in new *giras, huqs,* and *khunti* rights in pre-colonial times. There are numerous instances of such negotiations in the eighteenth-century Maratha polity. These are well documented in historical records and commented upon extensively in historiography.[63]

The power of the Bhil chiefs rose as they wrested more rights from the powers-that-be and diminished if the rulers crushed their rebellion or, in some instances, killed them en masse. Also, new *huqs* allowed the Bhils to harness greater resources of the plains for their community. While pre-colonial polities allowed these manoeuvres, the colonial state saw them as transgressions and put them down with an iron hand.

V. LAW AND THE COLONIAL SOVEREIGN

We now shift our focus to the domain of law, a realm of abstraction and universal principles, which purportedly works as a regulatory mechanism that restrains the powers of those who govern and protects the rights of the governed. Through a historiographical survey, this article has tried to track the complicated career of colonial rule of law as evident in the passage of numerous exceptional legislations. At this juncture, it would be instructive to look at the process of law-making in early colonial India. After all, who had the power to legislate for the colony?

It is important to note that the violence and injustices carried out by the East India Company upon natives became a matter of serious concern in Britain and resulted in the assertion of parliamentary control over the affairs of the Company.[64] The Regulating Act of 1773 vested the power of legislation in the Governor General and his Council.[65] The Council consisted of four members. The Act also granted the Governor General supervisory authority over the presidencies of Madras and Bombay. The Supreme Court in Calcutta was established by this Act to restrain the colonial government's exercise of power in Bengal. The Pitts India Act of 1784 reduced the number of councillors to three, tightened the control of the Governor General over

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63 Sumit Guha, 'Forest polities and agrarian empires: The Khandesh Bhils, c. 1700-1850' (1996) 33(2) Indian Economic and Social History Review 136; KB Marathe (ed), *Selections from the Satara Rajas' and the Peshwas' Diaries (SSRPD),* vol II(VI) (Deccan Vernacular Translation Society 1909) 145-173.

64 For a general survey of this period, see Sekhar Bandyopadhyay, *From Plassey to Partition: A History of Modern India* (Orient Blackswan 2009) 75-82. For the impeachment trial of Warren Hastings, see Nicholas Dirks, *The Scandal of Empire: India and the Creation of Imperial Britain* (Permanent Black 2006).

65 Bandyopadhyay, *From Plassey to Partition* (n 64) 77.

Madras and Bombay, and made him the effective ruler of British India.[66] The Governor-General's council now had the power to make laws and regulations in British India. These were authoritarian orders passed in secrecy and were not made public. The Supreme Court alone had the right to veto laws passed by the Governor-General's Council. The Court was given the general power and responsibility to ensure that the Company's exercise of power in India was in conformity with the spirit of the laws of England. The Court's primary function in the colony was to maintain the inviolability and sanctity of person and property.[67]

As Mithi Mukherjee has pointed out, British India witnessed a conflict between two competing discourses of sovereignty during the period of 1774-1833. The Supreme Court as the representative of King-in-Parliament claimed sovereignty in the colony whereas the Governor General's council claimed sovereignty as state necessity. The Supreme Court deployed the discourse of justice in the colony and demanded accountability from the servants of the East India Company. For the Company Government in India, preservation of the state was the cornerstone of the discourse.[68]

This conflict was finally resolved by the Charter Act of 1833. The Governor-General's Council was converted into a legislative body and a fourth legal member was introduced in the Council. This fourth member happened to be Lord Macaulay, who prepared the Draft Penal Code in 1837. The legal member was introduced as a substitute to the sanction of the Supreme Court. The Court was made subordinate to the Council and the Charter Act of 1833 gave the latter the power of sovereign legislation. Earlier, the King-in-Parliament had the right to amend laws made in India. The Charter Act of 1833 took this power away while allowing home authorities in London to retain the power to disallow laws in India. Thus, the power of positive legislation was left in the hands of the East India Company's Government in India.[69] The Indian Legislative Council was formed only later, by the Charter Act of 1853. As far as the operation of the Governor-General's Council was concerned, the only difference between the old Council and the new legislative body (formed under the Charter Act of 1833) was that the discussions concerning lawmaking could no longer simply be authoritarian orders passed in secrecy but had to be made public.[70]

The Governor-General's Council now enjoyed the sovereign power of legislation. The combined executive and legislative power of the Council further accentuated the authoritarian character of the East India Company Government. As Mukherjee points out, the concept of the 'will of the people'

66 ibid 78.
67 Mukherjee (n 2) 57.
68 ibid 58-59.
69 ibid 65.
70 ibid 39, 64-65.

and the legislative principles of universality, equality, and liberty were conspicuous by their absence in this first legislative body created in colonial India.[71] The Indian Legislative Council formed later under the Charter Act of 1853 had the same features.[72]

A brief overview of the law-making process presented above makes it evident that the executive enjoyed supremacy in the colonial administrative apparatus, even as the Supreme Court and the evolving judicial system in the colony can be said to have heralded the beginnings of the modern system of justice.[73]

While a comprehensive survey or critique of the colonial administrative apparatus and its implications for the colonial modern state are beyond the scope of this article, it may be helpful to draw upon historical works that have shed light on the overriding powers of the executive in the colony. Two citations are in order here, one for the Company period and the other for the post-1857 period. The Revolt of 1857 led to the transition from Company rule to the rule of the British Crown.

In an insightful article, while commenting on Warren Hastings' Judicial Plan of 1772, Rahul Govind writes, "while the system of courts established in 1772 is familiar to every undergraduate student in Indian history, the supremacy of the President and Council and its control is scarcely alluded to in such pedagogy."[74] To take an example from the post-1857 period, Radhika Singha examines the "bad-livelihood sections" of the Code of Criminal Procedure (Sections 109-110) and shows how summary judicial powers wielded by the executive head of the district were incorporated into the Code. She argues that codification was reconciled with executive discretion and questions whether this was a case of 'over-legislation'.[75]

VI. Special Legislation for Tribal Areas: The Excluded Areas Act of 1846

The supremacy of the executive in governance, its discretionary authority, and its control over the legislature, as outlined in the preceding section, assume special significance in tribal areas. The Excluded Areas Act of 1846 brings these features of colonial governance in sharp relief. Before we turn to this special legislation, a brief account of special and protective legislations in other parts of tribal India is in order.

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71 ibid 70.

72 ibid.

73 Eric Stokes, *The English Utilitarians and India* (Clarendon Press 1959).

74 Rahul Govind, 'The King's Plunder, the King's Justice: Sovereignty in British India, 1756-1776' (2017) 33 Studies in History 151, 169.

75 Radhika Singha, 'Punishment by Surveillance: Policing "dangerousness" in colonial India, 1872-1918' (2015) 49 Modern Asian Studies 241.

Kumar Suresh Singh has pointed out that the areas of tribal concentration were enclaved to "reclaim to civilisation" the tribes who had often rebelled or were difficult to pacify.[76] The concept of protection of the tribes as an ethnic community developed in these enclaves.[77] Further, he outlines the main features of the protective system of administration – paternalistic rule of district officers, keeping tribal areas out of the operation of the regulations, laws, etc. that were alien to the tribal ethos and undermined it, laying down a set of simple rules to settle disputes, restricting the jurisdiction of the courts that enforced normal laws.[78] There were other features such as special agrarian laws, and the regulation of the entry of outsiders into tribal areas.[79]

For the purposes of this article, we focus only on the paternalistic system of administration. The protection of the tribes as an ethnic community and concern about tribal ethos is an aspect of these legislations that is outside the scope of this article, as the Excluded Areas Act of 1846 is silent on these points. The special administrative system came to be known as the Agency system. A British Agent was appointed to look after the tribal population. K.S. Singh cites at least four examples of the Agency system – the Bhil agencies in Khandesh to pacify the Bhils (1825), South-West Frontier Agency in Chotanagpur (1833), Agency in the Meriah tract (1839-65), and the Agency in Ganjam (1839).[80] The Act of 1846 that appointed a British Agent in the *Mavasi* (hill) tracts of Khandesh and Ahmadnagar, and exempted them from Bombay regulations was thus part of a series of special legislations passed in the first century of British rule in India.

The proliferation of emergency legislation leading to the creation of non-regulation tracts was a long-drawn process. Also, many of these tracts were brought under the regulations at different points in time. Moreover, in some areas, general regulations were in operation while the territory continued to be a non-regulation tract in official parlance. The Scheduled Districts Act of 1874 was passed to establish order in this seemingly chaotic terrain. The Act was designed to consolidate prior legislations pertaining to non-regulation tracts.[81] All prior legislations were repealed and these areas were now covered by the Act of 1874. The Excluded Areas Act of 1846 was one of them.[82]

It needs emphasising that the genealogy of the Act of 1874 is somewhat complex and is tied together with the history of the princely states of India.

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76 KS Singh, 'Colonial Transformation in Tribal Society in Middle India' (1978) 13 Economic and Political Weekly 1221, 1225.

77 ibid 1225.

78 ibid.

79 ibid 1226.

80 ibid.

81 Legislative Department Proceedings, File No 23/117, December 1874, Digitized Public Records, Legislative, National Archives of India (NAI) 2 <indianculture.gov.in/archives/scheduled-districts-act-1874> accessed 3 March 2024.

82 ibid Schedule V, 56-64.

The question of sovereignty and the legal position of the native states of India came up for discussion in the context of this Bill.[83]

We now turn to Act XI of 1846. As discussed earlier in this article, the hill chiefs, mostly tribal but a few Rajput chiefs too, had enjoyed partial autonomy since the British conquest of this area. The threat of tribal rebellion loomed large in these semi-autonomous principalities and Kuar Vasava's rebellion signalled the need for a change in governing strategies. This was achieved through the Act of 1846, which was "An Act for the exemption of certain Territory in the Province of Candeish and the Zillah Ahmednuggur from the operation of the General Regulations".

The Act provided that:

> I. …from and after the First day of February 1847, so much of Appendix A, of Regulation XXIX of 1827 of the Bombay Code as declares the Villages contained in the schedule annexed to this Act, and the lands attached thereto (being parts of the Purgunnahs of Nundoorbar, Sooltanpoor and Kookurmoondah in the Province of Candeish and Zillah Ahmednuggur) subject to the Regulations established for the administration of Civil and Criminal Justice in the Bombay Presidency, be repealed.
>
> II. … the administration of Civil and Criminal Justice, the Superintendence of the Police and the collection and Superintendence of the Revenues of every description within the said portions of Territory shall vest in such Agent to the Governor of Bombay as shall be appointed by the Governor of Bombay in Council.

In the Schedule annexed to the Act, the list of villages belonging to seven *Mavasi* (hill) chiefs of Khandesh and Ahmadnagar were included. Kuar Vasava along with Oomed Parvi (two chiefs bearing the same name), Bikna Parvi, Khatia Bhil, Raja Parvi, and Gunpat Singh (a Rajput chief) were brought under the purview of the Act.

This legislation placed the hill chiefs under the direct administrative control of the Agent, a British Officer, appointed by the Governor in Council, and excluded them from the Bombay Regulations of 1827. The decision of the Agent was to be final regarding civil and criminal cases in the territories so excluded. The Agent was bound by the rules laid down by the Governor in Council and was to forward those cases he deemed necessary to the Sadar Diwani and Sadar Foujdari Adalats where they would be tried under the due process of law.

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[83] ibid 30.

VII. Conclusion

The paternalistic control of the British Agent and the formulation of exceptional rules/laws now to be administered in these territories put the chiefs at one remove from the due process of law while bringing them under the purview of the same if the officer-in-charge so decides. The picture that emerges is one of a paternalistic form of rule in these areas supported by exceptional laws laid down solely by the highest executive in the Bombay Presidency, while the law courts in British India would continue to be the final arbiter of justice.

To put things in perspective, we now turn our gaze to the northeast. While a large body of work on this region, some of which has been cited earlier in this article, has argued for the concept of 'layered sovereignty' and the resilience of tribal autonomy and culture, the similarity in governance practices between the northeast and the tribal heartland is striking. In a comprehensive survey of colonial rule in the northeast, Yengkhom Jilangamba has shown how military operations and the support of princely states and chiefs of the hill-tribes were used to control vast territories.[84] The British made clear distinctions between friendly and unfriendly, independent and dependent hill tribes, and played one against the other. In 1823, the entire area from Cachar and Sylhet in the south to the Sikkim country in the north was placed under David Scott, the Agent to the governor General. Jilangamba underscores the political necessity of making a distinction between dependent and independent chiefs.

We conclude on a note where we emphasise the political necessities of colonial rule that left their characteristic stamp on law and governance. There is a need to look at tribal India afresh with a view to bring some of these processes into sharp relief.

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[84] Yengkhom Jilangamba, 'Frontier Regime and Colonial Rule' in Neeladri Bhattacharya and Joy L Pachuau (eds), *Landscape, Culture, and Belonging: Writing the History of Northeast India* (Cambridge University Press) 179.

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Deconstructing Police Discretion as Brahminism

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Abstract

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.

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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.

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

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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.

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').

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 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

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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.

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 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

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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).

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.

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 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

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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.

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').

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 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

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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.

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.

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 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

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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.

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.

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. Policing Hereditary (Caste) Criminals: The Case of the CTA

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 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]

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33 Dilip D'Souza, 'Declared Criminal at Birth' (2001) 123 Manushi 1.

34 Chandavarkar (n 30) 241.

35 Arnold (n 10) 12-13.

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

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 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

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).

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.

(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]

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

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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.

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.

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 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

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[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.

[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

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.

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

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.

59 ibid; see also *State of Madras v Champakam Dorairajan* AIR 1951 SC 226.

60 Kumar (n 1) 40.

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 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

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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.

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 by habit a robber, house-breaker, thief, or forger, or

offenders, utilise a pernicious, and as Singha 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

(b) is by habit a receiver of stolen property knowing the same to have been stolen, or
(c) habitually protects or harbours thieves, or aids in the concealment or disposal of stolen property, or
(d) habitually 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) habitually commits, or attempts to commit, or abets the commission of, offences, involving a breach of the peace, or
(f) habitually 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
(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.

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.

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 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]

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71 Singha (n 68) 241.

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://

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

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,

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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.

[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.

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 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

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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.

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.

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 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.

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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.

86 *Lalita Kumar v State of Uttar Pradesh* (2008) 14 SCC 337.

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 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

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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.

90 ibid 84.

91 ibid 79.

92 ibid 80.

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,*" 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.

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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.

96 ibid 90.

97 ibid.

98 ibid 71.

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 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

[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.

[100] CPA Project, 'Drunk on Power: A Study of Excise Policing in Madhya Pradesh' (n 78) 12.

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]

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

[101] ibid.

[102] Bej, Sonavane and Bokil (n 12).

[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)

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, 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.

[107] Kumar (n 1) 23.

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Janhit Abhiyan: Where Does It Lead Us?

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Abstract

In Janhit Abhiyan v. Union of India *(2022), the Supreme Court of India upheld the constitutional validity of the Constitution (One Hundred and Third Amendment) Act, 2019 that introduced reservations for the Economically Weaker Sections (EWS) of society.* First, *this Comment deviates from the existing criticisms of the judgment to argue that the judgment may pave way for expanding the scope of discrimination law by laying the groundwork for recognising 'poverty' or 'socio-economic disadvantage' or 'economic class' as a protected marker of discrimination.* Second, *it argues that the diverging opinions of Justice Pardiwala and Justice Bhat on the interpretation of Article 15(1) require clarification and raise questions on the desirability of applying the reasonable classification test to Article 15(1).* Third, *the Comment argues that the decision in Janhit Abhiyan conflicts with a previous Constitution Bench judgment in* M. Nagaraj v. Union of India *on whether the 50% ceiling on reservations is essential to the equal opportunity clause. This Comment thus anticipates the wider implications of the judgment on the evolution of discrimination law in general, and the constitutional doctrine on equality law in India, in particular.*

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I. INTRODUCTION

In the recent case *Janhit Abhiyan v Union of India* ('*Janhit Abhiyan*'),[1] the Supreme Court of India ("SCI") was tasked with determining whether the Constitution (One Hundred and Third Amendment) Act, 2019 ('Amendment') violated the basic structure of the Constitution. This Amendment added sub-article (6) to the text of Articles 15 and 16. Through these amendments, the State is empowered to enact special provisions for the advancement of economically weaker sections ("EWS") of society. Further, the State has to reserve 10% of the seats or posts in educational institutions and employment opportunities for the EWS. The State is also empowered to exclude Scheduled Castes, Scheduled Tribes, and Other Backward Classes from the purview of these measures. The SCI has upheld the validity of the Amendment by a 3:2 majority.

The verdict has already been criticised for validating the creation of an upper-caste quota.[2] It has also been critiqued for distorting the purpose of reservations, in that reservations were historically envisaged only for socially and educationally backward classes, and not for economically poor citizens.[3] Separately, commentators have opined that by virtue of this judgement, reservations have been reduced to a welfare tool.[4] Some others have argued that the focus of affirmative action measures will now shift from the upliftment of a community to the welfare of select individuals.[5] Lastly, the methodology

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1 *Janhit Abhiyan v Union of Indi*a (2023) 5 SCC 1.

2 Abhik Bhattacharya, 'EWS Quota: Was economic condition ever the foundational principle for reservation in India?' (Outlook, 12 December 2022) <https://www.outlookindia.com/national/ews-quota-was-economic-condition-ever-the-foundational-principle-for-reservation-in-india--news-243712> accessed 1 September 2023; Shreehari Palitah, 'Economist Ashwini Deshpande on why reservations are not the right instrument to reduce poverty' (Scroll, 12 November 2022) <https://scroll.in/article/1037199/economist-ashwini-deshpande-on-why-reservations-are-not-the-right-instrument-to-reduce-poverty> accessed 1 September 2023; Alok Prasanna Kumar, 'Charity, Not Parity' (2022) 57 Economic and Political Weekly 8.

3 Al Jazeera Staff, 'Why 10% quota for 'economically weak' in India has caused uproar' (Al Jazeera, 9 November 2022) <https://www.aljazeera.com/news/2022/11/9/why-10-quota-for-economically-weak-in-india-has-caused-uproar> accessed 1 September 2023; see also: Kailash Jengeer, 'Reservation is about adequate representation, not poverty eradication' (The Wire, 18 May 2020) <https://thewire.in/law/supreme-court-bench-reservation> accessed 1 September 2023.

4 Ambar Kumar Ghosh, 'The new Economically Weaker Sections (EWS) Quota: The changing idea of affirmative action' (Observer Research Foundation, 23 November 2022) <https://www.orfonline.org/expert-speak/the-new-economically-weaker-sections-ews-quota/> accessed 1 September 2023.

5 Sudhir Krishnaswamy, 'EWS Judgement fundamental shift from caste. It reshapes affirmative action as anti-poverty' (The Print, 8 November 2022), <https://theprint.in/opinion/ews-judgment-fundamental-shift-from-caste-it-reshapes-affirmative-action-as-anti-poverty/1202916/> accessed 1 September 2023.

and the tools of interpretation adopted by some of the judges have also been critiqued.[6]

In this comment, I do not propose to dwell upon any of these observations. The arguments that a quota for the upper castes has been validated, and the focus of affirmative action measures may now shift from benefitting a group to the welfare of select individuals, are noteworthy. However, in this comment, I propose to focus on what may be the implications of this decision. It is my submission that as far as discrimination law is concerned, the impact of *Janhit Abhiyan* may be threefold.

Firstly, it may pave the way for expanding the scope of discrimination law. This could happen because the reasoning adopted in *Janhit Abhiy*an lays the groundwork for the recognition of 'poverty' or 'socio-economic disadvantage' or 'economic class' as a protected marker in discrimination law. Secondly, it may create the need to clarify the meaning of Article 15(1) of the Constitution. The opinions of Justice Pardiwala and Justice Bhat bring to the fore a divergence in the understanding of Article 15(1) — a divergence which has historically plagued this provision. While one interpretation strengthens the protection that Article 15(1) offers, the other takes the sting out of it. Thirdly, the decision in *Janhit Abhiyan* may necessitate the resolution of an issue by a larger bench. This is because there is now a conflict between the decisions in *M. Nagaraj v Union of India* ('*Nagaraj*')[7] and *Janhit Abhiyan* on whether or not the 50% ceiling on reservations is essential to the equal opportunity clause.

To bring out this threefold impact of *Janhit Abhiyan*, in this comment, I propose to adopt the following structure. I will first set out and briefly analyse the additions made to the Constitution by the Amendment. I will then describe the points for determination framed by the SCI, and the arguments advanced by both sides on these points. In the backdrop of these arguments advanced, I will thereafter critically analyse how the SCI answered each of the points for determination framed by it. It is in the course of this analysis that I will cull out the three potential impacts spelled out above.

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6 Ayan Gupta, 'Schrodinger's Substantive Equality – Conceptual Confusions and Convenient Choices in Justice Maheshwari's Plurality Opinion in the EWS Case' (Indian Constitutional Law & Philosophy, 11 November 2022) <https://indconlawphil.wordpress.com/2022/11/11/guest-post-schrodingers-substantive-equality-conceptual-confusions-and-convenient-choices-in-justice-maheshwaris-plurality-opinion-in-the-ews-case/> accessed 1 September 2023; Kieran Correia, 'Equality as Non-Exclusion: Justice Bhat's dissent in the EWS Case' (Indian Constitutional Law & Philosophy, 8 November 2022) <https://indconlawphil.wordpress.com/2022/11/08/guest-post-equality-as-non-exclusion-justice-bhats-dissent-in-the-ews-case/> accessed 1 September 2023.

7 *M Nagaraj v Union of India* (2006) 8 SCC 212.

II. THE AMENDMENT AND WHAT IT SAYS

As mentioned previously, by virtue of the Amendment, Articles 15 and 16 of the Constitution came to be amended, and Articles 15(6) and 16(6) were inserted. Article 15(6) reads as follows:

> (6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making, —(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and
>
> (b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.
>
> Explanation. —For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.[8]

Similarly, Article 16(6) states,

> (6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category.[9]

It is apparent from a bare perusal of Articles 15(6) and 16(6) that they both deal with 'economically weaker sections'— a term hitherto absent from the scheme of Articles 14 to 17 of the Constitution. Notably, while the Amendment introduces this phrase 'economically weaker sections', it does not define it. No other Article in the Constitution defines it either. The explanation to Article 15(6) leaves it to the government of the day to notify a definition for this phrase. Not only does the government have the discretion to define the phrase 'economically weaker sections', it also has the power (if it so chooses to exercise it) to create a special provision, or a reservation in appointments

[8] The Constitution (One Hundred and Third Amendment) Act 2019, s 2.

[9] The Constitution (One Hundred and Third Amendment) Act, 2019, s 3.

or posts, for the EWS. As stated in the Introduction, the executive has been empowered to enact affirmative action measures in favour of the EWS.

Moreover, the drafters have also sought to shield the exercise of this power from a constitutional challenge. They have done so by deploying what is commonly known as a non-obstante clause. Both Articles 15(6) and 16(6) open with the words, "Nothing in this article shall prevent the State…". When this phrase is read in the context of Articles 15(1)[10] and 16(1) & (2),[11] it appears that the drafters anticipated a potential challenge to the affirmative action measures which the government of the day might enact in furtherance of Articles 15(6) or 16(6) on the ground that they violate Articles 15(1) or 16(1) & (2) of the Constitution. It is to preclude such a challenge — a challenge mounted on the basis that the affirmative action measures violate the injunctions contained in Articles 15(1) or 16(1) — that they appear to have used a non-obstante clause.

With this overview of the Amendment, I will now proceed to discuss the issues framed and the arguments advanced in *Janhit Abhiyan*.

III. POINTS FOR DETERMINATION AND ARGUMENTS ADVANCED

In *Janhit Abhiyan*, the SCI framed three points for determination,[12] which can succinctly be summarised as –

1. Whether reservations that are based singularly on economic criteria violate the basic structure of the Constitution?

2. Whether the exclusion of classes covered under Articles 15(4), 15(5), and 16(4) from the benefits of EWS reservation violates the basic structure doctrine?

3. Whether a breach of the ceiling of 50% to create additional reservation of up to 10% for the EWS violates the basic structure of the Constitution?

On these issues, the Petitioners argued that affirmative action measures, and in particular reservations, could only be enacted to address historical inequalities.[13] They cannot be grounded in any fact other than historical

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[10] The Constitution of India, Article 15(1) states, "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

[11] The Constitution of India, Article 16(1) states, "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State."

The Constitution of India, Article 16(2) states, "(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State."

[12] *Janhit Abhiyan* (n 1) [37].

[13] ibid [9.1].

injustice or stigma.[14] The Petitioners argued that by inserting Articles 15(6) and 16(6), the idea of social and educational backwardness, which formed the kernel of reservation policy, has been vetoed.[15] They also urged that any economic criterion is inherently transient in nature, and therefore, cannot be linked to a historical lack of adequate representation that is necessary to justify a measure of affirmative action.[16]

Not only is it transient, the idea of 'poverty' is also relative. The other markers of discrimination recognised and protected by the Constitution are not relative. Instead, they contain an element of immutability. Since 'poverty' is antithetical to immutability, it cannot form the basis of reservation.[17] The Petitioners also argued that a reservation policy cannot be converted into a poverty alleviation scheme.[18] Insofar as the second issue framed by the court was concerned, the Petitioners urged that the exclusion of socially and educationally backward classes violates the basic structure of the Constitution. This exclusion, they said, is a caste-based exclusion, and effectively creates a reservation in favour of certain forward caste groups. Thus, on this ground too, there was a violation of the basic structure.[19] Lastly, the Petitioners argued that the 50% ceiling on reservations was a part of the basic structure of the Constitution and could not be breached.[20]

According to this author, when the arguments advanced by the Petitioners are scrutinised, some of them serve not only as arguments in opposition to the constitutional validity of the Amendment, but can also be canvassed as arguments against the recognition of 'poverty' as a protected marker in discrimination law. Alternatively, they can be canvassed as arguments against affording the same degree of protection to 'poverty' as that afforded to other markers of discrimination. For instance, when it is urged that 'poverty' lacks 'immutability'— a factor often associated with the other protected markers of discrimination law[21]— what is effectively contended is that 'poverty' is not the same as markers such as gender, caste or race, and should not, therefore be protected by discrimination law. Similarly, when it is argued that 'poverty' is inherently transient, what is implicitly suggested is that persons can move in or out of 'poverty' and are therefore, not afflicted by the historical injustices or stigma which identities of caste or religion can saddle an individual with. In my opinion therefore, an adjudication by the SCI of these arguments would also implicitly be an adjudication of whether 'poverty' can be protected by discrimination law.

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14 ibid [11].
15 ibid [9.3].
16 ibid [10.4].
17 ibid [20].
18 ibid [14], [18.1].
19 ibid [9.4], [19].
20 ibid [29].
21 Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015) 50.

In response to the case put forth by the Petitioners, the Respondents contended that 'economic justice' is one of the constitutional goals identified in the Preamble, and that poverty is one of the root causes of social and educational backwardness. There was thus no embargo against using 'economic criteria' as the sole basis of affirmative action measures.[22] By using 'economic criteria' as the basis of framing a reservation policy, 'intersecting disadvantages' as opposed to 'generational disadvantages' are addressed.[23] It was also argued that the 'economically weaker sections' among the Scheduled Castes, Scheduled Tribes, and Other Backward Classes are already offered protection under Articles 15(4) and 16(4) of the Constitution. They were excluded to extend special provisions to those persons who are not covered by Articles 15(4) or 16(4).[24] Lastly, the Respondents stated that the precedents laid down by the SCI did not state that the ceiling of 50% was an inviolable limit. Thus, the additional 10% reservation proposed to be created, too, did not violate the basic structure.[25]

In the backdrop of these rival claims, this Comment will now proceed to analyse how the SCI dealt with the three points for determination framed by it.

IV. VALIDITY OF THE USE OF ECONOMIC CRITERION AS THE BASIS FOR RESERVATION

To adjudicate the validity of the use of economic criterion as a metric to devise reservation policies, Justice Maheshwari surveyed the text of the Preamble, the provisions of the Constitution, and precedents to conclude that in almost all references to substantive equality, economic justice had received the same attention as social justice.[26] He then took note of the definition of 'poverty' arrived at by the United Nations General Assembly, and held that deprivations arising out of economic disadvantages, "including those of discrimination and exclusion", require the attention of the State.[27] Poverty, according to him, was a point of regression, and therefore, remedying its ill effects through affirmative action measures (such as reservations) was in sync with constitutional goals.[28] To address the difference between a socially and educationally backward class and an economically poor class, Justice Maheshwari stated that the objective of the State was to ensure all-inclusive socio-economic justice, and the claim of one section of citizens to affirmative

22 *Janhit Abhiyan* (n 1) [30.2] (Maheshwari J).
23 ibid [35] (Maheshwari J).
24 ibid [30.3] (Maheshwari J).
25 ibid [30.4] (Maheshwari J).
26 ibid [112] (Maheshwari J).
27 ibid [115] (Maheshwari J).
28 ibid [117] (Maheshwari J).

action measures cannot be used to deny the claim of another section.[29] He further stated that to achieve this goal, one section of the people cannot be left to struggle because of income inequalities.[30]

Justice Pardiwala agreed with the final decision arrived at by Justice Maheshwari,[31] and did not, in his separate opinion, dwell as much on the use of economic criterion as a basis of affirmative action. He simply observed that in a country where only a small percentage of the population is above the poverty line, opportunities of higher education and employment cannot be denied to those who are economically backward.[32] Neither did Justice Trivedi, who concurred with Justice Maheshwari,[33] provide additional reasons for why the use of an economic metric was valid. Like Justice Maheshwari, she too observed that the Preamble visualised the removal of economic inequalities. The enactment of affirmative action measures for the EWS only helps fulfil the ideals of Article 46 of the Constitution.[34]

Justice Bhat dissented on the overall outcome of the case. He held that the Amendment, insofar as it excludes classes covered under Articles 15(4), 15(5), and 16(4) from the benefits of EWS reservation, violates the basic structure of the Constitution. Chief Justice Lalit (as he then was) did not deliver a separate opinion. He joined Justice Bhat in his opinion. On the issue pertaining to the use of an economic metric to frame an affirmative action measure though, both these judges concurred with the majority.

Justice Bhat opined that the Supreme Court had previously held the use of an economic criterion in isolation to be impermissible because the texts of Articles 15(4) and 16(4) did not allow for it.[35] However, these precedents did not foreclose the necessity to address a future need. He observed how abject poverty translates into illiteracy, marginal incomes, little access to basic amenities, and poor education, and how it is incumbent upon the State to remedy these ill-effects.[36] He observed that while there are communities who are oppressed because of their caste, there are also a substantial number of people who have not progressed due to economic deprivation.[37] Justice Bhat then went on to delineate how poverty is multidimensional and is not only a question of income levels.[38] On this issue, the opinion concluded by stating

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29 ibid [118] (Maheshwari J).
30 ibid [130.2] (Maheshwari J).
31 ibid [226] (Pardiwala J).
32 ibid [281] (Pardiwala J).
33 ibid [190] (Trivedi J).
34 ibid [206]-[207] (Trivedi J).
35 ibid [533] (Bhat J).
36 ibid [535] (Bhat J).
37 ibid [537] (Bhat J).
38 ibid [549]-[552] (Bhat J).

that economic emancipation is a facet of economic justice, and that without economic emancipation, liberty and equality are mere platitudes.[39]

A. Affirmation of a Change in Constitutional Meaning

With unanimity on the validity of the use of an economic criterion to frame an affirmative action policy, the SCI has affirmed a change in constitutional meaning. A short journey back in time elucidates how. When Article 16(4) of the Constitution came up for discussion in the Constituent Assembly, some members wanted the phrase 'backward class' to be defined.[40] They argued that if the phrase was understood to include economically backward classes, the phrase would lose meaning because it would include a vast majority of the country.[41] Dr. Ambedkar while concluding the debate though, felt that it was appropriate to leave the definition of this phrase to the government of the day.[42] A year later when draft Article 286 was discussed,[43] an amendment was proposed to define the phrase 'backward class' as any 'class or classes of citizens backward economically and educationally'.[44] The amendment was rejected.[45] One could thus infer that the Constituent Assembly resisted any attempt to draw a nexus between backwardness and economic backwardness (or poverty). However, at the same time, it did not foreclose this possibility.

The foreclosure seems to have occurred sixteen months later when the Constitution was first amended. When the Constitution (First Amendment) Act, 1951 was debated, one of the first drafts of the proposed amendment sought to empower the State to make special provisions for the economic advancement of any backward class of citizens.[46] After the Bill was referred to a Select Committee, the word 'economic' was dropped. When the Bill came up before the House for discussion once again, the absence of this word was even flagged by one member.[47] Despite this being the case, the Constitution was amended without the word 'backward' being prefaced by 'economic'. Instead, it was only prefaced by 'socially and educationally'. Therefore, it can be argued that as of 1951, the Constitution did not intend poverty to be an independent basis of framing affirmative action policies.

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39 ibid [553] (Bhat J).

40 Constituent Assembly Debates, vol VII (30 November 1948) <https://www.constitutionofindia.net/debates/30-nov-1948/> accessed 7 November 2023.

41 ibid [7.63.123]- [7.63.124] (Sri Ari Bahadur Gurung).

42 ibid [7.63.205]- [7.63.206] (Dr. B.R. Ambedkar).

43 Constituent Assembly Debates, vol IX (23 August 1949) <https://www.constitutionofindia.net/debates/23-aug-1949/> accessed 7 November 2023.

44 ibid [9.122.68] (Sardar Hukum Singh).

45 ibid [9.122.177] (Sardar Hukum Singh).

46 Parliament Debates, (17 May 1951), 105 <https://library.bjp.org/jspui/bitstream/123456789/2499/1/The-Parliamentary-Debates.pdf> accessed 17 November 2023.

47 Parliament Debates (29 May 1951), 9641 <https://eparlib.nic.in/bitstream/123456789/760712/1/ppd_29-05-1951.pdf> accessed 17 November 2023.

The SCI, too, has from time to time re-affirmed this constitutional intent. When called upon to consider whether economic criteria or 'poverty' can be used as an exclusive metric to identify a protected group for the purposes of an affirmative action policy, the SCI has repeatedly answered this question in the negative.[48] According to me, economic class has only been regarded as a background characteristic or an associated factor that can be considered when determining social backwardness.[49] The emphasis has been on 'social and educational' backwardness.

It follows therefore that with the decision in *Janhit Abhiyan*, a change in constitutional meaning has been affirmed. From being excluded as a metric/basis to frame affirmative action measures, 'economic backwardness' has now been validated as a legitimate basis for reservations. 'Poverty' can now be an independent or standalone factor for enacting affirmative action measures. It need not only be a background characteristic or an associated factor.

B. New Meaning, New Ground?

What interests me though, is whether this affirmation of a changed constitutional meaning can also pave the way for striking down a law or an executive measure if it discriminates against the poor.[50] In my opinion, if a change in constitutional meaning has been affirmed, logically, this must follow as a matter of *sequitur*. If a protected class/individual can now be identified for the purposes of affirmative action on the basis of their economic wherewithal, it can plausibly be suggested that a class of citizens or an individual can be discriminated against on the basis of their economic status. It sounds illogical to suggest that the State can, on the one hand, frame measures for the benefit of the poor, but can also, on the other hand, discriminate against them.

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[48] See *Janki Prasad Parimoo v State of Jammu and Kashmir* (1973) 1 SCC 420, [24]; *K Vasanth Kumar v State of Karnataka* 1985 Supp SCC 714, [15], [80], [83].

In *Janki Prasad Parimoo*, to arrive at its conclusion, the Supreme Court reasoned, "… But if poverty is the exclusive test, a very large proportion of the population in India would have to be regarded as socially and educationally backward, and if reservations are made only on the ground of economic considerations, an untenable situation may arise…"

Pertinently, the SCI was not alone in adopting this logic. In *San Antonio Independent School District v Rodriguez* [(1973) 411 U.S. 1], the Supreme Court of the United States, too, rejected a bid to recognise discrimination against the 'poor' on the ground that the 'poor' did not constitute a discrete and insular minority.

[49] See *MR Balaji v State of Mysore* 1963 Supp (1) SCR 439, [23]; *Indra Sawhney v Union of India* (2000) 1 SCC 168, [21], [22], [45].

[50] As an illustration of such a measure, one could possibly consider the regulations framed/circulars issued by the Central Government during the COVID-19 pandemic. One of these regulations/circulars stated that slots for getting a vaccine could only be booked on an online portal. The argument advanced against these regulations/circulars was that they discriminated indirectly against the poor, who did not possess the same degree of access to digital technology, or the same level of digital literacy, as the rich. After *Janhit Abhiyan*, this argument can even be canvassed under Articles 14 and 15 of the Constitution. It need not only be a policy argument.

Poverty cannot be relegated to a factor or a characteristic to be considered when identifying disadvantages related to intersectional identities, if it can be an independent factor when designing an affirmative action policy.

This conclusion must also follow from the text of Articles 15(6) and 16(6), as inserted by the Amendment. Both these sub-articles open with the words "Nothing in this article shall prevent the State…". According to me, these words would not have been required if the drafters of the Amendment did not believe that but for these words, an affirmative action policy enacted in favour of the poor could potentially be struck down on the grounds that it discriminates on the basis of economic class or income levels. A recognition of 'poverty' or 'economic class' as a protected marker is thus implicit in the text of the Amendment itself.[51]

Besides deductive logic and a structural interpretation of Articles 15 and 16 of the Constitution, the opinions delivered in *Janhit Abhiyan*, too, lay a more purposive foundation for a recognition of 'poverty' or 'socio-economic disadvantage' as a protected ground in Indian discrimination law. In this regard, there are a few noteworthy features:

a. Maheshwari J, Pardiwala J, and Bhat J have all spelled out the ill-effects or adverse consequences of poverty. They have all noted how poverty leads to an exclusion from healthcare and education services, and how it translates into poor access to basic amenities. Bhat J, in fact, went a step further and even commented on the multidimensional nature of poverty;

b. Bhat J even observed that just like there had been communities who had been oppressed because of their caste, there were also a substantial number of people who had not progressed due to economic deprivation;

c. Maheshwari J made a note of how the State needs to pay attention to economic discrimination and exclusion;

d. Bhat J observed how equality was a mere platitude without economic emancipation. Maheshwari J observed how there was a nexus between economic justice and substantive equality.

While none of the judges squarely addressed some of the arguments advanced by the Petitioners, such as how poverty could not be protected

[51] When taken to its logical conclusion, this argument will also reopen a debate on whether Article 15(1) contains a closed list of protected markers. This might happen because 'economic class' is not listed as an independent marker in Article 15(1). It will also ignite a debate on whether the protection offered by Article 15(1) insofar as economic class is concerned is symmetric or asymmetric in nature. This is because a *non-obstante* clause would not have been necessary if the legislators had not opined that Article 15(1) guarded against discrimination generally on the basis of economic class or income levels. A non-obstante clause would not have been needed if the legislators believed that Article 15(1) only offered asymmetric protection, i.e., only prohibited discrimination against the poor.

because it lacked immutability or because it was inherently relative in nature; in my opinion, there are striking parallels between some of the reasons offered in *Janhit Abhiyan* and the reasons previously put forth for the recognition of poverty as a protected marker.

For instance, Fredman argues as to how people living in poverty often experience a lack of recognition and social exclusion.[52] The Committee on Economic, Cultural and Social Rights has observed how the pervasive discrimination and social exclusion that poverty begets leads to unequal access to education and healthcare services, and even to public places.[53] Poverty thus engenders more poverty. Moreover, this deprivation continues across generations.[54] Given these inter-generational handicaps, it has even been argued as to how the promise of substantive equality will remain meaningless unless poverty is recognised as a prohibited marker in discrimination law.[55] Substantive equality commands a recognition of economic disadvantage experienced within the welfare state.[56]

Therefore, when closely compared, it becomes apparent that the SCI in *Janhit Abhiyan* has offered similar reasons to uphold the use of economic criteria as the basis of affirmative action measures to the ones offered to advocate for the recognition of 'poverty' as a prohibited marker in discrimination law. It is thus that I submit that this decision may have implications beyond upholding the constitutional validity of the Amendment. It may pave the way for the recognition of a new marker of discrimination. More importantly, the significance of this potential may lie in the fact that although sustained attempts have been made across jurisdictions to recognise poverty as a prohibited marker, these bids have enjoyed little success.[57] The

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[52] Sandra Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Advancing Poverty' (2011) 22 Stellenbosch Law Review 566.

[53] Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, E/C. 12/GC/20 (2009). See also, Lalit Panda, 'The Fault in Our Class: A Caution on Constitutional Attitudes towards Economic Weakness', (*NLSIR Online*, 25 April 2023) <https://www.nlsir.com/post/the-fault-in-our-class-a-caution-on-constitutional-attitudes-towards-economic-weakness> accessed 9 September 2023; Surbhi Soni, 'An Anti-Discrimination Law for the Socio-Economically Disadvantaged in India', (Socio-Legal Review Forum, 15 April 2021) <https://www.sociolegalreview.com/post/an-anti-discrimination-law-for-the-socio-economically-disadvantaged-in-india> last accessed 9 September 2023.

[54] D E Peterman, 'Socioeconomic Status Discrimination' (2018) 104 Virginia Law Review 1283, 1328-33.

[55] See Martha Jackman, 'Constitutional Contact with the Disparities in the World: Poverty as a prohibited ground of discrimination under the Canadian Charter and Human Rights Law' (1994) 2(1) Review of Constitutional Studies 76.

[56] See Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23(2) South African Journal on Human Rights 214.

[57] See Shreya Atreya, 'The Intersectional Case of Poverty in Discrimination Law' (2018) 18 Human Rights Law Review 411, 413.

decision in *Janhit Abhiyan* could potentially lend a fresh lease of life to these attempts.[58]

A recognition of 'poverty' as a marker in discrimination law may even advance the objectives of substantive equality. For instance, one of the objectives of substantive equality is to facilitate or enhance the participation of relatively marginalised groups in society.[59] By recognising 'poverty' as a marker, the attention of the State can potentially be shifted to the distribution of resources in those instances when a legislative or executive measure discriminates against the poor. A better distribution of resources may in-turn enhance the ability of several social groups to participate in society. Recognising 'poverty' as a marker may even help redress the harms caused by status-based inequalities.[60] The fact that women, persons with disabilities, persons of colour, and Dalits are disproportionately represented among the poor is hardly disputable.[61] Thus, redistributive solutions, which recognising poverty as a marker may also help reduce the disadvantages suffered on account of gender, caste, religion, or race.

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[58] At this juncture, it is only appropriate that I clarify that in this Comment, I do not contend that a case for the recognition of 'poverty' or 'socio-economic status' has necessarily been made out. When (and if) this proposition is eventually canvassed, there are several hurdles that will remain to be canvassed. For starters, will this ground be located in Article 14 or Article 15(1) of the Constitution, the latter being a closed list according to some. (See Gautam Bhatia, 'Round-Up: The Delhi High Court's Experiments with the Constitution' (Indian Constitutional Law & Philosophy, 26 June 2018) <https://indconlawphil.wordpress.com/2018/06/26/round-up-the-delhi-high-courts-experiments-with-the-constitution> accessed 9 September 2023).

Moreover, the proponents of this argument will also have to deal with criticisms that often surface in cases dealing with the enforcement of socio-economic rights. For example, the criticism of vagueness. Suppose that a portal akin to the 'Cowin' portal designed by the Government of India for booking slots for vaccinations during the Covid-19 pandemic was challenged on the ground that it indirectly discriminated against the poor who had lesser access to the internet. Should the Court order that the portal be shut down and not be used as a tool to book slots? What does an equal right to vaccination irrespective of socio-economic status include? Arising from the same example, is the problem of institutional competence and legitimacy. Is it legitimate for a court to decide whether a democratically elected executive must not use the 'Cowin' portal as the sole means for booking vaccination slots in the midst of a pandemic? Does the court have the skills or resources to weigh alternative policy choices? Lastly, what would be the fiscal cost of enforcing an order prohibiting the use of the 'Cowin' portal? These and other such criticisms may have to be addressed by a court in a suitable case. These criticisms have been summarised neatly in Mitra Ebadolahi, 'Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa' (2008) 83 NYU Law Review 1565. See also Avinash Govindjee, 'Adjudication of Socio-Economic Rights by the Constitutional Court of South Africa: Walking the Tightrope between Judicial Activism and Deference' (2013) 25(1) National Law School of India Review 62, 75.

[59] Sandra Fredman, 'Substantive equality revisited' (2016) 14 International Journal of Constitutional Law 712.

[60] Fredman (n 56) 218.

[61] ibid; Jackman (n 55) 77.

Circling back to the decision in *Janhit Abhiyan*, there was consensus among the judges on the first of the three points for determination, namely, whether reservations based singularly on economic criterion violates the basic structure of the Constitution. On the second question, i.e., whether the exclusion of classes covered under Articles 15(4), 15(5), and 16(4) from the benefits of EWS reservation violated the basic structure doctrine, Lalit CJ (as he then was) and Bhat J dissented. Interestingly, although Justices Maheshwari and Pardiwala arrived at the same conclusion, their reasoning differed. It is to this second question that I now turn.

V. Exclusion of Classes Protected Under Articles 15(4) and 16(4): A Dichotomy

In my opinion, the opinions of Justices Maheshwari, Pardiwala, and Bhat belong to three distinct categories in regard to the second question.

Maheshwari J observed a definite logic to the exclusion of classes covered by Articles 15(4), 15(5), and 16(4) from Articles 15(6) and 16(6). According to him, this exclusion was inevitable for the true operation and effect of an affirmative action policy designed to benefit the EWS.[62] Poverty was, in any case, a material factor to be considered when identifying groups for the purposes of Articles 15(4), 15(5), and 16(4). Therefore, if Parliament had considered it fit to not extend the benefit of measures envisaged under Articles 15(6) and 16(6) to these groups, there was no reason to question its judgement.[63] There was no reason to extend a second benefit to those classes who were already provided with affirmative action.[64] In fact, the exclusion of groups covered by Articles 15(4), 15(5), and 16(4) was vital to provide benefits to the target group.[65] Compensatory discrimination could not be enacted in favour of the EWS without excluding groups already protected.[66] Based on these reasons, Maheshwari J opined that there was no violation of the basic structure.

According to me, Maheshwari J's reasoning was motivated by the need for administrative convenience. This is because, according to him, EWS would be benefitted by designing a policy that excludes classes covered by Articles 15(4), 15(5), and 16(4). Thus, it could not be said that the basic structure was violated.[67]

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62 *Janhit Abhiyan* (n 1) [137] (Maheshwari J).

63 ibid.

64 ibid [140].

65 ibid [142]

66 *Janhit Abhiyan* (n 1) [146] (Maheshwari J).

67 There is another fallout to the opinion of Maheshwari J that needs to be tested in times to come. It is now possible for the Legislature to design an affirmative action policy in favour of persons with disabilities, by excluding classes protected under Articles 15(4), 15(5), and 16(4) from the purview of that policy on the ground that these classes are already "protected". Not

Maheshwari J did not engage directly with the text of Article 15(1), i.e., the exclusion of groups protected under Articles 15(4), 15(5), and 16(4) was not tested on the anvil of Article 15(1). He also did not consider whether it would be administratively expedient to only have Articles 15(4), 15(5), and 16(4), and whether the EWS would actually be covered in the classes protected by these provisions themselves.

Pardiwala J, on the other hand, did. After citing the decision in *Kathi Raning Rawat v State of Saurashtra*,[68] he opined that Article 15(1) embodied the right to be treated equally among equals.[69] He further stated that Article 15(1) only guarded against such differential treatment as was based on disrespect, contempt, and prejudice. It did not prohibit every difference of treatment based on religion, race, caste, sex, or place of birth.[70] A measure designed to advance the interests of the EWS which excluded Scheduled Castes and Scheduled Tribes could not be categorised as one based on prejudice, contempt, or insult.[71] Instead, it was merely a case of under-inclusiveness, which could be justified on the grounds of administrative convenience or legislative experimentation.[72]

Bhat J, too, engaged with the text of Article 15(1). However, he differed almost entirely with Pardiwala J on how Article 15(1) ought to be understood. He observed that Article 15(1) of the Constitution embodied a specific injunction against discrimination by the State on certain proscribed grounds.[73] It embodied an absolute prohibition against classification on the grounds of race, caste, sex, religion, and place of birth. None of these grounds could serve as intelligible differentia.[74] No person can be excluded by the State on

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only would this perpetuate stigma, it could also create a situation where intersectionality is ignored. Roughly, a person belonging to a Scheduled Tribe or a Scheduled Caste who has a disability may come to be left out of both sets of affirmative action policies. Would this not be contrary to the tenets of substantive equality, one may ask. See Rishika Sehgal, 'The Indian Supreme Court on Affirmative Action for the Upper Caste Poor' (Oxford Human Rights Hub, 30 January, 2023) <https://ohrh.law.ox.ac.uk/the-indian-supreme-court-on-affirmative-action-for-the-upper-caste-poor-part-i/> accessed 9 September 2023.

68 *Kathi Raning Rawat v State of Saurashtra* 1952 SCR 435.

69 *Janhit Abhiyan* (n 1) [400] (Pardiwala J).

70 ibid.

71 ibid [401] (Pardiwala J).

72 *Janhit Abhiyan* (n 1) [392] (Pardiwala J). Interestingly, the citation referred to by Pardiwala J in support of this proposition is *State of Gujarat v Shri Ambica Mills Ltd., Ahmedabad* (1974) 4 SCC 656. This decision did not discuss 'under-inclusiveness' under Article 15 at all. Instead, it did not even discuss 'under-inclusiveness' in the context of any marker of discrimination. The question before the court was whether the definition of an 'establishment' in the Bombay Labour Welfare Fund Act, 1953 (as amended for the State of Gujarat) was under-inclusive, and hence, in violation of Article 14. Establishments employing less than 50 employees had been excluded from that definition. The applicability of this doctrine and the relevance of this precedent in the facts of the present case was thus questionable.

73 *Janhit Abhiyan* (n 1) [483] (Bhat J).

74 *Janhit Abhiyan* (n 1) [484], [515] (Bhat J).

these grounds.[75] To permit such exclusion by employing a test of reasonable classification would only undermine the guarantee encapsulated in Articles 15(1) and 16(2).[76] Article 15(1) formed a part of the basic structure of the Constitution, and thus, the Amendment fell afoul of the basic structure.[77]

It is thus apparent that the opinions of Pardiwala J and Bhat J lie at two ends of a spectrum. There is a fundamental disagreement between these two opinions insofar as the meaning and scope of Article 15(1) is concerned. As observed previously, Maheshwari J's opinion does not wade into the text of Article 15(1). Trivedi J concurs with Maheshwari J, but not with Pardiwala J. Lalit CJ (as he then was) concurred with Bhat J. Therefore, neither of these two opinions enjoyed the support of a majority on their interpretation of Article 15(1).

What they do spell out though, is the need for a future bench to dwell on the meaning of Article 15(1). Previously, I have argued that while High Courts have consistently interpreted Article 15(1) as embodying an absolute prohibition against classification on any of the proscribed markers — an interpretation carried forward by Bhat J — the SCI has on a couple of occasions applied the 'reasonable classification' test even in the context of Article 15(1).[78] Even then, I had submitted that Article 15(1) has not been examined in as much depth as would have been desired by the SCI.[79] While Pardiwala J and Bhat J have now commented on this provision in some detail, there is a lack of consensus between them. Therefore, while *Janhit Abhiyan* paves the way for an expansion of the contours of discrimination law, it also creates the need to clarify its very foundations.

Pertinently, it is imperative for this issue to be clarified. This is because the text of Article 15(1) does not accommodate the view adopted by Pardiwala J. In fact, his interpretation only serves to dilute the protection offered by Article 15(1), and to increase the burden cast on a litigant by requiring them to also establish an animus (such as contempt or prejudice) on part of the State. Furthermore, if what Pardiwala J opines were to be correct and 'reasonable classification' on the grounds such as sex or caste were to be permissible, Articles 15(3) and (4) would be rendered redundant.[80]

Not only that, the approach of Pardiwala J would mean incorporating and entrenching within Article 15(1) a deferential standard of review, i.e., the 'rational nexus' test. It has been feared that unless this test is shelved, the

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75 *Janhit Abhiyan* (n 1) [504] (Bhat J).

76 *Janhit Abhiyan* (n 1) [507] (Bhat J).

77 *Janhit Abhiyan* (n 1) [492], [504], [514], [521] (Bhat J).

78 Dhruva Gandhi, 'Locating Indirect Discrimination in India: A case for rigorous review under Article 14' (2020) 13(4) NUJS Law Review 1, 9-10.

79 ibid 5.

80 The downsides to the interpretation adopted by Pardiwala J have been fleshed out in further detail by me in Gandhi (n 78).

promise and potency of equality would itself be denuded of meaning.[81] A formalistic vision of equality will thus be entrenched.[82] On the other hand, if the approach of Bhat J is adopted, Article 15(1) will address the stigma, stereotyping, and humiliation caused by differentiation based on certain protected characteristics. It will address recognition-based harms in that all differentiations based on race, sex, caste, religion, or place of birth will be prohibited.[83] In the process, one of the objectives of substantive equality will be furthered.[84] What is at stake therefore is a choice between two competing visions of equality.

VI. THE 50% CAP: A CONFLICT WITH *M. NAGARAJ*

This only leaves the third question framed by the SCI in *Janhit Abhiyan*. As the text of Article 16(6) makes apparent, the 10% reservation that the State has been empowered to create will be in addition to the reservations already in existence. With the reservations already in existence capped at 50%, what Article 16(6) implies is that it is now permissible for the State to create reservation up to 60%.

While examining this issue, Maheshwari J held that the precedents which had capped reservations at 50% had all been delivered by the SCI before the Amendment was brought into force. These precedents had to be read only in the context of Articles 15(4), 15(5), and 16(4).[85] They could not be cited to curb the powers of the Parliament to address a future need.[86] In any case, with reservations themselves not being a part of the basic structure of the Constitution, a ceiling limit of 50% could not be claimed to be a part of the basic structure either.[87] Trivedi J and Pardiwala J, who concurred with Maheshwari J, did not express a separate view on this issue.

Bhat J held that because he had found the Amendment to be violative of the basic structure, it was not necessary for him to render a specific finding on whether breaching the 50% cap also violated the basic structure.[88] He only sounded a note of caution, by saying that breaching the 50% cap should not

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81 Tarunabh Khaitan, 'Beyond Reasonableness: A rigorous standard of review for Article 15 infringement' (2008) 50(2) Journal of the Indian Law Institute 177, 190.

82 Tarunabh Khaitan, 'Equality: Legislative Review under Article 14' in Madhav Khosla, Sujit Choudhury and Pratap Bhanu Mehta (eds), *The Oxford Handbook of Indian Constitutional Law* (OUP 2016) 699.

83 Gandhi (n 78).

84 Fredman (n 59); Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011).

85 *Janhit Abhiyan* (n 1) [156] (Maheshwari J).

86 ibid [157] (Maheshwari J).

87 ibid [172] (Maheshwari J).

88 ibid [608] (Bhat J).

reduce the right to equality to a right to reservation.[89] Therefore, on the third issue, the only prevailing opinion is that of Maheshwari J.

Although Maheshwari J cites the precedents where this issue was discussed; in my opinion, he wriggles out of applying these precedents by stating that they were all delivered before the Amendment came into force. The reason why I use the phrase 'wriggled out' can be discerned by a consideration of the conclusion in *Nagaraj*,[90] wherein the SCI held, "We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse."[91]

In my opinion, this conclusion has been rendered with respect to Article 16 as a whole. Maheshwari J may be correct in holding that the requirements of 'creamy layer' and 'backwardness' would not apply to Article 16(6) because 'creamy layer' was an economic criterion, and the word 'backward' has not been used in Article 16(6). However, there is nothing in the conclusion in *Nagaraj* or in the text of Article 16(6) to suggest that the parameters of "overall administrative efficiency" or "inadequacy of representation" will not apply with equal vehemence to reservations created in favour of the EWS. These concepts are not excluded, either explicitly or by necessary implication, by the text of Article 16(6).

On the contrary, the SCI in *Nagaraj* held that these parameters are "constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse". One could argue that the parameters which are not implicitly excluded (such as "inadequacy of representation" or "overall administrative efficiency") must necessarily apply to reservations created under Article 16(6) as well. Moreover, given that the "ceiling limit of 50%" was also identified as one such parameter, in my opinion, it was incumbent upon the SCI in *Janhit Abhiyan* to discuss as to how the creation of an additional 10% reservation would not lead to the collapse of the "structure of equality of opportunity". Does this structure not collapse merely by virtue of the fact that the Parliament identifies an additional need to be addressed? Even if reservations may not be a part of the basic structure, is the principle of equality not violated if more than a majority of seats are reserved? Given that the decision in *Nagaraj* was also delivered by a Constitution Bench of five judges, these were questions which the court in *Janhit Abhiyan* necessarily had to answer.

What has now ensued is a potential conflict between *Nagaraj* and *Janhit Abhiyan*. On the one hand, the court in *Nagaraj* has held that the ceiling

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89 ibid [610] (Bhat J).

90 *Nagaraj* (n 7) [122].

91 ibid. (emphasis supplied)

limit of 50% is pivotal insofar as preventing the "structure of equality of opportunity" from collapsing is concerned. On the other, the court in *Janhit Abhiyan* has held that the ceiling limit of 50% can be circumvented by identifying a new protected group and amending the Constitution.

VII. CONCLUSION

In conclusion therefore, there are three takeaways from the decision in *Janhit Abhiyan* — one for each of the three questions framed by the court. The first is that with this decision, the groundwork may have been laid for the identification of 'poverty' or 'socio-economic disadvantage' as a protected marker in discrimination law. The second is that after this decision, the need to clarify the import of Article 15(1) has been brought to the forefront. While Bhat J reaffirms the stance adopted by several High Courts over the decades, the opinion of Pardiwala J shows the pitfalls of importing the doctrine of 'reasonable classification' into Article 15(1). The third takeaway is that there is at least one issue which may need to be resolved by a larger bench, namely, the issue of the 50% ceiling. A larger bench will have to decide whether the 50% ceiling only applies to reservations created under Article 16(4), or to any reservation whatsoever. In doing so, it will have to outline what the phrase 'equality of opportunity' entails.

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Book Review of *Victims' Access to Justice: Historical and Comparative Perspectives*

Edited by Pamela Cox and Sandra Walklate, Routledge: 2022

*Radhika Chitkara**

I. Introduction

To what extent are modern criminal justice systems able to deliver on their promise of 'justice'? What imaginations of 'justice' find their way into the legal system, and what are left out? Criminal law as a device to redress public wrongs has been the subject of intense scrutiny by a range of scholars, social and political movements, human rights practitioners, and even domestic and international institutions.

Abolitionists question whether processes mediated by the State's monopoly over violence, culminating in punitive and discriminatory forms of imprisonment, are capable of redressing structural harms that are at best symptomised by formal notions of crime and criminality.[1] Can carceral frameworks deliver 'justice' to victims of crimes at all? Another stream of scrutiny, while divided on the legitimacy of State authority under criminal law, questions the limited role of victims as witnesses in the criminal justice machinery, and their glaring absence as important stakeholders in the process.[2] Speaking to the phenomenon of "secondary victimisation", this stream of scrutiny, represented largely though not exclusively by feminists, child rights advocates, and other human rights frameworks, advocates law,

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1 See, for instance, Angela Y Davis, *Are Prisons Obsolete* (Seven Stories Press 2003); Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence* (Duke University Press 2008).

2 Partners for Law in Development, 'National Conference on Women and Access to Justice: A Report' (10-11 December 2006) <https://pldindia.org/research/publications/women-culture-and-access-to-justice/> accessed 8 November 2023; Helen Fenwick, 'Procedural 'Rights' of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?' (1997) 60(3) Modern Law Review 317; Douglas E Beloof and others, *Victims in Criminal Procedure* (4th edn, Carolina Academic Press 2018).

policy, and institutional reform to recognise rights and enable participation of victims in criminal justice processes towards greater access to justice. All of this remains complicated scrutiny, as criminal law continues to dominate a State-led pursuit of justice for public wrongs, and as a device for regulating social and economic relations.

The edited volume on *Victims' Access to Justice* by Pamela Cox and Sandra Walklate offers a timely opportunity to reflect on these legal, policy, and institutional reforms over the past half a century to secure the rights and participation of victims in the criminal justice process. The volume emerges from an inter-disciplinary empirical research project to study victims' access to justice in English criminal courts from 1675 to the present. In its final form, however, it takes within its sweep a wide range of methodologies and universes, covering adversarial common law jurisdictions such as India, Canada, and Wales, as well as non-adversarial legal systems in Sweden, Brazil, the Netherlands, and Spain. Contributors to the volume include researchers and practitioners with a long history of engagement on law reform and crisis intervention, who variously bring to bear historical, comparative, feminist, decolonial, empirical, and other approaches to this extensive study. Although victims' rights and participation within the criminal justice process have intermittently been the subject of international norm development,[3] the volume limits its focus to law reform and institutional initiatives within the domestic legal sphere of these different jurisdictions.

As a part of Routledge's series on 'Victims' Culture and Society', the volume sets out to answer three questions: *first,* subjective and legal imaginations of victim-centric justice; *second*, the manner in which legal systems and policies accommodate such imaginations of justice; and *third*, processes by which different criminal justice systems enable or inhibit victims' rights and participation. At its heart, the endeavour is to interrogate the reasons underlying the failure of legal systems to secure access to justice for victims despite prolific initiatives across jurisdictions over the past many decades.

In this book review, I first offer an overview of the content and structure of the volume, with brief notes on individual contributions. While the volume covers a wide range of concerns, in this part, I focus on key thematic findings with respect to law and policy reform in the domain of victims' access to justice, and the role of the voluntary sector and victim support services. I also focus on the contributors' findings on notions of 'justice' that influence States in their institutional reforms and victims in their perceptions of redress. In the second part, I remark on the value of these reflections in charting the

[3] United Nations General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', General Assembly Resolution 60/147, adopted on 16 December 2005; Carlos Fernández de Casadevante Romani, 'International Law of Victims' in A von Bogdandy and R Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Max Plank Foundation 2010).

way forward on persisting and emerging challenges to victims' rights. Here, I emphasise the need for deeper scrutiny of the tri-partite relationship between the State, victims, and accused in the criminal justice system, particularly given the fraught relationship between citizens and police powers of the State in the South Asian context.

II. OVERVIEW OF THE VOLUME

The volume proceeds in three sections, with the first focusing on the United Kingdom, the second on adversarial common law jurisdictions, and the third on non-adversarial civil law jurisdictions. Within this jurisdictional rubric, individual contributions are anchored in critical analyses of legislative and institutional reforms in the realm of procedural law, prosecution, remedies and social services to recognise a (limited) role of victims in legal processes. These include Lamont's review of the disappearance of victims from adversarial criminal processes in England over time,[4] Barn and Kumari's incisive analysis of law reform in the domain of sexual violence in India,[5] and Manikis and Iliadis' focus on crimes that do not reach prosecution.[6] The entirety of the final section covers law reform in Sweden,[7] the Netherlands,[8] Spain,[9] and Brazil.[10] Separately, Impara[11] and Mawby[12] address civil society interventions in crisis support, particularly by independent feminist organisations for domestic

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4 Ruth Lamont, 'The Crown Against…: The Victim and the State in the Pursuit of Criminal Prosecution, 1840-1985' in Pamela Cox and Sandra Walklate (eds), *Victims' Access to Justice: Historical and Comparative Perspectives* (Routledge 2022).

5 Ravinder Barn and Ved Kumari, 'Gender, Sexual Violence, and Access to Justice in India' in Cox and Walklate (eds), *Victims' Access to Justice: Historical and Comparative Perspective* (Routledge 2022).

6 Marie Manikis and Mary Iliadis, 'Analysing the Victim Review Scheme of Decisions Not to Prosecute in England and Wales and Within Comparative Jurisdictions' in Pamela Cox and Sandra Walklate (eds), *Victims' Access to Justice: Historical and Comparative Perspectives* (Routledge 2022).

7 Kerstin Svensson and Carina Gallo, 'The Swedish Welfare Model and the Development of Social Services for Crime Victims,' in Pamela Cox and Sandra Walklate (eds), *Victims' Access to Justice: Historical and Comparative Perspectives* (Routledge 2022).

8 Maarten Kunst and others, 'Victim Participatory Rights in Dutch Criminal Proceedings: A Review of Research on their Potential Effectiveness' in Pamela Cox and Sandra Walklate (eds), *Victims' Access to Justice: Historical and Comparative Perspectives* (Routledge 2022).

9 Gema Varona, 'The Critical Presence of Absent Victims in Criminal Policy: Fragments of Spanish Legislation' in Pamela Cox and Sandra Walklate (eds), *Victims' Access to Justice: Historical and Comparative Perspectives* (Routledge 2022).

10 Thiago Pierobom de Avila, 'Evolution of Victims' Access to Criminal Justice in Brazil' in Pamela Cox and Sandra Walklate (eds), *Victims' Access to Justice: Historical and Comparative Perspectives* (Routledge 2022).

11 Elisa Impara, 'Using Crime Survey Data to Track and Measure Access to Justice: Problems and Possibilities' in Pamela Cox and Sandra Walklate (eds), *Victims' Access to Justice: Historical and Comparative Perspectives* (Routledge 2022).

12 Rob I Mawby, 'The Changing Landscape of Service Delivery for Victims of Crime in England and Wales in the Last Fifty Years' in Pamela Cox and Sandra Walklate (eds), *Victims' Access to Justice: Historical and Comparative Perspectives* (Routledge 2022).

and sexual violence victims; and challenges with data collection to measure the successes and failures of State-led victim support initiatives. Shore and Williams,[13] and Petoukhov[14] make crucial interventions on the construction of 'ideal victim types' through structural biases within the criminal justice system and stereotyping by judicial and other State authorities based on race, gender, age, sexual orientation, etc. Gema Varona also highlights the structural limitations of crisis support through the vantage point of so-called 'hidden victims', that is, those who remain invisible not only to the legal system but also to social support services.[15]

In doing so, the volume brings attention to 'justice gaps', 'implementation gaps', and 'conceptual gaps',[16] as phenomena that are by now all too familiar to those engaged in law reform and advocacy based on access to justice frameworks. The justice gap speaks to the structural under-reporting of crimes by victims, especially sexual and institutional violence against women, children, and sexual minorities, such that legal systems encounter but a small percentage of those who have experienced harm. The implementation gap describes the inability of institutions to adequately adapt and respond to law and policy reform measures, and thus, their failure in transforming victims' experiences of the justice system. The conceptual gap measures the differing evaluations of who constitutes a victim, and consequently merits a role in prosecution and redress.

The comparative analysis effectively illustrates that geography and the type of legal system, while relevant, are not overriding factors bearing upon the exclusion of victims' rights, interests, and participation in seeking redress and justice. Expansion in remedies through recognition of victim compensation, formal and independent victim support services, and to some extent procedural law reform, emerged more or less contemporaneously across jurisdictions. The content of law and policy reform also shows remarkable affinity across geographies, in the form of special tribunals for vulnerable victims, modified procedural rules to ensure sensitivity in prosecutions, interventions in institutional cultures, practices and attitudes towards victims, among others.

It is the historical analysis that sheds light on the changing nature of State power and authority as a more relevant factor, underlining that access to justice is, eventually, political and cultural. For instance, both Mawby for England

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13 Heather Shore and Lucy Williams, 'Divergent Victims in the Old Bailey, 1950-1979' in Pamela Cox and Sandra Walklate (eds), *Victims' Access to Justice: Historical and Comparative Perspectives* (Routledge 2022).

14 Konstantiv Petoukhov, 'I Want Your Tears and I Want them to be Real' in Pamela Cox and Sandra Walklate (eds), *Victims' Access to Justice: Historical and Comparative Perspectives* (Routledge 2022).

15 Varona (n 9).

16 Pamela Cox and Sandra Walklate, 'Introduction' in Pamela Cox and Sandra Walklate (eds), *Victims' Access to Justice: Historical and Comparative Perspectives* (Routledge 2022) 9.

and Wales,[17] and Svensson and Galo for Sweden,[18] map the journey of support services for victims since the 1970s onwards. At one level, the distinction in the nature of constitutional polities between the two jurisdictions directly translates into the quality of support available to victims, irrespective of their status as victims. In Sweden, Svensson and Galo assert that universal health care and municipal social services were available to victims early on, based not on their status as victims but as individuals or families in need. Gradually, however, women's groups asserted that this welfare model neglected the specific vulnerabilities arising from violence against women.[19]

In common in both jurisdictions was the pioneering role played by NGOs and the voluntary sector in developing programs for victim support, particularly in cases of violence against women. NGO-led victim support centres and services proliferated in the landscape, which would later become the model for State-led support institutions. NGOs also played the crucial function of advocacy with law-makers and State institutions, which was instrumental in placing victims on the political agenda, and pushing the envelope on the scope of State obligation towards victims.

Over the ensuing decades, while Sweden witnessed a gradual decentralisation of service delivery for crime victims, England and Wales went in the other direction towards greater centralisation but localised agenda-setting. Protocols for service delivery also changed, with Mawby expressing scepticism in the ability of contemporary models of victim contact in bringing victims into the fold of support services.[20]

The volume also offers an in-depth empirical review of particular victim support initiatives and schemes in England and Wales, in the form of crime surveys, witness service, victim support offering psycho-social, paralegal support, etc. Such an evidence-based evaluation of interventions is well-appreciated to take stock of the journey so far, and to map the way forward. For instance, Impara quantifies access to justice through a combination of variables relating to the experience of victims navigating the criminal justice system by relying on Crime Survey Data.[21] Separately, the volume flags concerns about protocols of victim contact, intensity and sustainability of engagement with victims, and victims' own desires of interacting with the legal system that limits the efficacy of victim support services.[22]

Equally relevant to flag here is the role of the police as gatekeepers to institutional support. This carries a political and cultural relationship with the kinds of victims that enter the formal legal system and independent

17 Shore and Williams (n 13).
18 Svensson and Gallo (n 7).
19 Svensson and Gallo (n 7) 160-166.
20 Shore and Williams (n 13) 91-92.
21 Mawby (n 12).
22 Shore and Williams (n 13) 91-92.

support services. Shore and Williams show in England, for instance, victim support services travel from a preponderant focus on property-based crimes like burglary, and assaults against the elderly, to later focus on vulnerable victims like women and children. The early focus on property-based crimes emerges from a reliance on police records and formal reporting of crimes to identify victims. It is only with a politicisation of violence against vulnerable groups that feminist interventions are successful in shifting the targets of support services.[23] Sexual minorities, as victims of hate crimes, continued to be stigmatised within the judicial system.[24] Petoukhov further shows how the settler colonial agenda in Canada, which caused a proliferation of oppressive residential schools for children of indigenous groups, also marginalised experiences of sexual, physical, and emotional violence against children in residential schools, premised on stereotypical notions of "ideal" victims.[25]

Apart from an evidence-based evaluation, Impara's contribution converges with Barn and Kumari's contemplation on subjective meanings of "justice" for victims. In their own ways, both emphasise the journey of victims through the criminal justice process as an important determinant of subjective satisfaction of a sense of justice. While Impara works their way through quantitative data beset with its own limitations, Barn and Kumari draw from a qualitative assessment of victim experiences through the criminal justice system. Barn and Kumari particularly underline a feeling of being heard, validated, and informed as crucial to satisfying victims' needs for justice.[26] This is a timely reminder in an era of overcriminalisation, zero tolerance, and deterrence-oriented responses to violent crime, which compromise fair trial rights of the accused in the interest of victims' rights.

III. Mapping the Way Forward

As stated at the outset, the edited volume offers an opportunity to take stock of victim-centric interventions in legal systems from the 1970s onwards, and to critically map the way forward. To this end, the volume offers valuable insights through a scrupulous evaluation of State obligations towards victims, the changing dynamics between State institutions and the voluntary sector, as well as the efficacy of victim support services across jurisdictions. The volume also presents a welcome refresher on the political factors underlying the label of "victim" and the contours of "justice", which have for long been on the agenda of access to justice-oriented advocacy, but continue to persist today.

Even though the relationship between State and victim is central to the inquiry, the volume studies 'victims' as a distinct identity, and then searches for their presence in the legal system. There is value in this endeavour. In terms

[23] Petoukhov (n 14) 40-41.

[24] ibid 44.

[25] ibid.

[26] Barn and Kumari (n 5) 110-111.

of mapping the way forward, it would also be useful to interrogate the role and function of lawmakers, and investigative and prosecutorial agencies in representing the interests of the victim. What interests find representation and in what form is also a political question, which cannot be isolated from the larger trajectory of criminalisation and State power under the criminal justice machinery.

This is best exemplified in the relationship between victims and accused under procedural laws. Even as evidence mounts on the injustices of the carceral penal system, in terms of overpopulation, overrepresentation of marginalised groups, and overcriminalisation of social and economic vulnerabilities,[27] States continue to double down on deterrence-oriented draconian criminal frameworks. In India, as in many other jurisdictions in the world, sexual violence and acts of terror are met with stringent sentencing including capital punishment, increased State power, and abrogated fair trial rights of accused under procedural laws, among others. Part of the rhetoric justifying these so-called reforms is the rights and interests of victims and their need for justice.

These measures place victims in competition with the accused, while offering a pretext for expanding coercive State power in investigations and prosecution of crimes. Varona, in the context of Spain, and Barns and Kumari in the context of India, address this concern in their contributions. Varona maps law reform in the domain of anti-terror measures and sexual violence and the location of victims in these processes, to reiterate the selection bias underlying acts and groups that attract the label of 'terrorism', and the enduring conflict with human rights in such law reform measures.[28] Here, Kent Roach's work on due process and victims' rights is instructive on the manner in which victims' rights commonly triumph over the rights of the accused over the period under study between the 1980s and 1990s.[29]

Omitted from the analysis in the edited volume, but underlining the political dynamics behind recognition of "victims", are narratives of victims of corporate crimes and environmental harms. The continuing struggle of the victims of the Bhopal Gas Tragedy in the 1980s in India, or of residents of Tuticorin against mercury poisoning of natural resources, and consequent human rights violations with State complicity, further complicate the tale. The absence of victims of corporate crimes and environmental harms from the volume appears as a glaring omission. This is also one area which requires scrutiny on the tripartite relationship between the State, accused, and the victim, although in a different fashion than those under sexual violence and

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[27] See, for instance, Irfan Ahmed and Md Zakaria Siddiqui, 'Democracy in Jail: Over-Representation of Minorities in Indian Prisons' 2017 52(44) Economic and Political Weekly; Vrinda Grover, 'The Adivasi Undertrial, a Prisoner of War: A Study of Undertrial Detainees in South Chhattisgarh' in Deepak Mehta and Rahul Roy (eds), *Violence and The Quest for Justice in South Asia* (Sage 2018) 201.

[28] Varona (n 9) 193-195.

[29] Kent Roach, *Due Process and Victims' Rights* (University of Toronto Press 1999).

anti-terror laws. This may be of particular interest to scholars and practitioners in South Asia, given the radically different histories and contemporary relationship between citizens and the police powers of the State.

With an eye on the political economy of the criminal justice system today, and the selective instrumentalisation of victim interests, interrogating the tripartite relationship between the State, accused, and victims presents the next frontier of scrutiny. Cox and Walklate present a methodological template for scholars and practitioners to take up this next frontier of scrutiny with vigour and inter-disciplinarity.