

CRIMINALISATION OF ADIVASIS AND THE INDIAN LEGAL SYSTEM

EXECUTIVE SUMMARY



Shomona Khanna | Astha Saxena | Puja | Khushboo Pareek

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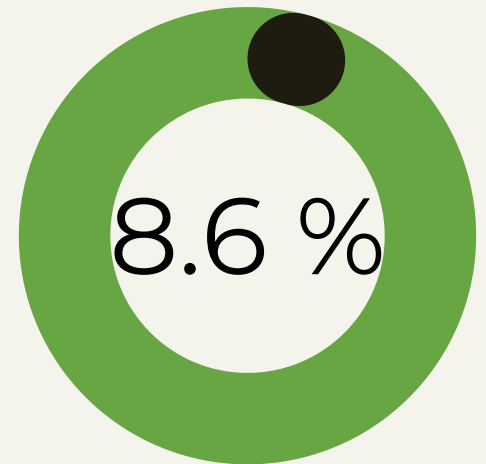
Picture of the Pathalgarhi (traditional practice of doing stone inscription) describing the provisions of the Constitution of India, 1950 and the Chota Nagpur Tenancy Act, 1908 at a village in Khunti, Jharkhand. (Photo: Puja)

Background

According to the Ministry of Tribal Affairs, as of 2013, there are 104.3 million Indigenous Peoples or Scheduled Tribes, also called tribal or Adivasi, in India. They constitute 8.6 percent of the country's total population. **Ninety (90) percent of them live in rural areas without access to basic facilities.** Despite having special constitutional protection, the Adivasis have faced criminalisation and violence at the hands of the State and non-state actors.

The number of crimes and atrocities committed against the Adivasis has steadily risen in the last three years. The National Crime Records Bureau (NCRB) under Ministry of Home Affairs recorded 6,538 cases against the Scheduled Tribes in 2018. In 2019, there were 7,570 cases and 8,272 in 2020.

Impunity in India is extensive and deeply entrenched, especially if it involves the upper castes. This is exemplified in the **conviction rate for crimes committed against Scheduled Tribes which was merely 28.5 percent during 2020** despite provision for speedy trial in 'special courts'.



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6,538

2018

7,570

2019

8,272

2020

Cases against the Scheduled Tribes
2018- 2020

With this reality and as part of its work on highlighting and monitoring incidents of criminalisation, violence, and impunity against Indigenous Peoples, Indigenous Peoples Rights International (IPRI) commissioned a research examining the dimensions of criminalisation of Adivasis in India.

Written by Shomona Khanna, Astha Saxena, Puja, and Khushboo Pareek, *Criminalisation of Adivasis and the Indian Legal System*, provides a 360-degree view on criminalisation of Adivasis. A first of its kind, this study provides a firm foundation to kickstart future engagements and inquiries on this critical issue relating to upholding the rights of the Adivasis in India. IPRI hopes that this publication will play a part in inspiring Indigenous Peoples' movements in India and beyond to strengthen their ongoing initiatives to protect their rights through engaging with the legal system. We also hope that it will be a useful resource material for policymakers and advocates to having deeper awareness on the importance of strengthening protection of Adivasis through a more comprehensive and efficient legal and justice systems.

Executive summary

Criminalisation of Adivasis began with the forest laws enacted by British colonial regime that constructed a discourse that forest is a space inhabited by unruly savages who are, by nature, dangerous criminals. Thus, forests and Adivasis were both to be tamed and rescued by the colonial government from each other.

Colonial domination was established through the Indian Forest Act, 1927, itself based on a 19th century Forest Act of 1865. This mainframe colonial legislation continues to be the parent statute that governs the forests and its resources even today.

This summary provides a glimpse of the 11 chapters as they build on a narrative that traces the construction of the Adivasis from original settlers to “illegal encroachers”. They stand accused and are victimised. Whether as complainants or as accused persons, they are forced to engage with a legal system that persistently treats them with disdain and prejudice.

Different chapters show the different manners in which criminality exists as a norm in law and how it operates on the ground. The structure of legislations and rules, along with the attitudes of the police, the forest bureaucracy, the administration, and the courts — all depict an underlying idea of development by discrimination, and the engagement of criminality and violence within these dynamics. This criminalisation process spills over beyond the forest laws into other general laws in their application to Adivasis.



*Women collecting Minor Forest Produce in Kandhamal district, Odisha 2017
Photo: Tarun Kumar, Samudrishti*

Chapter 1

An introduction: the rights and wrongs of criminality

Chapter 1 opens with the concepts of need and greed within the context of resource distribution and use, and what is considered legitimate and illegitimate in law. It explores the connections and disconnections of violence and peace, justice and injustice, legal and illegal, and how these ideas relate to discrimination and criminalisation against Adivasis, which are controlled and defined by the state's laws and institutions, and the overarching caste–class–race dynamics.

It discusses the letter and spirit of the law and how it reflects the perception and assessment of the populace as well as establishes the kind of relationship between them and the state. Chapter 1 lays out the structure of the publication that guides the reader on the focus of each chapter.

Chapter 2

History: a witness to the alienation of the Adivasis

Chapter 2 reminds the reader that post-independence India has not sobered up from its 'colonial hangover'. It establishes that laws, policies, and discourse generated by the colonial regime continue to inform the post-independence ideation on (i) conservation; (ii) forest as resource; and (iii) Adivasis and other traditional forest dwellers as criminals. It discusses the 'assimilationist approach' of the colonial and post-colonial regime, which imposed penal obligations on traditional governance structures and institutions to coerce compliance with colonial laws and policies. It also illustrates how the rebellion of Adivasis against the British empire established the narrative of the 'wild, savage, irrational, and blood-thirsty Adivasis' whose suppression by violence and brutality was considered proper, rational, and legitimate.



Picture of the Shaheed Smarak (Martyrs Memorial) at Ranchi, Jharkhand 2021
Photo: Khushboo Pareek

This narrative paved the norm of criminality in Adivasi community, which continues to fuel antagonism by non-Adivasis against them, and which extends to the Dalits, the Muslims, and other marginalised groups to this day. The chapter posits that the institutionalisation of the Adivasis as 'forest encroacher' and 'criminals' originated from the colonial legislations of 1865 and 1871, being the Indian Forest Act and the Criminal Tribes Act, respectively.

Chapter 2 also attempts to connect the history of insurgencies and counter-insurgencies to legislation of laws that conceal the co-optation of Adivasi customary law within the criminal justice system of colonial India. This antagonism against Adivasis as a community was reflected further and integrated into post-independence legislations. Simultaneously, the Adivasi revolts also paved the way for enactment of laws that recognised certain customary rights over resources and governance. It relates these colonial legislations to the Forest Rights Act, 2006— a positive legislation that recognises forest rights of the Adivasis— and how it was perverted before the Supreme Court to legitimise eviction orders against 10 million Adivasis from the forest although these orders were later rescinded.

Chapter 3

Radical break from the past: Constitution of India and its interpretations

Chapter 3 lays down the normative framework that provides equality and protection to the Adivasi and forest dwelling communities as enshrined in the Indian Constitution. This chapter provides a **comprehensive overview of the Indian Constitution and how it embodies the aspirations of a post-colonial and independent India in deconstructing the historical injustices against the Adivasi.** It highlights the importance of the Fifth Schedule provisions and the development of other significant legislations such as the Panchayats (Extension to Scheduled Areas) Act, 1996 and the Forest Rights Act, 2006. It discusses the evolution of the 'savage' and 'primitive' Adivasis to an individual and a community with rights and liberty, which can be invoked within the legal justice system. The Supreme Court also reaffirmed this constitutional status while legislative progresses to undo historical injustices expanded the scope of rights and recognition of self-governance.

The chapter sets the discussion on the incongruity of the progress of legal document to its interpretation within the legal system, which is **transforming from a lens of development and inclusion to one of patriarchy, protectionism, and paternalism.**

Chapter 4

A norm of criminality: *Adivasis'* interface with the criminal justice system as accused persons

This chapter investigates the assumptions made by the criminal justice system in engaging with the Adivasis and other forest dwelling communities. It dives into questions of discrimination under Article 14 and 15 of the Indian Constitution and **illustrates how the system, which is otherwise committed to maintaining peace and security of the nation,**

has made a conscious choice of regulating and controlling the most basic existence of Adivasis and forest communities. It carries out the tedious process of identifying discriminatory laws that possess provisions for rendering an Adivasi an offender, paving the beginning of a long engagement with police stations, prisons, and the courts. This chapter argues that there exists a norm of criminality in law, ranging far and wide, even to the most straightforward and unproblematic statutes.

Chapter 4 maps around 150 legislations, codes, rules, regulations, and orders that are disseminated across various categories of laws and groups them in ten broad categories. Among those categories are Forest Offences, Minor Forest Produce, Taxation, Public Security and General Laws. This categorisation illustrates that each of these laws unfolds a web of legal provisions that target and criminalise the identity and way of life of the Adivasis. It focuses on four categories that are deemed blatant in their approach towards criminalisation. These are laws (i) creating offences of habituality; (ii) addressing collection of Minor Forest Produce; (iii) seeking protection of environment and wildlife, and (iv) relating to property. In these laws, a forest dweller is usually positioned as an accused within the system, a person liable to bear the burden of their criminality and, therefore, in need of correction. To be an accused is not a difficult task for an Adivasi in a system that already considers them as one or expects them to become one by their mere existence.

Chapter 4 also echoes the ongoing conflict between the landmark Forest Rights Act, 2006 (FRA), the Indian Forest Act, 1927 (IFA) and Wildlife Protection Act, 1972 (WLPA), and how no serious legislative changes are put forward to reconcile the latter two to the more progressive FRA. It posits that the IFA and WLPA exemplify the narratives in conservation and development where the lives and realities of Adivasis, for whom engagement with environment and wildlife is a matter of course, are discounted. This chapter furthers the discussion on how the state is allowed to overtake and remove, through violence and use of the criminal justice system, processes of conserving forests and wildlife that Adivasis may have with their environment. The State tends to view the assertion of lawful rights by the victims of criminalisation as an affront to itself and comes down heavily using national security legislations to silence them. Another vicious layer of criminalisation is thus clamped on the Adivasis.



*Mass gathering in Kalahandi, Odisha 2002
Photo: Shomona Khanna*

Chapter 5

Authority, Criminality, and the Law in Forests

In this chapter, the Indian Forest Act, 1927 (IFA) is deconstructed and its key criminal provisions are further examined. It elaborates on IFA as the foundation of a complex architecture of statutes, rules, executive instructions of the central government along with the variations at the State level enacted by State legislatures.

Through the lens of criminal law, Chapter 5 highlights the **spirit of IFA, which lies in asserting power and dominion of the sovereign Indian state.** The IFA vests power in the police and forest officers to arrest any person without a warrant and without orders from a Magistrate, with only the barest of restrictions. This chapter illustrates that the spirit to control and criminalise has only been amplified with no significant departure made by any State Government or Union Territory or even the Autonomous Regions under the Sixth Schedule. State level legislatures intensified sovereignty and hegemony using the criminal law provisions as powerful tools to reinforce order. **In addition, unlike the IFA, State level laws have provisions for eviction in protected forests and are blatant in disregarding Constitutional due process protection.**

This chapter also explores the Wildlife Protection Act, 1972 (WLPA) and argues that its letter, spirit, and implementation is more of a categorical criminal legislation against the Adivasi and forest-dwelling communities, than a legislation to protect the wildlife. It illustrates how the WLPA adopts the same approach as IFA towards forest and wildlife protection, retaining two significant aspects: (1) the legitimacy of authority (to declare spaces which were hitherto accessed by forest dwelling and Adivasi communities as 'Protected Areas' under the law); and (2) the corresponding power to pronounce criminality in such forest spaces (by retaining the power to define, and prosecute, act which are 'wildlife offences').

Chapter 5 provides summary of amendments made by different State legislatures to the IFA regarding punishments for forest offences in Reserved and Protected Forests. It also outlines the penalties for wildlife offences in National Parks, Wildlife Sanctuaries and Tiger Reserves as per the WLPA.

Chapter 6

Redefining the forest and reinventing the conflict

Chapter 6 reiterates that even as the State is mandated to undo historical injustice perpetrated on the Adivasis and other forest dwellers, it simultaneously unleashes its development agenda that not only decimates the forests but is also vicious on the rights of forest dwellers. **This results in the creation of another layer of criminality.**

This chapter delves into the Compensatory Afforestation Fund Act, 2016 and its Rules of 2018; Right to Fair Compensation and Transparency in Land Acquisition (Rehabilitation and Resettlement) Act, 2013 and the rules made thereunder by State governments; and policies of 'Land Bank' and other government initiatives for the 'ease of doing business,' including creation of jobs to address the economic slowdown due to the COVID-19 pandemic. These laws and policies promote the interests of industry and global capital by diluting industrial, environmental, and labour standards. **These also adversely affect the Constitutional guarantees and statutory rights of Adivasis and add to the list of existing laws that end up criminalising Adivasis and forest dwellers.**

This chapter argues that forest diversion for non-forestry activities and the associated compensatory afforestation in lieu of the diversion over land where people have rights results in perpetuating the historical injustice. Land Banks for afforestation have the potential of implicitly criminalising Adivasi and other traditional forest dwellers because after the land is registered in a Land Bank and intended to be used for the purposes of compensatory afforestation, it comes under the control of the forest department. The forest department then notifies such land under the category of Reserved Forest or Protected Forest. Access by Adivasis to such land can become criminal in nature thereafter if they continue to depend on the forest for fuelwood, cattle grazing, Minor Forest Produce collection or any such livelihood purposes. This process creates conditions for conflict between two unequal parties i.e., the state and the forest dwellers, resulting in further criminalisation of the latter. It places the idea of **Fifth Schedule of the Constitution of India under threat because it practically by-passes the process of consultation as stipulated under Panchayats (Extension to Scheduled Areas) Act, 1996 and consent under the Forest Rights Act, 2006.**

Chapter 7

Security laws and impunity

This chapter asserts that in a modern constitutional democracy, Security Laws, insofar as they contravene basic principles of criminal justice and constitutional rule of law, are **obsolete**. It undertakes a deeper analysis of the architecture of security laws, such as the Unlawful Activities (Prevention) Act, 1967; Chhattisgarh Special Public Safety Act, 2005; Indian Penal Code, 1860, Central Industrial Security Forces Act, 1968, the Odisha Industrial Security Forces Act, 2012 and Information Technology Act, 2000.

This chapter is a special one, for it analyses laws that are used in extraordinary circumstances, usually when the security of the nation is under threat. It recounts how these special laws are regularly used in forested areas and demonstrates the norm of criminality in its live form, where distinct, targeted legislations are enforced to tackle Adivasi outrage equating it to Naxalism and Maoism.

Therefore, jails are filled with forest dwellers accused of something as minor as petty theft or as serious as waging war against the country. It is astonishing to see how a single community is thought to be capable of so much criminality that offences of all ranks and orders can be traced back to it.

The chapter reads the securitisation laws, assesses their audience and the kind of relationship they built between the state and populace. Their use in specific regions and against specific populations narrates a tale that must be read within the context of criminalisation. The chapter dedicates a section on militarisation of specific regions like Jharkhand and Bastar and narrates stories of horror, the encounter killings by State and State sponsored vigilantes, and the denial of constitutional rights that have disproportionately high Adivasi accounts. This chapter on Security Laws lay out the operative texture of what exists in the law as a perception. This perception manifests in mass criminalisation of the Adivasi and all other forest dwelling communities and in the manufacture of the unlawful Adivasi.

Chapter 8

Violence against Adivasi women: an unravelling of the social structure

Chapter 8 focuses on the *Adivasi* woman's engagement with the criminal justice system. In this state of constant conflict, of violence and criminality between the state and the community, women's bodies have become sites of war, and their encounter with state forces tell many stories. This chapter examines the implications of regressive legislations on Adivasi women who are particularly more vulnerable because they are targeted by the state and have more interface with forests for day-to-day subsistence than men. Also when a suspicion of an on-coming raid is sensed, it is the women who are left behind to safeguard their children and property while men flee into the forest to protect themselves from criminal charges or worse. The Adivasi women face the force of such combing state operations, putting them in a strikingly vulnerable position.



Occupation of Paramilitary Forces and barbed fencing at a Panchayat Building at Khunti, Jharkhand 2018
Photo: Puja

The chapter reviews the data pertaining to crimes specific to women as per the National Crime Records Bureau from 2018 to 2020. In 2020, for instance, 25 per cent of total crimes against Scheduled Tribes were sexual crimes, committed against Adivasi women.

The proportion of crimes in 2020 have increased and so have the total number of cases when compared to 2019.

Deep within the forest, the complex architecture of constitutional and fundamental rights, the special protections and panaceas, become meaningless when an Adivasi woman is confronted with agents of the State, and the systemic impunity which protects those agents.

The examination of the struggles and bravery of Adivasi women in this chapter unfolds the violence and oppression against Adivasi women, and how criminal law procedures operate differently for marginalised women. As women leaders from the margins seek accountability, their unwavering commitment is threatened by the launch of assaults against their body. Notwithstanding the challenges they face while in a disadvantaged position, this chapter also highlights their strength and bravery as Adivasi women continue to withstand these egregious assaults and emerge strong as some of the most powerful leadership that Indigenous Peoples in India have ever known.

Chapter 9

Prisons and the Adivasis in India

This chapter studies how the forest dwelling communities appear in and engage with the penal aspect of the criminal justice system. Prisons are one institution that hold a significant place in the life and struggle of these communities. They encounter prisons not only as convicted criminals, but also as people accused of crimes or under-trials, who often spend more time in jails than they would have had they committed an offence. **Chapter 9 relays some stories of Adivasis from Chhattisgarh and Jharkhand illustrating how the ripple effect of unjust incarceration on Adivasi people is simply beyond quantification.**

Also presented in this chapter is the proportion of Scheduled Tribes (ST) population to the total population in each of the 10 Fifth Schedule States, which is juxtaposed with the proportion of ST convicts and ST undertrials to total prison population in these States. Note that there are special constitutional and statutory protections for Scheduled Tribes in each of these States, which are recognised administratively as regions with considerable autonomy for Adivasis and their traditional governance mechanisms. This chapter reiterates that **the proportion of Adivasi prisoners, whether undertrials or convicts, is substantially higher than their proportion to the State population.** These are not mere numbers at a moment in time; they represent lived experiences of structural violence and unimaginable suffering in the lives of the prisoner, as also their family and clan members.

Chapter 9 argues that **without addressing the structural biases within the criminal justice**

system against the Adivasis and rethinking the economic development that is dependent on exploitation of forests, any mechanistic initiatives such as setting up more courts, or introducing more police personnel, or building bigger jails, or even providing more lawyers, are futile in addressing the disproportionate incarceration of Adivasis in India.

Chapter 10

Adivasis and Protective Legislations: Interface with the Criminal Justice System as Complainant

Taking a leap from the norm of criminality, the last and final chapter of the publication, Chapter 10, concentrates on Adivasis' engagement with law as complainants, rather than as the accused. It assesses the change in perception and structural dynamics when the Adivasi engages with the legal system as one who has been wronged, invoking legislations that have been forged to offer protection to marginalised communities. Juxtaposing this engagement with that of an Adivasi as accused would give us an opportunity to understand the length, breadth, and depth of discrimination prevalent in law.

This chapter highlights that the law does not function as fiercely in matters of oppression against the Adivasi and forest dwelling communities as it does when they are accused of various crimes. Akin to deep discrimination, this lag renounces all principles of equality and fraternity that India seeks to abide by.



*A woman looking at a mining field at Goa 1999
Photo: Mongabay India*

Chapter 11

In Conclusion: The Beginning of a Study in Criminality

Drawing from the earlier chapters, Chapter 11 recounts the Adivasi experience of the inter-relationship between discrimination and development, and the engagement of criminality and violence within Indian legal system, in the hope that the publication would initiate deeper research into the criminalisation of Adivasi and forest dwelling communities.

Epilogue

The North-East: Of Unfamiliarity and Shared Histories

The authors point out that the north-east region of India, predominantly inhabited by Indigenous Peoples, is not a part of this study. The political history, the distinctly different constitutional status and governance structures of a higher degree of tribal autonomy, and multiplicity of militant political struggles strides a different path requiring a frame of analysis entirely different from that of peninsular India.

The authors note that despite a longer history of militarisation and conflicts, an examination of the criminal justice system in the north-east must be carried out from a different perspective that is grounded in its particular context. This calls for a separate initiative.

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