CRIMINALISATION OF ADIVASIS AND THE INDIAN LEGAL SYSTEM

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Indigenous Peoples Rights International
Championing Indigenous Peoples Rights

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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)

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To the *Adivasi* prisoner

and

To those who dare to walk with her

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This report has been 15 years in the making. It all started in 2005, when one of us undertook a study of the criminal law provisions of the *Indian Forest Act, 1927*, and found deeply oppressive provisions that have remained unchanged since prior to Independence. Since then, we have encountered many instances of injustices within the criminal justice system in varied shapes and forms, but were unable to gather an opportunity to understand and articulate it all. A study of this scale and complexity required diligence and patience, both of which are rarely found. We are deeply grateful to Joan Carling, Global Director at the Indigenous Peoples Rights International ("**IPRI**") and a formidable indigenous peoples' rights activist herself, for giving us that opportunity to collate all these experiences, learnings, and insights in one place. Without her encouragement, patience and faith in our work, this study would not have been possible.

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Shomona Khanna
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Abbreviations

AFSPA	Armed Forces (Special Powers) Act, 1958
Arms Act	Arms Act, 1959 -
Atrocities Act	The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989
BLSA	Bonded Labour System (Abolition) Act, 1976
CEACR	Committee of Experts on the Application of Conventions and Recommendations, ILO
CAF	Compensatory Afforestation Fund
CAF Act	Compensatory Afforestation Fund Act, 2016
CAF Rules	Compensatory Afforestation Fund Rules, 2018
CDRO	Coordination of Democratic Rights Organisations
CEC	Central Empowered Committee
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women, 1979
CISF	Central Industrial Security Forces
CISF Act	Central Industrial Security Forces Act, 1968
CLPRA	Child Labour (Prevention and Regulation) Act, 1986
CNTA	Chota Nagpur Tenancy Act, 1908
COVID-19	Coronavirus Disease
CPI	Communist Party of India
CrPC	Code of Criminal Procedure, 1973
CRPF	Central Reserve Police Force
CSPSA	Chhattisgarh Special Public Safety Act, 2005
CTA	Criminal Tribes Act, 1871
DM	District Magistrate
FCA	Forest Conservation Act, 1980

FDI	Foreign Direct Investment
FDST	Forest Dwelling Scheduled Tribes
FIR	First Information Report
FRA	The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006
FSO	Forest Settlement Officer
HOH	Household Ownership Holdings
HRF	Human Rights Forum
ICCPR	International Covenant on Civil and Political Rights, 1966
IEA	Indian Evidence Act, 1872
IFA	Indian Forest Act, 1927
IFR	Individual Forest Rights
IIS	Industrial Information System
ILO	International Labour Organisation
IPC	Indian Penal Code, 1860
IPCC	Intergovernmental Panel on Climate Change
IPRI	Indigenous Peoples Rights International
IT Act	Information Technology Act, 2000
JagLAG	Jagdalpur Legal Aid Group
JHALSA	Jharkhand Legal Services Authority
JMFC	Judicial Magistrate of First Class
KKM	Kabir Kala Manch
LARR	Right to Fair Compensation and Transparency in Land Acquisition (Rehabilitation and Resettlement) Act, 2013
LWE	Left-Wing Extremism
MHA	Ministry of Home Affairs, Government of India
Migrant Workers Act	Inter-State Migrant Workers' Act, 1979

MoEF&CC	Ministry of Environment, Forest and Climate Change, Government of India
MP Adhiniyam	Madhya Pradesh Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969
MP Rules	Madhya Pradesh Village Forest Rules, 2015
mtpa	million tonnes per annum
NCRB	National Crime Records Bureau
NHRC	National Human Rights Commission
NIA	National Investigation Agency, Government of India
NSA	National Security Act, 1980
NSS	Niyamgiri Suraksha Samiti
OBC	Other Backward Classes
Odisha LARR Rules	Odisha Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Rules, 2015
Odisha Rules	Orissa Village Forest Rules, 1985
OFA	Orissa Forest Act, 1972
OISF	Orissa Industrial Security Forces
OISF Act	Orissa Industrial Security Forces Act, 2012
Orissa Trees Act	The Orissa Protection of Scheduled Castes and Scheduled Tribes (Interest in Trees) Act, 1981
OSATIP	Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulations, 1956
OTFD	Other Traditional Forest Dwellers
PESA	Panchayats (Extension to the Scheduled Areas) Act, 1996
PIB	Press Information Bureau, Government of India
PIL	Public Interest Litigation
POCSO	Protection of Children from Sexual Offences Act, 2012
PRI	Panchayati Raj Institutions
PSU	Public Sector Undertaking

PUCL	People's Union for Civil Liberties
PUDR	People's Union for Democratic Rights
PVTG	Particularly Vulnerable Tribal Group
RTI	Right to Information
Sanction Rules	The Unlawful Activities (Prevention) (Recommendation and Sanction for Prosecution) Rules, 2008
SC	Scheduled Caste
SDM	Sub-Divisional Magistrate
SFJ	Sikh For Justice
SIT	Special Investigation Team
SLMC	State Level Monitoring Committee
SP-CID	Superintendent of Police, Crime Investigation Department
SPTA	Santhal Pargana Tenancy Act, 1876 and 1949
ST	Scheduled Tribe
TAC	Tribes Advisory Committee
UAPA	Unlawful Activities (Prevention) Act, 1967
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples, 2007
UNGA	United Nations General Assembly
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
VFC	Village Forest Committee
VFR	Village Forest Rules
WLPA	Wild Life (Protection) Act, 1972
WP	Writ Petition
WSS	Women Against Sexual Violence and State Repression
1915 Act	Bihar Excise Act, 1915

1952 Act	Madhya Bharat Vagrants, Habitual Offenders and Criminals (Restriction and Settlement) Act, 1952
1966 Rules	Orissa Forest Contract Rules, 1966
1969 Act	Himachal Pradesh Habitual Offenders Act, 1969
1971 Act	Public Premises (Eviction of Unauthorised Occupants) Act, 1971
1972 Act	Orissa Prevention of Land Encroachment Act, 1972
1981 Act	Orissa Forest Produce (Control of Trade) Act, 1981
1995 Rules	The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995

Glossary of Terms

Adivasi	*Adivasi* people are the indigenous people of India who are designated as Scheduled Tribes under the Constitution. However, there is some political conflict around the term. Hailing from the Hindi language, this term is not accepted by all Indian tribes. Tribes in the North East region, for example, prefer to be called as 'indigenous communities' and not *Adivasi*. The term also does not encompass other communities who are categorised under law as Other Traditional Forest Dwellers ("**OTFD**")
Abadi	Category of land as described in government records
Aadhaar	*Aadhaar* is a 12-digit unique identity number that can be obtained voluntarily by citizens of India after enrolment and is based on their biometric and demographic data
Adhiniyam	A law made by competent legislature
Amicus Curiae	Friend of the court; a person or organisation not party to the proceeding who offers to assist a court or tribunal in cases
Bhil	An *Adivasi*/indigenous community residing in West and Central India
Bhumkaal	*Adivasi* rebellion which took place in Central Indian region in 1910
Chhote-bade jhaar ke jangal	Category of land as described in government records
Daayitwa	Responsibility
Dalit	Downtrodden castes in India who have been subjected to untouchability, designated in Indian Constitution as Scheduled Castes
Diku	A term used by *Adivasis* to describe outsiders such as caste Hindus, traders, moneylenders, landlords and other colonial loyalists
Dongaria Kondhs	The *Dongaria Kondh* tribe is a Particularly Vulnerable Tribal Group inhabiting the Niyamgiri hills range in the State of Odisha
Fifth Schedule	A Schedule under the Indian Constitution dealing with the administration of tribal areas which are also categorised as Scheduled Areas
Gond	An *Adivasi*/indigenous community residing in the Central Indian States

Gram Panchayat	The elected body of representatives of a village under the *Panchayati Raj* laws
Gram Pradhan	Head-person of the *Gram Sabha*
Gram Sabha	Village assembly comprising of all adult members of the village
Gram Van Samiti	Village Forest Committee
Gudia	Shifting cultivation practiced by *Adivasis* in Kandhamal district of Odisha
Havildar	A soldier or police officer corresponding to a sergeant
Ho	An *Adivasi* community that populates the Kolhan region of Jharkhand and certain parts of Odisha
Hul	Call for resistance against oppression by Santhal *Adivasis*
Jal	Water
Jhuggi	A slum dwelling
Jungle	Forest
Jungle-jhari land	Categories of lands in government records
Khesra jungle	Unregulated forest lands/regions
Kol	An *Adivasi* community living in the Kolhan region of Jharkhand.
Kutia Kondhs	An *Adivasi*/indigenous community classified as Particularly Vulnerable Tribal Group residing in the State of Odisha
Lathi-charge	Police dispersing an assembly of people by batons
Lok Sabha	Lower House of the bicameral Parliament of India. It is composed of representatives of people chosen by direct election on the basis of Universal Adult Suffrage
Madia Gonds	An *Adivasi* community residing in Maharashtra
Manjhi	Traditional head of the village in Santhal Pargana, Jharkhand
Manki	Head of a supra-village institution i.e., *Pir* in Ho and Munda villages
Mankaria Kondh	An *Adivasi*/indigenous community classified as Particularly Vulnerable Tribal Group residing in the State of Odisha

Munda	A dominant *Adivasi* community living primarily in the Chota Nagpur region of Jharkhand. *Munda* is also a head-person of *Munda* villages in Jharkhand
Naxal	A person adhering to the Maoist ideology and believing in use of violence for revolutionary struggles. The name is derived from Naxalbari in West Bengal, where the Maoist movement was very strong.
Nistar rights	Tribal customary rights over forest resources
Other Backward Classes	Backward classes of citizens other than the Scheduled Castes and Scheduled Tribes as may be specified by the Central Government
Other Traditional Forest Dwellers	A category of forest dwellers that are entitled to various kinds of forest rights under *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Rights) Act, 2006*
Oudh	A region in Central Uttar Pradesh
Panchayat	A village council formed under the *Panchayati Raj* laws
Panchayati Raj	Local governance system recognised by the Constitution of India
Pardhi	An *Adivasi* /indigenous community from the Central and South West India
Pargana	Pargana is a supra-village conglomerate formed out of many villages in the Santhal Pargana area.
Parganaits	The head of Pargana in Santhal Pargana area
Particularly Vulnerable Tribal Group	A classification made by the Government of India for the purpose of enabling improvement in life conditions of certain communities
Patil/Patel	Village head in Maharashtra
Pathal	Stones
Pathalgadi or *Pathalgarhi*	Custom of erection of stone slabs in Khunti District of Jharkhand during pre-colonial times. It has now spread to other States as well
Pir	Conglomerate of *Munda* and *Ho* villages
Podu	Shifting cultivation practiced by *Adivasis* in the State of Telangana
Rajya Sabha	Upper House of the bicameral Parliament of India

Raiyatwari tenure	A system of land tenure and taxation implemented in South India, devised by the British in 1820 during the colonial rule
Salwa Judum	*Salwa Judum* is understood as a 'purification hunt'. It was an anti-insurgency operation designed to combat and neutralise Naxals in the State of Chhattisgarh
Samiti	Committee
Sangathan	Local organisation or group
Santhal	A dominant *Adivasi* community living primarily in the States of Jharkhand, Bihar and Odisha
Sarpanch	Head of a village *Panchayat* under the *Panchayati Raj* laws
Scheduled Areas	Areas inhabited predominately by tribal communities created under the Indian Constitution where special laws are applicable
Sixth Schedule	A Schedule under the Indian Constitution dealing with the administration of the tribal areas in north-eastern states of Assam, Meghalaya, Tripura and Mizoram.
Tahsildar	Village accountant, appointed by State Government; or official of the revenue department of the State government
Tendu leaves	A Minor Forest Produce used for making plates and *bidi* (traditional cigarette)
Thakurdeo	God of the *Madia Gond Adivasis* residing in Gadchiroli district of Maharashtra
Van Gujjar	A forest dwelling nomadic community typically found in the North Indian hilly States
Ulgulan	A movement against the British colonial regime by *Munda Adivasis* in Chota Nagpur area of the State of Jharkhand
Zamadar	Government official
Zameen	Land
Zamindars	Landlords and tax collectors
Zudpi jungle	Category of land in the government records

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Chapter 1

AN INTRODUCTION: THE RIGHTS AND WRONGS OF CRIMINALITY

RIGHT

By Cherabandaraju[1]

I will not stop cutting down trees,

Though there is life in them

I will not stop plucking out leaves,

Though they will make nature beautiful

I will not stop hacking off branches,

Though they are the arms of a tree

Because —

I need a hut.

1.1 Of Rights and Wrongs

Need and **greed** are two rather connected and fateful emotions; they alter with time and region and despite being distinct, often bleed into each other's domains of perception. The distinction between them — entangled with a range of other socio–political dynamics — is crucial for our resource distribution systems. Principles determining the distinction between the two also differentiate between legitimate and illegitimate desires, between a 'rightful' manner of engagement with nature and a 'wrongful' one where the wrongful is made into an act inviting suffering and sanction (punishment). A wrongful act is a crime against the society and a rightful one is entitled to approbation from the society and environment. The ways in which production is organised also determine notions of rights and wrongs irrespective of whether the acts are themselves acts of need or greed.

These lines from the poem 'Right' are descriptive of the society today — a society that, despite of its relentless efforts otherwise, desires to assemble this distinction. It fails to decipher whether a particular act is one of need or greed or how those desires are compatible with natural resources. And within the contours of these failures, the society has developed perceptions and structures that fuel the world today. In the scheme of things, acts of illegitimacy are recurrently rendered criminal offences. Even though such a manner of distinction is ambiguous, it is taken seriously and any identified act of illegitimacy is punished with appropriate sanctions. Whether we consider them as crimes against nature or not, we certainly tend to believe them to be crimes against us all, against the society as a whole.

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[1] The poem appears in Ramchandra Guha, *An Anthropologist Among the Marxists and Other Essays* (Permanent Black, Delhi, 2001) at 32.

Accordingly, criminality then has been defined on presumptions that do not necessarily find their legitimate basis. Where corporations with an influx of money are legitimately (and legally) destroying forests and landscapes while funding afforestation drives elsewhere, people traditionally residing in forests have found their existence suspect. Legitimising one and illegitimising another are corresponding processes; one is fuelled by the other. The need for a hut has exponentially transformed into the greed to conquer the world and all lives living in it; at the same time, it continues to be articulated as a mere need for survival, a striving towards our best possible versions of selves. It has rendered the acts of extraction, of felling trees and plucking leaves unproblematic and justifiable.

A crime and a criminal, therefore, occur as anomalies to our society and the socio–legal structures constructed therein. The idea of criminality occurs as one that needs to be controlled and disciplined,[2] to be fixed and beaten into shape so as to ensure that existing institutions of society remain steady. Within the model of nation–state,[3] there lie sharp distinctions between what is deemed to be acceptable or worthy of rejection. Within these distinctions lie the spectrums of criminality as also the foundations of our institutions. The socio–legal system severs criminals or offenders from the society. They are treated as individuated phenomenon that cannot abide by the need to maintain peace in a nation. Therefore, they are to be kept at bay. Once an act, or a person, is deemed criminal, their world alters as does the perception of state towards them. All means, including the violent ones, are then justified in dealing with the criminal. Questions regarding how the standards of legitimacy are defined and what accounts as criminality are no longer asked or answered. All violence directed to tackle criminality gains unquestionable legitimacy.

1.2 Criminality and Violence in a Nation–State

Crime and society, therefore, are two juxtaposed phenomena where crime needs fixation, punishment and possibly, assimilation into the society. The criminal justice system is positioned to achieve this objective. They also have default values of legitimacy and illegitimacy attached to them. The legal system treats crimes and criminals as individualised phenomenon, which exists as an anomaly. The manner of

[2] In his 1975 book, *Discipline and Punish: The Birth of Prison*, Michael Foucault traces the cultural shifts that led to a predominance of the institution of prisons via body and power. He argues that the institution did not birth because of humanitarian values and concerns regarding people receiving a fair chance of reformation. The book is an analysis of social and theoretical mechanisms behind the changes that occurred in modern penal systems of France. The idea that people need to be identified, disciplined, and punished for their crimes also emerges from the book.

[3] Although the concept of a nation–state does not possess universal validity, scholars have agreed that it was not a political invention, but an inadvertent byproduct of 15th century intellectual discoveries in capitalism, mercantilism, political economy, and others. A nation–state refers to a territorially bound sovereign polity that is ruled in the name of community of citizens who identify themselves as a nation. Michael Foucault, in his series of lectures now available as the compilation *Society Must Be Defended* (at 93) gives a historical account on how a modern nation – state was constructed. This state is secular and authority is not vested in a single person.

determining what is anomalous is often a structural phenomenon, factored by forces of inherent bias and discrimination. The idea of punishment under criminal law, and of allegation and prosecution, does not merely treat a certain individual in a certain manner with the intent to correct and discipline them, but also manifests a structural establishment of law and its power of assertion.[4] The promise of maintaining peace and security by punishing criminals and maintaining a threat of violence keeps the nation–state steady. The primary task of a legal system, powered by the legitimacy to inflict violence, is to do exactly this — i.e., protect state structures and identify offences and offenders and construct systems to bring them to justice. Considered as unproblematically legitimate, these foundations of criminality dictate the very perceptions of being.

In this process of finding legitimacy, violence plays a key role even when social structures are seemingly at peace, and steady over time. *Adivasi*[5] accounts and encounters with the state are usually crowded with violence, a lot of which, as we would read in the pages that follow this introduction, is of extraordinary nature. And a lot of this violence goes beyond active acts of murder and rape; it is a violence of discourse and of identity. *Adivasi* identities have been grossly distorted and those identities have fatefully become their reality.[6] At its foundation, violence is the means by which law is instituted and preserved. Within these contours of nation–state, criminality becomes a mode of social control; the manner in which offences are defined and offenders are identified determines the relationship between the state and its populace. It also forges the standards of use and misuse of violence, wherein the state reserves all powers to legitimately use and inflict violence as a paternalistic protector,[7] one who is protecting everyone from dangerous outlaws or potentially dangerous ones. The state develops a keen interest in maintaining monopoly over violence, which is how it seeks to preserve law and order. Any violence, outside the realm of law, threatens the law not by the ends it seeks to pursue, but by its very existence outside the law. The process of criminalisation, therefore, is sanctioned to label this violence as illegitimate, so that the systems of law remain well preserved.

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[4] Walter Benjamin, in *Critique of Violence*, published in 1921, argues that there is an intimate relationship between violence and law, and this relationship is twofold. Firstly, violence is the means by which law is instituted and preserved. Secondly, domination is the end of the law. Benjamin distinguishes between lawmaking violence and law-preserving violence on basis of whether the end towards which violence is used as a means is historically acknowledged, i.e., sanctioned or unsanctioned violence. If violence as a means is directed towards natural ends (as in the case of interstate war where one or more states use violence to ignore historically acknowledged laws such as borders), the violence will be lawmaking, otherwise it would be law preserving, one that seeks to preserve existing structures.

[5] Throughout this report, the culturally consistent term *'Adivasi'* will be used, since it is both inclusive of communities which have the characteristics of tribal society, and also approximates as closely as possible to the international law term "indigenous peoples". The administrative category of 'Scheduled Tribe' will be used when referring to or citing a specific legal document or legislation or government report.

[6] For a deeper insight, please refer to *Chapter 2: History: A Witness to the Alienation of Adivasis*.

[7] *Supra*, note 4.

The state's claim to legitimate violence is typically stationed at a means–end analysis, where it declares that it is merely keeping its citizens' behaviour within certain acceptable bounds for their own good and for the good of society as a whole. Otherwise, crime and anarchy would lead the way. It uses violence to protect peace. The state, whether democratically elected or otherwise, proclaims itself as the protector from forces that emanate on the outside and on the inside of its boundaries. However, the fact that this is backed by threat of violence — i.e., it is the threat of state using its powers to inflict violence that maintains peace — reveals its ultimate game. The entire process is a lot about the state asserting its own power than it accepts in its declarations and promulgations. There is a self-perpetuating character intrinsic to violence that subsumes any leaders' attempt to use violence as a *mere means* to the ends it seeks to achieve. Therefore, any attempt at using a means–end analysis to assess violence and criminality fails on account of the dynamics of power that are inherent within these structures.

Although the idea of going beyond a means–end relationship for violence and law seems appealing and, to an extent, disturbingly crude and real, it is not as uncomplicated or forthright as it may seem at first. Forces of power manifested in caste–class–race dynamics splurge all over the discourse on criminality, scattering and segregating the ends that the socio-legal system seeks to achieve. Discriminations based on caste and class emanate in the idea of criminality as those fundamentals are inherently tied within the structures. These ends are further distinguished by the post-colonial capitalist regime. It shapes a significant portion of what the nation–state model represents and how political ideologies are formulated and permeated.

The distinctions between behaviour that is acceptable from that which is not, have been logically and clearly laid down by our penal codes and so have been their corresponding procedures.[8] The criminal justice system constitutes all these modalities. This report is dedicated to studying these realities, experiences and stories that pass along with the system and give it the life it has today. This report is also dedicated to unfolding the preconceptions that go into constituting these structures and understanding the why and how of criminality being woven into our minds and institutions. In order to understand what an offence is and who is the offender, and against whom an offence can be committed, we need to unravel the hidden realities of our law and the institutions it establishes; we need to attach faces and identities to abstract provisions and principles. As a study of *Adivasi* engagement with the criminal justice system, this report questions the perceptions and structures from the margins, narrating a tale that otherwise remains at odds with everything we know about our systems of governance.

[8] Indian Criminal Jurisprudence is primarily characterised by the *Indian Penal Code, 1860*, the *Code of Criminal Procedure, 1973* and the *Indian Evidence Act, 1872*. There are several other statutes describing principles, declaring procedures and building or supplementing institutions, which have been discussed in this report.

1.3 A Narrative of Discrimination and of Mass Criminalisation: Design of the Report

Stories, experiences and accounts of *Adivasi* and forest dwelling communities recount discrimination at a multitude of levels.[9] Despite constitutional protections,[10] not only is this prejudice reflected in the normal course of operation, but occurs as a structural phenomenon, inherent to our systems of existences. Enmeshed with this discrimination are a range of colonial and post–colonial legislations which criminalise *Adivasis* and their socio-economic practices. Discrimination and criminalisation, therefore, have had a continuing connection, possibly one where discrimination resonates in criminal jurisprudence, and vice–versa. It is widely understood that such criminalisation over decades, even centuries, has further alienated and excluded *Adivasis*, creating a chasm between countervailing notions of legality and illegality, and indeed of justice and injustice itself. However, the exploration of the exact processes through which the legal system in India has proceeded to create these chasms, and the dimensions and contours of these chasms, has not been done. In the present exploratory study, it is proposed to examine the contours, dimensions and processes of criminalisation of *Adivasis* and forest dwelling communities in India, with the objective of mapping the problematic assumptions that have been woven into the fabric of law. The purpose of the study is to create a base document, which can then provide the basis for further discussion, understanding, and strategic advocacy. Since no systematic study of criminalisation of *Adivasis* and forest communities in India currently exists, it is hoped that this report will signify the beginning of a deeper understanding of how criminalisation of *Adivasis* in India operates, rather than being an end in itself.

The report begins with an account of coloniality and its transition into a post–colonial India. After this introductory note in Chapter 1, Chapter 2 assesses the way the colonial government asserted its power over the *Adivasi* populace and introduced concepts of sovereignty, eminent domain, property and criminality that went on to become their weapons in ruling over the country. Oppression of an *Adivasi* was consolidated with a clear, legal process of criminalisation, as also with a range of land alienation statutes. The criminal *Adivasi* birthed in colonial India with the *Criminal Tribes Act, 1871*, and lives on till date. Chapter 2 assesses in detail the colonial connections between property and criminality, and the manner in which this coloniality travels even in post–colonial India. Chapter 3 lays down the normative framework that provides equality and protection to the *Adivasi* and forest dwelling communities as has been enshrined under the Indian Constitution. This chapter is dedicated to understanding the constitutional status of the *Adivasi* and forest dwelling communities and the idea of equality as has been interpreted for them. Thereafter, under Chapter 4, we initiate a long, tiring but fascinating exercise in mapping the variety of legislations, codes, rules,

[9] There lies a wide literature recounting the historical discrimination faced by the *Adivasi* and forest dwelling communities.

[10] *Chapter 3: A Radical Break from the Past: The Constitution of India and its Interpretations* describes in detail the Indian Law on *Adivasi* and Forest Dwelling Communities.

regulations, and orders that are disseminated across various categories of laws and yet, cater to one concentrated objective of criminalising the forest dweller. 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. Chapter 4 carries out a process of identification of those laws that possess provisions for rendering a person an offender under them, beginning 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 to the most straightforward and unproblematic statutes. It creates categories of laws like those of Forest Offences, Minor Forest Produce, Taxation, Public Security and General Laws and unfolds, one by one, a web of legal provisions that target and criminalise particular identities.

The next two i.e., Chapters 5 and 6 respectively specifically deal with Forest Laws and the legal categorisation of forested spaces into Reserved Forests, Protected Forests. We observe here a tendency of state to assert authority in forest legislations, one that is factored by stringent criminal provisions and the use of violence. Chapters 4, 5 and 6 utilise a tabular analysis to bring forth their argument. Different tables focusing on different categories of laws have been designed to observe the nature of laws that exist within them. The tables are not meant to be exhaustive, but rather representative of the state of legal structure in the country: they analyse Central and State legislations, mostly of Madhya Pradesh and Odisha, on keen jurisprudential principles in order to represent the nature of laws that exist in tribal areas. These two States have been chosen in view of the paucity in time that this project demanded, and the familiarity of the researchers involved. It is hoped that this analysis would be further carried on covering the entire country.

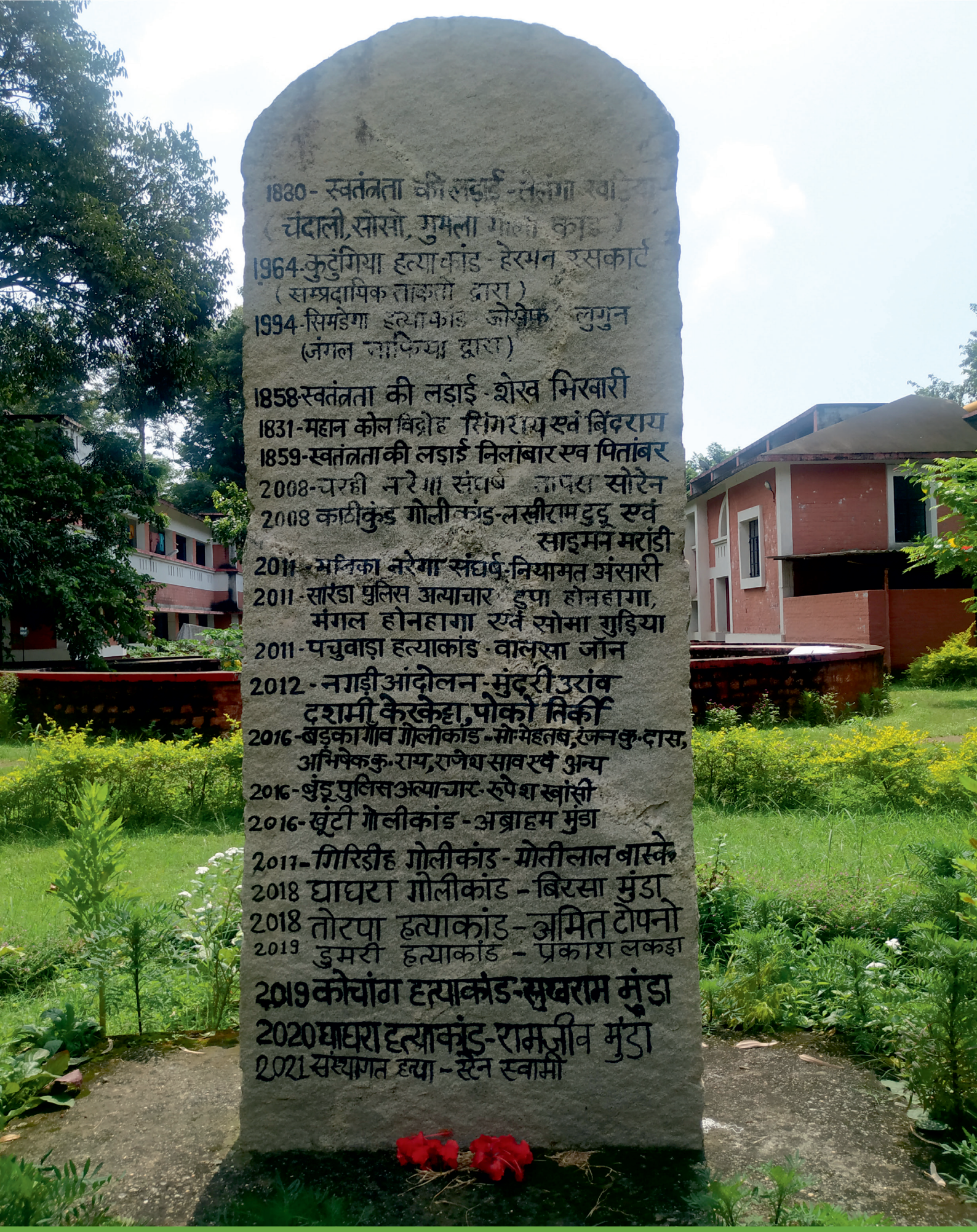
Chapter 7 continues the argument of the report and undertakes a deeper analysis of Security Laws like the *Unlawful Activities (Prevention) Act, 1967*. This chapter is a special one, for it analyses laws that are used in extraordinary circumstances, usually when the security of the nation is under threat. 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 like Naxalism and Maoism. As a consequence, our 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. We read the letter and spirit of securitisation laws, assess 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. We read stories from regions of Jharkhand and Bastar, stories of horror, that have disproportionately high *Adivasi* accounts. These chapters on Security Laws and Prisons lay out the operative texture of what exists in the law as a perception. This perception manifests in what we call as mass criminalisation of the *Adivasi* and all other forest dwelling communities.

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 very different stories. Although the central argument of this report holds as true for women as for anyone else, their experiences require special attention. Their accounts, therefore, have been accumulated and recounted in a dedicated chapter.

Chapter 9, thereafter, 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, who often spend more time in jails than they would have had they committed an offence. Chapter 9 relays some stories capturing the experiences and realities of being an *Adivasi* prisoner in India.

Taking a leap from the norm of criminality, the last and final chapter of the report. i.e., Chapter 10, concentrates on *Adivasi* engagement with law as complainants, not as the accused. It assesses the change in perception and structure dynamics when a forest dweller 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 where an *Adivasi* happens to be an accused would give us an opportunity to understand the length, breadth, and depth, of discrimination prevalent in law. We find 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.

We end this report by drawing out conclusions from our findings and recounting of *Adivasi* experiences and hope that this report would initiate deeper research into the criminalisation of *Adivasi* and forest dwelling communities.



Picture of the Shaheed Smarak (Martyrs Memorial) at Ranchi, Jharkhand 2021

Photo: Khushboo Pareek

Chapter 2

HISTORY: A WITNESS TO THE ALIENATION OF THE *ADIVASIS*

2.1 Background

Documented history, at least from the past two centuries, is telling of the *Adivasis*' resistance against historical injustices of the British colonial regime and the continuing injustices of the post-independence state. Law, through its structures and institutions, and through the discourse produced by them, alienated *Adivasis* from their land, forests and culture. *Adivasis* were locked in a constant struggle against alienation, which was manifested in insurgencies and rebellions. The colonial regime adopted various means to contain such rebellion and to secure its hegemony over forests.

This chapter attempts to analyse the history of *Adivasi* rebellions, and the colonial administration's response to those rebellions. It undertakes a discussion on the protectionism offered by the colonial regime in certain regions against tribal land alienation. It discusses counter-insurgency measures applied by the regime to eliminate any perceived danger. It also discusses the 'assimilationist approach' of the colonial regime, which imposed penal obligations on traditional governance structures and institutions to coerce compliance with colonial laws and policies.

In short, this chapter is a study of the overarching implication of *Adivasi* struggle that fostered protectionism, counterinsurgency and assimilation laws and policies during the colonial times - a legacy that continues its run even in post-independence India. This chapter clearly establishes the link between colonial and post-independence laws and policies, demonstrating that the pattern of colonial subjugation of *Adivasis* through criminal law and other tactics continues into present day.

2.2 The Insurgent *Adivasi* and the Protectionism Offered by the Colonial Regime

Given the constant opposition of *Adivasis* to colonial policies of control over land, forest and natural resources, the regime considered them to be a highly insurgent population. The British invoked criminal laws to control the *Adivasi* community and curb resistance to their policies.

An understanding of the extensive use of criminal laws against *Adivasis* in the colonial and post-colonial state is rooted in the appreciation of the dialectical opposition between the colonial administration and its insurgent subjects. The latter half of the 19th century was marked by several insurgencies in *Adivasi* areas, proving to be an extremely turbulent time for the British administration and its survival as a hegemonic force in the region.[1] It is a very difficult task to discuss the range of insurgencies and rebellions by the *Adivasis* in various part of the South-Asian sub-continent during the colonial

[1] Ranajit Guha, "The Prose of Counter-Insurgency", in Ranajit Guha and Gayatri Chakravorty Spivak (eds), *Selected Subaltern Studies* (Oxford University Press, New York, 2011) at 45-84.

regime, the British colonial regime's response and its aftermath post-independence. Therefore, we are analysing the colonial regimes strategies for control through the lens of *Adivasi* rebellions that occurred in Eastern India, which is at the heart of the movement for *Adivasi* homeland. This analysis shows particularity of the resistance and counter-resistance, but commonalities can also be deduced since the British regime's tactic to control the forested and tribal regions were, more or less, the same.

During the colonial period, the *Santhals*,[2] the *Mundas*[3] and the *Kols*[4] rose against the British colonial regime and the local *Dikus*[5] (outsiders) in the Santhal Pargana, Chota Nagpur plateau and Kolhan region, respectively. They declared *Hul*[6] (1855) and *Ulgulan*[7] (1899-1900) as declarations of resistance against the tyranny of the colonial regime and colonial masters. Some common explicit and implicit factors triggered these insurgencies. The explicit factors included the infiltration of the *Adivasi* lands and forests by the *Dikus* such as moneylenders who defrauded *Adivasis* by way of unfair loans, and the colonial loyalists who administered the lands. The British also earned exorbitant amount of revenue from the non-timber forest produce, which was and continues to remain a major source of livelihood for the *Adivasi* peasants.[8] But it was the implicit factors that strongly fostered the *Adivasi's* resentment and consequent insurgency. The *Adivasis* of Santhal Pargana and Chota Nagpur perceived the material alienation (loss of access to forest) as cultural alienation because their very identity as a community is embedded with the forest. In their imagination, their existence as a whole cannot be separated from that of the forest.

The insurgencies were met with the might of the colonial regime and crushed. After every insurgency, the colonial administration handled *Adivasi* resistance with a combination of pragmatism and force.[9] Pragmatically, the colonial regime recognised the need for special laws to protect the interests of the *Santhal, Munda* and *Ho*[10] communities against the *Dikus*. Therefore, the *Santhal Pargana Tenancy Act, 1876*

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[2] A dominant *Adivasi* community living primarily in the States of Jharkhand, Bihar and Odisha.

[3] *Munda* community is also a dominant *Adivasi* community living primarily in the Chota Nagpur region of Jharkhand. However, they are also found in other parts of Jharkhand, Odisha, West Bengal, and adjacent areas of Chhattisgarh.

[4] An *Adivasi* community living in the Kolhan region, which is part of the State of Jharkhand and covers districts including East Singhbhum, Seraikela Kharsawan and West Singhbhum.

[5] *Diku* is a term used by *Adivasis* of Jharkhand to describe 'outsiders' such as caste Hindus, traders, moneylenders, landlords and other colonial loyalists, who inflicted atrocities and oppression on them. During the colonial regime, the British populated *Adivasi* areas with such outsiders to collect taxes, administer the area and conduct trade. Their customs and traditions differed significantly from those of the *Adivasis* and they regarded *Adivasis* as inferior to themselves.

[6] *Hul* is a call for resistance against oppression. In the colonial context, *Hul* was declared against the British as a political demand for independence and self-determination.

[7] *Ulgulan* is an overarching political, religious, social and cultural movement against the colonial regime. *Ulgulan* was declared against the British authority and its Indian loyalists such as landlords and moneylenders.

[8] Somnath Ghosal, "Pre-colonial and colonial forest culture in the presidency of Bengal", *Human Geographies - Journal of Studies and Research in Human Geography,* (2011) 5.1 at 107-116; available at: *http://humangeographies.org.ro/articles/51/5_1_11_8_ghosal.pdf.*

[9] *Supra*, note 1 at 57-59, 70-78.

[10] *Ho* is an *Adivasi* community that populates the Kolhan region of Jharkhand and certain parts of Odisha.

and *1949* ("**SPTA**") and *Chota Nagpur Tenancy Act, 1908* ("**CNTA**") were put in place to protect *Adivasi* land from wrongful alienation to any outsiders.[11] The SPTA and CNTA lay down provisions prohibiting the transfer of Scheduled Tribe ("**ST**") land (i.e., land belonging to *Adivasis*) to non-*Adivasis*. Elaborate procedure is laid down for few transfers that might occur in cases of industrial development and mortgages. In those cases, consent of the Deputy Commissioner is mandatory.[12]

Table 1: Protective Colonial Legislations and Penalties for Wrongful Alienation of Land in Jharkhand

No.	Legislation	*Adivasi* Community	Description
1	*Santhal Pargana Tenancy Act (1876 and 1949)*	*Santhal Adivasi* (Santhal Pargana)	**Penalty for fraudulent transfer of land under Section 67(2):** If a land is transferred in contravention of Section 20 or any provision of the SPTA or by fraudulent method and is held or cultivated by any person with knowledge of such transfer, then that person will be punished with imprisonment of maximum three years and/or Rs. 1,000 fine. If the offense is continuous, then a fine of Rs. 50 will be levied every day until the offence ceases to exist.
2	*Chota Nagpur Tenancy Act, 1908*	*Munda Adivasi* (Chota Nagpur plateau)	**Penalty on landlord for levying anything in excess of rent under Section 63:** If a landlord or his agent forces the tenants to pay more rent than they are lawfully expected to pay, then in those cases they can face imprisonment upto six months and/or Rs. 500 as fine. This offence is cognisable, bailable and compoundable without the leave of the court.

Although both laws are civil in nature (given the intent to protect *Adivasis* from being dispossessed by the *Dikus*), they include penal provisions. When the transfer of land from tribal to non-tribal is made fraudulently or without following the process

[11] See *Handbook on Land Law* (Judicial Academy Jharkhand, Ranchi, 2019) at 1-42; available at: *https://jajharkhand.in/wp/wp-content/uploads/2019/08/06_handbook_on_land_law.pdf*

[12] See Section 20, SPTA. It deals with the restriction on transfer of *Raiyati* tenure lands in Santhal Pargana region in Jharkhand. See also Section 46(1), 47, 48 and 240, CNTA. Section 46 provides for restrictions on transfer of *Raiyati* tenure lands. Sections 47 and 48 provide for restriction on sale and transfer respectively of *Bhunihari* tenure lands. Similarly, Section 240 deals with the restriction on *Mundari Khuntkatti* land. *Raiyati, Bhunihari* and *Mundari Khuntkattidar* land are three different varieties of land in relation to occupancy. *Mundari Khunkattidar* lands are owned by the original *Munda* settlers in the Chota Nagpur area. *Raiyati* and *Bhunihari* land tenurial rights vest with *Mundas* and other caste communities who later settled. The provisions of this law are applicable in the Chota Nagpur region of Jharkhand.

mentioned in the SPTA and CNTA, it is treated as an offence with punishments prescribed for the offence. There can be no denying that these tenancy laws did extend some protection to the *Adivasis* against the *Dikus*. Indeed, one finds such provisions subsequently replicated in all tribal land alienation laws across the country, even those that came into being in the post-independence period.

However, to quell any future insurgencies or rebellions, the colonial state also introduced its role in the socio-economic affairs of the *Adivasi* society as an administrator or a governance agency. This meant that the colonial administration continued its hold over *Adivasi* areas through the office of the Deputy Commissioner. These laws did not challenge the eminent domain of the colonial regime over land and forest at all. The alienation of *Adivasis* from forest and land caused due to extraction of timber and natural resources was not sought to be remedied through these legislations. Instead, the legislations pitted the non-*Adivasis* against the *Adivasis*, which, in today's time, is manifested in the conflict between the *Adivasis* and the *Dalits*, Other Backward Classes and Muslims. The pragmatism in colonial tactic, therefore, resulted in creation of otherness amongst others, which may also have deflected the gaze of anti-colonial movement in the region trying to eradicate colonial rule. In its essence, the British response to the revolts was part of its long-term assimilation design, transforming overtime the nature and mandates of the *Adivasi* customary laws, institutions, and offices.

2.3 Insurgency, Counterinsurgency and Birth of the 'Encroacher'

The colonial regime engaged in counterinsurgency and took pre-emptive measures against any perceived threat. The regime slowly built up a narrative through the writings of anthropologists, ethnographers and local administrators who claimed to have witnessed the insurgencies that identified *Adivasis* as blood-thirsty insurgents without any political consciousness or rational thinking.[13] The discourse produced by this knowledge was based on the racial and cultural theory of segregation where the *Adivasi* race and culture were constructed as inferior to that of Western, and even the mainstream Indian cultures. The *Adivasis* who took up arms against the colonial regime were de-legitimised as "insurgents, defying the authority of the state based on their impulse".[14] Rationalisation of the *Adivasi* as a blood-thirsty, wild, savage, without any rational and political thinking, to a notable extent, gave legitimacy to the attachment of criminality to the entire *Adivasi* community. The use of brute force was such that the rebellions of *Hul* in Santhal Pargana (1855), *Ulgulan* in Chota Nagpur (1899-1900), *Bhumkaal* in Bastar (1910), the *Bhil* uprising (1857-66) and the *Santhal* insurrection in Purnea (1938-1942) were suppressed with almost little or no remedy.[15]

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[13] *Supra*, note 1 at 57-59.

[14] This discourse informs the discussion about the *Adivasi* insurgencies even today as there is a widespread belief in the academia that *Adivasis* resort to bloody resistance and opposition against the colonial and post-colonial state. This view originates in imperialist discourse, which refuses to acknowledge the "calculated conscious" decision of the *Adivasi* society to resist their subjugation.

[15] Kavita Punjabi, *Unclaimed Harvest: An Oral History of the Tehbhaga Women's Movement* (Zubaan, New Delhi, 2017) at 185-219; Shashank Kela, *A Rouge and Peasant Slave: Adivasi Resistance, 1800-2000* (Navayana, New Delhi, 2012) at 226-250; and Nandini Sundar, *Gunda Ghur Ki Talash Mein* (Penguin India, New Delhi, 2009) at xv-xviii.

The second half of the 19th Century and the beginning of the 20th Century were also marked by the establishment of hegemonic control of the colonial regime over land, forests and resources by employing forest law and administrative division of forest. The Department of Forests was born in 1864 and *Indian Forest Act* for the first time was passed and applied in 1878. Overtly, the intent behind this move was the systematic exploitation of timber and forest resources. Covertly, the department was also mandated to maintain dominance over *Adivasis* and limit their access to the forest. The colonial administration blamed *Adivasi* communities for the destruction of forests, even though evidence suggests otherwise. The narrative of irresponsible and destructive *Adivasi* was used to justify the restriction imposed by *Indian Forest Act, 1878* on access to forest by *Adivasis*. This Act created the categories of Reserved and Protected Forests. The *Adivasis* were subjected to punishment for entry into the Reserved and Protected Forests for any action that did not constitute a right guaranteed to the *Adivasi*. Finally, with the passing of *Indian Forest Act, 1927* ("**IFA**"), various forest offences were instituted for accessing Reserved and Protected Forests.[16] It was during this time that the conservationist discourse on "encroacher" was born. They were rendered without rights, while all the powers of management and use of the forest resources then started to vest with the British Administration. Although IFA does provide some settlement rights to the *Adivasis* in Reserved Areas, these are subject to the discretion of Forest Settlement Officer.[17] Such rights are also not absolute and can be taken away at the discretion of the forest department. Therefore, the settlement rights under IFA are an exception rather than the rule. In other words, the entire exercise of grant of rights and taking away such rights from the forest dweller was arbitrary and designed to keep the exclusive control of forest with the colonial government through the forest department (*for more information, please refer to Chapter 5: Authority, Criminality and the Laws in Forests*).

The laws, policies and discourse generated by the colonial regime continues to inform the discourse on (i) conservation; (ii) forest as resource; and (iii) *Adivasi* and Other Traditional Forest Dwellers ("**OTFD**")[18] as criminals. Such discourse keeps reproducing the systematic and structural discrimination based on race, caste and class and finds a reflection in actions of executive agencies and the orders of various High Courts and the Supreme Court. In the year 2001 in *T N Godavarman Thirumulpad* v. *Union of India and Others*,[19] the Amicus Curiae filed an application against illegal encroachment of forests in various States and Union Territories. On April 1, 2002, the Union and State governments responded by saying that the cases of encroachments

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[16] Mahesh Rangarajan, *Fencing the Forest: Conservation and Ecological Change in India's Central Provinces 1860-1914* (Oxford University Press, New York, 1996) at 10-137.

[17] See Sections 5-16, IFA which deal with the powers of Forest Settlement Officer to grant right to settlement under the Act, the record of such rights and its commutation (in case there is a conflict between the maintenance of reserved areas and settlement of rights).

[18] 'Other Traditional Forest Dwellers' is a legal category under Section 2(o), *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* and includes individuals dependent on forests and who have been living in the forest for last three generations or 75 years. These include non-ST communities such as *Dalit* communities dependent on forest produce.

[19] WP (Civil) 202 of 1995 along with IA No. 502; available at: *https://main.sci.gov.in/jonew/bosir/orderpdfold/33380.pdf*. Since this a continuous case of mandamus, updated Orders in the said case may be accessed from the website of the Supreme Court of India.

were being reviewed and they would submit their report in the next six weeks.[20] Thereafter, major eviction drives were conducted across the country resulting in violence and atrocities.[21] Similarly, on February 13, 2019, directions were issued by the Supreme Court in *Wildlife First and Others* v. *Union of India and Others*,[22] to State governments to evict those families from forest lands whose claims were rejected under *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* ("**FRA**"). It is important to point out that FRA does not provide for eviction because its intention is to recognise rights and not to eliminate them.[23] Moreover, the main contention in the petition did not even concern the eviction of forest dwellers. Instead, the petition challenged the constitutional validity of FRA itself. It is not relevant to go into the details about why the constitutional validity of FRA was in question, except for the fact that one of the major contentions of the petitioners was that forest dwellers are encroachers on forest land and that, therefore, forests must be protected from them. At several hearings before the Supreme Court in the matter, the Attorney General of India was not present leading to a situation where, in the absence of a strong defence, the rights of the STs and OTFDs underwent attack by the opposite party. The Supreme Court's eviction order for 10 million *Adivasis* across the country should be read in the light of these circumstances. It, yet again, affirmed that the 'colonial hangover' of our institutions, which regard *Adivasis* as criminals and encroachers, is far from being over.

2.4 Insurgency, Counterinsurgency and Birth of the 'Criminal Tribes'

On the one hand, the discourse on *Adivasi* as the 'encroacher' was developing post-insurgencies. On the other, the state was also forming the narrative of nomadic and pastoral tribes, hunter and gatherers and other such caste as 'criminal tribes'. After the revolts of 1857 and various other uprisings, the British colonial regime tried to control the movement and activities of communities and people it considered dangerous or regarded as a threat. It also built up a surveillance regime of its own by expanding its policing powers and activities through various laws.

The *Criminal Tribes Act, 1871* ("**CTA**") was one of the many laws that legitimised heavy policing against those notified as 'criminal tribes' by the local government (*for further discussion on this, please see Chapter 4: A Norm of Criminality*). It was

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[20] *Supra*, note 19 read with IA No. 703; available at: *https://main.sci.gov.in/jonew/bosir/orderpdfold/57909.pdf*

[21] Armin Rosencranz, Edward Boenig and Brinda Dutta, "The Godavarman Case: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests", *ELR News & Analysis* 37: 10032-42 at 10035.

[22] WP (Civil) 109/2008; available at: *https://main.sci.gov.in/supremecourt/2008/8640/8640_2008_Order_13-Feb-2019.pdf*. The case is still pending before the Supreme Court of India.

[23] Preamble of the FRA states that the objective of the Act is to recognise and vest forest rights (in the forest land) in those Forest Dwelling Scheduled Tribes ("**FDST**") and OTFDs who have been residing in the forests but their rights could not previously be recorded. It aims at recognising the rights of the FDST and OTFDs to conserve, maintain and protect the forest for ensuring their livelihood and food security. The Act seeks to right the wrongs of historical injustice stemming from non-recognition of the rights of FDST and OTFDs. Therefore, the FRA purports to do away the tenurial insecurity and provide access rights to these communities.

originally only applicable in the North-West Provinces of Punjab and Oudh.[24] Both these regions had particularly seen an intense uprising during the revolt of 1857.[25] Therefore, the enactment of the Act in the backdrop of the revolt of 1857 comes across as an attempt to prevent the movement of those communities or groups, which the regime particularly regarded as 'trouble-makers'.[26] The Act was made applicable to the Bengal Presidency in the year 1876. Its application was extended to the Madras Presidency through the 1911 amendment.[27] A contextual reading of the events in a chronological order suggests that while, at the outset, the law was limited in its geographical application, with the passage of time, it acquired a different intention and purpose. Moreover, it criminalised the way of life of nomadic and other tribal communities in colonial India. Racial theory and class bias utilised for defining the inferiority of the gypsies, vagrants and Irish migrants in Britain were mirrored in the context of the Indian nomadic tribal communities.[28] The racial theory based its theory of inferiority on physical features, customs and way of life to rationalise an entire nomadic community's categorisation as "criminal by nature".[29]

Even after the repeal of the CTA in 1952, post-independence laws relating to Habitual Offenders and Beggary were passed in many States. These laws are replicas of CTA (*for more discussion on Habitual Offenders and Beggary Laws, please see Chapter 4: A Norm of Criminality*).[30] Although both laws do not target any specific community, they target individuals. The residue of CTA remains hidden within the operation of Habitual Offenders and Beggary Laws by the executive agencies like the police and the district administration. These laws end up criminalising individuals from certain class and castes. Often these are de-notified tribes or, as once notoriously called, the criminal tribes. The law then, by default, was invoked against tribal nomadic communities, subjecting them to systemic and structural discrimination (*the assertion made here has been substantially elaborated upon in the discussion under Chapter 4*).

2.5 Assimilation of Tribal Customary Law within the Criminal Justice System of Colonial India

The secular criminal law in India promulgated by the colonial rule did not go uncontested by the natives. The indigenous communities of India rose against the British *Raj*, which imposed alien western notions of property, revenue infrastructure and civil and criminal laws. It is a documented fact that some of the well-known revolts

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[24] Section 1, CTA.

[25] Ranajit Guha, *Elementary Aspects of Peasants Insurgency in Colonial India* (Duke University Press, Durham, 1999) at ix-17.

[26] *Supra,* note 1 at 45-86.

[27] Subir Rana, "Nomadism, Ambulation and the 'Empire': Contextualising the Criminal Tribes Act XXVII of 1871", *Transcience* Vol. 2, Issue 2, 2011; available at: *https://www2.hu-berlin.de/transcience/Vol2_Issue2_2011_1_22.pdf*

[28] Meena Radhakrishna, "Laws of Metamorphosis: From Nomad to Offender", in Kalpana Kannabiran and Ranbir Singh (eds), *Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India* (SAGE Publications, Thousand Oaks: California, 2008) at 3-27.

[29] See *Criminal Tribes Act, 1871*; available at: *http://www.bareactslive.com/ACA/ACT225.HTM*

[30] For more information, see tabulation under *Annexure B: Legislations creating Offences of Beggary, Habituality and Vagrancy* to this report.

of the indigenous communities across India (then the South-Asian subcontinent) resulted in the acknowledgement of the customary laws and institutions of the indigenous communities by the British colonial regime.

Some of the well-known revolts worth a mention occurred in what is now the State of Jharkhand. The '*Kol* Revolt' of the *Ho Adivasis* in the years 1831-32 in the Kolhan region led to the formation of *Wilkinson Rules of 1837*, which recognise the political authority of *Manki*[31] and *Munda*[32] over the *Pir*[33] and villages.[34] It also gives powers to the *Mundas* and *Mankis* under the civil and criminal law and procedure.[35] Similarly, after the '*Santhal Hul*' in the year 1855, *Yule's Rules* or *Santhal Police Rules, 1856* were passed and enforced in the Santhal Parganas giving legal recognition to the customary laws of *Santhals* and placing the powers to govern village societies in the hands of the *Manjhis*[36] and *Parganaits*[37] for village and *Parganas*[38] respectively.[39]

Prior to the advent of colonial regime, the *Mundas* and *Mankis*, the *Manjhis* and *Parganaits* had political, social and religious responsibilities towards the village and *Pirs* or *Parganas*. These institutional heads did not have responsibility to collect rent as no formal system of taxation was put in place. Rather, their office survived on occasional gifts during festivals or assistance during exceptional situations, like war.[40] The *Santhal, Ho* and *Munda Adivasis* had their own notions of crime and punishment, and the resolution of those disputes through customary principles of *Adivasi* tradition. In this context, a critical reading of the Wilkinson's Rules and Yule's Rules shows that although these laws were drafted to make *Adivasis* of the region stakeholders in the governance of their societies, the core objective of these rules was to assimilate the *Adivasis* customary law into the fold of colonial criminal and civil law regime. This can be established by the fact that major responsibilities of the *Adivasi* customary offices such as *Mundas/Mankis* and *Manjhi/Parganaits*, and customary institutions such as village council had certain responsibilities towards the administration of the territory within their jurisdiction. These responsibilities included collecting rent from the tenants, performing the duties of police officers of the colonial regime to prevent crimes, administering justice in petty criminal offences through village councils, and arresting and delivering offenders of serious crimes (such as murder, homicide, rape

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[31] *Manki* is the supra-village institution head in *Ho* and *Munda Adivasi* communities.

[32] *Munda* is the village head in *Munda* and *Ho Adivasi* communities.

[33] Among *Ho* community, the supra-village entity, which is a conglomeration of more than one village, is known as a *Pir*. It is a region administered by *Manki*.

[34] *Supra*, note 11 at 4-8.

[35] Bineet J. Mundu, *On the Future of Indigenous Traditions: The Case of Adivasis of Jharkhand, India* (Thesis submitted for the Degree of Master of Philosophy in Indigenous Studies, University of Tromso, Norway, Autumn 2006) at 37-40, 67-70, 80-92.

[36] *Manjhi* is the village head in *Santhal Adivasi* communities.

[37] *Parganait* are the head of *Pargana* in *Santhal Adivasi* communities.

[38] *Pargana* is a supra-village conglomerate formed out of many villages in the *Santhal Pargana* area.

[39] Bir Singh Sinku, *Jharkhand Mein Adivasiyon Ki Paramparik Swashashan Vyavastha* (Ranchi: Birsa, 1998) at 37-39.

[40] *Supra*, note 35 at–31-38, 42.

and riot) to the police and district administration. The obsoleteness of the general criminal provisions relating to crimes under the *Indian Penal Code, 1860* was well known to the British administration. Therefore, it did not bother enforcing the entire code on the *Adivasis* of Jharkhand.[41] Only in cases of serious crimes,[42] customary institutions were not empowered to administer justice and were required to report them to the district administration.[43] The list of these crimes itself indicates that the crimes against property were considered and treated with utmost seriousness. The customary offices and institutions had a duty to report the law and order situation within their jurisdiction to the district administration. Therefore, tribal customary institutions were utilised for administering criminal law in these territories. *Table 2* provides more information in this regard.

Table 2 : Duties and Powers of Policing given to the Customary Institutions in Colonial Jharkhand

No.	Laws	*Adivasi*	Rules
1	*Yule's Rules*	*Santhal Tribe* (Santhal Pargana)	Power and authority of policing given to the *Manjhi* and *Parganaits* *Manjhi* was the police officer of his village *Parganait* was recognised as equivalent of the Sub-Inspector
2	*Kolhan Khetra Mein Manki-Munda ke Daayitwa* (The duties of Manki-Munda in Kolhan region	*Ho Tribe* (Kolhan area)	Power of policing given to *Manki* and *Munda*. *Munda* is recognised as police officer of the village. He has powers to arrest and he reports to the subordinate officer. *Manki* is recognised as police officer of his *Pir*. He has the power to arrest and a duty to give information about crimes to the government.

The assimilationist tendency of the state continues even post-independence. In Maharashtra and Madhya Pradesh, Village Forest Rules has been framed under IFA. These rules endeavour to impose the governance structure under IFA on *Gram Van Samiti* or the Village Forest Committee on the village community and *Gram Sabhas*. The *Madhya Pradesh Village Forest Rules, 2015* ("**MP Rules**") brings *nistar* rights, which are the customary rights of the *Adivasis* for the use of forest and its produce, within

[41] W G Archer, *Tribal Law and Justice* (Isha Books, New Delhi, 2018) at 309-32.

[42] The crimes listed here were regarded as serious crimes: (i) murder and homicide; (ii) assaults with wounding or severe personal injuries; (iii) rape; (iv) dacoity, highway robbery, burglary, theft including cattle stealing; (v) affrays and riots; (vi) arson; (vii) counterfeiting or uttering base coin; and (viii) receiving stolen property.

[43] *Supra*, note 41 at 313-321.

the purview of forest department. *Nistar* rights become subject to the approval of the Divisional Forest Officer under the MP Rules.[44] Moreover, it imposes certain duties on the forest dwellers, including the duty to prevent the commission of any offence in the village forest. It also includes the duty to report to the forest administration about the commission of an offence in the village forest and aiding the police or forest officer in preventing or investigating an offence. It shows that even the post-independent state has been diluting the essence of the powers and functions of *Gram Sabhas* under the *Panchayats (Extension to Scheduled Areas) Act, 1996* and FRA, the traditional customary institutions, and the village society for maintaining its control over forests.[45]

2.6 Concluding Reflection

It is common knowledge that Fifth Schedule Areas and tribal areas (such as - Jharkhand, Odisha, Chhattisgarh, Madhya Pradesh, Andhra Pradesh, Telangana, Maharashtra and West Bengal) are a political space utilised by the Maoists engaged in revolutionary struggle. Therefore, the state refers to these as areas of Left-Wing Extremism where the sovereignty of the state is contested by Maoist struggle. To understand the contemporary 'disturbances' in these regions, there is a need to revisit the history of *Adivasi* insurgencies during the colonial rule. Upon a reflection, history is repeating itself because the dreams of equality and dignity continue to be shattered by the post-independent state's response to the *Adivasi* problem.

The Indian Constitution promises equality, freedom and justice to all. It makes special provisions for the weaker sections of our society. It is imperative to remember that the Constitution is not an ordinary legal document; it is an inherently inclusive document that is the outcome of intense debates and careful deliberations. Jaipal Singh Munda, who was the only *Adivasi* member of the Constituent Assembly from the Fifth Schedule Area (he was a native of Jharkhand), fought hard for special guarantees to the *Adivasis* and OTFD. It is not surprising then that long drawn political conflicts manifested in historical wrongs continue to rise in these areas.

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[44] Rule 5, MP Rules.

[45] Rule 14, MP Rules states:

"14. Duties of the Residents:

It shall be the duty of every resident of the village to: -

(a) Prevent the commission of any offense which is in contravention of the provision of this Act and is being committed in the village forest;

(b) Help in apprehending and initiation legal action against the person who has committed any offense in the village forest in contravention of the provision of the Act;

(c) To report the forest officer about the offense committed in the village forest and safeguard the forest produce until the forest officer takes charge thereof ;

(d) To help in extinguishing the fire about which he has knowledge or has received information and to prevent the fire from spreading ;

(e) To assist any forest officer or police demanding his aid for preventing the commission of any offense against the Act or these rules or in the investigation of any such offense."

Chapter 3

A RADICAL BREAK FROM THE PAST: THE CONSTITUTION OF INDIA AND ITS INTERPRETATIONS

3.1 Introduction

As the previous chapter narrated, coloniality, as a thing of the past, was woven into the fabric of law. And with coloniality, a specific form of criminality was generated, one that was associated with property and its appropriation. The colonial government processed narratives and laws in a manner that criminalised the *Adivasi* way of living. When the freedom movement began, it was seeking to break away not only from the government and its mode of operation, but also the narratives that coloniality had generated.

The *Constitution of India, 1950*, therefore, was a document that mirrored the freedom revolution and sought reform. It was designed to lay down a foundational law for a newly free nation. It was hoped that with a Constitution that belonged to the people, law and legitimacy would invigorate indigeneity. Granting fundamental rights to each individual and directing the state with policies that were based on socialism and secularism, the Constitution was making way for a new India that was suffused with ideas of self-governance and self-reliance. Indigenous population was no longer considered to be savage and uncivilised; rather the 'Indianness' of the nation was to be preserved and cultivated.

For a country that was under colonial regime for over 200 years, this constitutional promise meant a lot. It meant that the very relationship of people with their government was to be altered. The government was not alien, but *of* the people, *for* the people and *by* the people. Now, it could not be a regime wherein criminality would be used as a method of occupation and governance, but one where people were citizens of a nation — rightful and legitimate participants of a society that was seeking to grow together. The Constitution, therefore, became that radical break from the past where their past was to vanish into a new, promising future.[1]

In establishing this narrative, the Constitution undertook a near impossible task of social and economic reform. It recognised the ghosts of its colonial past, as also broke away from them. While granting a fundamental right to equality, it gave substantive space to some portions of the population whose history brimmed with oppression and subjugation. Different, yet similar spaces were created for different portions of the population, alongside moving towards ideas of inclusion and redistribution of resources. While giving a fundamental right to equality to all through Article 14, it also created Article 244 along with the Fifth and Sixth Schedules which curated a special place for *Adivasi* and other tribal communities within the Constitution. The state was to protect these communities as well as provide them with enough space to assert their autonomies — an extremely delicate task — making the state both present and

[1] Anand Chakravarti, "Conscience of the Constitution and Violence of the Indian State," *Economic and Political Weekly*, Vol. 47/48, December 1, 2012 at 33–38.

absent in matters of *Adivasi* and tribal life. Though *Adivasi* and tribal communities were now equal to the dominant population, they were not to be fused with them. They were also inherently linked to their lands (primarily forests) and customs, and had a right to protect their *jal, jangal* and *zameen*.[2] A common Constitution with rights to equality for all did not mean that everyone was to be treated similarly, but that every community protects their diversity and thrives in it,[3] and, as a nation, we all grow together.

India's first Prime Minister, Sh. Jawaharlal Nehru, encapsulated the Constitution's approach to tribal development in a set of five fundamental principles he termed the *Panchsheel* Doctrine[4], as follows:

1. *People should develop along the line of their own genius and we should avoid imposing anything on them. We should try to encourage in every way their own traditional arts and culture.*
2. *Tribal rights to land and forest should be respected.*
3. *We should try to train and build up a team of their own people to do the work of administration and development. Some technical personnel from outside will, no doubt, be needed, especially in the beginning. But we should avoid introducing too many outsiders into tribal territory.*
4. *We should not over administer these areas or overwhelm them with a multiplicity of schemes. We should rather work through, and not in rivalry to, their own social and cultural institutions.*
5. *We should judge results, not by statistics or the amount of money spent, but by the quality of human character that is evolved.*

The purpose of Scheduled Areas, as also recognised in several judgments, is to preserve tribal autonomy, their culture and economic empowerment, to ensure social, economic and political justice, and preservation of peace and good governance.[5] It is with this object in mind that the Constitution created the Fifth Schedule which has famously been called "A Constitution within a Constitution" by the late Dr. B D Sharma, former Commissioner for Scheduled Castes ("**SCs**") and Scheduled Tribes ("**STs**"). When placed within this larger constitutional perspective, the Constitutional provisions clearly create a distinct dispensation for tribal people and tribal areas. This dispensation is based on the recognition that tribal or indigenous peoples have historically suffered at the hands of people from the 'mainland', including the colonisers, and require special protections at a constitutional level to ensure that these historical wrongs are not repeated, and are reversed.

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[2] For a deeper understanding of the relationship between *Adivasis*, their resources *(jal, jangal, zameen)*, and the Constitutional framework, see various writings of Dr. B D Sharma, former Commissioner for Scheduled Castes and Scheduled Tribes under Article 338 of the Constitution.

[3] Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle," *Dalhousie LJ* 22 (1999) at 5.

[4] Elwin Verrier, *A Philosophy for NEF*A (North East Frontier Agency, Shillong, 1959) at 62.

[5] *Samatha* v. *State of Andhra Pradesh* (1997) 8 SCC 191.

And in all this, the Constitution created a new populace, which would consistently use it to negotiate with the state and establish their rights and rightful place. With the right to move the court in cases of infringement of fundamental rights, the Constitution gave to the people a way of negotiating with the state their rights and wrongs. In over 70 years of independence, the Constitution continues to grow as belonging to the people. The *Adivasis* have been using the Constitution to assert their life and autonomy. Along with fighting in courts of law, the *Adivasis* have been writing the Constitution on stone slabs, in movements like the *Pathalgadi*,[6] and using this document as if it *belongs to them*, like their nation that strives for sense of belongingness and fraternity. A *sovereign, socialist, democratic and republic*[7] nation demands of its people to be participants in governance and law making, and that is exactly what the *Adivasis* sought to do.

The case of *Samatha* v. *State of Andhra Pradesh*[8] ("***Samatha* case**") narrates a long story of the *Adivasis* finding a place in the Constitution to protect their identity. The court was asked to rule on whether the grant of a mining lease to a non-tribal in a Scheduled Area was in violation of laws preventing alienation of *Adivasi* lands. The specific context for the case was the *Andhra Pradesh Scheduled Areas Land Transfer Regulation 1 of 1970*, which explicitly prohibits any person in a Scheduled Area from transferring lands to anyone other than an ST. The premise of the Regulation was that all land in a Scheduled Area is presumed to have been *Adivasi* land; hence, not only should no land now pass into the hands of non-*Adivasis*, but any land, having already been transfered to and presently owned by non-tribals should come back to the hands of STs. The primary question before the Court was whether the grant of a mining lease on government land to a non-tribal violated this principle.

The Court held that the Constitution itself requires that land in Scheduled Areas should remain with the *Adivasis* to preserve their autonomy, culture and society. The said Regulation, hence, should be interpreted 'expansively' to fulfil this mandate. Equality, therefore, was to be of a substantive kind, where difference (or diversity) was recognised and respected. The *Adivasi* and their lands are not to be frantically included in the mainstream discourse, rather they are to be protected and preserved. It was recognised that the Constitution, among other things, specifically provides for different kinds of autonomies for *Adivasi* communities, and their fundamental right to equality lies in preserving their sense of autonomy in resource distribution.

On numerous occasions where the constitutional validity of land legislations, which prohibit / restrict the transfer of land by tribals in Scheduled Areas, was challenged, the courts have held similarly. The Fifth Schedule of the Constitution has been

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[6] Anjana Singh, "Pathalgadi movement and conflicting ideologies of tribal village governance" in Varsha Bhagat-Ganguly and Sujit Kumar (eds), *India's Scheduled Areas: Untangling Governance, Law and Politics*, (Routledge, New York, 2020).

[7] The preamble to the Indian Constitution describes India as a *"Sovereign Socialist Secular Democratic Republic"*. These characteristics have been held by the Supreme Court of India as being part of the 'basic structure' of the Constitution, and therefore immune from constitutional amendment. See *Keshavananda Bharti* v. *State of Kerala* (1973) 4 SCC 225.

[8] *Supra*, note 5.

designed in furtherance of Article 15(4) and Article 46, to protect tribals from social injustice and exploitation by non-tribals. Therefore, these special legislations cannot be held to be unconstitutional on the ground of violation of other fundamental rights, such as Article 14 and 19(1)(g). There is, therefore, a constitutional duty on the state to take positive and stern measures for the survival and preservation of the integrity and dignity of tribals.

In the recently neo-liberalised and globalised world, however, these delicacies of constitutionalism have been compressed, and their meanings have lost their essence. Basic concepts, such as 'development' and 'inclusion' have taken on entirely new interpretations, with constitutional jurisprudence witnessing new turns. Coated in the language of protection and paternalism, courts, in recent years, have begun to engage with *Adivasi* communities as 'primitive' people who need to be *uplifted* in order to be equal to others, indeed as somewhat 'less than' citizens.

A recent five-judge decision of the Supreme Court has directed constitutional jurisprudence to dangerous paths. In a strange turn, the Court in *Chebrolu Prasad Rao* v. *State of Andhra Pradesh*[9] struck down a State legislation requiring reservation of teachers' posts in government-run schools for eligible candidates from *Adivasi* communities. The ground was that such law violated the principle of equality in the Constitution. Adopting an approach of formal equality, the decision reduces the power of the Governor under the Fifth Schedule to its skeletal nadir, making an inexplicable departure from 72 years of constitutional evolution.

What is most unfortunate, however, is that the opinion openly articulates societal prejudices and biases. These biases have repeatedly been documented in previous opinions of the Supreme Court, as also other constitutional courts, as being at the root of the various forms of structural violence against indigenous peoples, not only in India, but across the world. Generating a problematic precedent of patriarchy, paternalism and protectionism, the Court stated:

> *"Reservation provided to scheduled tribes and constitution of scheduled areas is for the reason as systems concerning way of life are different. They were in isolation, differed in various aspects from common civilisation such as the delivery of justice, as regards legal system, the culture, way of life differs from the ordinary people, their language and their primitive way of life makes them unfit to put up with the mainstream and to be governed by the ordinary laws. It was intended by the protective terms granted in the constitutional provisions that they will one day be the part of the mainstream and would not remain isolated for all time to come. The Scheduled Tribes Order, 1950 was promulgated to include groups and communities which were not part of social society, based on characteristic and culture, which developed by that time. The formal education, by and large, failed to reach them, and they remained a disadvantaged class, as such required a helping hand to uplift them and to make them contribute to the national development and not to remain part of the primitive culture. The purpose of the constitutional provisions is not to keep them in isolation but to make them part of the*

[9] 2020 SCC Online SC 383.

> *mainstream. They are not supposed to be seen as a human zoo and source of enjoyment of primitive culture and for dance performances. The benefits of developments have not reached them, and they remain isolated in various parts of the country. The social and economic upliftment and education are necessary for tribals to make them equal."*[10]

While this case relates to the relatively uncontroversial matter of government jobs, the judgment caricatures *Adivasis* as 'primitive', describes their culture using derogatory terms such as 'human zoo', and quickly progresses to viewing them as 'less than' equal citizens with 'less than' equal right to the protection of the law against all forms of violence. As a civil liberties organisation, while presenting its findings on the incomprehensible violence which marks the lives of *Adivasi* and indigenous communities caught in the undeclared war between the Naxalites and the Indian state, has observed:

> *"Our perception of Adivasis has been historically clouded by false caricatures and misinformation by a complex of vested interests. It is similar to what Europeans have done to Africans and the same European settlers have done to Native Americans. They needed their extraordinarily rich lands and natural resources but couldn't just shove those people aside and expropriate them – their own collective moral conscience wouldn't allow that. So they began to portray the native residents of these continents (the "Adivasis" there) as savages that need to be civilized if necessary, and inevitably necessarily, at the point of a gun. The caricaturing of the natives as less-than-human beings is essential to the brutal imposition of "civilization" and "development" on them. Our Adivasis have similarly been caricatured and imprinted as less-than-human in our minds over several generations. This makes the violence imposed on them seem insignificant and the resultant suffering invisible."* [11]

Numerous review petitions have been filed in the Supreme Court, including by the State of Andhra Pradesh, where this judgment is sought to be set aside. At the time of writing this chapter, these petitions were pending hearing. A decision such as this represents not only a discrepancy from the aspirational principles the Indian Constitution embodied at the time of Independence but also an incongruity with the body of judicial precedent that has evolved since. Instead of moving away from colonial and post-colonial narratives that invite a paternalistic attitude, this judgment reaffirms it and is, therefore, dangerous to the future of *Adivasis* as envisaged by the Indian Constitution.

The modern world, however, has also brought a large and promising discourse of International Human Rights. Along with constitutions across the world accepting and protecting their indigenous populations, there are a range of international conventions that assist in the process of reforming the state of law relating to indigenous discourse. The next section discusses those laws in detail, with specific reference to criminal jurisprudence and the manner in which it applies to indigenous populations.

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[10] *Ibid*. At para 107. (*The quote is riddled with grammatical errors, which are in the original and published version. These are not being corrected or indicated in parenthesis as they are too numerous*.)

[11] Human Rights Forum, *The Terrible Cost of an Inhuman Counter-Insurgency*, Publication No. 28 (Human Rights Forum, Hyderabad, 2013) at 5-6; available at: *http://www.humanrightsforum.org/HRF_Inhuman_Counter-Insurgency.pdf*

3.2 International Law Safeguarding Indigeneity

3.2.1 The Human Rights Discourse and Criminal Jurisprudence

International law with respect to indigenous peoples has evolved over the years with the purpose of promoting their rights to self-determination and socio-cultural autonomy, and for protecting them against discrimination and stigmatisation. This is important because long-standing historical injustices and discriminations where indigenous peoples are systematically dispossessed from their lands, resources, and cultures, still remain entrenched and continue to adapt new forms. The socio-economic challenges faced by indigenous communities cannot be assessed in isolation from other issues such as discrimination in criminal justice systems, procedural fairness, substantive justice including free, fair and just remedies, and the lack of recognition of rights to lands and resources. A detailed examination of the international law regime, as applicable in India, with regard to indigenous peoples' rights is beyond the scope of the present study. In this section, we will examine the safeguards under international law to prevent structural injustices in the criminal justice system.

The International Labour Organisation ("**ILO**") *Convention Concerning Indigenous and Tribal Populations, 1957* (ILO Convention 107)[12] mandates special protections when it comes to criminal justice and indigenous peoples. Article 10 thereunder states:

> ***"Article 10:***
>
> 1. *Persons belonging to the populations concerned shall be specially safeguarded against the improper application of preventive detention and shall be able to take legal proceedings for the effective protection of their fundamental rights.*
> 2. *In imposing penalties laid down by general law on members of these populations account shall be taken of the degree of cultural development of the populations concerned.*
> 3. *Preference shall be given to methods of rehabilitation rather than confinement in prison."*

India, having ratified this Convention, is duty bound to ensure that these commitments are not breached. As we will see in subsequent chapters of this report, the ground reality tells a different story altogether.

The *Indigenous and Tribal Peoples Convention, 1989* (also known as ILO Convention 169)[13] marks an important paradigm shift in international law, where the notion of assimilating and mainstreaming of indigenous peoples was finally put to rest. Important for our purpose is Article 10, which states:

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[12] ILO, *Indigenous and Tribal Populations Convention,* (Convention No. 107) June 26, 1957; available at: *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107*

[13] ILO, *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, (Convention No. 169) June 27, 1989; available at: *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169*

> ***"Article 10***
> *1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.*
> *2. Preference shall be given to methods of punishment other than confinement in prison."*

This provision takes the mandate of Article 9(1), *International Covenant on Civil and Political Rights, 1966*[14], that no person shall be arbitrarily arrested or detained, considerably further insofar as the interface of indigenous peoples with criminal justice is concerned.

The preamble to the *United Nations Declaration on the Rights of Indigenous Peoples, 2007*[15] ("**UNDRIP**") reaffirms that indigenous peoples should be free from any kind of discrimination while exercising their rights. It furthers indigenous peoples' rights by recognising their right to determine the contours of their social, economic, and cultural development,[16] and puts a positive obligation on the state to protect their right to life, physical and mental integrity, liberty and security of person.[17]

The right to access, governance, and decision-making with respect to their lands and resources is at the heart of tribal culture. Hence, the UNDRIP treats these aspects as pivotal, and affirms under Article 10 that indigenous peoples shall not be forcibly removed from their lands, and no relocation can be undertaken without establishing free, prior and informed consent. Article 30, UNDRIP prohibits military activities on the lands of indigenous people unless justified by public interest and after due consultation with indigenous peoples.

In order to overcome the structural biases against indigenous peoples, a collaborative interface with justice delivery mechanisms and governance institutions is vital. With regard to justice mechanisms, Article 34, UNDRIP provides that indigenous peoples shall have the right to promote their own traditional justice mechanisms, as under:

> ***"Article 34***
> *Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards."*

Upholding the right to procedural fairness while accessing justice mechanisms of the state, Article 40, UNDRIP mandates that indigenous peoples be accorded the right to access to and prompt decisions through just and fair procedures for resolution of

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[14] *International Covenant on Civil and Political Rights,* Resolution 2200A (XXI), December 16, 1966; available at: *http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.*

[15] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, October 2, 2007; A/RES/61/295, available at: *https://www.refworld.org/docid/471355a82.html.*

[16] Article 3, UNDRIP.

[17] Article 7(1), UNDRIP.

disputes, in a manner that their unique cultures and traditions are taken into account. It states:

> ***"Article 40***
> *Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights."*

The deep chasm between these commitments and the reality of the criminal justice system in India has a cascading effect when indigenous communities find themselves dispossessed from their traditional lands, even as these lands are diverted in violation of numerous extant laws, for mining, industry and even biodiversity conservation. In her report to the Human Rights Council, the United Nations Special Rapporteur on Indigenous Peoples has stated that the gap between the legal and customary rights renders indigenous peoples and their lands vulnerable to the growing threats of agro-industrial production, destructive mining and logging practices, and large-scale infrastructure developments leading them to face increasing criminalisation and violence for their efforts to protect Mother Earth.[18]

The most prevalent notion to conserve forests, as seen globally, is by terming forest dwelling communities, who are primarily indigenous peoples, as 'encroachers'. However, the Intergovernmental Panel on Climate Change ("**IPCC**") in its 2019 report clearly acknowledges the critical role of indigenous peoples and local communities in safeguarding the world's lands and forests. While identifying policies which enable and incentivise sustainable land management for climate change adaptation and mitigation, the Report highlights how important it is to empower women and indigenous peoples, and enhance local and community collective action, among other things.[19] It goes without saying that the impact of environmental destruction is first faced by the communities dependent on forests for livelihood and sustenance.

3.2.2 Operation of International Law in India

For many decades, Indian courts took a conservative view regarding the application of international law, stating that international treaties are not binding in India unless they have been incorporated into domestic law through legislation. This view is based on a narrow interpretation of Article 253[20] of the Constitution, and there are a number

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[18] *Report of the Special Rapporteur on the Rights of Indigenous Peoples – Attacks against and the criminalization of indigenous human rights defenders*, A/HRC/39/17, United Nations Human Rights Council, 2018; available at: *https://www.undocs.org/A/HRC/39/17*.

[19] Intergovernmental Panel on Climate Change, *Climate Change and Land: An IPCC Special Report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems* (Summary for Policymakers) August 7, 2019; available at: *https://www.ipcc.ch/srccl/*.

[20] Article 253, Indian Constitution states:
"Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

of judicial precedents to this effect.[21] The Indian Supreme Court has also reiterated this position and found that obligations arising under international agreements or treaties are not by their own force binding upon Indian nationals, and that the power to legislate in this respect lies with Parliament.[22]

More recently, in a few decisions relating to human rights violations, the courts have taken a more expansive view of international conventions. These pertain to instances where it was found that (i) there is no inconsistency between international conventions and domestic law; or (ii) where the court felt that there was a gulf between existing domestic law and the international law commitment. Outstanding among these is a judgment of the Supreme Court[23] which arose out of a writ petition filed by women's organisations seeking the implementation of India's commitments under the *Convention on Elimination of Discrimination Against Women, 1979*[24] ("**CEDAW**") to formulate effective measures to check sexual harassment in the workplace. The Supreme Court took the view that since India has no law on the specific subject, and since there is no conflict as such between the contents of international conventions such as CEDAW, the guarantees of gender equality and the right to work with dignity under the Indian Constitution, safeguards against sexual harassment in the workplace are implicit therein.[25]

Thus, the Indian courts may enforce international treaties and conventions, which are consistent with Indian laws. The Supreme Court went on to observe:

> *"Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and the enabling power of the Parliament to enact laws for implementing the international conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution".* [26]

With regard to the application of international conventions and treaties on the rights of indigenous peoples to India's STs and Scheduled Areas, the Supreme Court in the landmark *Samatha* case[27] held that:

> *"India being an active participant in the successful declaration of the Convention on the Right to Development and a party signatory thereto, it is its duty to formulate its policies, legislative or executive, accord equal attention to the promotion of, and to protect the*

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[21] See, for instance, *Birma* v. *State of Rajasthan* AIR 1951 Rajasthan 127; *Shiv Kumar Sharma and Others* v. *Union of India* AIR 1968 Delhi 64.

[22] *Magan Bhai* v. *Union of India* (1969) 3 SCR 254.

[23] *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241.

[24] UNGA, *Convention on the Elimination of All Forms of Discrimination Against Women*, December 18, 1979, UN Treaty Series, Vol. 1249; available at: *http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm.*

[25] C.R. Bijoy, Shankar Gopalakrishnan and Shomona Khanna, *India and the Rights of Indigenous Peoples* (Asia Indigenous Peoples Pact, Thailand, 2010) at 50.

[26] *Supra,* note 23 at 249, para 7.

[27] *Supra*, note 5.

> *right to social, economic, civil and cultural rights of the people, in particular, the poor, the Dalits and Tribes as enjoined in Article 46 read with Articles 38, 39, and all other related articles read with the right to life guaranteed by Article 21 of the Constitution of India. By that constant endeavour and interaction, right to life would become meaningful so as to realise its full potentiality of 'person' as inalienable human right and to raise the standard of living, improve excellence and to live with dignity of person and of equal status with social and economic justice, liberty, equality, and fraternity, the trinity are pillars to establish the egalitarian social orders in Socialist Secular Democratic Bharat Republic."*[28]

Wise words indeed. It is then baffling that in a judgment relating to displacement of tribal people in large numbers in the State of Gujarat as a result of submergence in the Sardar Sarovar project, the same Supreme Court chose to rely upon a provision[29] under ILO Convention No. 169 to arrive at a finding that displacement of tribal people for the purpose of 'development' is unavoidable and, therefore, cannot be held to be in violation of the obligations of the Indian state under the said Convention.[30]

In this case, while dealing with objections to the project raised by organisations regarding egregious environmental law violations, as well as the incalculable adverse socio-economic impact of the dam, the Supreme Court took note of the detailed articulation by the petitioner of the Right to Life under Article 21 of the Constitution read with Article 12 of ILO Convention No. 107.

The Court accepted the legal proposition that international treaties and covenants can be read into domestic laws. It, however, went on to dismiss the contention of the petitioners regarding specific violation of Article 12 when it observed that:

> *"The said article clearly suggested that when the removal of the tribal population is necessary as an exceptional measure, they shall be provided with land of quality at least equal to that of the land previously occupied by them and they shall be fully compensated for any resulting loss or injury. The rehabilitation package contained in the award of the Tribunal as improved further by the State of Gujarat and the other States prima facie shows that the land required to be allotted to the tribals is likely to be equal, if not better than what they had owned."*[31]

A similarly perplexing approach was taken in a decision regarding the failure of the State of Kerala to implement its own commitments to restore lands, which had been alienated through illegal 'sale' to non–tribals, to the original tribal owners.[32] The

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[28] *Supra,* note 5. See judgment written by Justice K Ramaswamy, at para 75.

[29] The Supreme Court has relied upon the following two sub-sections of Article 16, ILO Convention 169:
"1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned."

[30] *Narmada Bachao Andolan* v. *Union of India* (2000) 10 SCC 664.

[31] *Ibid.* At para 58.

[32] *State of Kerala* v. *Peoples Union for Civil Liberties and Others* (2009) 8 SCC 46.

Supreme Court examined Article 21 of the Constitution, the ILO conventions and the UNDRIP, and arrived at the following finding:

> *"It is now accepted that the Panchsheel doctrine which provided that the tribes could flourish only if the State interfered minimally and functioned chiefly as a support system in view of passage of time is no longer valid. Even the notion of autonomy contained in the 1989 convention has been rejected by India."*[33]

Noting that tribal people in Kerala are far better off than their counterparts in other States, and that they have been absorbed into various institutions, both in their home state as well as in other parts of the country (even though no such evidence was placed before it), the Court concluded:

> *"Furthermore, we have noticed hereinbefore that the members of the Scheduled Tribes are educated and we can safely presume that most of them are serving various institutions in the State of Kerala and/or in other parts of India. Indisputably, the question of restoration of land should be considered having regard to their exploitation and rendering them homeless from the touchstone of Article 46 of the Constitution of India.*
>
> *For the aforementioned purpose, however, it may be of some interest to consider that the insistence of autonomy and the view of a section of people that tribals should be allowed to remain within their own habitat and not be allowed to mix with the outside world would depend upon the type of Scheduled Tribe category in question. Some of them are still living in jungle and are dependent on the products thereof. Some of them, on the other hand, have become a part of the mainstream. The difference between Scheduled Tribes of north-east and in some cases the islands of Andaman and Nicobar, on the one hand, and of those who are on the highlands and plains of the southern regions must be borne in mind."*[34]

It is quite unfortunate that the courts have insisted on ignoring important strides made in international law relating to indigenous peoples since the mid-20th Century. Further, it is inexplicable that the courts have often not applied their mind to the purpose and intent of the Fifth Schedule and other constitutional provisions, or the complex architecture of statutory laws which protect *Adivasi* rights. Instead, we often see the judiciary continuing to adhere to outmoded notions of mainstreaming. The stereotyping of *Adivasis* as poverty stricken, uncivilised, 'primitive', and in need of urgent rescue, has seeped into the criminal justice system so deeply such that persons and communities who do not fit into such stereotypes are immediately dismissed as being 'unworthy' of the protection of the law.

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[33] *Ibid*. At para 107.

[34] *Supra*, note 32 at para 115, 116.

COMPLIANCE REPORTS BY THE INDIAN GOVERNMENT

Having ratified only ILO Convention 107, and not ILO Convention 169, India's reporting obligations are rather limited. However, the Committee of Experts on the Application of Conventions and Recommendations ("**CEACR**") has made detailed observations about India's reporting record. In 1993, 1995 and 2005, the CEACR observed that no report had been submitted at all, while in 1991, 2001 and 2004, India's reports were either submitted very late or were too brief for the Committee to consider.

Reports from the Indian Government were submitted on time in 2009, 2011, 2013 and 2015. In the observations made by the Committee to the 2011 report, it is stated that the Indian Government failed in responding to the clarification sought on whether the relocations undertaken in India are in compliance with Article 12(2) and (3) of Convention 107.[35] Subsequently, in the report for 2013, the Indian Government provided details of the judgment of the Supreme Court in *Orissa Mining Corporation* v. *Ministry of Environment and Forests and Others*[36] ("***Niyamgiri* case**"), and the implementation of *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* ("**FRA**") with respect to distribution of land titles.[37] In the latest report submitted in 2015, the Committee noted that more specific information with respect to Conservation-cum-Development Plan by the State of Odisha after the judgment of the Supreme Court in the *Niyamgiri* case was required. It further noted the adoption of the *Right to Fair Compensation and Transparency in Land Acquisition Rehabilitation and Resettlement Act, 2013* and requested for updated information on the measures adopted for resettlement of families affected by the Sardar Sarovar Dam.[38]

So far, the international treaty bodies have not sought answers from the Indian Government regarding the disproportionate criminalisation of *Adivasis* in the criminal justice system, and the large numbers of incarcerations in overcrowded prisons even as basic rights to fair trial are denied.

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[35] Observation (CEACR) - adopted 2011, published 101st ILC session (2012) Indigenous and Tribal Populations Convention, 1957 (No.107) India (Ratification: 1958); available at: *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2699329.*

[36] (2013) 6 SCC 476.

[37] Observation (CEACR) - adopted 2013, published 103rd ILC session (2014) Indigenous and Tribal Populations Convention, 1957 (No. 107) - India (Ratification: 1958); available at: *https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3143588.*
The report notes that as of June 30, 2013, a total number of 32,56,128 claims have been filed under the FRA and while 13,08,619 land titles have been distributed, 15,700 titles were ready for distribution. A total of 28,27,410 claims have been disposed of (86.83 per cent).
Current data regarding the implementation of the FRA, as released by the Ministry of Tribal Affairs, Government of India, states that as on February 28, 2021, a total of 42,64,820 claims have been filed under the FRA, of which 20,01,919 titles have been distributed, while 38,03,515 claims have been 'disposed of'. For more information, see: *https://tribal.nic.in/downloads/FRA/MPR/2021/(A)%20-%20MPR%20Feb%202021.pdf.*

[38] Observation (CEACR) - adopted 2015, published 105th ILC session (2016) Indigenous and Tribal Populations Convention, 1957 (No. 107) - India (Ratification: 1958); available at: *https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3248874.*
The report notes that as of March 31, 2014, some 37,42,000 claims had been filed and 14,32,000 titles distributed in accordance with the FRA.

3.3 From Criminals to Right-Bearers and Protectors of the Forest

3.3.1 A Constitutional Struggle against Structural Violence

As we began this chapter, we noticed how transformation and reform were both folded into constitutional jurisprudence. To break away from a deep sense of coloniality, this document altered the very manner in which *Adivasi* and tribal communities were perceived and discoursed. From a narrative that reduced their identity within the sharply carved binary between savages and civilised, the Constitution recognised these populations as being both equal and special. It gave a new meaning to civility and traditional knowledge. This segment of the chapter is dedicated to unfolding the provisions of law that bring about these changes. We discuss a wide range of provisions from individuated fundamental rights to specially carved out legislations that apply to an *Adivasi* or forest dweller in the country and observe how the presumption of their criminality was overturned. We also examine what happens to a notion of criminality when it meets such provisions of law that alter the very manner of perception.

And here, we begin with equality. The notion of equality, in particular, forms a rich and complex backbone of the Constitution. Articles 14 to 17, commonly known as the Equality Charter, encapsulate an approach to equality which not only provides the formal 'equal protection of the law' to all citizens, but also recognises affirmative action for the correction of historical wrongs as an important substantive component of the notion of equality itself. This approach has come to be known as the 'substantive equality' approach. Specific note is made of the Scheduled Tribes in Article 15(4), which requires the state to *"make special provisions for the advancement of any socially and educationally backward classes of citizens or for the... Scheduled Tribes"*.

3.3.2 A Constitution of the *Adivasi*, for the *Adivasi* and by the *Adivasi*

The Constitution, as well as myriad statutes, recognise the vulnerability of these communities to alien concepts and cultures, making it necessary to ensure that they are provided with systems and structures, which allow them to exercise their traditional rights as well as meaningfully exercise their constitutional and fundamental rights. At the very core of this approach is the fundamental right to equality, which recognises the historical disadvantage of such communities, and the need to remedy the same through special protections and affirmative action.

The Constitution bears a commitment to the concept of equality of all citizens before the law. This is stated at the outset in the preamble itself when it commits to the vision of 'equality of status and opportunity' as a core part of the aspiration of a newly independent nation. The fundamental right to equality has been held to be part of the 'basic structure' of the Indian Constitution and, therefore, unalterable even by a constitutional amendment.[39]

[39] The principle of 'basic structure' has been articulated in *Keshavananda Bharati* v. *State of Kerala* (1973) 4 SCC 225, and reiterated in numerous judicial precedents thereafter. See also *Minerva Mills Limited* v. *Union of Indian* (1980) 3 SCC 625.

Article 14 recognises the right to equality before law and equal protection of the law, and makes the same available to all persons, that is, citizens as well as non-citizens. The Constitutional provisions as well as numerous judicial precedents firmly establish that a mere 'formal' equality approach has been rejected. Instead, the Constitution clearly recognises that to be completely meaningful, a 'substantive' approach to equality is required to be adopted. Accordingly, the historical discrimination of certain groups and classes must not only be abjured by the state, but concrete steps must be taken by it to reverse the present consequences of such historical discrimination. It is only with such a substantive or affirmative approach can equality in a real sense be achieved.

In keeping with this approach to equality, the Constitution recognises the right against discrimination in **Article 15** which prohibits discrimination by the state of any citizen on grounds of religion, race, caste, sex, place of birth, or any of them. The Article insists on affirmative action, in the form of special provisions for 'socially and educationally backward classes of citizens or for STs', as a part of this right.[40] **Article 16** (prohibition of discrimination in public employment includes reservations for 'backward class of citizens' and reservations in promotions for STs), and **Article 17** (prohibition of untouchability in any form) are instances of other specific areas where the Constitution requires the state to take an affirmative and proactive approach.[41]

Article 19(1) of the Constitution protects certain fundamental freedoms, including the freedom of speech and expression, the freedom to assemble peacefully without arms and to form associations, unions and cooperatives, the freedom to move freely throughout India and reside and settle in any part of the country, and the freedom to practice the profession or occupation or trade of one's choice. Articles 19(2) to 19(6) allow the state to place 'reasonable restrictions' on these freedoms, but only on the strictly limited conditions articulated there. Important for our purpose is that the state can restrict the freedom of citizens to travel into, reside, and settle in any area "for the protection of the interests of any Scheduled Tribe".

The right to life under **Article 21**[42] of the Constitution has been interpreted in a catena of judgments to include the right to a life of dignity, for which a host of other rights are necessary to ensure that this life is a holistic one. Therefore, the right to livelihood,[43] the right to shelter,[44] the right to a clean environment,[45] the right to water,[46] and

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[40] Article 15(4), Indian Constitution states:
"(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

[41] *Safai Karamchari Andolan and Others.* v. *Union of India and Others* (2014) 11 SCC 224.

[42] Article 21, Indian Constitution states:
*"**21. Protection of life and personal liberty:** No person shall be deprived of his life or personal liberty except according to procedure established by law."*

[43] *Olga Tellis* v. *Bombay Municipal Corporation* (1985) 3 SCC 545; *Narendra Kumar* v. *State of Haryana* (1994) 4 SCC 460 and *State of Himachal Pradesh* v. *Raja Mahendra Pal* (1999) 4 SCC 4.

[44] *Shantistar Builders* v. *Narayan Khimlal Toame* (1990) 1 SCC 520.

[45] *N D Jayal* v. *Union of India* (2004) 9 SCC 362 at 382.

[46] *B L Wadhera* v. *Union of India* (1996) 2 SCC 594.

numerous such other rights of a socio-economic nature, have been held by judicial precedent to be part of the fundamental right under Article 21.

Part IV of the Constitution, entitled 'Directive Principles of State Policy' contains several provisions which directly and indirectly impact the fundamental rights of citizens in general, and indigenous peoples in particular. The principle of 'distributive justice', or the promotion of a social order where economic resources are justly distributed, is recognised under Articles 38 and 39. **Article 38** places a duty on the state to "secure a social order in which justice, social, economic and political, shall inform all the institutions of the national life" and in particular to minimise inequalities in income and eliminate inequalities in status among individuals and amongst groups of people. **Article 39** contains critical obligations on the state to direct its policy towards what has come to be known as 'distributive justice', with respect to adequate means of livelihood, ownership and control of material resources, minimisation of concentration of wealth in the economic system, and so on.

In addition, **Article 46** contains an obligation on the state to promote the educational and economic interests of weaker sections, in particular the STs, and also to protect them from social injustice and all forms of exploitation.

The substantive equality approach recognises the need to correct historical wrongs in the present and the future, with a core commitment to distributive justice and the reduction of economic inequalities. This has informed the entire constitutional dispensation regarding marginalised peoples in general, and STs in particular.

3.3.3 A Constitution within the Constitution: A Specific Form of Governance

Article 244 and the **Fifth Schedule** must be examined within the constitutional dispensation described above. Article 244, contained in Part X of the Constitution entitled 'The Scheduled and Tribal Areas', reads as follows:

> ***"Article 244.*** *(1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Area and Scheduled Tribes in any State other than the States of Assam, Meghalaya, Tripura and Mizoram."*

The creation or cessation of Scheduled Areas[47] is possible only through Presidential Orders issued under Paragraph 6 of the Fifth Schedule, which states that:

> *"In this Constitution, the expression 'Scheduled Areas' means such areas as the President may by order declare to the Scheduled Areas."*

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[47] The First Scheduled Areas and Scheduled Tribes Commission, also known as the Dhebar Commission (1960-61) laid down the following criteria for declaring any area as a 'Scheduled Area' under the Fifth Schedule:
- Preponderance of tribal population, which should not be less than 50 per cent;
- Compactness and reasonable size of the area;
- Underdeveloped nature of the area; and
- Marked disparity in the economic standard of the people, as compared to the neighboring areas.

More recently, a viable administrative entity such as a district, block or taluk, has been also identified as an important additional criteria (see *Annual Report 2013-14*, Ministry of Tribal Affairs, Government of India).

BRIEF OUTLINE OF THE FIFTH SCHEDULE PROVISIONS

The Fifth Schedule to the Constitution of India comprises only seven paragraphs.

Paragraph 1 specifically excludes four States from the application of this Schedule.[48]

Paragraph 2, while stating what Scheduled Areas are, further provides that subject to the provisions of the Schedule, executive power of the State extends to the Scheduled Areas lying in such State. This provision makes it clear that the power of 'administration and control' of the State extends to these areas, removing doubts, if any, whether these areas are subject to the overarching authority of the State and its machinery. It has been held by the courts that the power of 'administration and control' referred to in this clause is wide enough to embrace exercise of governmental power of every description - executive, legislative and judicial.[49]

Paragraph 3 requires the Governor of the State to make a report annually or when required to do so by the President of India, to the President regarding the administration of the Scheduled Area. The Governor is vested with enormous legislative powers in Scheduled Areas, as we will see below. It further provides that the executive power of the Central government will extend to the giving of directions to the State government for the administration of these areas. This provision is significant, as it makes a sharp divergence from the non-Scheduled Areas where the executive power of the Centre extends only insofar as the subject matters within its legislative domain under the Seventh Schedule.[50] In Scheduled Areas, on the other hand, the executive power of the Central government extends to **ALL** subject matters, even those which fall within the domain of the State.

Paragraph 4 provides for the setting up of a Tribes Advisory Council ("**TAC**") to be set up in each State where there are Scheduled Areas. A TAC is also set up in States with a significant tribal population to give advice on matters relating to the welfare and advancement of the STs in that State.

Under **Paragraph 5** the Governor has been empowered to direct, by public notification, that any particular Act of Parliament or of the State Legislature shall not apply to the Scheduled Area of that State, or shall apply subject to exceptions and modifications. Paragraph 5 also empowers the Governor to make Regulations to restrict or prohibit transfer of land by or among members of STs, regulate allotment of land, and regulate moneylending, subject to the assent of the President.

Paragraph 6 lays down the manner in which the geographical boundaries of a Scheduled Area may be declared. This power lies solely with the President of India, who shall, by Order, either declare a Scheduled Area, or direct cesser of such area, increase or alter such area, or rescind any order made under this paragraph.

Paragraph 7 allows the amendment, alteration or repeal of provisions of the Fifth Schedule by Parliament, without the complex process otherwise required for constitutional amendments under Article 368.

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[48] The four States which are excluded from the operation of the Fifth Schedule are Assam, Meghalaya, Tripura and Mizoram. These are also the four States where the Sixth Schedule of the Constitution applies to designated 'tribal areas' in terms of Article 244(2).

[49] *Amarendra Nath Dutta* v. *State of Bihar* AIR 1983 Patna 151 at paras 18, 46.

[50] Article 73(1)(a), Indian Constitution states:
"(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend to (a) all matters with respect to which Parliament has power to make laws…"

The constitutional design, therefore, is that any kind of alteration of boundaries of a Scheduled Area, whether an increase, decrease, cessation, or declaration, is only permitted by an order of the President of India. In certain situations, consultation with the Governor is necessary, but the provision is quite categorical that the location of this power is at the highest office of government in the country.

Having said that, the special powers vested in the Governor lie at the heart of the Fifth Schedule. Paragraph 5(1) gives the Governor the power to restrict the application of any Central or State legislation to the Scheduled Area, either completely, or subject to exceptions and modifications.[51] Paragraph 5(2) empowers the Governor to make Regulations for the 'peace and good government' of a Scheduled Area. The provision has a *non-obstante* clause, so that its wide application to a plethora of subject matters is proscribed only by the necessity to ensure 'peace and good government'. Here also, while making such regulations for Scheduled Areas, the Governor can amend or repeal any Central or State legislation.

Specifically, this paragraph empowers the Governor to make regulations regarding:

(i) prohibition and restriction of transfer of land from and between STs. Almost every State in the country, and certainly all States with Scheduled Areas, have enacted legislations relating to prevention/ prohibition of land transfer in Scheduled Areas by tribals to non-tribals, and in some cases, even the transfer of land between tribals inter-se is restricted;

(ii) regulation of allotment of land to tribals in Scheduled Areas; and

(iii) regulation of moneylending in Scheduled Areas to tribals.

It is unfortunate that for a large part, the Governors have been slow to use their powers, and long-standing demands by civil society as well as *Adivasi* organisations to restrict the operation of oppressive laws, such as the *Indian Forest Act, 1927* ("**IFA**") and other legislations of its ilk, have remained unaddressed. As an official committee found:

> *"The Governors, on their part, remained oblivious about the state of the tribal people. Even the mandatory annual Reports by the Governors to the President regarding the administration of Scheduled Areas under Para 3 of the Fifth Schedule are irregular. They comprise largely stale narrative of departmental programmes without even an allusion to the crucial issues in administration, the main thrust of the Fifth Schedule."*[52]

In recent years, however, some Governors have exercised the powers under Paragraph 5(1) of the Fifth Schedule to protect *Adivasi* rights. For instance, the Governor of Chhattisgarh amended the FRA a few years ago to provide for review of rejected forest rights claims, after it came to light that claims were being rejected *en masse* on a variety of completely specious grounds. The Governor of Maharashtra passed a Regulation amending Central and State legislations, such as the IFA (to provide decision-making role

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[51] It has been held by the Supreme Court that the power to make exceptions and modifications includes the power to amend these laws. *Edwingson Bareh* v. *State of Assam* (1966) 2 SCR 770.

[52] *Report of MPs and Experts to make recommendations on the salient features of the law for extending provisions of the Constitution (73rd) Amendment Act, 1992 to Scheduled Areas*, 1994, at 14; available at: *http://www.odi.org.uk/projects/00-03-livelihood-options/forum/sched-areas/about/bhuria_report.htm.*

to *Gram Sabhas* in the transit, collection and sale of Minor Forest Produce), the *Water (Prevention and Control of Pollution) Act, 1974* (to provide for prior informed consent of the *Gram Sabha* before the State Pollution Control Board provides permission for setting up an industry which may pollute a minor water body), the *Markets and Fairs Act, 1862* (to provide for prior informed consent of *Gram Sabhas* before establishing markets and fairs), the *Maharashtra Village Panchayats Act, 1959* (to bring fishing activities in minor water bodies under the purview of the *Gram Panchayat*) and the *Maharashtra Land Revenue Code, 1966* (to mandate consent of *Gram Sabha* prior to grant of prospecting or mining lease or auction of minor minerals).[53]

One of the most important areas of law in Scheduled Areas relates to prevention of land alienation of tribal lands. In fact, it is not just States with Scheduled Areas where such laws have been enacted, but almost all States in the country which have tribal populations. A list of State-level legislations on the subject has been examined elsewhere in this report (*see* **Annexure F**).[54]

These laws make stringent provisions, either prohibiting any form of transfer of tribal lands to non-tribals, or regulate such transfers heavily, with a requirement for case-specific permissions from the District Collector. Transfers made in violation of these laws are not only declared void, there's also an obligation on the state machinery to ensure restoration of possession to the original tribal owner. General legal principles relating to adverse possession, limitation, and estoppel are specifically excluded. Violations of the provisions prohibiting transfer are also categorised as crimes.

It is not surprising, then, that the constitutional validity of these legislations has been repeatedly and fiercely challenged by dominant elites, as social justice legislations with affirmative provisions often are, on the grounds of violation of fundamental right to equality (Article 14), right to life and livelihood (Article 21), and right to carry on profession, business or trade (Article 19(1)(g)). These challenges have firmly been rejected by the constitutional courts, and the law is quite well established that legislations regulating or prohibiting transfer of land in tribal areas and Scheduled Areas are protected by the Fifth Schedule as well as by Article 15(4), among other provisions of the Constitution.[55]

3.4 Undoing Historical Injustices: An Idea of Self-Governance and of Power

Any exercise in socio-political transformation demands an undoing of historical injustices. What the Constitution is doing, as we see here, is to mark a specific status

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[53] Notification dated October 30, 2014 bearing No. RB/TC/e-11019(89)(2013)/Notification-4/1120/2014, issued by the Office of the Governor of Maharashtra.

[54] For a detailed discussion, also see *Chapter 4: A Norm of Criminality* and *Annexure C* to this report.

[55] For good measure, most of these legislations restricting alienation of tribal lands to non-tribals have also been included in the Ninth Schedule to the Constitution. Legislations included in the Ninth Schedule are protected by Article 31B from constitutional challenge on the ground that they violate certain fundamental rights. For a detailed examination of the extent of such protection, see *IR Coelho* v. *State of Tamil Nadu* (2007) 2 SCC 1.

of *Adivasi* and tribal communities in the Indian polity and operationalise their relationship with all others. It is creating a legal order where India engages with the ghosts of its colonial past and attempts to undo the injustices done. It alters the presumptions made by the preceding legal order; people who were previously presumed to be offenders of a legal order were now right bearers and self-governing communities. The *Panchayats (Extension to Scheduled Areas) Act, 1996* ("**PESA**") envisaged the extension of self-rule to all Scheduled Areas, giving life to constitutional jurisprudence. There was, however, a link missing from this puzzle (which debuted in 2006): the idea that forest communities are deeply linked to their forests and lands, and that this relationship must be by law recognised. This task was undertaken by the historic legislation - the Forest Rights Act (FRA). Together, these two laws have undertaken the massive task of altering paradigms. They stand tall and high against all social and legal presumptions, and provide forest communities their due in history, in the present and in the future, as rightful citizens along with everyone else.

3.4.1 Meaning of Self-Governance under PESA

Sections 4(a) and 4(d) of PESA, which encapsulate the essential spirit of the law, recognise the supremacy of customary law, traditional management practices for community resources, and traditional methods of dispute resolution in Scheduled Areas. These provisions state as follows:

> ***"4...***
> *(a) a State legislation on the Panchayats that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources;*
>
> ....
>
> *(d) every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution."*

It is apparent, therefore, that PESA obligates the state to ensure that any law on *Panchayats* enacted for the Scheduled Area must give primacy to existing customary law and traditional mechanisms, and also give primacy to the community in the management of its community resources. It is generally agreed that these clauses encapsulate the essential ingredients of the approach of PESA for all laws relating to *Panchayats* and local self-governance in Scheduled Areas. The critical elements of such an approach comprise the:

(i) centrality of traditional mechanisms, whether with respect to law, dispute resolution, or resource management;
(ii) necessity to protect these traditional mechanisms, including cultural identity, customs and religious practices of the community; and
(iii) centrality of the *Gram Sabha*, or the village community in this function, and the vesting of power in such *Gram Sabha* for this purpose.

One important provision of PESA, for instance, is the mandate of reservations for STs at all levels in the *Panchayats*, along with reservation of all posts of Chairperson of *Panchayats* at all levels in the Scheduled Areas for STs. This provision was the subject matter of a constitutional challenge in the Supreme Court of India, in a batch of petitions from the State of Jharkhand, on the ground that it violates the right to equality under Article 14. The Supreme Court rejected the challenge and upheld the constitutional validity of this provision, stating as follows:

> *"...Especially in the context of Scheduled Areas, there is a compelling need to safeguard the interests of tribal communities, with immediate effect, by giving them an effective voice in local self-government. The Bhuria Committee Report had clearly outlined the problems faced by Scheduled Tribes, and urged the importance of democratic decentralization which would empower them to protect their own interests."*[56]

The Court further observed as follows:

> *"There is, of course, a rational basis for departing from the norms of 'adequate representation', as well as 'proportionate representation' in the present case. This was necessary because it was found that even in the areas where Scheduled Tribes are in a relative majority, they are under-represented in the government machinery and hence vulnerable to exploitation. Even in areas where persons belonging to the Scheduled Tribes held public positions, it is a distinct possibility that the non-tribal population will come to dominate the affairs. The relatively weaker position of the Scheduled Tribes is also manifested through problems such as land-grabbing by non-tribals, displacement on account of private as well as governmental developmental activities and the destruction of environmental resources. In order to tackle such social realities, the legislature thought it fit to depart from the norm of 'proportional representation'. In this sense, it is not our job to second-guess policy choices."*[57]

How far these high ideals are translated into reality requires scrutiny. We find that the radical shift towards meaningful local self–governance which PESA represents has, in fact, not been effectively translated into law at the State level. Even the limited provisions which find adequate reflection in the law are not implemented in their true spirit, and often not at all.[58] Till date, six out of the 10 States with Scheduled Areas have notified PESA Rules.[59]

An additional area of concern is the fact that most State legislations on *Panchayati Raj* Institutions contain several provisions that vest enormous control as well as punitive powers in the hands of the State bureaucracy *qua* the functioning of *Panchayats*. *Panchayati Raj* laws across the country have managed to subvert the notion of local self–governance by providing varying degrees of control and monitoring of these institutions by the district administration.

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[56] *Union of India* v. *Rakesh Kumar* (2010) 4 SCC 50; para 45.

[57] *Ibid*. At para 48.

[58] There are several studies that examine in detail the extent to which the Central PESA Act has been incorporated into State-level legislations in the various Fifth Schedule States. See: *Land and Governance in the Fifth Schedule: An Overview of the Law,* Ministry of Tribal Affairs, Government of India, 2015; Ajay Dandekar and Chitrangada Choudhury, *PESA, Left Wing Extremism and Governance: Concerns and challenges in India's Tribal districts* (Ministry of Rural Development, Government of India); and C R Bijoy, *Policy Brief on Panchayats (Extension to Scheduled Areas) Act, 1996* (UNDP, India, 2012).

[59] The six States which have notified Rules under PESA are Rajasthan, Maharashtra, Gujarat, Andhra Pradesh, Himachal Pradesh and Telangana.

For instance, the *Orissa Gram Panchayat Act, 1964* states that the District Collector or other authorised officer "*shall exercise general powers of inspection, supervision and control over the exercise of powers, discharge of duties and performance of functions by the Gram Panchayat under this Act.*" The State government also has the power to monitor plans, inspect documents and records, inspect any *Panchayat* property or works, take disciplinary action, and even rescind or alter resolutions passed by the *Gram Sabha*. The law empowers the District Collector to suspend or remove the *Sarpanch* and *Naib Sarpanch* (Section 115). In case the *Gram Panchayat*, the elected body of representatives of the *Gram Sabha*, is found to be incompetent to fulfil its duties, it can be dissolved. The law also creates several offences which are punishable with imprisonment or fine. There is, therefore, a sense of criminality that exists even in the provisions of self-governance. The amending provisions extending these laws in terms of PESA do not contain any exemption for *Panchayats* in Scheduled Areas from these provisions, or the command and control hierarchy they perpetuate.

3.4.2 The Idea of Rights under the FRA

The FRA is an Act of transformation — it is both a product of and the bedrock of paradigmatic shifts. It is meant to recognise an occupation in forest land in forest dwelling tribes and other traditional forest dwellers. The Act does not create any new rights in forests and lands, but recognises historically existing claims that forest communities have on their forests. Meant to undo historical injustices, Section 3 of the Act lists out several forest rights, including the right to protect, regenerate, manage and conserve community forest resources, and the right to biodiversity. Overriding all standing laws, Section 4 vests all these rights in forest dwelling communities, meaning thereby, that forests are not only for these communities to live in, but are also theirs to conserve and protect. STs and Other Traditional Forest Dwellers together are granted this recognition. This legislation makes a remarkable departure in law — denying the strict rules of property and eminent domain, it grants to people what is theirs by dint of usufruct and tradition and makes them responsible for forest governance.

The constitutional scheme relating to Scheduled Areas and the statutory scheme under the FRA was considered by a three-judge bench of the Supreme Court in the *Niyamgiri* case.[60] The Court unambiguously upheld the provisions of the FRA and various government circulars issued under it which require prior informed consent of the *Gram Sabha* before their traditional habitats in forest areas are diverted for non-forest purposes. The Court was of the view that:

> *"Of late, we have realised that forests have the best chance to survive if communities participate in their conservation and regeneration measures. The Legislature also has addressed the long standing and genuine felt need of granting a secure and inalienable right to those communities whose right to life depends on right to forests and thereby strengthening the entire conservation regime by giving a permanent stake to the STs dwelling in the forests for generations in symbiotic relationship with the entire ecosystem."*[61]

[60] *Supra*, note 36.

[61] *Supra*, note 36 at para 50.

The legal framework of the Constitution, the FRA and PESA together construct the ideas of rights, power and self-governance for the *Adivasi* and forest dweller. They encompass a legal scenario where forest dwellers have power of and responsibility towards forests and other resources that occur within them. The post-colonial idea of undoing injustice happens via this route. In undoing injustice, the law also recreates their identity — of both individual and community — as residents and protectors of forests. The colonial regime had not only rendered individuals criminal, but had also criminalised entire tribe peoples, like the *Pardhi* Tribe from Madhya Pradesh under their *Criminal Tribes Act, 1871* ("**CTA**") in an attempt to take over forest resource governance.[62] In the new legal universe of the Constitution, FRA and PESA, these colonised identities are recreated and reimagined. Tribal people and communities now become part of a justice system that seeks fairness and, therefore, also acquire a set of rights under the Constitution, to be invoked in any situation of encounter with the criminal justice system. The next section outlines those provisions.

3.5 Constitution and Criminality: Ensuring Fairness and Maintaining Order

The Indian Constitution under Part III on fundamental rights also provides important protections for persons who encounter the criminal justice system as accused persons. These provisions have been developed and advanced through judicial precedents over the last seven decades, to approximate as closely as possible the standards of fair trial in international law. Fundamental rights of protection against any state intervention, each of which we outline here, are available to all *Adivasis* and forest dwellers in the event they encounter the criminal justice system. Whether it is a petty offence of trespass or a charge as serious as sedition, each of these rights are provided as protections against state arbitrariness.

While a detailed discussion of these principles is beyond the scope of this report, it is important to list some of the more important principles which trace their lineage to the fundamental rights chapter of the Indian Constitution. **Article 20** of the Constitution provides certain basic protections, while **Article 22** makes important provisions with regard to arrest, detention and preventive detention.

- *Prohibition of retrospective application of criminal law and penalties:* This fundamental principle of criminal jurisprudence, articulated in **Article 20(1)**, states that a person cannot be prosecuted, convicted or punished for an act which was not defined as a crime at the time the act was committed. This means that if a certain act was previously a crime, but the law under which it was criminalised has been repealed, or if a legislation stating that such act is a crime has been brought into force subsequently, then a person cannot be prosecuted for such a crime. Nor can a punishment be imposed, which was not on the statute books at the time of the act. This principle is of utmost importance while

[62] For a detailed understanding of the historical context, please see *Chapter 2: History: A Witness to the Alienation of the Adivasis.*

analysing how the criminal justice system operates against *Adivasis*. Elsewhere in this report,[63] we examine how *Adivasis* continue to be criminalised for simply existing, long after the CTA has become dead letter, or continue to be treated as encroachers on forest lands under various colonial and post-colonial forest laws, even though the FRA (since 2006) erases their criminality by recognising them as right holders.

- *Prohibition of double jeopardy:* **Article 20(2)** mandates that a person cannot be prosecuted and punished more than once for the same offence. Again, this is important when examining the repeated criminalisation of *Adivasis* and forest dwelling communities, who are arrested, prosecuted, convicted, and sentenced for 'encroaching' on the so-called forest land on which their ancestors have resided, over and over again, and sometimes over and over again through generations, from parent to child to grandchild.

- *Prohibition of self-incrimination:* **Article 20(3)** lays down one of the most important principles, from which a plethora of other legal protections emerge, namely, that a person cannot be forced to be a witness against himself. This prohibition of self-incrimination has been incorporated into criminal law directly through categorical provisions in the *Indian Evidence Act, 1872* ("**IEA**") stating that a confession made to a police officer is inadmissible in a criminal trial.[64] Although this rule has been watered down in several security legislations by allowing confessions to police personnel, there are strict conditionalities for such exceptions to be valid. The forest law regime, however, continues to provide for multiple milestones where a person accused of a forest offence may confess, agree to pay a fine to get the offence compounded, and be discharged from further prosecution, all within the closed ranks of a muscular forest bureaucracy.[65] Even if the case reaches a court of law, multiple 'opportunities' are provided to plead guilty and accept an immediate monetary sentence. The 'accused' *Adivasi* is often compelled to accept this when confronted with the alternative of interminable incarceration without bail during a contested trial. The constitutional right to not self-incriminate in such circumstances seems hollow.

- *Presumption of innocence:* The principle of presumption of innocence flows from the aforesaid right against self-incrimination. It is a foundational precept of the criminal justice edifice that an accused person is presumed innocent, until proven guilty in a criminal trial. The burden of proving such guilt lies on the state through the prosecutor. It is most unfortunate that in recent years we have seen this principle eroded in multiple ways especially in legislations regarding offences against the state.[66] Every challenge to the constitutional

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[63] *See Chapter 4: A Norm of Criminality* and *Chapter 5: Authority, Criminality and the Law in Forests,* subsequently in this report.

[64] See Sections 25 and 26, IEA.

[65] The provisions of the forest law are discussed in greater detail under *Chapter 4: A Norm of Criminality* and *Chapter 5: Authority, Criminality and the Law in Forests.*

[66] For a detailed discussion on law relating to Security, see *Chapter 7: Security Laws and Impunity.*

validity of such provisions has been rebuffed by the argument that these presumptions are rebuttable, and an accused person is always provided with an opportunity to produce evidence that the presumption is unfounded. What is less well known is that presumptions of guilt pervade the definition as well as prosecution of offences under the forest law regime in India. These laws have continued unchallenged through colonial rule, and subsequently for 75 years after independence.

- *Rights of an arrestee:* It is fundamental to Indian criminal jurisprudence that a person who has been arrested must be informed, without delay, about the grounds of the arrest, is entitled to legal representation and consultation of his choice, and his family members will be informed of where he is being detained (**Article 22(1)**). Without delay, and most definitely within 24 hours, the arrestee must be produced before the nearest Judicial Magistrate, who must authorise any further detention (**Article 22(2)**). This is to ensure that the exercise of power by the police has judicial supervision and does not run amok. There is a rich jurisprudence around these provisions, and numerous amendments have been carried out to the Criminal Procedure Code and to Police Manuals across the country to ensure that these protections are actually translated into reality. Most unfortunately, as discussed elsewhere in this report,[67] these advances in the constitutional and statutory law find no reflection in the forest law regime, which continues to operate on principles of arbitrariness and unaccountability put in place by colonial rulers with the object of entrenching coercive control over forest areas, forest resources and forest dwellers.

- *Preventive detention:* Finally, provisions allowing preventive detention of citizens (**Articles 22(3)** and **(4)**), remain among the most disheartening parts of the Indian Constitution. Sweeping powers to the law enforcement machinery to arrest and detain persons in anticipation that they might commit a crime in the future, is anathema in a constitutional democracy based on principles of liberty. Be that as it may, the Constitution does attempt to provide boundaries to circumscribe the power of the state machinery while enacting and enforcing law relating to preventive detention.

The above list is not exhaustive. There are a host of other criminal justice principles developed in Indian law over the years which draw upon the fundamental rights and the constitutional dispensation in order to bring the criminal justice system closer to international standards of fair trial. Jurisprudential advances made by Indian courts have ensured that the protections guaranteed to persons within the criminal justice system are not restricted to the above bare conditions, but rather Article 21 – the Right to Life and Liberty – has been interpreted over the years to include numerous rights and protections which are guided by international principles of fair trial and Indian constitutional morality. While it is true that the criminal justice system in India continues

[67] See *Chapter 5: Authority, Criminality and the Law in Forests.*

to fall short of these standards, when it comes to persons belonging to socially and economically marginalised communities, the very existence of such standards is itself a protection, at least for those who cobble together the necessary legal resources to insist these standards be applied to them. However, when it comes to the forest law architecture, the complete absence of criminal justice standards, to begin with, becomes an insurmountable chasm between the reality of an *Adivasi* or forest dweller's life, and the promise of a democratic Constitution. It is unconscionable that such a chasm continues to exist in the third decade of the 21st century.

A history that never passed: The continuing idea of criminality

Transformative laws and legal reforms may have immense rhetorical power; but they are often unsuccessful in breaking away from the past. History often travels into the future and therefore, a complete paradigm shift is usually not possible. Something similar has been happening in the *Adivasi* discourse of criminality. The legal attitude that we saw in the previous chapter may have begun in the colonial period, but it lives and breathes in new and sophisticated forms in the post-colonial present. While there is obviously no CTA (anymore) that earmarks communities as being criminal by identity, there are other, more sophisticated forms of law that exist intertwined within ideas of welfarism and protectionism.

In the chapters that follow, we undertake a long, deep analysis of the Indian law to observe the spaces where such tendencies exist, and the consequences of such tendencies. Criminalisation is a serious instrument in the hands of the state and therefore, its use *qua Adivasis* and forest dwellers must be closely scrutinised.

Mass gathering in Kalahandi, Odisha 2002

Photo: Shomona Khanna

Chapter 4

A NORM OF CRIMINALITY : *ADIVASIS'* INTERFACE WITH THE CRIMINAL JUSTICE SYSTEM AS ACCUSED PERSONS

4.1 Criminality and Violence in an Unequal World

It is a fundamental law of the land that state cannot deny to any person equality before law or equal protection of laws within the territory of India.[1] Any form of discrimination on the grounds of religion, race, caste, sex or place of birth is prohibited by the Indian Constitution[2] and for the purposes of this report, three of these five elements — race, caste and sex — are crucial. Breaking away from the colonial past, the Indian Constitution guarantees to every person equality and fairness.[3] This lays the foundation of a legal landscape where the state cannot operate or make any law that operates on the assumptions of impurity, inability, disability or criminality of a person for any purposes whatsoever. In a country where inequalities, particularly based on caste, race and sex, are woven into the very fabric of our society, Articles 14 and 15 of the Constitution demand substantial reform of perception. The law needs to be in tune with this foundational principle of our nation and extend equal protection to all, cutting across social prejudices that have been historically reigning the society. The criminal justice system, which is one of the most powerful faces of an all-encompassing state, is endowed with responsibilities of maintaining law and order, while, at the same time, it is bound by the foundations of that law and the means of keeping order. Equal protection of laws does not allow the state to continue with or create new means of presuming a person as being criminal or a potential threat or having a criminal mindset (by habit or culture) merely based on their identity or where they come from, even if such presumptions have been our reality for the longest time. Equal protection of laws is also the hardest to sustain for the legal system in maintaining law and order. But the principle is also indispensable to maintaining the very integrity of that legal system.

The dynamics of a criminal justice system that thrives in notions of equality in a world filled with inequalities are, therefore, both *strange in approach* and *absurd in character*. We call the approach of this system *strange* because, at the center of it, is the notion of violence and principles determining legitimate use of that violence. When violence is an inevitable reality for a justice system to function, it becomes difficult, if not impossible, to realise rights of equality. The system generates not only laws but also law enforcing officers who too are a product of the same society

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[1] Article 14, Indian Constitution states:
"Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

[2] Article 15, Indian Constitution. Clause one of the Article reads:
"Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth:
(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

[3] The discussion under *Chapter 3: A Radical Break from the Past: The Constitution of India and its Interpretations* details the significance and implication of having a constitution in post-colonial India.

with all its glorified beliefs and prejudices. Discrimination is, after all, a reality that one cannot oversee. It is then *strange* that a system that strives to achieve equality and order is based on the use and misuse of violence. Violence and state become inseparable units that interact in complex dimensions of power and are hence unable to maintain an ideal of equality. We also call the character of a criminal justice system *absurd* when the state endowed with powers to use legitimate violence is simply expected to use such power wisely. In fact, there are ongoing processes that maintain state virility in the use of violence. An entire array of penal laws is framed outlining powers along with a few limitations on the state in the process of use of that violence. Such a criminal justice system operating in a state burdened with colonial history of oppression and having law enforcing officers that are a product of that history is inherently problematic. One cannot simply presume that Articles 14 and 15 of the Indian Constitution are met in letter and spirit; the reports from forests will not have us believe this. The history of criminalising tribes does not just continue in the post-colonial period, but also seemingly finds subtle, sophisticated ways of survival. This chapter investigates the assumptions made by the criminal justice system in engaging with people belonging to *Adivasi* and other forested communities. It dives into questions of discrimination under Article 14 and 15 of the Constitution and whether the system (which is otherwise committed to maintaining peace and security of the nation) chooses to treat the *Adivasi* population any differently.

The reason that the system needs to be critically examined is because *Adivasi* experiences are stirred with experiences of arrests, detentions, police firings and court hearings. For the general public, these experiences, or for that matter any engagement with the criminal justice system maybe an anomaly or a matter of embarrassment, but for the *Adivasi*, such engagement is a mundane, everyday reality; a rather distinct experience that should not occur in a world ruled by Article 14. Tribes from the forests are generally seen as a threat to development, civilisation, the State and to the nation. As this report was being written, Hidme Markam, an *Adivasi* Gond from Dantewada's Burgum village in the State of Chhattisgarh was arrested at an event organised to celebrate Women's Day on March 8, 2021.[4] The two-day program to mark International Women's Day was triggered by deaths of four women who had had encounters with the criminal justice system.[5] Markam joined over 6,000 other *Adivasis* in prisons and was denied bail. Her arrest is the latest episode in a long-running conflict in Chhattisgarh, a State which has close to a fifth of India's iron ore and coal deposits. Back in 2019, the Chhattisgarh government had identified overrepresentation of *Adivasis* in prisons and had appointed a committee headed by Justice A K Patnaik to look into criminal cases involving more than 23,000 tribal people.[6] Under the terms

[4] "India: Prominent Indigenous Activist Violently Arrested During International Women's Day Event," *Survival*, March 16, 2021; available at: *https://www.survivalinternational.org/news/12544.*

[5] Malini Subramaniam, "Four Deaths and an Arrest Mark Adivasi Women's Struggles with Bastar Police," *Scroll*, Autumn 2021; available at: *https://scroll.in/article/990264/four-deaths-and-an-arrest-mark-adivasi-womens-struggles-with-bastar-police.*

[6] Seema Chishti, "Panel Set to Review Cases against 23,000 Tribals in Chhattisgarh Naxal Belt," *The Indian Express*, October 16, 2019; available at: *https://indianexpress.com/article/india/panel-set-to-review-cases-against-23000-tribals-in-chhattisgarh-naxal-belt-6070978/.*

of reference, this Committee was required to review cases registered under statutes like the *Indian Penal Code, 1860* ("**IPC**"); *Unlawful Activities (Prevention) Act, 1967* ("**UAPA**"); *National Security Act, 1980* ("**NSA**"); and the *Chhattisgarh Excise Act, 1915*, indicating that the legal framework involved in putting these people under trial is wider than the usual penal statutes.

Arrest and First Information Report ("**FIR**") are not the only ways in which the system can be invoked. There are a few other ways in which the criminal justice system engages with forest communities. Perceptions are built around the system that may not necessarily involve formal criminal proceedings, but nevertheless render some identities criminal based on their race. For example, in 2017, the Gujarat Tribal Research and Training Institute gave anthropological descriptions of tribes present in the State. Although the text has now been altered, back in November 2017, it described the *Gond* Tribe — one of the largest in the State — as "black, alcoholic, and criminal."[7] Screenshots of the website from that time indicate that their identity was reduced to these three realities — people of black skin, with inordinate thirst for liquor and hence, prone to display criminal behaviour. One of the sections meaning to describe the forms of communications used by the tribe stated that the tribe also uses mobile phones for *"many purposes-giving information, getting information, finding jobs, finding husband/wife, information about illness, place of treatment, about accidents, collection of relatives, caste people and for crime/criminal strategies."*[8] To believe that a communication device would be used for making criminal strategies, alongside being used for getting and giving information, simply because that device is being used by a particular tribe is nothing but an absurd compound of colonial stereotyping and modernity. In sync with similar perception and in the name of maintaining public order, Sections 107 and 109 of the *Code of Criminal Procedure, 1973* ("**CrPC**") are used in Madhya Pradesh to target people belonging to the *Paridhi* tribe, a former criminal tribe under the colonial *Criminal Tribes Act, 1871* ("**CTA**"). Both these provisions set the procedure for maintaining public peace and order. In 2018, reports emerging from Madhya Pradesh indicated that members of the *Pardhi* community were served notices under these provisions of CrPC every year around the festival of Holi and around every election.[9] Public notices indicating that these people have been previously involved in criminal activities and warning that they must press pause on any such ongoing illegal activities are quite common.[10] In 2016, following a liquor ban in Bihar, many people from *Dalit* and *Adivasi* backgrounds were arrested under the prohibition law. A study conducted by the Tata Institute of Social Science Criminal Justice Fellowship Program of undertrial prisoners in Bihar between

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[7] Aditya Menon, "Shocking! Gujarat Gov Body Calls Bhil Tribals 'Criminals', 'Alchoholics' and 'Black'", *Catch News*, November 22, 2017; available at: *http://www.catchnews.com/india-news/shocking-gujarat-govt-body-calls-bhil-tribals-criminals-alcoholics-black-90358.html*.

[8] *Ibid.*

[9] Ameya Bokil and Nikita Sonavane, "Why Charan Singh Bolts His House from Inside and Out," *Article 14*, May 29, 2020; available at: *https://www.article-14.com/post/why-charan-singh-bolts-his-house-from-inside-and-out-before-he-sleeps*.

[10] *Ibid.*

2016 and 2019 indicated that in all the 1.5 lakh arrests made following the liquor ban, marginalised people formed 88 per cent of the total number.[11] *Adivasi* communities formed a small percentage of those arrested (6.8 per cent), but their representation was six times more than their share of 1.3 per cent of Bihar's overall population.

Now, there are two ways this issue can be approached: one is, of course, to carelessly believe that as a community, the *Adivasi* is a notorious character and continues to be a threat even if the colonial idea of criminal tribes is defunct. The reason *Adivasi* community finds itself overrepresented in police lock-ups and prisons is because they mess with the peace and security of the society and tend to be against development objectives of the state. The other, a rather difficult perception, is to undertake a substantive analysis of the law and *Adivasi* experiences with the law so as to understand why is it that the *Adivasi* engagement and experience with the legal system is so different from the rest of the population. The latter is difficult, for it demands a recalibration of all our standing ideologies and means of gathering knowledge. It demands from us to ask whether there is, in our norm and practice, an inherent bias, that stands hidden behind these assumptions. Or are these calls for justice and fairness the problem of a naïve, over-sympathetic mind, which does not understand the seriousness of running a peaceful nation-state? And which nation-state are we actually speaking about when we are trying to maintain its peace and security? In a country as diverse in identities as ours, we need to categorically ask these questions. In this chapter, we give the latter approach a go, analyse the diverse laws of India — some blatantly criminal provisions along with certain others that are not so stark and examine whether fundamental constitutional moralities materialise in them. This would require us to undergo a general assessment of the law and contextualise them within tribal spaces.

4.2 Mapping the Process of Criminalisation

Mapping the bursts of criminalisation in different States, contexts and time zones is a tricky task. Some may even say that it would be an exercise without an end or objective. But the Indian Constitution keeps no place for law to discriminate in any manner whatsoever. Hence, undertaking this process becomes compelling. In order to understand whether there exists a bias within criminal laws and the justice system against *Adivasis* and forest dwellers, we need to first map the myriad laws that are invoked to prosecute the accused in question belonging to a tribal community, or even when the formal system may not be invoked but perceptions materialise a process of criminalisation for the same community. Reports from forests narrating stories of conflict often involve invocation of the penal statutes and forest regulatory laws — after all, general penal statutes are present in most criminal procedures and

[11] Praveen Kumar and Vijay Raghavan, "Undertrial Prisoners in Bihar: A Study of Liquor Ban Arrests," *Economic and Political Weekly* 55, no. 7, February 15, 2020; available at: *https://www.epw.in/journal/2020/7/insight/undertrial-prisoners-bihar.html*.

laws of the forest specifically operate in the regions where most tribal population can be found. But that is not all. From laws that create forest offences to the ones that are seemingly straightforward tax legislations, along with the ones that seek to protect the environment and wildlife, all are regularly invoked when it comes to penalising an *Adivasi*. Some of them are well defined offences, like the ones on encroachment of forest land and illegal transportation of forest produce, while others pertain to mere disobedience of government orders. At the Central and State level (in States having Scheduled Areas) the number of laws that create offences and procedures to operate them are over 150; the list however, is not exhaustive but only representative and appears under **Annexure A** (*List of Legislations Criminalising Adivasis*) to this report.

This list of legislations represents a scenario where the legal regime creates procedures, presumptions, and perceptions for dealing in areas of conflict. They create offences, establish processes, and empower officers to prosecute those offences. In all these legislations, two commonalities are noted: first, that their basic objective is to control criminal activities and ensure that governance in forests is well within the contours of the law. Second, that they encounter forest dwellers and *Adivasi* communities on a regular basis. As far as these legislations apply in forest areas, their engagement with people who live therein is inevitable. So is their involvement with political economy of the nation as these areas are hotbeds of natural resources. In order to maintain law and order therefore these legislations, therefore, regulate activities like collecting forest produce, using forest resources, farming, production and consumption of substances and the like, strictly. The problem is that a lot of these activities are customary to *Adivasi* existence. Further, due to the rich presence of resources in these areas, interference from the State and other private entities is massive leading to greater odds of conflict. The Bastar region is a perfect example of this: the region — the size of Kerala with a per capita income a third of the national average, is highly militarised and densely forested, where marginalised communities, like Markam's, struggle for the most basic constitutional rights. Here come alive Security Laws, penal offences and other legislations that regulate para-military forces, which makes for the detailed discussion under Chapter 7 of this report. Laws relating to development and acquisition of property also come into play and these have been elaborated upon in Chapter 6. Categories of laws, as they undertake the process of criminalisation, look something like this:

1. General Criminal Laws and Procedure Codes
2. Laws relating to Forests and Forest Offences
3. Laws regulating access, control and transfer of Minor Forest Produce
4. Laws of Property
5. Laws creating offences of Habituality, Vagrancy and Beggary
6. Laws seeking to Protect Wildlife and the Environment
7. Laws maintaining Public Safety and controlling Para-military Forces
8. Preventive Detention Laws
9. Laws seeking to obtain Developmental Goals
10. Taxation Laws

Four categories from this list are blatant in their approach towards criminalisation. Therefore, this chapter would focus on them. 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. Corresponding to these categories are four tables in Annexures B to E to this report, which assess these laws. This assessment is conducted on a range of standards i.e., who can be prosecuted under the Acts, what are the offences created and what executive and judicial processes are required to be followed in operating those laws. Tables under the Annexures to this report enlist a series of provisions that occur and operate in various States including in Madhya Pradesh and Odisha, which are representative of the legal scenario. A thorough, systematic study of the law in all States could not be conducted within the time frame in which this report was written. It is, however, hoped that this research would be taken forward. For, given the escalations in arrest numbers and conflicts in *Adivasi* regions, the time consumed in conducting a systematic analysis would have defeated the purpose of this report.

The remaining categories of laws have been discussed throughout this report under various chapters.

In the sections that follow, we pick each category, one at a time, to assess their nature and mode of operation. In order to study the materialisation of Article 14 and investigating a bias, it is necessary that we study these different legislations and see what they intend to do and for whom. We need to see whether the bias is inherent within the legal framework or does it materialise only when the law is implemented. Is it that the problem is only with implementing the law, as many would argue, and that the law is fair in its making? Or is there a place where social perception, legal language and legal procedure interact with one another to together produce discrimination? The problems of implementation of criminal laws are well documented.[12] Here, we pursue a deeper burden, to see whether discrimination exists in the very letter of the law.

In attending to this burden, we would first discuss **Annexure B** (*Legislations creating Offences of Beggary, Habituality and Vagrancy*) followed by **Annexure C** (*Legislations creating Offences of Property*). It is not only that these two categories of law continue forms of colonial oppression in the forests, but it is also that these laws have been a part of the discourse in criminal justice system for some time now. Therefore, a fair amount of sociological and legal research exists that has been furthered in this report. These two categories of laws have invoked the criminal justice system time and again; meaning thereby that the formal criminal justice system is engaged in the

[12] *See* Rahul Singh, *Criminal Justice in the Shadow of Caste: Study on Discrimination against Dalit and Adivasi Prisoners and Victims of Police Excess* (National Dalit Movement for Justice, 2018). Full report is available at: *http://www.annihilatecaste.in/uploads/downloads/data_190118030229_21000.pdf*.

prosecution of people who come within the aegis of these laws. Studies describing the arrests and violence used in these scenarios are a plenty.

Our next category, captured under **Annexure D** (*Legislations seeking to Protect Wildlife, Other Animals and the Environment*), is rather new and does not involve the formal justice system as much. Instead, it is more involved in everyday acts of violence and harassment by forest officials that are hardly documented; these are instances that usually go unreported. There have been a few instances where high militarisation and acts of forest brutalities have been reported, but there is hardly a study that systematically looks into these offences.

The last category falls under **Annexure E** (*Legislations creating Offences of Forest Produce Purchase, Transportation, Procurement and Sale*). Our regular manner of knowledge creation and dissemination that demands a certain level of scientific accuracy will be insufficient to study these laws. Our systems of knowledge only allow us to study the formal, written aspects of a problem. What happens, in reality, inside a forest can only be accumulated through experiences, narrated by word. However, this does not mean that these laws be left out for lack of sufficient evidence. Rather, we must initiate a study where experiences of tribal and forested communities can find a place in our discourses, and we can rethink our models of discourse. Therefore, these laws find their part in this chapter and seek further research.

4.3 Legislations Creating Offences of Beggary, Habituality and Vagrancy

One of the foremost things that a criminal justice system does, rather inherently, is to differentiate an offender of law from a non-offender. Not only is this a massive responsibility, but also one that empowers the system to create narratives of criminality; narratives that are blended with the idea of maintaining security and order. To keep the society secure, the system renders it necessary to identify possible threats and nail them before they cause any trouble. Therefore invoked are laws regulating habitual criminal behaviour. Born and bred in coloniality, these laws continue their stint in post-colonial India with the same objective and the same target as they were founded with a hundred years ago. Everyday policing, as a report from Bhopal, Madhya Prdesh narrates,[13] is not uncommon for marginalised communities, particularly those from denotified and nomadic tribal communities. A few stories from the State of Madhya Pradesh that give a glimpse of use of the laws regulating habitual offenders are shared in the Box below.

[13] Nikita Sonavane and Ameya Bokil, "How Poverty-Struck Tribals Become 'Habitual Offenders,'" *Article 14*, May 28, 2020; available at: *https://www.article-14.com/post/born-a-criminal-how-poverty-struck-tribals-become-habitual-offenders.*

MAKING OF THE 'HABITUAL OFFENDER'[14]

Story 1: "Entangled in a Pattern..."

"Santosh (name changed), 21, from the Adivasi Gond tribe, was arrested by Bhopal police on suspicion of stealing bells from a temple in the city in April 2019. He spent seven months in jail before the Madhya Pradesh High Court granted him bail in November 2019.

It was only the beginning of Santosh's problems. Even after he was released on bail, various police stations in Bhopal continued to hound him. In December 2019, Santosh was picked up again, this time by the police from Govindpura police station in Bhopal and arrested on suspicion of being involved in a theft.

*Without sufficient grounds to arrest him, the police then sent Santosh's case to the office of the Sub-Divisional Magistrate ("**SDM**"), with a recommendation that it carry out proceedings against him under a section of the law that empowers magistrates to require so-called "habitual offenders" to provide "security"— a fixed deposit, land title papers or title documents for any other assets — to ensure "good behaviour".*

It was at the SDM office that Santosh met an advocate who promised his release for a certain fee — after all, Santosh had a prior record of cases. He finally left after the magistrate made him execute a bond by providing a monetary guarantee promising his 'good behaviour'. But there was, indelibly, another record of his criminality.

Two days after he was released on bail, Santosh was arrested again, this time for the illegal possession of a knife under the Arms Act, which criminalises even the possession of certain knives and is among the easiest offences to charge a person with. Police claimed to have received a tip off from an informant. In Bhopal, it is hardly uncommon to see people picked up without cause by the police, subjected to extortion and charged under this section. One FIR is identical to the next one, with striking similarities as to the length of the knife and the role of the police informant."

Story 2: "Fitting the Description..."

"After a rape near Habibganj Station in Bhopal where the police had initially refused to register an FIR, dozens of scrap dealers, all Pardhi men, who fit the description of the perpetrator were rounded up. They were detained illegally for a day before new people were identified and accused. Following this, the police then moved the 20-odd Pardhi men in groups of four to different police stations registering FIRs against them for belonging to a gang of thieves (Section 401, IPC, 1860). The trial in these cases is still underway two-and-a-half years later."

[14] *Ibid.* Select excerpts encapsulated from the article.

Story 3: "Moving in Circles..."

"In Kota, Rajasthan, 60-year-old Rajkumar (name changed), from the Pardhi tribe, was arrested for allegedly hunting 108 teetars (partridges). A decade later, he continues to travel to Rajasthan from Sehore in Madhya Pradesh to attend hearings as the case drags on.

"When I was arrested, the other Pardhi men with me ran away," he said in Hindi. "I was in jail for a month before being granted bail. I have been travelling to Rajasthan since to attend all the hearings. The lawyer charges about Rs 400-500 as fees for each hearing and my conveyance comes up to Rs 2,000."[15]

Without clearly defining a 'habitual criminal', Section 110, CrPC provides that the Executive Magistrate, on receiving information that a habitual offender is within his local jurisdiction, must seek security of good behaviour from them.[16] Without getting into the details of what or who constitutes the definition of a 'habitual offender', the provision presumes that the person who qualifies for being one is a threat to public safety. The process of identifying and defining who would constitute this category has been left to the States. This appears as the first standard of analysis in the tabulations under Annexures B to E — the row titled *'Who can be Prosecuted under the Act'* exemplifies the variety of definitions and the range of criteria accorded by the States. That person could be by habit a robber, thief, breacher of peace or even be *so desperate and dangerous that his being at large without security is hazardous to the community.*

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[15] *Supra,* note 13.

[16] Section 110, CrPC, reads as follows:

"***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,

(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 Funds 2 and Family Pension Fund Act, 1952; 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 or (52 of 1962);

(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 as 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."

The State laws follow up on this idea and create a framework where any person who is identified as such must be legally restricted from roaming around freely in public, and institutionalised, if need be so. Most of these legislations are also titled accordingly. Annexure B tabulating the *'Legislations creating Offences of Beggary, Habituality and Vagrancy'*[17] lays out laws from various States including Andhra Pradesh, Madhya Pradesh and Odisha that criminalise certain activities and existences.

The *Madhya Bharat Vagrants, Habitual Offenders and Criminals (Restriction and Settlement) Act, 1952* ("**1952 Act**") under Section 2(4) defines a "habitual criminal" as:

> **"Section 2(4):** *"Habitual criminal" means a person who before or after the commencement of this Act has been sentenced to a substantive term of imprisonment, such sentence not having been set aside in appeal or revision, on not less than three occasions for one or another of the offences under the Indian Penal Code set forth in the schedule, each of the subsequent sentences having been passed in respect of an offence committed after the passing of the sentence on the previous occasion;*
>
> *Explanation - The passing of an order requiring a person to give security for good behaviour with reference to section 110 of the Code of Criminal Procedure, 1898, shall be deemed to amount to the passing of a sentence of substantive imprisonment within the meaning of this clause."*

The Police and Prison Regulations take this definition a little further by criminalising certain tribal communities by their very existence. As per the 1952 Act, criminal history of the individual matters definitely. Three convictions, to be precise, would qualify a person to be a habitual offender. Rule 411 of the *Madhya Pradesh Jail Manual, 1987* furthers this objective and categorises all convicted persons as either habitual or casual and classifies 'habitual criminals' as follows:

> ***"Rule 411:***
> *(i) Any person convicted of an offence whose previous conviction, or convictions under Chapters XII, XVI, XVII or XVIII of the Indian Penal Code taken by themselves or with the facts of the present case show that he habitually commits an offence or offences punishable under any or all of those chapters;*
> *(ii) Any person committed to or detained in prison under section 123 (read with section 109 or 110) of the Code of Criminal Procedure;*
> *(iii) Any person convicted of any of the offences specified in (i) above when it appears from the facts of the case. Even although no previous conviction has been proved that he is by habit a member of a gang of dacoits, or of thieves or a dealer in slaves or in stolen property.*
> *(iv) Any member of the denotified tribe subject to the discretion of the state government concerned*
> *(v) Any person convicted by a Court or tribunal acting outside India under general or special authority of the government of India of an offence that should have rendered him liable to be classified as a habitual criminal if he had been convicted by a court established in India."*

Among other provisions are those where even though no previous conviction has been proved against the accused, it may *appear from the facts of the case* that the

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[17] See *Annexure B* to this report.

said *person is in the habit of committing an offence*, the presence of sub-clause (iv) in Rule 411 is of particular significance. The tribes that were denotified and decriminalised in post-colonial independent India ruled by Article 14 of the Constitution, can legally and effectively be rendered not only offenders of law, but as *habitual criminals* i.e., those who, by their very nature, are in a *habit* of being at the wrong side of law and therefore, must be kept restricted, surveyed and in constant fear of the state, for their *habit* cannot be helped otherwise.

It is also pertinent to note that law-making by the executive, such as in the case of Madhya Pradesh, is a limited power of the State. Creating new offences or expanding on legislatively defined criminal offences is beyond the power of the executive. If, however, one shifts their attention to the second column in the table and observes the row on *'Offences created and their Nature'*, one would find that these legislations are not merely building a framework of restriction for the habitually criminal, but also creating fresh offences. A disobedience of an order passed under the Act, like in Madhya Pradesh or Gujarat or Himachal Pradesh, would constitute a fresh offence. For the already habitual criminal, perhaps, another trial or conviction is not new. And in each of these States, a police officer has the power to arrest without warrant.[18] To be an accused, therefore, is not a difficult task for an *Adivasi*. You are either already one by your very existence or you can easily become one, for the police has unaccounted power to arrest you on contravening an order you perhaps were not even aware of. Or there's another way. If your criminal history or previous convictions do not suffice to be proof of your habituality, the prison or police authorities should just believe that it so appears from the facts of the case you are in for now. And that's not difficult to achieve, is it?

Similar accounts of definitions of habitual offenders can be observed in Andhra Pradesh, Odisha, Himachal Pradesh and others.

Institutionalisation and the Corresponding Executive Processes

One of the objectives of these category of laws is to settle habitual offenders and beggars. The legislations create a range of powers and processes to identify and institutionalise people. The State governments are required to establish corrective or reformative settlements and notify a list of habitual offenders who would be kept in those establishments. Once a person has been so notified by the State or district magistrate, their movements, in most cases, are under the constant watch of the police. One extremely interesting thing about these provisions is that the burden of proving that an order of restriction or institutionalisation should not be passed against them is on the accused person themselves. Continuing our analysis of Madhya Pradesh, the 1952 Act under Sections 4 and 17(2) states that:

> ***"Section 4. Procedure in making Order of Restriction:*** *Whenever a Magistrate acting under section 3 deems it necessary to require a person to show cause why an order of restriction should not be made against him, he shall follow, as nearly as may be, the*

[18] *Ibid.*

procedure laid down in sections 112, 113, 114, 115 and 117 of the Code for an order requiring security for good behaviour.

> ***Section 17(2). Power to establish settlement and place habitual criminals therein:*** *Government or the District Magistrate, if authorised by Government in this behalf, may in lieu of an order of restriction made against any person under this Act make an order directing such a person to be placed in an appropriate settlement established under sub-section (1) for a period not exceeding the period for which the order of restriction has been made:*
> *Provided that in the case of a habitual criminal this period may be up to seven years."*

So, a person who probably has a history of being a criminal or just appears to be a criminal to the government, can be restricted by an order made by a magistrate. Further, if such an order of restriction has been passed against a person, they can be placed in a settlement for up to seven years. This, of course, is in addition to any imprisonment that a person may already have undergone as an undertrial or a convict on any previous occasion. Or if a person belongs to a denotified tribe, they could simply be identified as a habitual criminal and put into a corrective settlement for seven years. Under the *Himachal Pradesh Habitual Offenders Act, 1969* ("**1969 Act**") this period is regarded as one of 'training' which can be anywhere between two and five years. This period of training can be enhanced to a punishment of up to 10 years or even life. Section 19, 1969 Act states that:

> ***"Section 19. Enhanced punishment for certain previously convicted persons:*** *(1) Whoever, being a person in respect of whom a direction has been made under section 11 or section 15, and having been convicted of any of the scheduled offences falling under Part I of the schedule, is convicted of the same or of any other scheduled offence falling in that part shall, on conviction, be punished with imprisonment for life or with imprisonment for a term which may extend to ten years."*

The Schedule thereunder includes a very wide range of offences from a simple theft or dealing in stolen property to an attempt to murder. Sections 11 and 15, 1969 Act are orders of restriction of movement or to receive corrective treatment. Both the orders can be given via an executive process without any judicial interference as is clear from the Himachal Pradesh entry in under the column titled *'Quasi-Judicial Process'* So, effectively, a habitual offender could be sent in for life imprisonment for an offence as simple as causing hurt to a public servant on duty.[19] Similar provisions of enhancing punishments of habitual offenders and vagrants are provided in the 1952 Act (of Madhya Pradesh).[20] In Himachal Pradesh, if a person against whom order of restriction or correction has been passed is even found in circumstances that are *suspicious*, they can be imprisoned for up to three years and pay a fine of up to Rs.

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[19] Schedule to Section 2(j), 1969 Act lists Section 332, IPC (*Voluntarily causing hurt to deter public servant from his duty*) as an offence.

[20] Section 23, 1952 Act states that:
"***23. Punishment for offences***: *(1) Whoever, being a person against whom an order of restriction or an order of settlement has been made and having been convicted of any of the offences under the Indian Penal Code specified in the Schedule, is convicted of the same or of any other offence specified in the Schedule shall, on conviction be punishable with transportation for life, or with imprisonment of either description for a term which may extend to ten years.*"

1,000. The determination of the definition, description and content of such suspicious circumstances is (rather conveniently) left to the police officers who arrest the person. Section 20, 1969 Act reads as follows:

> ***"Section 20. Punishment for certain registered offenders found under suspicious circumstances.*** *Whoever, being a person in respect of whom a direction has been made under section 11 or section 15, is found in any place under such circumstances as to satisfy the court, (a) that he was about to commit, or aid in the commission of, theft or robbery, or (b) that he was making preparation for committing theft or robbery, shall, on conviction, be punished with imprisonment for a term which may extend to three years, and shall also be liable to a fine which may extend to one thousand rupees."*

The stories narrated at the beginning of this section and the legal provisions discussed thereafter are not disjunct, but birth a complex and yet very simple form of discrimination. The letter of law represents a deep-seated perception — that certain communities have been, and will forever be, in conflict with law and society. The rhetoric of law and fable of security trumps the rights and existence of a few people. Therefore, they must be kept under serious scrutiny, for providing them with equal rights of autonomy and movement would necessarily render the society unstable. Now, to have to say that there are criminals who are habitual is one thing, but to say that certain communities are more prone to being habitually criminal, is an entirely different matter. That is a violation of Article 14, plain and square. Both within the letter of law and its operation, there exists a bias, which allows the system to target some communities and maintain their rhetoric of security. This is nothing but an infringement of our most basic constitutional value of equality.

4.4 Laws Creating Offences of Property

> *"The promise of free land at taxpayers' cost in place of a jhuggi … is a proposal which attracts land grabbers. Rewarding an encroacher on public land with a free alternate site is like giving a reward to a pickpocket."*[21]

Responding to a Public Interest Litigation ("**PIL**") in 2000, the Supreme Court of India, while making this observation, ordered the Delhi government to remove slums and unauthorised colonies from public land. The moral claim of governmental rationality has been reiterated in this manner in a number of other judgements.[22] It has also been vehemently criticised for its rather inhuman approach to socio-economic problems that are structural and have been woven into discourse by the development paradigm.[23] When people are legally identified as encroachers and equated with pickpockets for laying claim on something that does not rightfully belong to them, the temptation is to treat them as outlaws, who do not deserve the sympathy or mind

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[21] Judgment on the Public Interest Litigation of *Almitra H Patel and Another* v. *Union of India and Others* WP (Civil) No. 888 of 1996; decided on February 15, 2000. Cited in *How Many Errors Does Time Have Patience For? Industrial Closures and Slum Demolitions in Delhi* (Delhi Janwadi Adhikar Manch, Delhi, 2000) at 21.

[22] For a thorough perusal of the legal right to housing as has been discussed and deliberated by Indian courts, please see: Anindita Mukerjee, *The Legal Right to Housing in India* (Cambridge University Press, United Kingdom, 2019).

[23] Nivedita Menon and Aditya Nigam, *Power and Contestation: India since 1989* (Fernwood Publishing Limited, London, 2007).

space of the populace. The inherent presumptions of law and society are, therefore, bound to be questioned and critiqued.

There is, however, another fundamental burden that the critique must bear — why is it that rewarding a pickpocket is considered the lowest frame of reference in the legal scheme? Does it not matter who the pickpocket is and what structures have been framed around them? If a community or a group of people have been living inside a forest that now stands declared as a Protected Area, their residence address is also now deemed criminal. Or by the same logic, a bunch of people who have been living in a slum that the government declares illegal then become criminals. We often tend to presume the legitimacy of such a system that works in favour of maintaining peace in a modern nation state. What we do not do, however, is to understand how or why such criminality is created and reasserted repeatedly.

Similar distinctions between owners and encroachers have been made by constitutional courts for forested communities. The underlying presumption is that forest dwellers occupying forest land in absence of established title are 'encroachers', meaning thereby that they are criminals whose crime must be set right by drives of evictions. The courts have indicated the need for evictions in 2002 and 2009,[24] establishing a notion of encroachment criminality.

On February 13, 2019, the Supreme Court, yet again, reasserted criminality in the holding of land. It issued an order for eviction of those whose claims under *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* ("**FRA**") have been rejected with finality.[25] Although the order was soon put on hold on February 28, 2019, this Order of the Court had enormous consequences. In Saharanpur, Uttar Pradesh, the SDM issued eviction notices against 99 villages in the State.[26] In Badnapur Forest Area of Madhya Pradesh, 128 claims from village Davali Kala were pending. After the Sub-Divisional Level Committee rejected these claims, they were pending for re-examination. On July 9, 2019, following the Court Order, forest officials arrived with 30 – 40 vehicles to carry out evictions, leading to opening of fire and seriously injuring five forest dwellers.[27] Similar reporting was noticed from Karnataka, Telangana and other States.[28]

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[24] *T N Godavarman Thirumalpad* v. *Union of India* (2002) 9 SCC 502. This was done through Order dated May 7, 2002 in IA No. 502; and another Order dated October 29, 2002 in IA No. 276 with IA Nos. 413, 437, 453 and 454. See also *Nature Lovers Movement* v. *State of Kerala and Others* (2009) 5 SCC 373.

[25] For a detailed discussion on the law of evictions, see Radhika Chitkara and Khushboo Pareek, "The Right to Land: A Study on Legality of Forced Evicitons", *NLUD Journal of Legal Studies*, Vol II at 69-88.

[26] Ishan Kukreti, "UP Forest Dept Cites Stayed SC Order for Eviction," *Down to Earth*, June 17, 2019; available at: *https://www.downtoearth.org.in/news/forests/up-forest-dept-cites-stayed-sc-order-for-eviction-65116.*

[27] ANI, "Magisterial Enquiry Ordered in Firing on Tribals in Madhya Pradesh," *Business Standard India*, July 13, 2019; available at: *https://www.business-standard.com/article/news-ani/magisterial-enquiry-ordered-in-firing-on-tribals-in-madhya-pradesh-119071300901_1.html.*

[28] *Supra*, note 26. See also "Telangana HC Directs State to Not Evict Tribals from Mahabubabad Forests," *The New Indian Express,* June 21, 2019; available at: *https://www.newindianexpress.com/states/telangana/2019/jun/21/hc-directs-telangana-government-to-not-evict-tribals-from-mahabubabad-forests-1993167.html.*

Encroachment and criminality, therefore, are innate to a legal system such as ours, which believes that any right that is not formally recognised is illegal. Powers of identifying encroachment and providing for evictions range far and wide in the legal landscape of property. When the state identifies forest land as property belonging to it, these provisions are applied to evict forest dwellers too, pushing them, yet again, to the margins of law. On November 12, 2020, for example, the office of the Divisional Forest Officer, Kehmil Forest Division, Kralpora in Jammu Kashmir, put out a notice under Section 4(1) of *Public Premises (Eviction of Unauthorised Occupants) Act, 1971* ("**1971 Act**") to evict people from occupying forest land.[29]

The tabulation under Annexure C analyses legislations that recognise public property and declare any kind of interference with that property as an offence. Section 4(1), 1971 Act, under which the eviction notices were issued, reads as follows:

> ***"4. Issue of notice to show cause against order of eviction:***
> *(1) If the estate officer is of opinion that any persons are in unauthorised occupation of any public premises and that they should be evicted, the estate officer shall issue in the manner hereinafter provided a notice in writing calling upon all persons concerned to show cause why an order of eviction should not be made."*

Another law, that has been used in this case of Jammu and Kashmir is the *Indian Forest Act, 1927* ("**IFA**"). Both the 1971 Act and the IFA put together procedures for identifying encroachers in forests and evicting them. Both Acts empower different officers, estate officer and the forest officer not below the rank of a divisional forest officer, to evict people as they deem fit. Although provisions of appeal exist under both laws, the fact that strong executive processes have been put in place to evict people lays down a consistent threat to the forest dwelling communities who are continuing to struggle for their basic rights. *Table 3* hereunder contains a brief analysis of the provisions of these two laws.

Following the same perception, the *Orissa Prevention of Land Encroachment Act, 1972* ("**1972 Act**") seeks to protect property of the government from any form of encroachment.[30] It declares a range of lands as the property of the government, like any land that belongs to a local authority and is intended to be used for a public purpose, or the land is held under *Raiyatwari* tenure. In case any person is found to be in occupation of land that is public property as declared by the Act, they are required to pay a fine as per the *Tahsildar's* description and can also be summarily evicted by the *Tahsildar*.

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[29] Office of the Divisional Forest Officer, Kehmil Forest Division, Kralpora "*Notice under Sub-Section (1) of Section 4 of Public Premises (Eviction of Unauthorized Occupants) Act 1971*" dated January 12, 2020.

[30] The preamble to the 1972 Act states that this is "*an act to provide for prevention of unauthorised occupation of lands which are the property of government*".

Table 3: Comparative Analysis of the 1971 Act and IFA (as applicable to Jammu and Kashmir)

The Public Premises (Eviction of Unauthorised Occupants) Act, 1971	**Indian Forest Act, 1927** (Insertion of Section 79A to the IFA through an order called the *Jammu and Kashmir Reorganisation (Adaptation of Central Laws) Order, 2020*
Who is an encroacher?	
Any person in an occupation of any public premises without any authority. It also includes such occupation where the authority to occupy has expired. (Section 2(g))	Any person who unauthorisedly takes or remains in possession of any land in areas constituted as Reserved or Protected Forests under Sections 20 or 29 of the Act. (Section 79A(1))
Who is the authorised authority to evict?	
Estate Officer	Forest Officer not below the rank of Divisional Forest Officer (Section 79A(1))
Process of Eviction	
1. Issue of Notice ▪ *When the Estate Officer has received information regarding unauthorised occupation* (Section 4(1)) If the Estate Officer has information that any person is in unauthorised occupation of any public premises, then the said officer shall within seven working days from the date of receipt of the information issue a show cause notice to person on why an order of eviction should not be made. ▪ *When the Estate Officer knows about unauthorised occupation* (Section 4(1A)) If the Estate Officer believes that any person is in unauthorised occupation of the public premises, the officer shall issue notice asking the person to show cause why an order of eviction should not be made.	1. Issue of Notice No order of ejectment under this sub section shall be passed unless a reasonable opportunity to show cause why an order should not be passed is not granted. (Proviso to Section 79A(1)) 2. Eviction The person can be summarily ejected and any crop standing on the land or any building constructed if not removed by the person within stipulated time shall be liable to forfeiture. (Section 79A(2))
Offences and Penalties	
For unlawful occupation of any public premises, the person can be punished with simple imprisonment for a term up to six months, or fine up to Rs. 5,000 or both. If any person again occupies the premises after been evicted then such person shall be punished with imprisoned for a term which may extend to one year, or fine up to Rs. 5,000 or both. (Section 11(2)) Magistrate can also order summary eviction of a person in a case where the person is convicted under Section 11(2).	No such provision

Source: Compiled by the authors of this report.

The process of summary eviction is a discretion granted to the *Tahsildar*.

> ***"Section 7: Summary eviction forfeiture and fine.***
>
> *(1) Any person unauthorisedly occupying land for which he is liable to pay assessment under section 4 shall be summarily evicted by the Tahsildar and any crop or other product raised on the land, any encroachments such as a building, other construction or anything deposited thereon shall be liable to forfeiture:*
>
> *Provided that in the case of said encroachments the Tahsildar shall give reasonable notice to remove the same.*
>
> *Notwithstanding anything contained in sub-section (1), where, any land is in the / unauthorised occupation of at landless person the Tahsildar may, instead of evicting such person from the land in his unauthorised occupation, settle the same with him, so, however, that the land so settled with him together with the land (excluding homestead), if any, owned by him and the lands owned by all the member of his family who are living with, him in common mess, shall on no account one standard acre."*

The provision makes a special case for lands occupied by otherwise landless persons and states that the *Tahsildar may* consider settling the same instead of summarily evicting the person. This power to settle is at the complete discretion of the *Tahsildar*. There is a long list of provisions that follow this paragraph that state various circumstances under which such settlement need not be conducted.

Likewise, the *Madhya Pradesh Land Revenue Code*, in Section 248 declares that unauthorised occupation of any unoccupied land, *Abadi*, service land or any land which is the property of the government, would amount to an offence. So, in Madhya Pradesh, one need not even worry about the technical definition of a public land. Occupation of any unoccupied land would make a person criminal and the *Tahsildar* acquires rights to summarily evict that person and levy a fine.

These provisions on property and others that have been discussed in the sections above may seem like they are not unusual and perhaps, they are not. Perhaps, it is normal for protective laws and laws that seek to save property from theft to have corresponding criminal provisions that incur the entire responsibility of criminality on that individual mind that is involved in the act. But that is exactly the problem. They represent a bigger reality, that people who derive their life out of land, do so at the peril of one property statute or another. This normalisation of criminality under so many different kinds of legislations seeking to do different things and having different objectives to achieve, usually target a specific ideology and a specific community that represents that ideology. Coloniality continues to relish even in its post-colonial avatar and so does the norm of criminality.

Stories of evictions continue in our next section, where we discuss the laws that seek to protect wildlife and the environment, not to mention the damage they cause to the people and their relationship with the environment.

4.5 Laws Seeking to Protect Wildlife and the Environment

The discourse on environment protection that has emerged in the post-colonial world insists that we treat forests and wildlife as a pristine ecosystem and keep it free of human habitation. With rising concerns of degrading environment, climate change and extinction of wildlife species, came a range of legal reforms that believed these problems to be originating in loose laws allowing people to degrade the environment. So, several laws were expeditiously enacted to remedy the situation. Legislations to protect wildlife, air, water, among others, were enacted and each was based on two presumptions: first, that any and all practices of people that could amount to degradation of environment of wildlife in any conceivable manner must be put to a stop, and second, that the state must exercise its power and dominance in order to curtail all such activities. The only legislation that sought to break this paradigm was the FRA. Several other laws, like the IFA and *Wild Life (Protection) Act, 1972* ("**WLPA**") contradict the provisions of the FRA and directly undercut the rights granted to forest communities. A recent letter from the National Tiger Conservation Authority dated March 28, 2017 states that *"in the absence of guidelines for notification of Critical Wildlife Habitats, no rights shall be conferred in Critical Tiger Habitats which is duly notified under Section 38V(4)(i) of the Wildlife (Protection) Act, 1972 under the Act cited under subject."*[31] Although this letter was later withdrawn, the attempts to create "inviolate zones" and prevent the application of FRA in such zones continues.

Under the legal scheme of the various Indian Forest Acts and the WLPA, a lot of activities in forests, however traditional or integral to livelihood, have been declared illegal and criminal offences. While the cost of degrading environment for capitalist ventures is monetary,[32] the cost of conducting everyday livelihood activities under these laws is encountering the criminal justice system as criminals. A bias of class (and caste) akin to what we saw in the previous segment continues in these legislations too. Annexure D is dedicated to assessing this category of legislations. Much like our previous analysis, these laws are assessed for the offences they generate, the people they target and the processes they create for the offences to be operated on ground. This table also assesses presumption of guilt under the second column and the amount of penalty or imprisonment under the sixth column that can be invited on being convicted.

In this complex and conflicting legal architecture, forests and wildlife offences become the legal mechanisms to ensure that the illegal use of forest resources can be deterred by the forest department. A report from *The Wire* states that:

> *"The forest department continues to use forest and wildlife offences to chastise forest-dwelling communities, whose members are often charged with the unauthorised use of forest resources under the Indian Forest Act of 1927 (IFA) and the Wildlife Protection Act of 1972 (WLPA).The legal architecture that governs our forests is complex and conflicting. Forest and wildlife offences are legal mechanisms to ensure that the illegal use of forest*

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[31] Arpita Kodiveri, "Conflicting Laws Are Criminalising Forest Communities for Exercising Their Rights," *The Wire*, February 5, 2017; available at *https://thewire.in/environment/conflicting-laws-criminalising-forest-communities-for-exercising-their-rights.*

[32] Refer *Chapter 6: Redefining the Forest and Reinventing the Conflict.*

resources can be deterred by the forest department. However, some of these prohibited activities are now guaranteed as rights under the FRA, but there have been no serious legislative efforts to reconcile these conflicting laws yet. Due to this legal quagmire, forest rights ranging from the right to harvest non-timber forest produce to grazing can continue to be criminalised by the forest department under the IFA and WLPA. Data on environment-related offences shows that 77% of all such offences are committed under the IFA and 17.4% under the WLPA. This shows that passing the 'landmark' 2006 law has not drastically reduced the charging of offences under these Acts." [33]

Narratives of conservation and development (highly popular today) do this strange thing - they discount lives and realities of people for whom engagement with environment and wildlife is a matter of course. They allow the state to overtake processes of conserving forests and wildlife, remove any linkages that people may have with their environment and use the criminal justice system to make their way. The use of violence, therefore, normalises itself. Reports from the Kaziranga and Rajaji National Park narrate a dangerous reality of this conservation discourse. This reality contains a perception of conservation that is based in violence.

EXCERPTS FROM VARIOUS REPORTS REFLECTING THE CONSERVATION DISCOURSE

"The Kaziranga National Park is one of the oldest wildlife conservation reserves of India, first notified in 1905 and constituted as Reserve Forest in 1908. It was specially established for conservation of the Greater One Horned Rhinoceros (Rhinoceros unicornis) whose number was estimated to be twenty pairs at that time. Kaziranga was declared a Game Sanctuary in 1916 and it was opened to visitors in 1938. It was declared a Wildlife Sanctuary in 1950, and notified as Kaziranga National Park in 1974 under the Wildlife (Protection) Act, 1972, with an area of 429.93 Sq. Km. which has now extended to 899 Sq. Km.

Poaching of wildlife, mostly rhinos, is a serious problem here. Between 2006 and 2016, 141 rhinos were poached. Coming under pressure from conservation organisations in 2013, the then Congress-led Assam government amended the provisions of Section 197 CrPC (Code of Criminal Procedure) law in India. This amendment grants forest officials immunity from prosecution if they attack poachers without taking prior consent from the government. Following the amendment, the forest department shot 22 and 23 suspected poachers in 2014 and 2015 respectively.[34]

Meanwhile, in 2012, the Guwahati High Court had suo motu registered a Public Interest Litigation (PIL) (No.66 /2012), following wide media coverage on poaching of rhinos in Kaziranga.

On October 9, 2015, the court issued direction to evict the human inhabitants

[33] *Supra*, note 31.

[34] Justin Rowlatt, "Kaziranga: The Park That Shoots People," *BBC News*, October 2, 2017; available at: *https://www.bbc.com/news/world-south-asia-38909512.*

from Kaziranga, and from adjoining villages--Deurchur Chang, Banderdubi and Palkhowa. The court asked the district administrations to carry it out within one month. The bench in its judgement also observed that the individual claims for a handful of persons is in conflict with the public and national interest. And that it can be inferred that the habitants in the park fall in the suspected group because they are aware of the animal movements, and therefore they would alone be in a position to do poaching successfully or abet poaching by others. However, in contrast to the court's order to improve the habitat, development projects have been granted clearance around the National Park. In 2016, construction activities in the eco-sensitive zone of the park by Patanjali Herbal and Mega Food Park led to the death of an elephant and left two others injured.[35]

The local communities alleged that the high militarization employed in the park is violating the human rights of the local people and that immunity had led the Forest Guards to use their power in an arbitrary way. In the last 9 years, it has been documented that a number of 62 people were killed as alleged poachers. Moreover, in 2016 in an accident, the forest department shot a 7 years old child, which brought the local organization to Delhi to campaign against the 'green militarization' used in the park. Indeed since 2010, the park has highly intensified the number of forest guards and the use of arms for wildlife protection. Organisations such as Survival International have also advocated against the 'legal immunity' given to the guards, the human rights violations such as tortures and harassments against the local communities, and the involvement of the WWF in funding militarization for conservation in the park."[36]

...

"Rajaji is a national park that encompasses the Shivaliks, near the foothills of the Himalayas. The Park was declared a wildlife sanctuary in 1983, and later a tiger reserve on 15 April 2015. The area is mostly inhabited by the community of Van Gujjars, an indigenous pastoralist nomadic community originally from the Kashmiri area.

The attempt to relocate the Gujjars from the forest goes back to 1975, but it became a priority in 1985, just after the announcement of the Rajaji National Park project. In all these years the community has been facing several eviction notices and harassment by the forest department, to convince them to leave their territory and give space to the national park. Indeed after creation of the Park, the Van Gujjars were asked to shift to a resettlement colony at Pathari near Haridwar. The forest authorities prohibit the communities to exercise their traditional pasture and

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[35] Manon Verchot, "Elephant Dies at Ramdev's Patanjali Project While Rescuing Her Kid," *The Quint*, November 26, 2016; available at: *https://www.thequint.com/news/environment/deadly-baba-how-ramdevs-patanjali-project-in-assam-killed-an-elephant-on-an-animal-corridor.*

[36] See Land Conflict Watch and Eleonora Fanari (ICTA), *Environmental Justice Atlas;* available at *https://ejatlas.org/conflict/kaziranga-conflict-rhinos-and-poachers-assam-india.*

grazing activity recognized under the Forest Rights Act, 2006 and blames them for poaching and timber smuggling from the park.

In 2005, after years of struggle, the Van Gujjars approached the Nainital court under the banner of Van Gujjar Kalyan Samiti (BGKS), and started a legal battle. This went on for the next few years till September 2008, when the Uttarakhand High Court sent a letter of contempt to the RTR director asking to stop the illegal relocation and acknowledge the right of the community as per Forest Rights Act (FRA). This has been the first time in India that a high court explicitly expressed in favour of the Forest Rights Act within the Protected Areas.

However, relocation and harassment did not stop and the Van Gujjars have continuously been pressurized by the forest department to leave their territory. Many Van Gujjars have been criminalized by the authorities, as was the case of 28 June 2011, when the leader of the movement, Noorjamal, got arrested on false charges. On that occasion, thousands of Dalits and Van Gujjars protested taking over the police station for one day. The Van Gujjars are claiming their forest rights under the Forest Rights Act (FRA), but most of their claims have been rejected. In 2011 the Uttarakhand government gave an order to relocate a number of 228 families from the Chillawali range of Rajaji National Park. Later in 2017, the forest department gave the order to evict 200 families from the Gohri tiger core area, denying them any rehabilitation package as considered 'encroachers'.

The Van Gujjars are struggling to get first of all their rights recognized, in order to have a proper rehabilitation package and be relocated under the rule of the law. In the last years, the Uttarakhand High Court has tried to evict the Van Gujjars overpassing the law. First, on 19 December 2016, an order declared the Van Gujjars dangerous for the wildlife and cause of forest fires, and hence needed to be evicted within one year time. Later, in August 2018 a High Court order termed as illegal the stay of the Van Gujjar in the buffer area of both Rajaji and Corbett Tiger reserve, ordering the eviction without rehabilitation. This has activated a wave of protests, and on September 24, 2018, the Supreme Court asked the government to maintain a 'status quo' on the matter."[37]

4.5.1 The Accused, the Offence and the Process of Prosecuting the Offence

The WLPA is first among our list and also happens to be one of the most dangerous of the lot.[38] The narratives from Kaziranga and Rajaji (*see Box above*) are based on the use and misuse of the WLPA, among other legislations. It creates a frightening number of offences. Four different categories of offences can be discerned from the text of the Act, all of which are cognisable and non-bailable and can be cursorily seen under the first

[37] See Eleonora Fanari (ICTA), *Environmental Justice Atlas,* available at: *https://ejatlas.org/conflict/rajaji-national-park.*

[38] In its preamble, the WLPA intends to *"provide for the protection of wild animals, birds and plants and for matters connected therewith or ancillary or incidental thereto with a view to ensuring the ecological and environmental security of the country."*

column of the table under Annexure D. First, it creates a category of 'Protected Areas' under Chapter IV (Sanctuaries and National Parks) and criminalises any violation or breach of provisions in these areas.[39] A wide range of activities are declared as offences: no person is allowed to alter, destroy or deface any boundary mark; set fire and use any explosive substances which can endanger any wild life; tease, molest any wild animal or even litter on the grounds of Protected Areas. Entering these Protected Areas without requisite permission; destroying, exploiting or removing any wild life including forest produce from the Protected Areas; destroying, damaging or diverting the habitat of any wild animal or such activities which are diverting, stopping or enhancing flow of water in the area; entering Protected Area with a weapon — all constitute offences.[40] It is important to note that while *permitted* grazing or movement of livestock is allowed in a Sanctuary, it stands prohibited in a National Park. While making these declarations, the State government need not necessarily take into account any livelihood matters that may already exist in those areas. It is entirely left to the discretion of the government to make such a declaration. So, if you belong to a community that has been residing inside a forest that now stands declared as a Protected Area under the Act, you would be an offender by mere residence.

Second, the Act declares that any act of harming an animal listed in Schedule I or II or a plant listed in Schedule VI thereunder would be an offence. Activities such as picking, uprooting, damaging, possessing, selling such plants are prohibited. However, the Act allows a member of ST to pick, collect and possess specified plants for personal use but the prohibitions applicable in Protected Areas are to override this right available to members of STs.

Third, there are offences related to trade and transportation of animals.

And fourth, declares specific offences that can be committed inside a Tiger Reserve. Therefore, only a person who is living in such an area or who engages with animals at any level i.e., a member of a ST could be the potential accused under the Act.

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[39] *Chapter 5: Authority, Criminality and the Law of Forests* describes in detail the different kinds of areas that various legislations define and the corresponding offences that can be committed in those areas. Sections 18 and 35, WLPA empower the State government to declare designated areas as Sanctuaries and National Parks.
*"**Section 18. Declaration of sanctuary:** (1) The State Government may, by notification, declare its intention to constitute any area other than an area comprised within any reserve forest or the territorial waters as a sanctuary if it considers that such area is of adequate ecological, faunal, floral, geomorphological, natural or zoological significance, for the purpose of protecting, propagating or developing wild life or its environment.*
***Section 35. Declaration of National Parks:** (1) Whenever it appears to the State Government that an area, whether within a sanctuary or not, is, by reason of its ecological, faunal, floral, geomorphological or zoological association or importance, needed to be constituted as a National Park for the purpose of protecting, propagating or developing wild life therein or its environment, it may, by notification, declare its intention to constitute such area as a National Park."*

[40] It is important to note that for offences such as hunting in a Sanctuary or National Park or offences committed with respect to trade, commerce in trophies, animal articles, the provisions of Section 360, CrPC, which relate to release of the offender on probation of good conduct or after admonition or the provisions of the *Probation of Offenders Act, 1958*, shall *not* apply unless such an offender is below 18 years of age.

To ensure prevention of these offences, Section 50, WLPA overrides all other provisions. It empowers several officers to ensure compliance who can stop people anywhere at any time, seize any goods, require for inspection, conduct any search or inquiry:

> *"**Section 50. Power of entry, search, arrest and detention:** (1) Notwithstanding anything contained in any other law for the time being in force, the Director or any other officer authorised by him in this behalf or the Chief Wild Life Warden or the authorised officer or any forest officer or any police officer not below the rank of a sub- inspector, may, if he has reasonable grounds for believing that any person has committed an offence against this Act,—*
>
> *(a) require any such person to produce for inspection any captive animal, wild animal, animal article, meat, trophy or trophy, uncured trophy, specified plant or part or derivative thereof in his control, custody or possession, or any licence, permit or other document granted to him or required to be kept by him under the provisions of this Act;*
>
> *(b) stop any vehicle or vessel in order to conduct search or inquiry or enter upon and search any premises, land, vehicle or vessel, in the occupation of such person, and open and search any baggage or other things in his possession;*
>
> *(c) seize any captive animal, wild animal, animal article, meat, trophy or uncured trophy, or any specified plant or part or derivative thereof, in respect of which an offence against this Act appears to have been committed, in the possession of any person together with any trap, tool, vehicle, vessel or weapon used for committing any such offence and, unless he is satisfied that such person will appear and answer any charge which may be preferred against him, arrest him without warrant, and detain him."*

Section 50(8) goes on further to empower officers to issue warrant and seek attendance of witnesses, again with an overriding effect.

> *"**Section 50:***
>
> *...*
>
> *(8) Notwithstanding anything contained in any other law for the time being in force, any officer not below the rank of an Assistant Director of Wild Life Preservation or [an officer not below the rank of Assistant Conservator of Forests authorised by the State Government in this behalf] shall have the powers, for purposes of making investigation into any offence against any provision of this Act—*
>
> *(a) to issue a search warrant;*
>
> *(b) to enforce the attendance of witnesses;*
>
> *(c) to compel the discovery and production of documents and material objects; and*
>
> *(d) to receive and record evidence."*

The two provisions, although not unusual in criminal jurisprudence, are rather severe in their letter and operation. They create a framework of law that is abrupt and strict in punishing activities that may be completely normal for an *Adivasi*. When one looks at entries in the table under Annexure D together, one realises that suspicion of something as minor as entering an area or even littering it, can invoke all of these powers of officers.

4.5.2 Presuming Guilt of Accused, Burden of Proof and the Good Faith of Officers

The second column of the table under Annexure D is the most interesting one in this process. Not only is there a bountiful of power with officers to search, seize, arrest and record evidence, there is also a presumption of guilt on mere invocation of these provisions. So regardless of what the facts of the case are or how they were presented to the court, if the case reaches a court, the presumption is that the accused is a convict. The cardinal idea of 'innocent until proven guilty' does not find any place in the normative framework of law that operates in forests. One can then only wonder how these provisions operate on ground. Re-harnessing the discussion on the WLPA, Section 57 thereunder states that:

> *"**Section 57. Presumption to be made in certain cases:** Where, in any prosecution for an offence against this Act, it is established that a person is in possession, custody or control of any captive animal, animal article, meat, [trophy, uncured trophy, specified plant, or part or derivative thereof] it shall be presumed, until the contrary is proved, the burden of proving which shall lie on the accused, that such person is in unlawful possession, custody or control of such captive animal, animal article, meat trophy, uncured trophy, specified plant, or part or derivative thereof."*

In cases before the Indian courts where the questions regarding presumption and burden of proof were raised, it has been said that if simple possession and recovery are proved by the prosecution, the burden of proof shifts upon the accused to prove that they were not in conscious possession of the article and were not aware of its existence.[41]

While these laws presume that an *Adivasi* is guilty of any and all offences that are charged against them, all public officers remain indemnified against any attempt of action against them. There is a classic case of the king can do no wrong and neither can his agents. Indemnity to officers and employee of the Central and State government is granted against suit, prosecution or any other legal proceedings for acts or damages caused in good faith. It also states that no suit shall lie against chairperson, members, member-secretary, officers or other employees of National Tiger Conservation Authority or Central Zoo Authority for anything done in good faith.[42] This indemnity to officers is in addition to the indemnity provided under Section 197, CrPC.

The mechanism adopted for conservation drives have located immense power in the hands of officials. Success of the conservation of one-horned Rhinoceros in Assam's Kaziranga National Park has been credited to its "shoot at sight" policy. An investigative report from BBC[43] highlighted that at the Kaziranga National Park, the State government has granted the guards extraordinary powers which give them considerable protection against prosecution if they shoot and kill people in park. A notification by the Government of Assam provides legal immunity from criminal

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[41] *Babu Lal and Another* v. *State* (Delhi Administration), (1981) 20 DLT 354: 1982 Cri LJ 41, Delhi High Court, at para 12.

[42] Section 60, WLPA.

[43] Justin Rowatt, "Kaziranga: The Park That Shoots People to Protect Rhinos", *BBC News*, February 10, 2017; available at: *https://www.bbc.com/news/world-south-asia-38909512.downloaded from http://www.rhinoresourcecenter.com/pdf_files/154/1541152178.pdf.*

prosecution to the forest guards and forest officers for acts done in discharge of their official duty without prior sanction of the State government. Further, in a Detailed Report to the Hon'ble Gauhati High Court by the Director of the Kaziranga National Park,[44] it has been submitted that to tackle the poaching of one horned Rhinoceros and their protection in Kaziranga National Park, the practice of 'killing the unwanted' to enforce the law was premised on 'must obey or be killed.'

4.5.3 Penalties

The next chapter (Chapter 5) conducts a detailed analysis of the penal provisions of WLPA. The painstaking manner with which the WLPA defines offences and provides corresponding penalties for each offence along with elaborate executive processes brings the real objective and framework of the legislation to the fore; while the WLPA may call itself an Act to protect wildlife, it is, in fact, a categorical criminal legislation in its letter, spirit and operation.

The law of conservation has, therefore, drafted an elaborate scheme of criminality. In fact, this criminality is integral to the functioning of conservation systems.

We now turn to our last section, where we analyse the Law of Minor Forest Produce. Like in conservation discourse, where the State regulates interaction of tribal communities with their forests, the following category of laws control and regulate another basic aspect of existence for *Adivasis* and forest dwelling communities — their right to collect and sustain on the forest produce.

4.6 Legislations creating Offences of Forest Produce Purchase, Transportation, Procurement and Sale

When a community resides in forests, it co-exists with its resources and accompanying wildlife. Utilising forest produce and everything else that naturally occurs there in a manner that can sustain inter-generational equity is a significant knowledge that an *Adivasi* possesses. Numerous accounts on traditional forest knowledge, including the perception that propagated the FRA, have recognised the role played by traditional communities in sustaining the forest and its environment. Forests resided in and maintained by traditional communities are reported to have sustained tough times of climate change and environment degradation that otherwise is massive throughout the world.[45]

The colonial and post-colonial ideologies, however, are still based on the idea of control and regulation. The post-colonial government retains the colonial norm of control,

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[44] M K Yadava, *Detailed Report On Issues And Possible Solutions For Long Term Protection of The Greater One Horned Rhinoceros In Kaziranga National Park Pursuant To The Order Of The Hon'ble Gauhati High Court,* August 5, 2014. Full Report may be downloaded from *http://www.rhinoresourcecenter.com/pdf_files/154/1541152178.pdf.*

[45] Neera Singh, Seema Kulkarni and Neema Pathak Broome (eds), *Ecologies of Hope and Transformation: Post-development Alternatives from India* (Kalpavriksh and SOPPECOM, Pune: India, 2018).

which effectively rendered almost all customary practices and uses of forest produce as criminal. This time, under the aegis of protecting forests, its pristine wilderness and valuable resources, the government began to massively regulate what people could do or not do with Minor Forest Produce.

In an interview given to the members of a local organisation working with *Adivasi* and forested communities in Odisha, a tribal man belonging to Desughati, presents a disturbing picture of the impact of plantation programs on rights and livelihood of the community. As per his note, this exercise of plantation involves destroying the indigenous species that are otherwise grown by the community in their use of forest land. And in this process, the department uses the criminal justice system to restrict any activity or even a movement that a person from his community might do. He states that:

> *"We cannot destroy forests as without forests we will die. The big trees are always felled by the forest department which blames us for forest destruction. It is always the forest department which cut down trees for timber and revenue generation. When we do agriculture in forest, production of minor forest produces such as siali, hillbroom, tubers increase. The MFPs will be extinct if we stop our traditional agricultural practices. Forest department is not planting our indigenous species but rather planting teak in our agricultural land. Plantation of this commercial species which is not local lead to loss of traditional millets and agricultural biodiversity."*[46]

Describing the mode and manner of plantation drives, he says:

> *"In 28 ha of area in our forest area numbers of Sal trees were there. In one night forest department officials came and cut down all the Sal trees and took away everything in 20 loaded truck. Sal tree is always beneficial for us as we collect sal seeds and sell it .it was our source of income but FD instructed us not to come to the land again now FD has constructed a nursery in our area where maximum number of trees are acacia, teak and chakunda. We are afraid of coming to our own land because in this area FD has set up cameras to track our movements."*[47]

On being questioned if any cases of forest offences relating to accessing the produce of forests have been pending against him or any member of his community, he responded:

> *"In our village cases were pending on 3 persons name. In our village everyone collected money and deposited Rs.5,000/ to fight the cases. But till now we are unable to deposit rs.1,500/-. One of person died fighting this case, but the forest dept continues to send warrant notice to his family even after his death. Rest two persons are not able to move out of the village as the case is pending against them."*

Setting up cameras to conduct surveillance in an otherwise peaceful hamlet is presuming that the people who usually go about in those areas are offending the law and the forest. And continuing to send warrant notices against a deceased to his family, is nothing but plain harassment. While these interviews were conducted as

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[46] Drawn from the field notes of an Independent Researcher based in Odisha dated June 27, 2016.

[47] *Ibid.*

part of a study to analyse the problem of plantation drives in the State of Odisha,[48] it brought to the fore experiences with an important aspect of forest dwelling: treating people living there as criminals. Accessing the forests and its produce is how these people survive.[49] Under the FRA, these people are right bearers and protectors of their land. But the surrounding legal regime treats them rather differently, especially in their right to access forest produce. This one interview may not look like a lot to go on, but experiences of people who have been working in this area assure that this represents a larger reality[50] that needs to be dug.

We are assessing here all those legislations that have been enacted to control the procurement, transportation, sale and usage of Minor Forest Produce. While regulating these processes, the laws also criminalise *Adivasi* existence and their basic practices of sustenance. The table under Annexure E enlists several laws that represent condition of Minor Forest Produce in their States and analyses them in terms of offences that they create and the manner of their prosecution.

4.6.1 The Accused, the Offence and the Process of Prosecuting an Offence Pertaining to Minor Forest Produce

The State of Odisha, for instance, has as many as four different laws that regulate different forest produces. A glance at the second and third column of the table,[51] i.e., *'Offences created and their Nature'* and the *'Powers of Search, Seizure and Detention'* would reveal that any contravention of the Rule or Regulation or an order passed under the law is defined as an offence by default. Whether the order has been properly notified or has been translated into a language that the communities would understand is irrelevant to the entire process. As far as criminal provisions operating inside a forest are concerned, their constitutionality or illegality is of little significance. As far as a provision exists for a forest officer to arrest, detain or even stop a person in transit, it will provide the officer wide powers of discretion. In each of these offences, the police officer, forest ranger or any authorised officer has the power to stop and search any person that they consider suspicious. The dangers associated with these provisions, therefore, are unimaginable.

The *Orissa Forest Produce (Control of Trade) Act, 1981* ("**1981 Act**") declares in its preamble that it seeks to create State monopoly in forest resources and trade.[52] While

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[48] *Voice of Jutia Kondh II* (Samadrushti Televisions, Desughati: Odisha, 2020); available at: *https://www.youtube.com/watch?v=7aVDRa8asW8&ab_channel=SamadrustiTelevisions.*

[49] Sanghamitra Dubey and Radhika Chitkara,"India: Plantations Uproot Women from Their Customary Forests," *World Rainforest Movement*, March 7, 2018; available at: *https://wrm.org.uy/articles-from-the-wrm-bulletin/section1/india-plantations-uproot-women-from-their-customary-forests/.*

[50] While conducting interviews in the course of writing of this report, we spoke to people who have been working towards operationalising the FRA. Several people narrated similar stories of criminalisation of *Adivasi* and forest dwelling tribes; instances that they have been consistently hearing for years, especially in the context of Minor Forest Produce. But since no systematic study has ever been conducted to understand and unwrap these laws, or even report such instances, there is very little written evidence of the matter.

[51] *Annexure E* to this report.

[52] Preamble to the 1981 Act states that: *"An Act to provide for control and regulation of trade in certain forest produce by creation of State monopoly in such trade"*. Full text of the law available at: *https://forest.odisha.gov.in/sites/default/files/2021-03/The%20Orissa%20Forest%20Produce%20%28Control%20of%20Trade%29%20Act%2C%201981.pdf.*

still maintaining that customary rights of tribals need to be protected,[53] the Act directs that only the State government, its officer or agent should be able to purchase, sell, gather and collect specific forest produce. It is a wonder how the Act seeks to protect customary rights of collection and transportation while wanting to monopolise the same. When a forest officer, under a colonial arbitrary forest department, encounters an *Adivasi* carrying a collection of *Tendu* leaves, would the officer respect their traditional rights of collection or impose the State's monopoly to assert their power over the person? A Divisional Forest Officer is also empowered to accept compensation from a person who is found in such suspicious circumstances. The amount of this compensation or the reasonability of the suspicion is entirely up to the officer. Section 19, 1981 Act states that:

> ***"Section 19. Composition of Offences:***
> *(1) The State Government may, by notification, empower any Forest Officer-*
> *(a) to accept from any person against whom a reasonable suspicion exists that he has committed an offence punishable under this Act, a sum of money by way of compensation for the offence which such person is suspected to have committed; and*
> *(b) when any property other than a specified forest produce has been seized as liable to confiscation, to release the same on payment of the value thereof as estimated by officer.*
> *(2) On the payment of such sum of money or such value or both, as the case may be to such officer, the suspected person shall be discharged, the property, other than the specified forest produce, if any, seized shall be released and no further proceedings shall be taken against such person or property."*

Not only does this provision provide a sweeping discretion to the officer, it is also accompanied by Section 18 that disallows the court from taking cognisance of any offence punishable under this Act without the same Divisional Forest Officer writing a report constituting the facts of the case.

> ***"Section 18. Cognizance of Offences:*** *No Court shall take cognizance of any offence punishable under this Act except on a report in writing of the facts constituting such offence made by a forest officer not below the rank of a Divisional Forest Officer or by any other officer as may be authorised by the State Government in this behalf."*

So effectively, the same officer is identifying the offence, describing it, deciding existence of suspicious circumstances, catching the accused, compounding the offence at hand and deciding whether the offence needs to be taken to court, where the officer rewrites the facts of the case.[54] There is, of course, the fundamental right to constitutional remedies[55] which every citizen of this country possesses where they can approach the High Court or Supreme Court against any such unfair trial; the *Adivasi* is not without all options. But shouldn't the mere existence of such a provision bother the Constitution?

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[53] Proviso to Section 5(a), 1981 Act.

[54] See table under *Annexure E* titled '*Legislations creating Offences of Forest Produce Purchase, Transportation, Procurement and Sale*'. A combined reading of the third, fouth and fifth columns (Powers of Search, Seizure and Detention; Quasi-Judicial Process; Judicial Trial) lay out these provisions together.

[55] Article 32 read with Article 226, Indian Constitution.

Not everyone has the capacity to assert their right to constitutional remedies each time a legally acclaimed criminal process is actualised.

The *Madhya Pradesh Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969* ("**MP Adhiniyam**") and its associated Rules 1973 narrate a similar story. The Act intends to create State monopoly in forest produce and transit.[56] To materialise this monopoly, Section 15 of the said Act gives wide powers to police and forest officers of search and seizure of any property that may be subject to the provisions of this Act:

> ***"Section 15. Search and seizure of property liable to confiscation and procedure therefore:*** *(1) Any Forest Officer as may be notified by the State Government or any Police Officer not below the rank of an Assistant Sub-Inspector or any other person authorised by the State Government may, with a view to securing compliance with the provisions of this Act or the rules made there under or to satisfying himself that the said provisions have been complied with,-*
>
> *(i) stop and search any person, boat, vehicle or receptacle used or intended to be used for the transport of specified forest produce;*
>
> *(ii) enter and search any place."*

The section goes on to describe powers of seizure etc. The seized goods, however, can be released on execution of a bond or payment of a security as is estimated by the officer. The forest officials can also seize the *Tendu* leaves on suspicion of contravention of the Act. Although the section provides for a judicial process to follow thereafter,[57] once security is received from the person and the property is released, there lies little to take the case to court. Section 15(3A) reads as follows:

> *"**15(3A):** Any forest officer of a rank not interior to that of a Ranger, who or whose subordinate, has seized any tools, boats, vehicles, ropes, claims or any other article as liable for confiscation, may release the same on the execution by the owner thereof, of a security in a form as may the prescribed, of an amount equal to double the value of such property, as estimated by such officer, of the production of the property so released, when so required, before the officer authorized to order the confiscation or the Magistrate having jurisdiction to try the offence on account of which the seizure has been made."*

One would notice a similar entry for the *Himanchal Pradesh Forest Produce Transit (Land Routes) Rules, 2013* and all other Minor Forest Produce legislations. The *Bihar Excise Act, 1915* ("**1915 Act**") provides for similar procedures of restrictions, describing offences and empowering the administration to search and seize anyone and any

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[56] Preamble to the MP Adhiniyam states: *"An Act to make provision for regulating in the public interest the trade of certain forest produce by creation of State monopoly in such trade".* Also, Sections 5 and 9 of the Act.

[57] Section 15(5), MP Adhiniyam states:
"***15(5).*** *No order confiscating any property shall be made under subsection (4) unless the authorised officer-*
(a) sends an intimation in forms prescribed about initiation of proceedings for confiscation of property to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made;
(b) issues a notice in writing to the person from whom the property is seized, and to any other person who may appear to the authorised officer to have some interest in such property;
(c) affords an opportunity to the persons referred to in clause (b) of making a representation within such reasonable time as may be specified in the notice against the proposed confiscation; and
(d) gives to the officer or person effecting the seizure and the person or persons to whom notice has been issued under clause (b), a hearing on the date to be fixed for such purpose."

property. Only here, the powers are distributed among the Excise Commissioner, the Collector, Magistrate, Police, officers of the Salt, Customs and Land Revenue Department. A reading of the entries under the third and fourth columns ('*Powers of Search and Seizure'* and *'Quasi-Judicial Processes*') for the 1915 Act reiterates these powers. Sections 67B and 67F thereunder, in fact, even empowers the Collector to confiscate for sale, disposal of or destruction of article seized.

4.6.2 A Bias of Class: Prosecuting Particular Criminalities

A stark juxtaposition and class bias can be observed from the entries in *The Orissa Protection of Scheduled Castes and Scheduled Tribes (Interest in Trees) Act, 1981* ("**Orissa Trees Act**") and the *Orissa Forest Contract Rules, 1966* ("**1966 Rules**"). Unlike its counterparts where the accused person is most likely an *Adivasi* carrying on and transacting in Minor Forest Produce, these laws mostly deal with contractors and licensors and the difference in the columns of 'Powers of Search, Seizure and Detention' and 'Quasi-Judicial Process' is disquieting.

The 1966 Rules lay down the terms and conditions of contract between the forest department and the contractor, neither contain any penal provision nor any powers of search or seizure are provided to the forest officers. These rules mandate that the contractor must have a license to collect any forest produce:

> ***"Rule 13. Permits for Removal of Forest Produce:*** *(1) A Forest Contractor shall not remove any forest produce from the contract area unless it is accompanied by a permit signed by the contractor or his authorised agent."*

But there are no provisions of inspection, search or seizure in order to ensure that the contractor does not deal in any forest produce for which he does not have a permit. The 1966 Rules do not contain any penal provision. A provision for tortious liability against the contractor, however, exists. And such liability is in the form of compensation to the Divisional Forest Officer of the forest department for damages. Rule 17 and the entry in second column of the table (under Annexure E) against the 1966 Rules reveal this.

> ***"Rule 17. Liability of forest contractors for damages:*** *A forest contractor shall be responsible for any damage that may be done in a government forest by himself or his servant and agents. The compensation for such damage shall be assessed by the Divisional Forest Officer whose decision shall be deemed to be that of an arbitrator and shall be final and binding on the parties, except to the extent that it shall be subject to appeal to the Conservator of Forest."*

A similar mellowness of tone can be discerned in the Orissa Trees Act. The Act intends to be protective in nature.[58] It deals with the protection of interest of STs and SCs when their interest in specified trees is transferred to others. Section 3 of the Act

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[58] Preamble to the Act states: *"An act to provide for the protection of the members of the Scheduled Castes and Scheduled Tribes from exploitation in the matter of transfer of their Interest in specified trees"*. Full text of Act available at: *http://www.bareactslive.com/Ori/OR690.HTM.*

declares that:

> ***"Section 3. Protection of interest in specified trees belonging to the Scheduled Castes and Scheduled Tribes:*** *(1) No contract entered into after the commencement of this Act by an owner of any specified tree for the sale of the timber thereof shall be valid if such owner is a member of the Scheduled Castes or the Scheduled Tribes and if the contract has been entered into without the previous permission in writing granted by the Range Officer on an application made in that behalf giving adequate description of the timber proposed to be sold."*

So, interest in specified trees could only be transferred with permission from the Range Officer. The Act also defines an offence:

> ***"Section 10. Offence:*** *(1) Any contractor who fells or causes the felling of any specified tree, or removes or causes the removal of the timber of any specified tree, in pursuance of a contract which is invalid under Section 3, or in contravention of any order passed by the Divisional Forest Officer under Section 6, shall, on conviction, be punishable with rigorous imprisonment each may extend to six months or with fine which may extend to two thousand rupees or with both.*
>
> *(2) The Magistrate may order that the whole of the fine so imposed or any part thereof, not being less than fifty per cent, may be paid as compensation to the owner of the specified tree in relation to which the offence has been committed, if he is of the opinion that the consideration money paid to the owner is substantially inadequate."*

The provision makes sense. An Act seeking to be protective of vulnerable communities must provide stringent provisions for any breaches. However, the Act provides absolutely no procedure by which this offence can be implemented on ground. A reading of Annexure E against the 1981 Act lays down that no provision of arrest, search or seizure have anywhere been provided. How is it then that the offence would be caught? Without processes or powers to implement an offence on ground, there can only be little hope of being caught. The contractor may be involved with an illegal timber transportation gang but forest officials, who otherwise are immensely powerful, are disenfranchised in this regard.

The difference in entries of powers of search and seizure and the accompanying administrative process may not have been disquieting if the kinds of people who could befall the Act would not be so different. There is the first set of legislations and rules that directly and rather obviously target the *Adivasi* community. Each of these pieces of law criminalise *Adivasi* manner of existence and entitles various State department, especially the forest and police department, to execute and make good these provisions. They aim to establish State monopoly on all resources of forests that are regularly engaged by the *Adivasi* communities for their sustenance and means of co-existence and therefore, issue and operate criminality. The process of criminalisation is complete from end to end. There is legitimacy and there is procedure to execute that legitimacy. However, when such monopoly is to be exercised against contractors or other people who have had the wherewithal to obtain licenses and other documents, the consequences of non-abiding by the law are not so exhausting. Even if the offences are defined by the law, there are no procedures in place to operate them. While the entries in second column of our table may seem fine in terms of defining offences (though there are still

stark differences since the first set of laws criminalise any anomaly from the normal), the accompanying entries in the third column where no powers or procedures are defined, nullify the entire idea. The process of criminalisation, therefore, is kept reserved for the *Adivasi* community. A norm of criminality is created for them and all powers are asserted against them. The legal process of accusing them of crimes and then letting them live with that status, is not only an easy endeavour but a norm in law.

4.7 Equal Protection of Laws in Criminal Justice System of Forests

The law has made a conscious choice of regulating and controlling the most basic existence of *Adivasis* and forest communities. Things that constitute their most basic livelihood, like possessing land and accessing forest produce have not only been regulated, but also criminalised. A similar or even comparable level of control is not done for the rest of the population, mostly because they do not stay so close to national resources that are wanted by capitalism. The laws we have studied here have criminalised an identity and a way of life. They have denied life, liberty and equality to the *Adivasi* population and continue to do so as this report is being written. Although here we have been able to only scratch the surface of this process, this criminalisation remains the base on which the state narrative rests, coating itself in ideas of peace, prosperity, and security.

The chapters that follow will undertake specific issues and specific laws that are engaged in this expansive process. They will all continue the argument that criminality is customised for *Adivasi* communities. Our next chapter analyses the laws that govern forests in India, the very different kinds of forests that are created, the different ways in which these forests are regulated and their points of contact.

Chapter 5

AUTHORITY, CRIMINALITY AND THE LAW IN FORESTS

5.1 Law's Idea of Criminality in the Forests: Colonial and Post-colonial Times

Whether in colonial or post-colonial times, forests have always been an important resource. While the precise location of that resource has varied, they mark an important continuum between the past and the present. *Adivasis* continue to rely directly or indirectly on forests for their primary livelihood needs for agriculture, pastoralism, animal husbandry, crafts, cottage industries, and so on. As per the 2011 Census, 66 per cent of Scheduled Tribes ("**STs**") continue to be engaged predominately in the primary sector (agriculture and allied activities). Criminalisation of forest-based livelihoods emerges from the colonial project of appropriating land, forests and natural resources of indigenous populations.

We have seen in the previous chapters that forests and *Adivasi* populations have been particularly difficult to administer. A complex architecture of laws was constructed through which the colonial government was able to establish legal control and domination over natural resources and land in the country. Establishment of control over the country's resources was as much a function of economic imperialism as it was of political domination, to mark the colonial presence. Forests were an important location of this process. Colonial domination was established through the mainframe legislation relating to forests and forest resources even today, the *Indian Forest Act, 1927* ("**IFA**") itself based on a 19th Century legislation the *Indian Forest Act, 1878*.[1] This is the parent statute of the entire architecture of forest laws in the country today.

A history of legislation of forest laws in this country and their use for extraction of vast forest wealth by the British colonial rulers is beyond the scope of this report.[2] It is, however, important for us to understand the underlying legal developments in the colonial past, and the manner in which they shape norms and experiences in the present day.[3]

The colonial government, falsely alleging lack of clarity in existing land ownership and control regimes in India at the time, claimed to bring clarity and regulation into an area which had hitherto been governed by tradition, easement, and complex relationships of overlapping usufruct. Placing its legitimacy on the narrative of civilisation, the colonial order dug deep roots into the Indian polity.

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[1] The precursor to the 1878 forest law was the first *Forest Act of 1865* (Act No. VII of 1865), which created the classification of 'government forests' and also contemplated that existing rights of individuals or communities shall not be abridged or affected when such forest was notified. Clearly, this approach did not last very long.

[2] Madhu Sarin, "Undoing Historical Injustice: Reclaiming Citizenship Rights and Democratic Forest Governance Through Forest Rights Act" in Sharadchandra Lele and Ajit Menon (eds), *Democratizing Forest Governance in India*, (Oxford University Press, New Delhi, 2014).

[3] We have already described a brief history of *Adivasi* communities in the context of criminal laws under *Chapter 2: History: A Witness to the Alienation of the Adivasis*. In this segment of the report, we further that narrative so as to understand the various ways in which colonial laws still propel the prevalent criminal jurisprudence in the country.

Since the entire idea of coloniality was to establish absolute authority geared towards unquestioning resource extraction, the legal regime of the time reflected similar politics. The colonial statutes relentlessly discarded any indigenous relationships that people had with land and superimposed their own authority as the controllers of land. This process of self-aggrandisement (of the colonial authority) was accompanied by an equally important articulation of proscribed behaviours, or 'crimes' (of the indigenous populations). Thus, IFA legislated a normative framework where authority and control over forest lands and forest resources vests in the colonial government. Simultaneously, it contained within it the equally important supportive structure of criminalising certain conduct, or 'forest offences', rendering age-old traditions, livelihood practices, and behaviours of forest dwelling communities illicit under the garb of *civilising the savage*.

These criminal law provisions played an integral role in establishing authority; the colonial government could declare various forest activities as criminal, regardless of whether these were as old as time itself.

Most unfortunately, this approach to forests, forest resources, and forest dwelling communities continued to be the reality even after the departure of colonial regime. Instead of recalibrating this damage, the newly independent Indian state chose not to make any paradigm shift in the legal framework. The *Forest Policy of 1952* only served to reinforce the domination of the state over forests and their use for commercial purposes. The alienation of tribal peoples and forest dwellers from their traditional rights over forests and forest produce begun by the British colonial rulers continued apace post-Independence. The mechanisms that were put in place for governance in the colonial times are in existence till date and strengthened with a newly established claim to legitimacy.

The IFA is applicable across the country. It is the foundation for a complex architecture of statutes, rules, executive instructions at the Central level along with the variations at the State level enacted by State legislatures and governments. 'Forests' being a legislative subject on which both the Parliament and State legislatures have jurisdiction,[4] some State governments have enacted their own State level forest statutes or carried out extensive amendments to the Central legislation insofar as it is applied to that State. However, the spirit of IFA, which lies in asserting power and dominion of the sovereign Indian state, has not been diminished by any of the States. If anything, that spirit to control and criminalise has only been amplified.

Almost all legislative devices that have followed the IFA have retained these twin powers, even those that have attempted to speak the language of rights. While examining the forest law regime through the lens of criminal law, it is seen that the overarching approach of the Central IFA applies consistently throughout the country, with no significant departure made by any State Government or Union Territory or

[4] The subject 'forests' is found at Entry 17-A of List III (Concurrent List) of the Seventh Schedule to the Indian Constitution. It was incorporated in this list by the Constitution (42nd) Amendment in 1977, prior to which 'forests' was in List II (State List) at Entry 19.

even the Autonomous Regions under the Sixth Schedule. This includes a wide array of State level amendments, legislations, and executive instructions on aspects of forest law as diverse as transport of Minor Forest Produce and cattle trespass. As under the IFA, most other regimes of Acts, Rules and Regulations relating to forests in India are infiltrated with the concepts of sovereignty and eminent domain. The state, mostly by virtue of its existence, exerts power and control over all property within its jurisdiction. The idea of private or community property, then, is conceptualised, if at all, within the dimensions of eminent domain.

Through the process of classification and demarcation of forests under IFA and also State level legislations of the same genus (such as the *Orissa Forest Act, 1972*, which is discussed below), the colonial state took over vast areas of forest and other land that was traditionally under the management and control of local *Adivasi* and forest dwelling communities. For a large part, rights of these communities in forests were not settled or recorded. This served a purpose — it allowed rights and processes to be flexible and continue to operate without external interference within the indigenous customary laws. Efforts by the government, if any, to record settlements of rights have been marked by a lack of political will and administrative stagnation. Each time the state aimed to formalise rights in the forests, it ignored the reality and customs of *Adivasi* populations and attempted to superimpose a formal order based on colonial ideas of clarity and efficiency. Naturally, such initiatives failed to operate in a space largely marked by complex social relationships. For example, the rights of *Adivasi* shifting cultivators have been largely ignored, and in the few places where settlement has been attempted, the bias of the state against the practice has been apparent.[5]

An enormous concentration of discretionary power, authority to exert control and mechanisms for enforcing decisions has been vested in the forest bureaucracy. In fact, users of forests and forest produce find themselves unambiguously in the position of a 'subject', who is rather helpless, poor and unknowledgeable in the state narrative. Where State legislatures have chosen to depart from the Central law, it is mostly to intensify sovereignty and hegemony, using the criminal law provisions as powerful tools to reinforce this order.

The result of this normative approach has been nothing short of devastating. Across the country, hundreds of thousands of *Adivasis* and forest dwelling communities who had been living in harmony with the forests for centuries, found that they had become criminals in the eyes of the law for continuing with their livelihood and cultural practices as before. *Adivasis* and forest dwelling communities now became 'encroachers' on their own homelands. This process led to myriad political upheavals and strife, which again are beyond the scope of this report. Suffice to say the forest dwelling and *Adivasi* communities who have dwelt in the forests have not remained silent spectators. They found many different ways to make their voices heard in the modern Indian democratic state.

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[5] Dr. B D Sharma, *Shifting Cultivators and Their Development* (Sahyog Pustak Kuteer, New Delhi, 2003).

However, the continuity between coloniality and post, and the reinforcement of state authority over forests, is not based upon principles of colonisation alone. After Independence, the Indian state has had to reinvent its continued colonial treatment of forest lands and *Adivasi* populations. Thus, the *Wild Life (Protection) Act, 1972* ("**WLPA**") was purportedly enacted[6] as a modern conservation law "*to provide for the protection of forests and the creatures dwelling therein*".[7] Yet, the WLPA adopts the same approach as IFA towards this end, retaining two significant aspects of the bargain: it has kept to itself the legitimacy of authority (to declare spaces which were hitherto accessed by forest dwelling and *Adivasi* communities as 'Protected Areas' under the law) and the corresponding power to pronounce criminality in such forest spaces (by retaining the power to define, and prosecute, actions which are 'wildlife offences').

The enactment of the *Forest Conservation Act, 1980* furthered the process of centralisation of power and authority, this time in the Central government's forest bureaucracy, so that any proposal to divert forest land for a 'non-forest purpose' would require prior approval from the Forest Advisory Committee at the Centre, after rigorous scrutiny.[8]

An acknowledgement of the dissonance between statutory law and the natural rights of *Adivasis* and forest dwellers came with the *Indian Forest Policy of 1988*, which, for the first time, recognised that tribals and forest dwelling communities have a 'symbiotic relationship' with forests, and that their rights need to be recognised.[9] In furtherance of this statement of intent, the Central government issued a set of executive instructions on September 18, 1990[10] (commonly known as the "**1990 guidelines**") aimed at securing some amount of tenurial security for *Adivasis* and forest dwellers within forest lands. While well-meaning in intent, the 1990 guidelines

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[6] It is ironical that the WLPA was enacted by India's Parliament exactly 100 years after the first ever national park was declared after erasing the traditional rights of Native American tribes through legislative fiat, in Yellowstone, USA.

[7] The Long Title of the WLPA describes itself as *"(a)n Act to provide for the protection of wild animals, birds and plants and for matters connected therewith or ancillary thereto with a view to ensuring the ecological and environmental security of the country."*

[8] Section 2, *Forest Conservation Act, 1980.*

[9] The Forest Policy of 1988 does not have the status of a law, in that, it does not create any legally enforceable rights which can be taken to a court of law for enforcement.

[10] For the purposes of our discussion hereunder this chapter, only the following four guidelines are relevant:

1. *Encroachments on Forest Land - a Review thereof and Measures for Confinement* (No.13-1/90/-FP (I)): This order provided for regularisation of encroachments predating the Forest Conservation Act, 1980, i.e., those prior to October 25, 1980.
2. *Review of Disputed Claims over Forest Land Arising Out of Forest Settlement* (No.13-1/90/-FP (2)): This order provided for settlement of disputed claims over reserve forests where the Settlement of Rights was faulty or had not been done.
3. *Disputes Regarding Pattas / Leases / Grants Involving Forest Lands* (No.13-1/90/-FP (3)): This order related to pattas/ leases/ grants of forest land which could not be renewed or have become 'illegal' due to the enactment of the 1980 Act.
4. *Conversion of Forest Villages into Revenue Villages and Settlement of other Old Habitations* (No.13-1/90/-FP (5)): This order related to the settlement of old habitations and dwelling sites, as well as de-reservation of forest land for conversion of forest villages into revenue villages.

The government had issued two other guidelines in this set, which related to payment of wages to forest workers, and compensation for loss of life due to predation of wild animals. A complete set of these six guidelines has been reproduced in Dr. B D Sharma, *Forest Lands: Tribals Struggle for Survival* (Sahyog Pustak Kuteer, New Delhi, 2003).

continued to describe *Adivasis* and forest dwellers as 'encroachers', a term which is not only derogatory, but also has serious implications under the criminal law regime. It is, therefore, no surprise that the implementation of these orders was unsatisfactory. With a series of 'interim orders' being issued in a 'public interest litigation' by the Supreme Court of India, the implementation came to a complete standstill in 2001.[11]

In this chapter, we undertake to begin deconstruction by analysing the various methods and categories crafted by law, by examining at some length the key criminal law provisions of the IFA and demonstrate some State level variations. We focus particularly on two States in Central India - Madhya Pradesh and Odisha, both of which have significant *Adivasi* and forest dwelling populations as well as geographical areas notified under the Fifth Schedule of the Indian Constitution. An assessment of laws in these two States would reflect the way authority and criminality has been woven into the scheme of forest law in general. It will not be possible to examine each State level legislation (*some of these are tabulated and briefly examined under the Annexures to this report*). However, we will be exploring the key criminal law provisions in the *Orissa Forest Act, 1972* ("**OFA**"), by which the State legislature replaced the IFA in its application to Odisha, and various amendments made by the Madhya Pradesh legislature to the IFA insofar as it applies to that State.

In **Part A**, we examine the various categories of forests created by law, and the plethora of acts and behaviours which are defined as 'forest offences' within those legal and geographical jurisdictions.

Thereafter, in **Part B**, we assess the empowerment of the forest bureaucracy through the criminal justice process, drawing attention to the dissonance with established criminal law principles as well as the Constitution of India.

In **Part C**, we examine how the courts have responded to this dissonance, and identify some of the key challenges in the road ahead.

PART A: FOREST CATEGORIES AND FOREST OFFENCES

5.2 Assertion of Authority through a Process of Criminalisation

Even before the thicket of criminal law provisions in Indian forest law is unwrapped, one is struck by the unmistakable authoritarian tone permeating these laws. The law explicates various categories of forests based upon the value of the forest for the state; based on the sliding scale of importance of each category, the law prescribes the acts and activities which shall be either proscribed / criminalised or allowed in each. Both in the categorisation of forests and in the definition of 'forest offences' for each legal category of forest land, the law adopts a hectoring tone. So deafening

[11] An interim order dated November 23, 2001 (*unreported*) passed by the Supreme Court in *T N Godavarman* v. *Union of India*, Writ Petition (Civil) No. 202 of 1995 (*pending*), directed that no further regularisation of encroachments in forest areas can take place.

is this tone that the incongruity of such an approach to defining crimes is almost forgotten — that a forest-based activity can be permitted, even licenced, in one forest area, and in an immediately adjoining forest area can be a criminal offence inviting harsh punishment, even mandatory imprisonment.

Thus, we find that on the one part the IFA along with the State-level forest laws (such as the OFA) and State amendments, classify forests into different categories. On the other part, they also lay down an important tool for ensuring smooth management of these different forest categories, namely, the creation of forest offences and a parallel forest offence regime. Numerous forest offences relating to different categories of forests and forest activities have been created, with varying punishments, including eviction and imprisonment. The seriousness of these offences is factored by the unrelenting power that has been given to the forest department to administer the imposition of these offences. This approach fundamentally defies the basic foundation of criminal law, where crimes are a social construct based on moral imperatives defined by societies.

A 'forest offence' under the IFA is defined with sweeping generality to include not only offences specifically defined in the law, but also "*an offence punishable under any Rule made thereunder*."[12] The OFA adopts the same definition, but takes it further to include "*the abetment of a forest offence*."[13] This is unusual, because as a general principle, definition of criminal offences is the exclusive domain of the legislature. The executive branch of government, which frames Rules, does not have the authority to define criminal offences. Apparently, criminal jurisprudence and justice systems work differently in forests.

Under the IFA, there are four categories of forests, namely, 'Reserve Forest', 'Protected Forest', 'Village Forest', and 'Private Forests' (forests which are not government owned). Then there are certain activities which are criminalised regardless of the category of forests. Finally, there are 'Protected Areas' under the WLPA. In this section, we dive into the intricacies of each of these types of forests and the corresponding offences that the law creates for each one of them. Each assert and secure, in varying degrees of aggression, the sovereignty of the state and the dominion of its bureaucracy. Categorisation, in fact, is only one manner of using complicated legal methods to assert state sovereignty. From the power to impose legal categories to a forested area, to its administration and control, the state assumes all powers of determination. It defines forest offences in intricate detail, applying differently to different categories of forests in order to assert its sovereign power. The language of rights or recognition of people in their customary relationship with forests and lands is entirely absent from this narrative. The process of criminalisation, along with its associated violence is, therefore, interlinked with the process of asserting control.

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[12] Section 2(3), IFA.

[13] Section 2(e), OFA.

5.2.1 Reserve Forests

IFA vests sweeping powers in the State government to constitute a Reserve Forest in *"any forest land or waste land which is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest produce of which the Government is entitled"*.[14] This is done through a process involving the following three essential steps:

(i) a notification of intention is issued, announcing the geographical boundaries of the area proposed to be declared a Reserve Forest;

(ii) a Forest Settlement Officer ("**FSO**") is appointed to examine claims for settlement of rights in such an area; and

(iii) after the rights settlement process is complete, a final notification is issued (under Section 20) declaring the area as a Reserve Forest, and all legal consequences, which flow from such declaration, commence from this date.

The IFA states that once *"it has been decided to constitute such land as reserve forest, and even before a final notification has been issued, there* ***shall be a bar on accrual of any forest rights over such land****"* (emphasis added).[15] All usufruct and ownership rights, therefore, become frozen at this point.

The law fixes a time frame for submission of claims to the FSO for people who have already been exercising rights in a notified area. If they do not submit their claims within this time frame, their rights "*shall be extinguished*"[16] as per law.

The FSO is empowered to acquire the forest rights in the area, upon payment of monetary compensation. He also has the power to recommend that certain portions of the area be excluded from the final notification, if he feels that there are too many forest dwellers' rights there. He has the option to pass an order permitting or prohibiting the continuation of pasture or forest produce collection rights.[17] If there are claims regarding shifting cultivation rights in such land, and if the FSO is of the view that these rights should continue, an order "*permitting or prohibiting the practice wholly or in part*" can be passed by the State government.[18]

It is, therefore, entirely within the powers of the State government to decide whether anyone at all retains legal rights over lands that they have been using and occupying, sometimes for many generations, before it decides that the area is a Reserve Forest and government property. It is well documented that a large proportion of forest dwelling and *Adivasi* communities did not, in fact, come forward to make claims before the FSO during the colonial period, and even thereafter. The result: since their

[14] Section 3, IFA.

[15] Section 5, IFA.

[16] Section 9, IFA.

[17] Section 12, IFA.

[18] Section 10, IFA.

pre-existing rights stood "extinguished", they became illegal occupants on their own traditional homelands. Even provisions for continuation of exercise of forest rights can be rescinded or modified or commuted within five years of the final notification.[19] Any public or private way or water course in a Reserve Forest can be stopped at any time, if an alternative has been provided *"which the State government deems to be reasonably convenient*."[20]

The forest legislations in Madhya Pradesh (through State amendments to IFA) and Odisha (through the OFA) go even further. These State-level laws create an additional sub-classification known as "Deemed Reserve Forest", where the law designates lands as forest through a deeming clause or a 'legal fiction'. Thus, *"any forest land or waste land...in the 'merged territories' .... which had been recognised by the rule of any such state.....as a reserved forest... or....which had been dealt with in any administration report (as a reserved forest).... shall be* ***deemed to be a reserved forest***"(emphasis added).[21] Here, the law openly acknowledges that even the superficial veneer of a process of rights settlement under the FSO is not required.

The authoritarian tone of the provisions which declare Reserve Forest on traditional *Adivasi* lands through legislative fiat is buttressed by criminalisation of various activities, including many that are traditional practices of forest dwelling communities in these areas. This is done through specific delineation of certain acts and omissions as 'forest offences' in such Reserve Forests.[22] Criminal offences in Reserve Forests are listed in Section 26, IFA[23] and include:

- *Setting fire to a Reserved Forest, or kindling a fire or leaving a fire burning, in such manner as to endanger the forest;*
- *Kindling, keeping or carrying fire, except at such seasons as the Forest Officer may notify;*
- *Trespasses or pastures cattle, or permits cattle to trespass;*
- *Causes any damage by negligence in felling any tree or cutting or dragging any timber;*
- *Fells, girdles, lops or burns any tree, or strips off the bark or leaves from or otherwise damages any tree. In Madhya Pradesh and a few other States, causing similar damage to forest produce has been included in this clause;*
- *Quarries stone, burns lime or charcoal, collects or removes any forest-produce, or subjects any of these to any manufacturing process;*
- *Clears or breaks up any land for cultivation or any other purpose. In Madhya Pradesh, this particular offence has been extended to include Protected Forests;*
- *Hunts, shoots, fishes, poisons water or sets traps or snares;*
- *In an area where the Elephant Preservation Act, 1879 is not in force, kills or catches elephants.*

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[19] Section 22, IFA.

[20] Section 25, IFA.

[21] Section 20A, IFA, as applicable to the State of Madhya Pradesh.

[22] Section 26, IFA.

[23] Corresponding Section 27 under OFA.

The law does recognise that if the exercise of a certain right, such as collection of Minor Forest Produce or access to pasture, has been permitted by the FSO, then such acts will not be a forest offence or crime.

However, the overarching authoritarian tone of the law with the enunciation of criminal offences, there is a clear adoption of a retributive approach to criminal justice. The criminal law provisions, therefore, are steeped in excessive punishments and presumption of criminality, reinforcing the stereotype of the forest dwelling savage who has to be whipped into obedience with the firm hand of the criminal law. It is useful to draw attention here to the principles of criminal justice enshrined in the fundamental rights chapter of the Indian Constitution, which have been discussed at length under Chapter 3 of this report.

Presumptions

In violation of the basic principle of criminal jurisprudence on presumption of innocence, the forest law makes certain important presumptions. These have far-reaching consequences for a forest dweller, who may be apprehended by a forest official while going about his ordinary activities in a Reserve Forest Area. Thus, where a question arises in a proceeding whether any forest produce is the property of the government, the IFA states that it shall be presumed that it is the property of the government, until the contrary is proved.[24] Another far-reaching presumption in forest law is that where any person is found in possession of a forest produce within the limits of a Reserve Forest, he shall be presumed to be guilty of removing the forest produce without authority, until the contrary is proved.[25]

Although these are rebuttable presumptions (i.e., the accused person will be given an opportunity to produce evidence in a trial to displace these presumptions), it must be recognised that these presumptions operate within a reality where the balance of power between the forest officer and the forest dweller is completely skewed. When read together with the numerous other criminal law provisions which increase this imbalance (*see Part B below*), the result is quite alarming.

Punishments

While the IFA (Central legislation) has proposed relatively mild punishments for forest offences, and also left considerable discretion with the judge to impose mild sentences, State amendments have enhanced punishments with a heavy hand. Throughout the IFA, the punishment for forest offences is "*imprisonment for a term which may extend to six months,* ***or*** *with fine which may extent to five hundred rupees,* ***or*** *with both*" (emphasis added), other than a few notable exceptions which we discuss further below. The State governments, on the other hand, while retaining the same or similar lists of forest offences as the Central legislation, have made extensive amendments to the punishment clauses.[26] This includes higher punishments and erosion of judicial discretion in imposing such punishments by erasing the option of imposing fines instead of imprisonment, and mandating minimum sentences of imprisonment in many cases.

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[24] Section 73, OFA.

[25] Section 73A, OFA.

[26] The variations in forest offences and punishments in Reserve Forests in different States are delineated in *Table 4* hereunder.

Table 4: Amendments made by different State legislatures to the IFA with regard to punishments for forest offences in Reserved Forests

State	Punishment
Bihar	Minimum term of six months which may extend to two years or with minimum fine of Rs. 1,000 which may extend to Rs. 5,000 or both in addition to compensation
Haryana	Term which may extend to one year, or with fine which may extend to Rs. 1,000 or both in addition to compensation
Himachal Pradesh	Term extendable to two years or fine which may extend upto Rs. 5,000 or both in addition to compensation
Madhya Pradesh	Term which may extend to one year or fine which may extend to Rs. 15,000 or both in addition to compensation
Maharashtra	Term which may extend to one year or fine which may extend to Rs. 2,000 or both in addition to compensation. For offences under Sections 26(1)(d) and (h), eviction from forest or land possible in relation to which offence has been committed
Punjab	Term which may extend to two years or fine which may extend to Rs. 5,000 or both in addition to compensation
Uttar Pradesh	For offences under Sections 26(1)(b), (f), (g) and (h): *First offence:* term which may extend to two years or fine which may extend to Rs. 5,000 or both and in addition compensation. *Second and every subsequent conviction*: term which may extend to two years or with fine which may extend to Rs. 20,000, not less than Rs. 5,000 or with both and in addition compensation. For offences under all other clauses: Term which may extend to six months or fine which may extend to Rs. 1,000 or both and compensation. On second and every subsequent conviction, term which may extend to six months or fine which may extend to Rs. 2,000 or both and compensation
Uttarakhand	Same as Uttar Pradesh
West Bengal	Term which may extend to one year or fine which may extend to Rs. 1,000 or both and compensation. In addition to penalties provided under Section 26(1), the following may be imposed: ▪ Eviction possible from forest or land of any person who in such forest, trespasses or pasture cattle, or permits cattle to trespass, or clears or breaks up such land for cultivation or for any other purpose, ▪ Demolition of any building erected or construction made by such person on such land ▪ Confiscation of any agricultural or other crops grown, or any building erected or any construction made
Gujarat	For offences under Section 26(1) (d) and (h), possible eviction from forest or land in relation to which offence has been committed (Section 26(4))

Particular attention must be given to the OFA, which adopts a very stringent approach to punishments for forest offences committed in Reserve Forests.[27] It classifies offences into several categories with differing intensities of punishment as follows:

(i) In forest lands where only the *first notification* (under Section 4) has been issued, a variety of activities such as making of fresh clearings, fire related offences, and removal of forest produce have been criminalised. These activities invite punishment of imprisonment of up to 1 year, **and** also a fine of up to Rs. 1,000.

(ii) In a Reserve Forest where the *final notification* has been issued (under Section 20), a much wider array of activities are listed as forest offences. The fine amount is increased to Rs. 2,000, and in addition, compensation is payable for the damage done to the forest. Interestingly, while most forest offences under the OFA do not provide a minimum sentence, an amendment in 2003 (Section 55AA) requires a judicial officer to impose a minimum sentence of one-month imprisonment combined with a fine of at least half of the maximum statutory fine in all such cases. Where a judge deviates from this mandatory minimum, he must provide sufficient reasons in writing.

(iii) Certain activities in a Reserve Forest invite very severe punishment, such as making of fresh clearings for cultivation or actual cultivation, fire related offences, causing damage to trees and forest produce, quarrying of stone and limestone, and hunting. Here, the statute itself provides a mandatory minimum sentence of imprisonment of three years, which can extend to seven years, **and also** a fine of up to Rs. 10,000. Such curtailment of the discretion of a judicial officer to mould the punishment to fit the crime on a case-by-case basis is another violation of a basic principle of criminal justice.

The statutes also provide for especially severe punishments on the community as a whole. Both the IFA as well as the OFA provide additional punishments in certain situations, which can be imposed on entire communities without going through the judicial process. Thus, where the government is of the view that a forest fire has been caused wilfully or through gross negligence, an order can be passed by the forest department suspending exercise of all rights in such area for any length of time. No reference to a court of law is required for such suspension of rights.[28] The OFA empowers the government to also suspend rights where there is a theft of forest produce, which may impact future yield of the produce, and a mere 'reasonable opportunity of being heard' shall suffice.[29]

Evictions

There have emerged several statutory amendments over the years which empower State authorities to evict forest dwellers from their forest homes. It must be noted here that the colonial government, while enacting the IFA, did not make any provision

[27] Section 27, OFA.

[28] Section 26(3), IFA.

[29] Section 28, OFA.

for eviction of forest dwellers from any category of forest land, with or without conviction for any forest offence. These powers have come through enactments by State legislatures of an independent nation. Our analysis of provisions across State forest legislations and amendments finds that there is no consistency in the different provisions and procedures for eviction provided under an array of State legislations.[30]

The OFA has an unusually harsh provision for persons who are convicted of certain forest offences by a court. It requires mandatory eviction of such person from the land in question, removal / demolition of structures and seizure and confiscation of any standing crop on such land. Somewhat incongruously, the same provision goes on to state that where any act is done with the written permission of the Divisional Forest Officer or authorised officer, it shall not be a forest offence.[31]

The provisions of the Central and State-level forest legislations, insofar as these relate to Reserve Forests, demonstrate how blinding authority, when bent towards the objective of imposing sovereignty through criminal law provisions woven into the fabric of law, results in a complex web. This confounds and terrifies forest dwellers and *Adivasi* communities who have been living in these forests for generations. These provisions, whether viewed separately or examined holistically, are anathema in modern criminal jurisprudence. They certainly have no place in a constitutional democracy. Yet these provisions continue in the statute books 74 years after Independence, and these continue to be replicated in other forest related laws.

5.2.2 Protected Forests

Ironically, Protected Forests are those where the level of protection and control exercised by the state is lower than that in Reserve Forests. The appropriation of authority by the State government to declare Protected Forests extends to any land over which it has proprietary control, which is not a Reserve Forest. The relevant provision begins with a pious intention to enquire into and record the nature and extent of rights being exercised by forest dwellers and *Adivasis* in such land. This intention is soon dissipated with a provision which states that if the State government is of the view that such inquiry and record will take a length of time *"and in the meantime the rights of the government shall be endangered,"* then such enquiry process can be done away with.[32]

This precise clause has resulted in vast swathes of forest land across India being classified as 'un-demarcated protected forest' where no rights recognition process has ever taken place. As Madhu Sarin, noted scholar on forest history, notes:[33]

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[30] Radhika Chitkara and Khushboo Pareek, "The Right to Land: A Study on Legality of Forced Evictions", *NLUD Journal of Legal Studies,* Vol. II, 2020 at 69-88; available at: *https://lawandotherthings.com/2020/10/volume-ii-of-the-nlud-journal-of-legal-studies/.*

[31] Section 27(6), OFA.

[32] Section 29(3), IFA.

[33] Madhu Sarin, "Undoing Historical Injustice: Reclaiming Citizenship Rights and Democratic Forest Governance through the Forest Rights Act", in Sharadchandra Lele and Ajit Menon (eds), *Democratizing Forest Governance in India* (Oxford University Press, Delhi, 2014).

> *"Seventy-six percent of Odisha's Schedule V areas have been declared state property - 50% as forests and 26% as revenue wasteland - while the vast majority of the tribals have been left legally landless. Lands with over 10-degree slopes were left unsurveyed simply because the cost of surveying them was too high or because shifting cultivators were considered ineligible for a grant of land titles as they did not occupy the same piece of land continuously for 12 years. Hundreds of tribal villages on land declared to be state forests have never been surveyed, depriving them of access to basic development facilities and citizenship rights."*[34]

Having declared these lands as Protected Forests without conducting any enquiry or settlement of rights, a vast array of forest related activities (which stand prohibited inside Reserve Forests) are permissible within such forests. This includes felling and removal of timber for personal use as well as trade, collection of Minor Forest Produce, cutting of grass for cattle feed as well as grazing, and so on. However, such continuation of forest activities is not without restriction, with forest-related activities being governed by a complex architecture of State level rules and regulations. We have seen earlier in this chapter that contravention of such Rules through act or omission is defined as a 'forest offence', and penalties for violation are provided in the body of the different Rules. Section 32, IFA enables the State government to make Rules on a variety of subject matters, including:

- Cutting, sawing and removal of trees and timber, and the collection, removal and manufacture of forest produce from protected forests;
- Grant of licenses to inhabitants of towns and villages around protected forests to take trees, timber, and other forest produce for their own use, and payments to be made by them for such license;
- Grant of licenses to persons felling or removing trees or timber or forest produce for purposes of trade, and payments to be made by them for such license;
- Clearing and breaking up of land for cultivation or other purposes inside protected forests;
- Protection of timber and trees lying in such forests from fire;
- Cutting of grass and pasturing of cattle in protected forests;
- Hunting, shooting, fishing, poisoning of water, setting of traps and snares, and in forest areas where the *Elephants Preservation Act, 1879* does not apply, the killing or catching of elephants;
- Protection and management of any portion of the forest which has been closed under Section 30 (*discussed below*); *and*
- Exercise of rights in such forests.

The State governments continue to retain a sovereign authority to alter the system of permissions, regulations, and privileges in Protected Forests at any time. Section 30, IFA provides State governments the power to notify certain classes of trees as 'reserved'

[34] *Ibid.* At 119.

or declare any portion of the forest to be closed, suspending all rights of private persons in such forest, or prohibit certain activities from "*any land in any such forest*."[35]

Thus, although there is no specific list of acts delineated as forest offences for Protected Forests in IFA, there are prohibitions enunciated in the law for trees / activities / areas notified under Section 30,[36] thus bringing the criminal law into play to assert state authority over this category of forests as well. Once a category of trees / activities / areas is notified under Section 30, certain activities are specifically prohibited and described as forest offences.[37]

IFA also provides that such offences are punishable with imprisonment for a term, which may extend to six months, **or** with a fine which may extend to Rs. 500, **or** both.[38] Different State legislatures have amended the punishment provisions in the Central statute insofar as it applies to them.[39] The law in Madhya Pradesh provides enhanced punishment of imprisonment of upto one year, or a fine which may extend to Rs. 15,000. The OFA provides punishment for such forest offences of imprisonment up to one year, **and also** a fine upto Rs. 2,000, along with an additional payment of compensation upto the value of the damage caused to the forest.[40]

The Central statute provides that when a fire is caused wilfully or by gross negligence in a Protected Forest, the State government can suspend the exercise of right of pasture or forest produce in such forest for such period as it sees fit. Reference to a judicial process or court of law is not required before passing such order of suspension.[41] The OFA takes the nature of punishment considerably further by providing for suspension of right to pasture and forest produce not only in case of wilful or negligent causing of fire, but also in case of theft of forest produce at a scale which is likely to imperil the future yield of the forest.[42]

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[35] Section 30, IFA.

[36] *Ibid*.

[37] Section 33, IFA lists the following acts, which are categorised as 'offences' in areas notified under Section 30:

- To fell, girdle, lop, tap or burn, strip leaves or bark, or otherwise damage any tree reserved under Section 30. In Madhya Pradesh, causing such damage to forest produce is also included within the purview of this offence.
- In violation of prohibition under Section 30, to quarry any stone, or burn any lime or charcoal, or collect, remove, or subject to any manufacturing process any forest-produce;
- In violation of prohibition under Section 30, to break up or clear for cultivation or any other purpose any land in any protected forest. In Madhya Pradesh, in addition to actual cultivation, any attempt to cultivate such land is also an offence;
- Setting fire to such forest, or kindle a fire without taking all reasonable precautions to prevent its spreading to any tree reserved under Section 30, whether standing fallen or felled, or to any closed portion of such forest;
- to leave a fire burning in the vicinity of any such tree or closed portion;
- to fell any tree or drag/ remove any timber so as to damage any tree reserved as aforesaid;
- to permit cattle to damage any such tree;
- to infringe any Rule made under Section 32.

[38] Section 33, IFA.

[39] See *Table 5* hereunder.

[40] Section 37, IFA.

[41] Section 33(2), IFA.

[42] Section 37(4), OFA.

Table 5: Amendments made by different State legislatures to the IFA with regard to punishments for forest offences in Protected Forests

State	Punishment for forest offence in Protected Forest
Bihar	Minimum term of six months which may extend to two years or with minimum fine of Rs. 1,000 which may extend to Rs. 5,000 or both
Gujarat	Possible eviction from forest or land in relation to which offence has been committed
Haryana	Term which may extend to one year, or with fine which may extend to Rs. 1,000 or both
Himachal Pradesh	Term extendable to two years or fine which may extend upto Rs. 5,000 or both
Madhya Pradesh	Term which may extend to one year or fine which may extend to Rs. 15,000 or both
Maharashtra	Term which may extend to one year or fine which may extend to Rs. 2,000 or both. Possible eviction from forest or land in relation to which offence has been committed
Punjab	Term which may extend to two years or fine which may extend to Rs. 5,000 or both
Uttar Pradesh	*First offence:* term which may extend to two years or fine which may extend to Rs. 5,000 or both. *On second and every subsequent conviction for same offence*: term which may extend to two years or with fine which may extend to Rs. 10,000 or both
Uttarakhand	*First offence:* term which may extend to two years or fine which may extend to Rs. 5,000 or both. *On second and every subsequent conviction for same offence*: term which may extend to two years or with fine which may extend to Rs. 10,000 or both
West Bengal	Term which may extend to one year or fine which may extend to Rs. 1,000 or both. Apart from penalty provided in Section 33(1), eviction may be done for clearing, breaking up land for cultivation or for any other purpose

The IFA makes no provision for eviction from a Protected Forest, but several States have made such provisions in their State legislations. Unfortunately, many of these State level laws are blatantly violative of the constitutional due process protection. The OFA, for instance, makes provision for mandatory eviction in case of conviction of a forest offence, where the offender has broken up or cleared land for cultivation within a Protected Forest.[43]

[43] *Supra*, note 30.

Nevertheless, there is a vast difference between the extent to which forest related activities are criminalised in Reserve Forests and in Protected Forests, in terms of activities which are proscribed in one while being permitted in the other. There is also an enormous difference in the weight of legal presumptions, which reinforce a forest dweller's criminality in one area but have no relevance in another. While the law creates these strict boundaries between the two categories of forest, the reality is that on the ground no such boundary is visible to a forest dweller or *Adivasi* going about his or her everyday activities. This can result in a forest dweller inadvertently committing what the law perceives as serious crimes simply because on a particular day she chose a different route to take a herd of sheep to a grazing ground or collected fallen wood for fuel from under a tree that was 'reserved' unbeknownst to her. Forest officials often take advantage of this ambiguity to terrorise forest dwellers and extort bribes from them under threat of criminal prosecution. In another chapter, we have specifically examined how such ambiguity interfaced with authority impacts forest dwelling women.[44] But even without examining the actual implementation of the forest law, these provisions clearly fly in the face of constitutional protections, which ought to be part of the criminal jurisprudence in a modern democracy.

5.2.3 Village Forests

An interesting though little used provision of IFA, is Section 28, which empowers the State government to create 'Village Forests' by assigning rights to any village community over any land that has been constituted as a Reserve Forest (and in Odisha, also over lands which are constituted as Protected Forests). In the same breath, the law also empowers the State to "*cancel such assignment*" at any time.[45]

The law enables the State to make Rules for such Village Forests. This includes Rules for "*regulating the managemen*t", for "*prescribing the conditions under which the community to which such assignment is made*", who can exercise any rights over the timber and forest produce, and delineating their "*duties for the protection and improvement of such forest*".[46]

To obviate any doubt regarding the nature of such 'assignment' of Village Forests, it is stated that all provisions relating to Reserve Forests (and in Odisha, also Protected Forests) shall apply to Village Forests. The law leaves no room for doubt that all the provisions relating to forest offences in Reserve Forests, both regarding definition as well as procedure, are applicable to Village Forests as well.

Accordingly, the State's power and authority resides even where Village Forests are concerned. The making and breaking of categories continues to remain, even here, at the pleasure of the government. Even within such assignment, the State retains

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[44] See *Chapter 8: Violence Against Adivasi Women: Unravelling of the Social Structure*.

[45] Section 28, IFA.

[46] Section 28(2), IFA.

control over the regulation and management of the forests and the forest produce through Rules. Any remaining room for uncertainty is removed with the application of criminal law provisions to these forests in just the same way as Reserve Forests.

Odisha is one of the few States in the country which has issued Rules for management of Village Forests[47] even though no Village Forests have actually been assigned. The *Orissa Village Forests Rules, 1985* ("**Odisha Rules**") vest the power of management of these forests in the Village Forest Committee ("**VFC**"), chaired by the *Sarpanch* of the *Gram Panchayat*, and comprising the ward members, the forester, the revenue inspector, and up to three more persons nominated by the village community. The focus of the Rules appears to be the protection of the tree plantations undertaken in these Village Forests. The exercise of rights to grazing, Minor Forest Produce and so on, by members of the village community are to be in strict compliance with the Management Plan and only upon obtaining the necessary permits from the VFC. Duties of the village community to protect and preserve these plantations have been duly emphasised.

Apart from the various injunctions contained in the Rules (violation of which amounts to 'forest offences' in terms of the definition of forest offence itself), Rule 15, Odisha Rules states:

> *"**15. Offence and Penalty -** The provisions of Section 27 of the Act shall apply mutatis mutandis to all village forests."*

Madhya Pradesh also notified the *Madhya Pradesh Village Forest Rules, 2015* ("**MP Rules**") in exercise of the rule-making powers of the State government under IFA. Here, it is the *Gram Sabha*, or general body of all adults in the village which is responsible for the management, protection and development of the Village Forest assigned to it. It carries out this responsibility by constituting a *Gram Van Samiti* or VFC, which is then responsible for implementing the Management Plan, including for cutting of trees, removal of timber and fuelwood, sharing of forest produce and its transportation, grazing, as well as determining closing periods. The pre-existing *nistar* rights of the village community are to be exercised under the supervision of the VFC, which can also allow other villagers to access the forest produce upon payment of a fee.

The MP Rules do not make any provision for offences and penalties, but there is a detailed listing of 'duties' of every member of the village to 'prevent commission of any offence', and assist in apprehending the culprits. The provision bears close examination:

> *"**14. Duties of Residents:** It shall be the duty of every resident of the village to:*
> *(a) **prevent the commission of any offence** which is in contravention of the provision of the (Indian Forest Act, 1927) and is being committed in the village forest;*
> *(b) **help in apprehending and initiating legal action** against the person who has committed any offence in the village forest in contravention of the provisions of the (Indian Forest Act, 1927);*

[47] See Sections 30 to 32, OFA. The other States where such Rules exist, although greatly different in terms of historical development and approach, are Uttarakhand, Maharashtra and Madhya Pradesh.

*(c) to **report the forest officer about the offence** committed in the village forest and **safeguard the forest produce** until the forest officer takes charge thereof:*

(d) to help in extinguish the fire about which he has knowledge or has received information and to prevent the fire from spreading;

*(e) to **assist any forest** officer or police officer demanding his aid for preventing the commission of any offence against the (Indian Forest Act, 1927) or these rules or in the investigation of any such offence."* (emphasis added)

Given that 'forest offence' is defined to include violation of any Rules framed under the IFA, the language of Rule 14 above makes it quite clear that failure of a forest dweller to provide such 'cooperation' to the forest bureaucracy may itself be a forest offence inviting prosecution. It is astonishing how an allegation of lack of cooperation with state authorities on lands that have been traditionally occupied by *Adivasis* and their ancestors for centuries, can be a criminal offence. Here, provisions in a colonial legislation to place certain forests under the charge of forest dwelling communities to a greater or lesser degree, have been twisted to become tools of dominance by the state machinery.

5.2.4 Forests and Lands that are not Government Property

There are various categories of lands which may not be owned by the government, or over which the state has joint interest, but where state protection is considered necessary for a variety of reasons. This could include wasteland, lands which are necessary for the prevention of forest fires, lands which require protection for purposes of soil preservation or preservation of water sources, and so on.[48] The State government may also find that certain privately-owned forests are being mismanaged, or certain categories of trees are in danger and, therefore, need to be taken over. The law even anticipates situations where a private owner requests the State to take over his forest, as fanciful as that may seem. In effect, this catch-all category removes all room for doubt whether the power and authority of the state extends further and beyond the category of government-owned forests. Beyond all measure of contestation, the eminency in domain is asserted and reinforced by IFA over private forests and trees which are not on government land.

In such forests, IFA (as well as the OFA in Odisha) give the State government power to issue directions restricting, regulating or prohibiting certain activities or to construct works at its own expense, whenever it is found to be necessary for the purpose of:

- Protection against storms, floods, etc.;
- Preservation of soil and prevention of land slips;
- Maintenance of water supply in springs, rivers, tanks, reservoirs, and irrigation projects;

[48] See Chapter V, IFA.

- Protection of roads, bridges, railway lines, and other lines of communication; and
- Preservation of public health and places of worship.

The powers of the state in such situations are wide and sweeping, with almost no checks and balances. This could include the power to:

- Take over the management of the forest land and hand over the management to a Forest Officer; or
- Take the forest land on lease on agreed terms; or
- Acquire the forest land under the *Land Acquisition Act, 1894*.[49]

In such forest areas, the State government can extend the provisions relating to forest offences in Reserve Forests and Protected Forests. Since there is no provision here for even the superficial process of rights settlement under an FSO, it is not far-fetched to anticipate situations where a person or a community exercising an age-old easementary right[50] in a private forest finds itself in breach of the law, and charged with a criminal offence to boot. It is also not far-fetched to envision use of such criminal law provisions against private owners in order to squash their objections to the takeover / control of their forests by state machinery. Rare instances of cooperative owned forests, such as the Kangra Forest Cooperatives in Himachal Pradesh, which were beacons of modern governance mechanisms at one time, have been run aground through bureaucratic apathy and red tape.[51]

5.2.5 Forests Offences Generally Applicable Across Forest Categories

The IFA and its State-level amendments have detailed provisions regarding certain acts which are criminalised regardless of the category of forest land from which they emerge. Not surprisingly, these provisions relate primarily to timber, which has continued to be considered the most important and valuable forest resource as far as the state is concerned.[52] The forest offences relating to timber include:

- *Counterfeiting or defacing marks on trees and timber and for altering boundary marks:* This forest offence as described signifies the extent of ownership of the

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[49] It must be noted that the *Land Acquisition Act, 1894* has been repealed by the *Right to Fair Compensation, and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.* However, the IFA, WLPA, OFA and a host of other forest laws continue to refer to it as the go-to legislation for any exercise of the State's power of eminent domain, and no amendments have been carried out in these laws. As a result, there is complete lack of clarity regarding what law will be applied for acquisitions when new forest areas or Protected Areas are to be declared post-2013.

[50] *Wharton's Concise Law Dictionary* (Universal, New Delhi, 2010) at 336, defines an *easement* as "*a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own*". In India, this area of law is governed by the *Indian Easements Act, 1882* (Act No. 5 of 1882).

[51] Sudha Vasan, "Community Forestry: Historical Legacy of Himachal Pradesh," *Himalaya, the Journal of the Association for Nepal and Himalayan Studies*: Vol. 21: No. 2, Article 8, 2001; available at: *http://digitalcommons.macalester.edu/himalaya/vol21/iss2/8.*

[52] See Chapter VI (Of the Duty on Timber and Other Forest Produce), Chapter VII (Of the Control of Timber and Other Forest Produce in Transit) and Chapter VIII (Of the Collection of Drift and Stranded Timber) of the IFA, which relate entirely to timber, other than specific provisions relating to forest offences, including offences relating to timber.

state over trees, timber or land. The punishment is imprisonment of up to two years, or a fine, or both. When compared to some of the punishments which have been brought in by State amendments, this does not appear very harsh, but it is important to note that in the Central statute, this offence invites the harshest punishment of all the offences defined thereunder. This fervour has been reserved for interference with the symbols of government ownership of forest lands and the most prized forest produce emerging there from, the timber.[53]

- *Offences pertaining to timber and other forest produce in transit:* There are strict provisions relating to transportation of timber and other forest produce. The Central statute provides for punishment of imprisonment for violation of these provisions, which may extend to six months, or fine which may extend to Rs. 500, or both. The punishment is doubled in case the offence is committed after sunset and before sunrise, or where there is preparation for resistance to lawful authority, or where the offender has been convicted previously of a similar offence.[54]

  There are several State amendments which increase the quantum of punishment. Under the OFA, the punishments provided for transport-related offences are unusually harsh. For example, any contravention of Rules relating to transit of timber invites imprisonment upto five years and fine up to Rs. 5,000. In case the offence is committed between sundown and sunrise, or is a repeat offence, or where there is preparation for resistance, then the same offence invites a mandatory minimum sentence of three years imprisonment which may extend to seven years, and in addition a fine which may extend to Rs. 10,000.[55]
- *Offences relating to protected trees, such as sandalwood:* Under the OFA, cutting, uprooting, removal or damage of a sandalwood tree, or any part of it is a serious criminal offence, inviting a mandatory minimum sentence of three years imprisonment which can extend to seven years, and a fine upto Rs. 10,000.[56] Sandalwood being a protected tree across the country, a special provision in this regard is not surprising. It is, however, surprising that such harsh mandatory minimum sentences are provided, overriding judicial discretion.
- *Offences pertaining to drift and stranded timber:* Contravention of Rules prescribed by the State government in this regard will attract imprisonment up to six months or fine extendable to Rs. 500 or both.[57]
- *Offences pertaining to cattle trespass:* Cattle trespass into a Reserve Forest or into a Protected Forest which is closed for pasture is an offence under the

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[53] Section 65, IFA.

[54] Section 42, IFA.

[55] Section 46(2), OFA.

[56] Chapter VII-A, OFA (Provisions relating to Sandalwood) contains several substantive provisions, which assert the exclusive dominion of the State government on "all sandal trees which may grow in any land", and the regulation, sale and manufacture of sandalwood products.

[57] Section 51, IFA.

Cattle Trespass Act, 1871. In addition to the punishment prescribed in that statute for the owner of such cattle, the forest law also provides that the cattle are liable to be impounded.[58]

- *For offences under the Act or Rules for which no penalty is provided:* These are punishable with imprisonment for a term which may extend to one month or fine which may extend to Rs. 500 or both.

For a legislation dating back to colonial India, the extent of detail that continues to exist in the law in 21st Century Independent India on the state's exercise of control and authority over timber is astonishing. Even a superficial examination of the provisions of IFA, and the laws in Odisha and Madhya Pradesh relating to timber and its control demonstrates that the focus of the substantive as well as procedural provisions of the forest law during colonisation was to exercise utmost dominance over every aspect of this valuable forest resource. Indeed, even the definition of forest resources distinguishes between timber on the one hand, and all other forest resources as 'non-timber forest resources'. It is unacceptable that such fixation with the timber 'produce' of forests continues well into the eighth decade of Independence, while forest dwellers and their age-old interactions with the forest for their modest livelihood needs are perceived through the jaundiced lens of the criminal law.

5.2.6 Protected Areas: National Parks, Wildlife Sanctuaries and Tiger Reserves

Creation of Protected Areas

Spurred by the emerging consciousness across the world regarding conservation of wildlife at the time, the Indian Parliament enacted the WLPA, which describes itself as "*(a)n Act to provide for the protection of wild animals, birds and plants and for matters connected therewith or ancillary or incidental thereto with a view to ensuring the environmental and ecological security of the country*." Although it was enacted exactly a hundred years after the formation of the Yellowstone National Park in America, this law adopted the 'fortress conservation' approach, and in much the same way rode roughshod over the traditional rights and livelihoods of indigenous forest dwelling communities.

The law also created a special administrative wing for 'wildlife' within the existing forest bureaucracy, both at the Central and the State level, and invested it with extraordinary powers.

As with demarcation of forests, the WLPA establishes a three-step process for declaration of National Parks, Wildlife Sanctuaries and Tiger Reserves. The law also adopts a peremptory tone, authorising the State government to constitute any area which is required to be protected "*by reason of its ecological, faunal, floral, geomorphological or zoological association or importance…for the purpose of*

[58] Section 70, IFA.

protecting, propagating or developing wild life therein or its environment" as a National Park or a Wildlife Sanctuary, and any area on the recommendation of the Tiger Conservation Authority as a Tiger Reserve.[59]

Procedure for settlement and acquisition of pre-existing rights has also been laid down in the law. There are some important differences in the process for National Parks, Sanctuaries, and Tiger Reserves. While declaring a *Wildlife Sanctuary*, the initial notification of intention and proclamation calling for claims from rights holders also provides for the appointment of a 'Collector' to determine the validity of these claims. If such claims are admitted, the Collector can either exclude the relevant area from the boundary of the proposed sanctuary, or can acquire such land or rights, or even allow such rights to continue in a prescribed manner. Thereafter, the final notification is issued declaring the Wildlife Sanctuary.

The process for declaration of *National Parks* is largely similar, with one important distinction. While making a settlement order, all existing rights in the proposed national park must be extinguished. The Collector is expressly forbidden from making an order allowing existing rights to continue. Even the continuation of grazing rights is disallowed. Therefore, National Parks are, by statute, designed to exclude human habitation and contact with wildlife, and subscribe to the 'wilderness' model of conservation.[60] National Parks are the true fortresses of conservation in India.

Tiger Reserves were earlier an administrative category but were elevated to a statutory category in 2006 through an amendment to the WLPA.[61] When declaring a Tiger Reserve, the State must distinguish between the *core* or critical tiger habitat, and the *buffer* or peripheral area. Here, the law provides for a detailed process, including consultation with local forest dwelling communities regarding whether co-existence is possible, and if not, the free prior consent of the forest dwellers in the area to be relocated, and also to the resettlement package being provided.[62]

Two other categories of Protected Area visualised under the WLPA are the *Conservation Reserves* and *Community Reserves*. The engagement of the forest bureaucracy in these categories of Protected Areas is limited with governance being located largely with the forest dwelling communities. However, the punitive provisions under WLPA have been extended to these areas as well, with similar consequences.

To a greater or lesser degree, the law provides for due process to be followed when declaring Protected Areas. Unfortunately, this intention is not reflected in reality.

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[59] See Sections 18, 35 and 38V of WLPA.

[60] A 2002 amendment to the WLPA permits removal of forest produce *"for meeting the personal and bona fide needs"* of the people living around the park, but this provision is not given effect to in reality. See Proviso to Section 35(6) of WLPA.

[61] Chapter IVB (containing Sections 38K to 38X) was inserted in the WLPA by the *Wildlife (Protection) (Amendment) Act, 2006* (39 of 2006) which came into effect on September 4, 2006.

[62] See Sections 38V(4) and (5), WLPA.

Settlement of rights of village communities living in and around sanctuaries has been notoriously defective.[63] Several sanctuaries were notified under local colonial statutes which did not require rigorous settlement of rights, unlike the present statute. Even notifications issued under the current statute have largely ignored the rights of local communities to usufruct, and if at all any rights have been compensated or allowed to continue, these remain limited to cultivation rights. Furthermore, in case of the declaration of Reserve Forests as Wildlife Sanctuaries, no settlement process is required at all, based on the presumption that settlements have already been completed under the IFA. The fallacy of such presumption needs no reiteration.

There are myriad examples across tribal areas in India of villages which have been 'allowed' to retain private lands inside Wildlife Sanctuaries for homesteads and cultivation but are, in fact, being strangulated by the oppressive regime of the forest bureaucracy in its enthusiasm to prevent extraction of forest produce of any kind.

Although the WLPA under Section 38V provides for consultation with local forest dwelling communities before declaration of Tiger Reserves, this provision has been followed only in the breach. An overwhelming majority of Tiger Reserves have been declared while flouting the provisions requiring consultation with local forest dwelling communities, and their prior consent to the rehabilitation plan. The forest bureaucracy has been relentless in pursuing forest dwelling communities who have chosen to remain inside Tiger Reserves, putting enormous social and economic pressure on them under the guise of 'voluntary relocation' schemes.[64]

Reliable estimates reveal that there are 363 million indigenous and local forest dwelling communities who continue to inhabit protected areas across the world.[65] As of December 2020, there are 981 designated Protected Areas within the geographical boundaries of India, covering 5.03 per cent (171,921 sq. km) of land.[66] In addition there are 130 Marine Protected Areas covering 8,716.98 sq. km.[67] While data on the number of people displaced to make way for these Protected Areas in India is not available, it is reliably estimated that this number could range anywhere between one to six lakh

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[63] Neema Pathak Broome, Shiba Desor, Ashish Kothari, Arshiya Bose, "Changing Paradigms in Wildlife Conservation in India", in Sharadchandra Lele and Ajit Menon, (eds), *Democratizing Forest Governance in India* (Oxford University Press, New Delhi, 2014).

[64] See, for instance, Meenal Tatpati and Sneha Gutgutia, "Criminalising Forest-Dwellers Has Not Helped India's Forests or Wildlife. It's Time for a New Deal", *The Wire*, May 23, 2017; available at: *https://thewire.in/environment/forest-rights-dwelling-communities.*

[65] *Rights-Based Conservation: The path to preserving Earth's biological and cultural diversity?* (Rights and Resources Initiative, Washington DC, 2020) at 5.

[66] *Protected Areas of India* – a database compiled by ENVIS Centre on Wildlife & Protected Areas and hosted by Wildlife Institute of India, Dehradun and the Ministry of Environment, Forests and Climate Change, Government of India ("**MoEF&CC**"); available at: *http://wiienvis.nic.in/Database/Protected_Area_854.aspx*. As of December 2020, of the total number of Protected Areas in India, 104 are National Parks covering 43,716 sq. km, 566 are Wildlife Sanctuaries covering 122,420 sq. km, 97 are Conservation Reserves covering 4,483 sq. km, and 214 are Community Reserves covering 1,392 sq. km.

[67] *Marine Protected Areas* – a database compiled by ENVIS Centre on Wildlife & Protected Areas and hosted by Wildlife Institute of India, Dehradun and MoEF&CC; *available at: http://wiienvis.nic.in/Database/MPA_8098.aspx*. Marine Protected Areas in India consist of 10 National Parks, 115 Wildlife Sanctuaries, Four Conservation Reserves and One Community Reserve.

people.[68] The discrepancy in the estimated numbers of displaced is an indicator how fallacious the promise of due process under WLPA has been.

The shortcomings of this law relate primarily to the concept of 'wilderness', an approach to conservation which is alien to the Indian subcontinent, having been imposed upon us by the Global North. In India, the approach to wildlife conservation and protection has been one of 'stewardship' where local communities have lived in proximity with nature, using it for their survival even while protecting and respecting it. Each tribal and forest dwelling community has developed their own rituals, customs and management practices which further this aim.

The WLPA, instead of acknowledging the existence and relevance of these rich traditional practices, completely overrides them, replacing them with a regime that is harsh and rigid. The imposition of this regime for the past century has, in fact, resulted in an unhappy situation where local communities view wildlife as competitors, with resentment replacing the traditional notions of stewardship and belonging. Indeed, this short-sighted policy has failed to advance the objectives of conservation in India in any lasting way, other than on paper.

There is also the question of faulty settlement procedures which have resulted in displacement of large numbers of tribal and forest dwelling communities from Protected Areas, and the breakdown of their cultural, social as well as economic support structures. In case after case, the state has demonstrated its eagerness to short-circuit the procedural rights of claimants, restrict the number of persons eligible for compensation, and exclude all but legally recorded private property rights from the domain of compensation. The law has facilitated this process by permitting the state to avoid the settlement procedure in a number of cases and providing no punishment or accountability against officials who subvert the procedural rights of local communities or use excessive force.[69]

Wildlife Offences

Section 51, WLPA (on Penalties) is a catch-all provision which states that "***(a)ny*** *person who contravenes* ***any*** *provision of this Act....or* ***any*** *rule or order made thereunder or who commits a breach of* ***any*** *of the conditions of* ***any*** *licence or permit granted under this Act, shall be guilty of an offence against this Act...".* (emphasis added) The overarching nature of this provision is itself suspect as it places the definition of wildlife offences in a state of confusing ambiguity. In addition, the WLPA creates numerous specific wildlife offences, including breach of terms of settlement, and provides for strict punishments in case of violations. These can range from imprisonment for three

[68] C R Bijoy, "Why India's Forest Rights Act is the Most Viable Forest Conservation Law", *The Wire Science*, May 11, 2021; available at: *https://science.thewire.in/environment/why-indias-forest-rights-act-is-the-most-viable-forest-conservation-law/.*

[69] The use of police and paramilitary repression to advance state policy initiatives which may be unpopular, illegal, or even unconstitutional, and the culture of impunity which enables such use, is examined at length under *Chapter 7: Security Laws and Impunity.*

years up to seven years, and include mandatory minimum punishments as well in certain cases. The law also provides for imposition of hefty fines of up to Rs. 25,000 in most cases, and going up to Rs. 50 lakh. Repeat offenders invite even more severe punishments.

From *Table 6* (*on the following page*), it is apparent that the law treats certain categories of wildlife offences as being serious in nature, inviting harsh punishments, while other wildlife offences do not invite such serious response. However, the very existence of certain offences in the statute book, regardless of mild punishments, contributes to the general atmosphere of criminalisation of *Adivasis* and forest dwellers who may be going about their everyday activities as they have traditionally done.

From a reading of *Table 6*, it is also clear that there are a variety of wildlife offences, the commission of which relates primarily to the geographical boundary of the Protected Area in question. In some instances, such as trade in animal trophies and ivory, it extends outside the boundaries of such area as well. We also find that the punishments provided are much more severe than the IFA, with fine in certain situations extending up to Rs. 50 lakh (approx. USD 67,440).

The law curtails judicial discretion by mandating minimum sentences for many wildlife offences. It also divests the judicial officer of the option of imposing a punishment of fine instead of imprisonment depending on the facts of the specific case. This, in itself, is an infringement of the principle of separation of powers. Further, within the geographical boundary of the Core Area of a Tiger Reserve, even the most minor wildlife offence invites a mandatory minimum punishment of three years imprisonment, and additionally a fine.

One final aspect requires attention when examining the definition of wildlife offences under the WLPA. Under Section 27(2), a list of duties has been imposed on persons living inside Protected Areas. This includes the duty to prevent the commission of a wildlife offence, to help in discovering the offender, to report the death of any wild animal, to extinguish any fire, and, in addition, to assist a wildlife officer to prevent or investigate any wildlife offence.[70] Such a provision places an oppressive burden on forest dwelling communities who continue to live inside Protected Areas, which includes both those who are victims of faulty rights recognition processes and those who are permitted to do so under the order of final declaration itself. At all times, these communities must remain beholden to the forest bureaucracy to assist in preventing so called wildlife offences, apprehending offenders, providing information about possible offences and so on. For all practical purposes, the forest dwellers are compelled to become informers against their own people, as failure to 'cooperate' would itself be construed as a forest offence, invite severe penalties and lead to possible cesser of their own access to the forest and forest resources.

[70] Sections 27(2) and 35(8), WLPA.

Table 6: Wildlife Offences in National Parks, Wildlife Sanctuaries and Tiger Reserves

Description	Penalty
Hunting of wild animals specified in the Schedules, without necessary permit or permission[71]	Mandatory minimum imprisonment of three years, which may extend up to seven years and also mandatory minimum fine of Rs. 10,000
Picking, uprooting, damaging, collecting, and cultivating any specified plant, whether from a Protected Area or any other specified area, and also the sale or transfer or such specified plants[72] *Exceptions:* An *Adivasi* (ST) who has been permitted to collect and possess such specified plant in a Protected Area, for bona fide personal use, is exempted	*First offence:* Imprisonment up to three years, or fine up to Rs. 25,000, or both. *Subsequent offence:* Mandatory minimum imprisonment of three years, which may extend up to seven years and also mandatory minimum fine of Rs. 25,000. In addition, any licence granted to a person convicted of a wildlife offence shall be cancelled[73]
Trade or commerce in trophies, animal articles, animal parts, or dealing in any kind of scheduled animals, or ivory, in any part of the country, without the specific permission[74]	Mandatory minimum imprisonment of three years, which may extend up to seven years and also mandatory minimum fine of Rs. 10,000
Causing damage, defacing, altering or removal of any boundary mark in a Protected Area[75]	Mandatory minimum imprisonment of three years, which may extend up to seven years and also mandatory minimum fine of Rs. 10,000
Entry into a Protected Area without necessary permit, unless the person is a public servant on duty or a person who lives there or his dependents[76]	
Destruction or removal of any wildlife or forest produce, or causing damage to habitat of any wildlife, or diversion or obstruction of a water source in a Protected Area[77] *Exception:* removal of forest produce for personal bona fide needs, but not commercial purposes, of people living in and around the Protected Area[78]	*First offence:* Imprisonment up to three years or fine up to Rs. 25,000 or both. *Second or subsequent offence:* Mandatory minimum imprisonment of three years which may extend up to seven years and also fine of not less than Rs. 25,000
Causing a fire, or leaving a fire burning, in such a manner as to endanger such Protected Area[79]	

[71] Section 9 read with Sections 11 and 12 of WLPA. The Chief Wildlife Warden can grant permission to hunt certain wild animals which have become dangerous to human life or human property (including standing crops), disabled or diseased, or are categorised as vermin. These hunted animals are considered to be government property. Permission can also be granted to hunt animals for educational or scientific research and management purposes.

[72] Sections 17A, 17B, 17C and 17D, WLPA.

[73] Section 51(4), WLPA.

[74] Sections 49A to 49C under Chapter VA, WLPA.

[75] Sections 27(3) and 35(8), WLPA.

[76] Sections 27(1) and 35(8), WLPA.

[77] Sections 29 and 35(5), WLPA.

[78] Provisos to Sections 29 and 35(5), WLPA.

[79] Sections 30 and 35(8), WLPA.

Description	Penalty
Entry into a Protected Area with a weapon, except with previous permission in writing from the Chief Wildlife Warden[80]	
Use of chemicals, explosives or any other substances which may endanger wildlife[81]	
Grazing of livestock inside a National Park[82] (which is completely prohibited) or grazing of livestock contrary to the regulations inside a Wildlife Sanctuary[83]	
Teasing or molesting any wild animal, or littering the grounds in a Protected Area or a zoo[84]	*First offence:* Imprisonment upto six months, or fine up to Rs. 2,000, or both. *Subsequent offence:* Imprisonment up to one year, or fine up to Rs. 5,000
Wildlife Offences in Tiger Reserves	
Any of the offences described above, when committed in relation to the core area (critical tiger habitat) of a Tiger Reserve[85]	*First offence:* Mandatory minimum imprisonment of three years which may extend up to seven years, and also mandatory minimum fine of Rs. 50,000 which may extend to Rs. 2 lakh. *Subsequent offence:* Mandatory minimum imprisonment of seven years (no upper limit provided), and also mandatory minimum fine of Rs. 5 lakh which may extend to Rs. 50 lakh.
Abetment of an offence in a core area (critical tiger habitat) of a Tiger Reserve, if the act abetted is committed in consequence of the abetment[86]	The same punishment as provided for the offence itself.

Presumptions and Evictions

[80] Sections 31 and 35(8), WLPA.

[81] Sections 32 and 35(8), WLPA.

[82] Section 35(7), WLPA.

[83] Section 33(c), WLPA.

[84] Sections 27(4), 35(8) and 38J, WLPA.

[85] Section 51(1C), WLPA.

[86] Section 51(1D), WLPA.

Deviating from constitutional protections in much the same way as forest law, the WLPA also departs from the principle of presumption of innocence. It specifically shifts the burden of proof on the accused in certain cases. It is provided[87] that where it is established that a person is in possession of any captive animal, animal article or meat, trophy, specified plant, it **shall be presumed** that such a person is in unlawful possession of such animal or item, unless the contrary is proved. To remove any doubt, the statute makes it clear that the burden to 'prove the contrary' is on the accused person. It is unfortunate that where the provision regarding presumption and burden of proof has been questioned, the courts have tended to uphold it. The court has held that if simple possession and recovery are proved by the prosecution, the burden of proof shifts upon the accused to prove that they were not in conscious possession of the article and were not aware of its existence.[88]

The WLPA also contains a sweeping power to remove encroachments from Protected Areas. Officers of the rank of Assistant Conservator of Forests and above are empowered to summarily evict any person from a Wildlife Sanctuary or National Park who *"unauthorisedly occupies government land"*, remove and confiscate any unauthorised structures, and seize the tools and effects of such person from such land.[89] It is clarified that such eviction is in addition to any other penalty for violation of the WLPA.

No guidance is provided for determination of whether such occupation is unauthorised, or indeed, what 'unauthorised occupation' means. We do not find any provisions resembling the detailed procedural protections under IFA when confiscation proceedings are undertaken, or the kind of hairsplitting applied to felling and transportation of timber. The only nod to procedural due process is a passing observation that an opportunity to be heard be provided to the affected person. The impact of such draconian provisions, when compounded with the criminal procedures laid down in the WLPA, are deeply oppressive and suffocating to the *Adivasis* and forest dwellers who have the misfortune to be caught inside these conservation fortresses.

The analysis under this part has demonstrated that the range of criminality created through forest legislations has a wide spectrum. In addition to the tone of authority rooted in eminent domain, these legislations pointedly criminalise *Adivasi* and forest dwelling populations in a design to control their regular functions, and discipline them into subordination to the state. Boundaries are drawn over geographical areas, between forest lands of different categories based upon their value and importance to the state, without any reference whatsoever to what these lands mean to the *Adivasis*

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[87] Section 57, WLPA states:
"***57. Presumption to be made in certain cases:*** *Where, in any prosecution for an offence against this Act, it is established that a person is in possession, custody or control of any captive animal, animal article, meat, trophy, uncured trophy, specified plant, or part or derivative thereof it shall be presumed, until the contrary is proved, the burden of proving which shall lie on the accused, that such person is in unlawful possession, custody or control of such captive animal, animal article, meat, trophy, uncured trophy, specified plant, or part or derivative thereof."*

[88] *Babu Lal and Another* v. *State (Delhi Administration)*, (1981) 20 DLT 354, 1982 Cri LJ 41, Delhi High Court, at para 12.

[89] Section 34A, WLPA.

who have lived in them for centuries. These legislative boundaries are then reinforced, not just through regulation of different forest activities but through criminalisation of activities in the more valuable forests, and provision of severe punishments for those who cross the line.

In the next part, we see how this process of criminalisation is furthered by establishment and empowerment of the forest bureaucracy, through which criminality is administered. We assess the architecture of forest law to understand the powers that have been vested in forest authorities and the reasons for such empowerment. Although the functions of forest bureaucracy overflow into all kinds of general and specific regulation of forests, our objective is to decipher the powers of this authority to declare, administer and prosecute forest offences.

PART B: AUTHORITY AND CONTROL

5.3 Concentration of Power in the Forest Bureaucracy

Having examined the nature and definition of criminal offences under the forest law at some length, we now turn to the criminal justice process. The authoritarian tone of the law relating to forests and wildlife, steeped as it is in colonial notions of eminent domain and sovereignty, also sets the tone for the manner in which the law is perceived and administered by the state and its functionaries. Taking these offences out of the domain of the normal criminal justice system, special procedures for criminal proceedings are laid down, where vast powers are vested in forest officials.

Unlike the normal criminal justice process under the *Code of Criminal Procedure, 1973* ("**CrPC**") and other mainframe criminal laws, the forest law regime is marked by a concentration of power in the forest bureaucracy, even the lowest rung of the forest hierarchy. In the general criminal justice system, the empowerment of police officials to administer criminal law provisions is kept to a bare minimum, with the powers of arrest, investigation, remand and custodial detention, framing of charges, and prosecution being distributed between the police and the judiciary. The powers of the police are also distributed between different verticals within. Under the forest law, even forest guards, the most junior official in the forest bureaucracy, are designated as 'forest officers' for this purpose under IFA and the State-level legislations[90] with all attendant powers. This departure from established practice for forest spaces is but another manner of asserting absolute and unfettered power by the state through its forest bureaucracy.

5.3.1 Powers of Seizure, Confiscation and Compounding of Offences

[90] See, for instance, definition of "forest officer" under Section 2(2), IFA; Section 2(f), OFA; and Section 2(12A), WLPA.

The IFA provides a general power to forest officers to prevent, and interfere for the purpose of prevention, the commission of a forest offence.[91] There does not appear to be any guidance in the statute on what the extent of such power is, the manner in which it is to be exercised, or whether there is any accountability after the fact for any action taken by such officer. Vesting of such absolute power without accountability is quite alarming in itself.

Where a forest offence appears to have been committed, the Central statute as well as the State legislations extend the powers of *seizure* to police officers and also forest officers.[92] IFA further provides that when there is reason to believe that a forest offence has been committed, the forest officer or police officer may seize the forest produce involved and also all tools, vehicles, cattle and anything else which may have been used to commit this alleged offence. Thereafter, a report of the seizure shall be made to the Magistrate having jurisdiction in the matter.

The law applicable in both Madhya Pradesh and Odisha makes some important departures from this process. For one thing, State level laws permit the seized goods to be produced before an Assistant Conservator of Forests, and a mere report (if the goods are too bulky) of such seizure to an authorised officer will suffice.

Upon such production, or upon such report, the authorised officer may proceed to *confiscate* the seized goods. Unlike the process of seizure, very detailed provisions are made regarding the procedure to be followed where such seized property is then confiscated, with ample space to the offending party to put forward their version of events. To begin with, the seized property is either to be produced before an Assistant Conservator of Forests, or a report regarding the seizure made to the Magistrate. If the property is to be confiscated, then a written notice must be sent to the person from whom the property is seized, and an opportunity to make a written response as well as a reasonable opportunity to be heard in person must be provided. An order of confiscation is also subject to appeal before a District Judge.[93]

However, in the same breath, the law also states that if the person is willing to get the offence *compounded*, then this procedure is not required to be followed. In such event, the same forest officer who seized the goods can accept monetary compensation from such person[94] and on receipt of such money, the person in custody can be released and discharged, the seized property shall be released, and no further proceedings shall be taken against such person.[95] It is highly inappropriate to vest the officer conducting a seizure with the power to compound the so-called offence. This concentration of power becomes completely untenable when we find

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[91] Section 66, IFA.

[92] Section 52, IFA.

[93] Section 59, IFA.

[94] The IFA fixes the upper limit of such monetary compensation at Rs. 50 (Section 68). This amount bears little relevance today, and accordingly, the Madhya Pradesh State amendment has enhanced the upper limit of monetary compensation to "two times the value of the forest produce" (Section 68 as amended for the State of Madhya Pradesh) and Odisha has enhanced the amount to Rs. 20,000 (Section 72, OFA).

[95] *Ibid.*

that the forest law makes no distinction, unlike the CrPC, between compoundable and non-compoundable offences. The result is that the power of the forest officer is not only unsupervised, it also extends, in theory, to **all** offences under the forest law.

Power is also vested in the Divisional Forest Officer[96] to direct, at any time, immediate release of any property seized. If the case is pending before the Magistrate, then his consent in writing is required.

The WLPA under Section 50(1) confers enormous powers in the hands of the forest bureaucracy with regard to the procedure to be followed in an alleged wildlife offence. This includes officers ranging from the Director of Wildlife Preservation, the Chief Wildlife Warden, any officer authorised by them, any police officer (not below the rank of sub-inspector) and any forest officer. A forest officer has been defined[97] as any officer appointed under the IFA, and such officers appointed under any other State law. Pretty much any government official can be designated as a forest officer for the purpose of the WLPA.

If such authorised officer *"has reasonable grounds for believing that any person has committed an offence against the (WLPA)"* he is vested with the following powers:

- to *inspect* for production of any captive animal, wild animal, animal article, meat, trophy, specified plant;[98]
- to *stop, enter and search* any vehicle, vessel, premises, land or baggage;[99] and
- to *seize* any captive animal, wild animal, animal article, meat, trophy, specified plant, any tool, trap vehicle, vessel and weapon used for committing an offence.[100]

These powers are combined with numerous other variations to ordinary criminal law; consequently, they become greatly enhanced. This is further discussed below.

Interestingly, the power to compound offences under the WLPA is not absolute. It has been provided that no offences where a minimum period of imprisonment has been prescribed as penalty can be compounded. This includes offences involving scheduled wild animals and also hunting in the core area of a Tiger Reserve, among other things *(see Table 6 above)*.

Under the WLPA also there is a power in certain forest officers to compound wildlife offences, albeit with some minimal restrictions.[101] The authorised officer has the power to compound a wildlife offence only at the initial stage where a 'reasonable suspicion exists', by accepting an amount up to Rs. 25,000. After payment of such a sum of

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[96] Section 65, OFA.

[97] Sections 49A to 49C under Chapter VA, WLPA.

[98] Section 50(1)(a), WLPA.

[99] Section 50(1)(b), WLPA.

[100] Section 50(3), WLPA.

[101] Under Section 54, WLPA, the forest officers who can compound wildlife offences include the Director of Wildlife Preservation, any officer not below the rank of Assistant Director of Wildlife Preservation, the Chief Wildlife Warden, and any officer not below the rank of Deputy Conservator of Forests.

money, the suspected person is discharged and no further proceedings are taken against him, although the authorised officer may direct that any permit or licence granted to such person be cancelled.

In the middle of a forest, where other means of accessing justice are already scarce, an absolute power in the hands of forest officers is alarming. It is important here to visualise the kind of power these provisions vest in an individual officer operating in remote areas, probably deep within a forest with little or no connectivity with the outside world, without any supervision from his own superior officers, leave alone supervision by a Judicial Magistrate. The manner of operation of these provisions is akin to legalising corrupt practices administered via provisions of law.

5.3.2 Powers to Arrest without Warrant

The IFA vests power in a police officer and also in a forest officer[102] to arrest any person without a warrant and without orders from a Magistrate,[103] with only the barest of restrictions on such power, that is:

- there should be a *reasonable suspicion* that the person has committed a forest offence punishable with upwards of one-month imprisonment;[104] and
- such power of arrest *does not extend* to forest offences committed in *Protected Forests*, except offences regarding reserved or closed portions of such Protected Forest.

The OFA takes these powers considerably further. To begin with, the power to arrest extends not only to persons who may be suspected of committing a forest offence, but also *"if such person refuses to give his name and residence, or gives a name or residence which there is reason to believe to be false or if there is reason to believe that he will abscond"*.[105] It is shocking that forest officers have been vested with such untrammelled power to arrest a person, merely on suspicion of committing a forest offence or if the person has refused to give his name, or appears to the forest officer to be a flight risk. Such powers are not vested even in police officers under the CrPC.

The WLPA empowers authorised wildlife officers to *"stop and detain any person whom he sees doing any act for which a licence or permit is required"*, and require such person to produce such licence or permit for inspection. If the person is unable to produce the licence or permit, then he may be arrested without warrant on the spot.[106]

After the person is arrested, there are certain procedures that apply immediately, including:

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[102] In Gujarat and Maharashtra, the power of arrest is vested in the Revenue officer.

[103] Section 64, IFA.

[104] Section 64(1), IFA.

[105] Section 68, OFA.

[106] Section 50(3), WLPA.

- a Forest Officer not below the rank of Ranger can release an arrested person on a bond that he will appear when required before the Magistrate or concerned police station.[107] Similarly, in case of a wildlife offence, if the arrested person satisfies the arresting officer that he will duly answer any summons or other proceedings, he may be released.[108]
- If the person arrested does not have a right to be released on bond, he must be produced, without unnecessary delay, before the Magistrate having jurisdiction, or the nearest police station.[109] The OFA, requires production before a Magistrate within 24 hours, in keeping with Article 20 of the Constitution.[110]

It is worth comparing these provisions briefly with those relating to arrest under the CrPC. Under Section 41, CrPC, arrest *without a warrant or permission from Court* can be made *only in cognisable offences*. For *non-cognisable offences*, which are usually offences punishable with less than three years imprisonment, arrest can only be made under a warrant or order of a Magistrate. Under IFA and the State-level forest laws, however, there is no such distinction between power of the forest officer to arrest in cognisable and non-cognisable offences. Instead, while none of the offences are punishable with a term exceeding two years, wide powers of arrest without warrant are still vested in forest officers, including without exception even those offences punishable with one month imprisonment.

The CrPC, additionally, provides that even in case of cognisable offences punishable with imprisonment of less than seven years, there are several conditions that are to be met before the accused person can be arrested.[111] For instance, the arresting police officer must record his reasons in writing while making such an arrest. IFA does not provide such protection to persons accused of a forest offence. As long as there is a 'reasonable suspicion' that an offence has been committed, a person can be arrested for a forest offence and no reasons need to be recorded by the arresting officer.

There is also provision in the CrPC that where arrest of a person is not required, a notice can be issued to him to join the investigation when called upon, and as long as he does so, he will not be arrested.[112] Pursuant to such a notice, the Investigating Officer must record reasons in writing before an arrest is made. This gives an opportunity to the accused to seek anticipatory bail from a court of law.[113] There is no provision under IFA or the State-level forest laws for any such opportunity being made available to persons arrested for forest offences.

The IFA and WLPA are silent on procedure of arrest and the duties of an arresting

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107 Section 65, IFA.

108 Section 50(3), WLPA.

109 Section 64(2), IFA and Section 50(4), WLPA.

110 For a discussion on the constitutional provisions relating to criminal justice, see *Chapter 3: A Radical Break from the Past: The Constitution of India and its Interpretations.*

111 Section 41(1)(b), CrPC.

112 Section 41A, CrPC.

113 Section 438, CrPC.

officer, which have been incorporated in the CrPC through a series of amendments.[114] There is also complete silence on the rights of arrested persons[115] to have an advocate of their choice present during interrogation.

Although the CrPC was also enacted during colonial rule, it has been through extensive and thorough amendments in the seven decades since Independence in order to bring it in conformity with the Constitution and with principles of criminal justice dear to a modern democracy. Many amendments in the law have also permeated down through judicial precedent and direction. It is most unfortunate that the forest law regime has not been through the same process of updation, remaining entrenched in the authoritarian mire of the 19th Century colonisers.

5.3.3 Lack of Clarity on the Right to Bail

There is a wealth of judicial precedent regarding the right of accused persons to be released on bail during investigation and trial of criminal offences. Ordinarily, there is a clear categorisation between offences which are *bailable* (where there is a right to be released on bail) and offences which are *non-bailable* (where a person can be released on bail upon a court order). The CrPC unambiguously states that persons accused of bailable offences "shall" be released on bail by the arresting officer.[116] The CrPC also distinguishes clearly between cognisable offences, where arrest can be carried out without a warrant, and non-cognisable offences, where no arrest can be carried out without a warrant of arrest. These categorisations are important in ensuring that an accused person knows clearly what his rights are when the state initiates any criminal proceeding against him.

With regard to bailable offences, the Supreme Court of India has stated:

> *"The right to claim bail granted by Section 436 of the Code in a bailable offence is an absolute and indefeasible right. In bailable offences there is no question of discretion in granting bail as the words of Section 436 are imperative. The only choice available to the officer or the court is between taking a simple recognizance of the accused and demanding security with surety. The persons contemplated by Section 436 cannot*

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[114] Section 41B, CrPC, states that:
"***41B. Procedure of arrest and duties of officer making arrest.***
Every police officer while making an arrest shall--
(a) bear an accurate, visible and clear identification of his name which will facilitate easy identification;
(b) prepare a memorandum of arrest which shall be--
(i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;
(ii) countersigned by the person arrested; and
(c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest."

[115] Section 41D CrPC, states that:
"***41D. Right of arrested person to meet an advocate of his choice during interrogation.*** *When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation."*

[116] Section 436, CrPC.

> *be taken into custody unless they are unable or (un)willing to offer bail or to execute personal bonds. There is no manner of doubt that bail in a bailable offence can be claimed by the accused as of right and the officer or the court, as the case may be, is bound to release the accused on bail if he is willing to abide by reasonable conditions which may be imposed on him."*[117]

Even with regard to non-bailable offences, the Supreme Court has been categorical in stating that bail is the rule, while jail is the exception, in the following terms:

> *"The provisions of CrPC confer discretionary jurisdiction on criminal courts to grant bail to the accused pending trial or in appeal against convictions; since the jurisdiction is discretionary, it has to be exercised with great care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. In our view, the reasoning adopted by the learned District Judge, which is affirmed by the High Court, in our opinion, is a denial of the whole basis of our system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognised, then it may lead to chaotic situation and would jeopardise the personal liberty of an individual.*
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> *xx*
>
> *This Court, time and again, has stated that bail is the rule and committal to jail an exception. It has also observed that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution."*[118]

Under the forest law regime, quite shockingly, it has not been expressly stated which offences are bailable and which offences are non-bailable, nor is there any distinction drawn between cognisable and non-cognisable offences. Under the IFA, any Forest Officer of the rank of Ranger or above, who has arrested or whose subordinate has arrested any person for a forest offence "may" release such person on his executing a bond to appear when required before the concerned Magistrate or police station.[119] Nor is it clarified which offences this provision applies to, except that they should be punishable with imprisonment upwards of one month.

Some State governments have carried out amendments classifying bailable and non-bailable offences, but without any clarification regarding the basis for such classification.[120] Instead of addressing the problem of ambiguity, such amendments have continued to create further confusion, and vest unguided discretion in the hands of the arresting forest officer.

Under WLPA also, there is no distinction between bailable / non-bailable / cognisable / non-cognisable offences, and the authorised officer has been given the power to arrest or detain without warrant any person who is believed to have committed an offence under the Act.[121] An *Adivasi* or forest dweller who may be going about his ordinary work, perhaps collecting fuelwood or even walking from his village to his agricultural

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117 *Rasiklal* v. *Kishore*, (2009) 4 SCC 446 at para 10.

118 *Sanjay Chandra* v. *Central Bureau of Investigation*, (2012) 1 SCC 40 at paras 25 and 27.

119 Section 65, IFA.

120 While Maharashtra and West Bengal attempt to differentiate offences for which bail cannot be granted as a matter of right, Uttar Pradesh and Uttarakhand, through sweeping amendments, have classified a majority of offences as non-bailable.

121 Section 50(3), WLPA.

fields inside a Protected Area, having forgotten to carry the precious "permit", can be stopped, detained, and arrested without warrant on the spot by a forest officer. He has no right to demand he be released on bail as a matter of right, or to demand that he be shown the warrant of arrest before he is taken into custody. These powers are a classic example of unguided and absolute discretionary power, which fall foul of a plethora of constitutional protections.

The provision relating to grant of bail under WLPA is harsher than any Central or State forest law. Under Section 51A, stringent provisions regarding grant of bail are stipulated in certain categories of wildlife offences. This provision applies to any person who has previously been convicted of a wildlife offence and is thereafter arrested or accused of any wildlife offence relating to scheduled animals, hunting inside a National Park or Wildlife Sanctuary, or altering the boundary marks of such parks or sanctuaries. Such a person cannot be released on bail, the statute exhorts, unless:

- The public prosecutor is given an opportunity to oppose the release on bail; and
- Where the prosecutor opposes the grant of bail, the court is satisfied that *"there are reasonable grounds for believing he is not guilty of such offence and that he is not likely to commit any offence while on bail"*.[122]

Later in this report, we examine in detail the provisions of the *Unlawful Activities (Prevention) Act, 1967* where grant of bail pending investigation and trial has been similarly made contingent upon an accused being able to convince the court that he is *prima facie* innocent. The echoes of an anti-terror legislation being found in a wildlife protection law, where thousands of forest dwellers continue to live and engage in traditional livelihoods, is deeply disturbing. It is, therefore, not surprising that *Adivasis* and forest dwellers living inside Protected Areas often succumb to pressure from wildlife officials and agree to 'voluntary relocation' settlements rather than continue to live under the cloud of an oppressive criminal law regime which treats them on a par with a terror accused.

5.3.4 Provisions for Summary Trial

Unlike the typical criminal trial process, a 'summary trial', outlined under Chapter XXI, CrPC dispenses with various procedural protections ordinarily provided to accused persons to ensure that basic standards of fair trial are met. For this reason, the summary trial procedure is usually adopted only where minor offences are involved and where punishments are not severe. The accused is given an opportunity to plead guilty. And if he does so, a summary verdict of conviction and sentence can be pronounced by the court. The prosecution does not have to discharge its burden of proof by leading evidence, examining and cross-examining witnesses, and so on.

Trial of wildlife offences under the WLPA, fortunately, takes place much as any

[122] Section 51A, WLPA.

other criminal offences and in accordance with the provisions of the CrPC. The only difference is that cognisance of a wildlife offence can be taken by a court only upon the complaint of an authorised wildlife official.[123] If the complaint is by a private individual, an advance notice of sixty days has to be given to the Central or State government.

The IFA provides that where the forest offence is punishable with up to one year imprisonment, and/or Rs. 1,000 fine, the Magistrate is empowered to try the offence summarily under Chapter XXI, CrPC. Ordinarily this would be the Judicial Magistrate specially empowered for this purpose.

As we have seen in the discussion above, most State-level amendments and laws prescribe punishments which far exceed one year imprisonment, with OFA even providing mandatory minimum sentence of three years in certain cases. The law, however, makes no clarification regarding where such offences will be tried. When compared to the extensive and detailed provisions regarding definition of forest offences, seizure and confiscation of forest produce and other items, quantum of punishments and so on, it is striking that there is so little clarity regarding where such forest offences will go to trial. There is also no clarity regarding where forest offences which constitute violations of any of the Rules would be tried. Such lack of clarity regarding the proper judicial authority to conduct a trial, and whether that trial will follow an ordinary criminal process or a summary process, is an outright violation of basic principles of fair trial. When correlated with an environment which is already ruthlessly biased against forest dwelling communities, perceiving them as criminals and encroachers, such lack of clarity can only magnify the power imbalance already in play when a forest dweller is accused of an offence.

It is also important to keep in mind that where forest offences are concerned, a possible consequence of imprisonment upto one year is hardly minor. A year of imprisonment for any person can have far reaching consequences, but for a forest dweller, especially an *Adivasi*, the result could be devastating. Elsewhere in this report, we explore how imprisonment amounts to cruel and unusual punishment for *Adivasis*[124] - a fact that ought to motivate the law to take special measures to ensure the best standards of fair trial are adhered to in the prosecution of forest offences. Instead, the entire architecture of forest law appears to be designed to ensure that the deck is stacked against the forest dwelling accused. Basic principles of criminal justice, available to ordinary accused persons under the CrPC are completely done away with for forest offences.

PART C: CONFLICT OF LAW

[123] The list of authorised wildlife officials on whose complaint a court can take cognisance of an offence under WLPA is provided under Section 55, WLPA.

[124] For a detailed examination of the incarceration of *Adivasis* and forest dwellers in Indian prisons, see *Chapter 9: Prisons and the Adivasi in India.*

5.4 Response of the Courts to Dissonance between IFA, CRPC and the Constitution

In the multiplicity of provisions describing forest offences in the IFA, various State amendments and forest laws, one lone provision creates an offence relating to actions of forest officers and police officers. Section 62, IFA states that where an officer, vexatiously or frivolously, seizes any property or arrests any person for any forest offence, such officer shall be punishable with imprisonment up to six months and fine upto Rs. 500. Similarly, the WLPA provides that if a person exercising power under the said law, *"vexatiously and unnecessarily seizes the property of any other person"*, he shall be punishable with imprisonment which may extend to six months or with a fine up to Rs. 500.[125] Some States, through amendments, have enhanced the punishment and also mandated that the fine imposed will be paid to the aggrieved party.[126]

However, these legislations are careful to provide that officers exercising powers under these laws are given the status of 'public servants'.[127] It is also stated that no suit or prosecution shall lie against any forest officer for actions taken in good faith.[128] This is not surprising, as similar provisions are found in all legislations which vest unusual powers in any particular wing of the state.

A generic provision is found in the CrPC, which mandates that prior sanction from the concerned government is necessary before a court can take cognisance of *"any offence committed by (a public servant) while acting or purporting to act in the discharge of his official duty"*.[129] Any attempted prosecution of a forest officer for wrongful seizure or arrest under IFA or WLPA will have to cross the threshold of this provision. It has been well documented that sanction for prosecution of public servants is rarely, if ever, granted by the government.[130]

It is important, therefore, to advert to certain important developments which have advanced the accountability of government servants and reduce the culture of impunity that surrounds their exercise, and often abuse, of power.

In a recent case relating to the burgeoning malaise of extra-judicial executions by police and para-military forces, in *Extra Judicial Execution Victim Families Association* v. *Union of India,*[131] the Supreme Court clarified that there is no blanket immunity to government servants from criminal prosecution unless certain facts are brought on

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125 Section 53, WLPA.

126 A similar provision is made under Section 66, OFA as well; however, the punishment is enhanced to up to one year imprisonment.

127 See, for instance, Section 59, WLPA.

128 See Section 74, IFA and Section 60, WLPA.

129 Section 197, CrPC.

130 In response to a Right to Information application filed before the Ministry of Defence, it was stated that out of 50 instances where sanction for prosecution was sought by the State government to prosecute members of the armed forces for a variety of criminal acts under the *Jammu and Kashmir Armed Forces Special Powers Act, 1990*, such sanction was refused in 47 cases. No information was forthcoming about the decision-making process behind such a large proportion of refusals. An appeal filed before the Central Information Commission was also rejected. See Order dated June 5, 2020 in *Venkatesh Nayak* v. *CPIO, CIC/DODEF/A/2018/152701.*

131 (2016) 14 SCC 536.

record necessary for the invocation of such immunity. Thus, it was held that:

> *"At this stage, we would like to make it clear that Section 6 of the AFSPA and Section 49 of the UAPA presently have no application to this case. It has yet to be determined whether the deaths were in fake encounters as alleged or whether the deaths were in genuine encounters in counter insurgency operations and it has also to be determined whether the use of force was disproportionate or retaliatory or not. If any death was unjustified, there is no blanket immunity available to the perpetrator(s) of the offence. No one can act with impunity particularly when there is a loss of an innocent life."* [132]

With regard to sanction for prosecution,[133] the Supreme Court in *Devinder Singh* v. *State of Punjab*[134] examined a series of judicial precedents where it has reiterated that the question of sanction for prosecution will arise only when the offence is committed *"while acting or purporting to act in the discharge of his official duty"*. The use of the expression, 'official duty' implies that the act or omission must have been done by the public servant in course of his service and that it should have been in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty. The Court observed that:

> *"Protection of sanction is an assurance to an honest and sincere officer to perform his duty honestly and to the best of his ability to further public duty. However, authority cannot be camouflaged to commit crime.*
>
> *Once act or omission has been found to have been committed by public servant in discharging his duty it must be given liberal and wide construction so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities. To that extent Section 197 Cr.P.C. has to be construed narrowly and in a restricted manner."*[135]

When viewed from this perspective, there does appear to be some scope for holding forest officers accountable for offences against forest dwellers, which are routinely committed in purported exercise of their 'official duty' of protecting the forests. This is particularly true after the enactment of the *Scheduled Tribes and Other Traditional Forests Dwellers (Recognition of Forest Rights) Act, 2006*, although the application of these principles to the forest law regime is at a nascent stage, and what construction the constitutional courts will arrive at remains in the realm of conjecture.

Unfortunately, efforts to challenge forest laws for violating the constitutional framework of criminal justice have met with little or no success. There have been numerous challenges to the criminal process prescribed under IFA and the State forest law amendments, insofar as these relate to the nature and boundaries of the authority vested in the forest bureaucracy while exercising its power to confiscate forest produce and other items under the forest law. Whether the views of the Apex Court in these decisions adhere to the principles of criminal justice and fundamental rights, as described in Chapter 3 *supra*, bear some scrutiny.

The Supreme Court in *State of West Bengal* v. *Mahua Sarkar*[136] held that the onus is

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132 *Ibid*. At para 152.

133 Under Section 197, CrPC.

134 (2016) 12 SCC 87.

135 *Ibid*. At paras 39.1 and 39.2.

on the accused to prove that he had no knowledge of the offence. It stated that:

> *"The requirement (of Section 59-B) is mandatory that the owner has to prove that he had no knowledge or had not connived. It is a matter which is within his knowledge. Mere assertion without anything else will not suffice. There is another requirement that either he or his agent, if any, or the person in charge thereof had taken all reasonable and necessary precaution against such use. This aspect has to be established by the person concerned by sufficient material. As noted above, mere assertion in that regard could not be sufficient."*[137]

The departures from fundamental criminal law principles of presumption of innocence and burden of proof, as demonstrated in the forest law regime, were thus upheld by the Apex Court.

In *State of West Bengal* v. *Sujit Kumar Rana*,[138] the Supreme Court held that it is not open to the High Court to quash confiscation proceedings undertaken under the IFA in exercise of its inherent powers.[139] The Court held that provisions relating to seizure and confiscation have been inserted in IFA keeping in view that forests are a national wealth and there are rampant acts involving large-scale pilferage and depletion of forest wealth.

The Court noted that confiscation under the IFA envisages a civil liability, as a result of which an owner is deprived of his right to property which is protected under Article 300A of the Constitution.[140] The proceeding of confiscation is independent of any proceeding of prosecution for the forest offence committed.

A recent judgment in *State of Madhya Pradesh* v. *Uday Singh*[141] examined the State amendments in Madhya Pradesh at some length, after which the Supreme Court held:

> *"The scheme contained in the amendments enacted to the Indian Forest Act 1927 in relation to the State of Madhya Pradesh, makes it abundantly clear that the direction which was issued by the High Court in the present case, in a petition under Section 482 of the Cr.P.C, to the Magistrate to direct the interim release of the vehicle, which had been seized, was contrary to law. The jurisdiction under Section 451 of the Cr.P.C was not available to the Magistrate, once the Authorised Officer initiated confiscation proceedings."*[142]

The WLPA gives enormous powers to authorised wildlife officers to conduct investigations and collect evidence, including through receiving and recording of evidence.[143] The law clarifies that such evidence is admissible during trial. Wildlife

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136 (2008) 12 SCC 763.

137 *Ibid*. At para 11.

138 (2004) 4 SCC 129.

139 Ordinarily, a High Court is empowered to quash ongoing criminal proceedings in exercise of its *"inherent powers…to prevent abuse of the process of any Court or otherwise to secure the ends of justice"* under Section 482, CrPC, a power which extends well beyond any statutory boundaries.

140 Section 300A of the Constitution states:
"***300A. Persons not to be deprived of property save by authority of law.-*** *No person shall be deprived of his property save by authority of law."*

141 (2020) 12 SCC 733.

142 *Ibid*. At para 29.4.

officials have been known to use this power to extract confessions from accused persons while in their custody, and then place these confessions on record during trial, even though the law relating to evidence categorically prohibits the use of confessions made to police officers during trial.[144]

This practice was challenged before court on a number of occasions. It was argued that confessions made before wildlife officials under WLPA should be placed under the same embargo established for police officers under ordinary law. The courts, however, have held that wildlife officials under the WLPA are not categorised as 'police officers'; therefore, the embargo contained under the evidence law cannot be applied to statements made to a forest / wildlife official.[145] The courts have held that there is no absolute rule that an extra-judicial confession can never be the basis of a conviction, and that such conviction is valid when the confession was voluntary and was not the result of inducement, threat or promise.[146]

These judicial precedents are not very encouraging when questions arise regarding the *vires* or even reasonableness of other aspects of the criminal process under IFA, the WLPA and other forest laws. Regardless, it is surprising, and unfortunate, that there has not been a substantive challenge to the foundational principles of the forest law regime. The Supreme Court has not had more occasion to examine this colonial law *qua* the standards of criminal justice established by Independent India in its Constitution.

The stereotyping of *Adivasis* and forest dwellers as criminals has serious consequences well beyond the everyday harassment of dealing with forest officials obstructing legitimate access to their traditional livelihoods and practices. The aggregation of power and authority through the forest law regime in forest officials tends towards greater and greater aggregation of power, a culture of impunity and lack of accountability.

This process is best illustrated with the example of Assam's Kaziranga National Park where the historical processes of oppression and violence against forest dwelling communities reached such a fever pitch that the authorities today credit the success of conservation efforts, aimed at the one-horned Rhinoceros, to its "shoot at sight" policy. An investigative report by the BBC[147] highlighted that the State government has granted the guards at the Kaziranga National Park extraordinary powers, and protection against prosecution if they shoot and kill people in the park. The State government issued a notification which merely reiterates Section 197, CrPC prohibiting criminal prosecution of forest officials for acts done in discharge of their official duty without its prior sanction; this notification has been interpreted by forest officials as

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143 Section 50(8) WLPA vests additional investigative powers in officers of a certain rank, including:
- Issuing search warrant;
- Enforcing attendance of witnesses;
- Compelling discovery and production of documents and material objects; and
- Receiving and recording evidence.

144 Section 25, *Indian Evidence Act, 1871* states that confessions made to a police officer are not admissible before the court and cannot be used against the accused during trial.

145 *Forest Range Officer* v. *Aboobacker and Others*, (1989) 1 KLJ 504, Kerala High Court, at para 7.

146 *Sansar Chand* v. *State of Rajasthan*, (2010) 10 SCC 604 at paras 29 and 30.

147 Justin Rowlatt, "Kaziranga: The park that shoots people to protect rhinos", *BBC News*, February 10, 2017; available at: *https://www.bbc.com/news/world-south-asia-38909512.*

well as members of forest dwelling communities, as a promise of immunity from prosecution.

In a detailed report submitted to the Gauhati High Court by the Director Kaziranga National Park, it has been acknowledged that poaching of one-horned Rhinoceros has been tackled through the practice of "killing the unwanted persons", and by ensuring it is commonly known that they "must obey or be killed".[148]

That a senior forest official has blithely put on record such an admission before a constitutional court displays the extent of impunity which the forest and wildlife officials believe they enjoy. In its obsession to establish untrammelled power in the name of protecting wildlife, the forest bureaucracy has become hardened towards the lives of *Adivasis* and forest dwellers, and towards the fact that they too are citizens in a country with constitutional and statutory protections.

[148] M.K. Yadava, IFS, Director Kaziranga National Park, *Detailed Report On Issues And Possible Solutions For Long Term Protection of The Greater One Horned Rhinoceros In Kaziranga National Park Pursuant To The Order Of The Hon'ble Gauhati High Court,* August 5, 2014.

Chapter 6

REDEFINING THE FOREST AND REINVENTING THE CONFLICT

6.1 Background

The idea of 'forest' is not a frozen conceptual category; it keeps evolving with new legal and policy changes. Various laws similarly affect the position of *Adivasis* and forest dwellers in the larger polity and their status as citizens. Apart from laws relating to forest rights such as the *Panchayat (Extension to Scheduled Areas) Act, 1996* ("**PESA**") and *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* ("**FRA**"), which recognise rights of the Scheduled Tribes ("**STs**") and Other Forest Dwellers ("**OTFDs**"), there are also other laws which affect their status as citizens of India and their constitutional rights. This includes laws that address 'development' from the state's perspective such as *Compensatory Afforestation Fund Act, 2016* ("**CAF Act**") and *Compensatory Afforestation Fund Rules, 2018* ("**CAF Rules**"); *Right to Fair Compensation and Transparency in Land Acquisition (Rehabilitation and Resettlement) Act, 2013* ("**LARR**") and the rules made thereunder by State governments; and policies of 'Land Bank' and 'ease of doing business'. Such 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*[1] and add to the list of existing laws that end up criminalising *Adivasis* and forest dwellers. In fact, developmental laws utilise colonial and post-independence legislations such as the *Indian Forest Act, 1927* ("**IFA**"), the *Wild Life (Protection) Act, 1972* ("**WLPA**") and the *Forest Conservation Act, 1980* ("**FCA**") to further criminalise *Adivasis*.[2] In this chapter, we discuss provisions of the CAF Act, LARR and the Land Bank Policy in view of the prevalent criminal justice system to understand the ways in which these culminate to criminalise *Adivasis* and inflict atrocities upon them.

6.2 Compensatory Afforestation: Redefining the Forests

The narrative of compensatory afforestation and consequent legislative enactments have distorted the essence of forests, their significance and its importance to the *Adivasi* and forest dwelling communities. Since colonial times, forest laws constructed a discourse that forest is a space, which is inhabited by unruly savage subjects who are, by nature, dangerous criminals. Thus, forests and *Adivasis* were both reduced to be tamed and rescued by the colonial government from each other. Such an approach not only antagonised the relationship of the forest with the *Adivasis* under

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[1] See rights guaranteed under Fifth and Sixth Schedule of the Indian Constitution. See also various rights and powers guaranteed to the *Gram Sabha* under Section 4, PESA and Section 3, 4(5) and 5, FRA.

[2] Ministry of Environment Forest and Climate Change, *Handbook of Forest (Conservation) Act, 1980 and Forest Conservation Rules, 2003 (Guidelines and Clarifications),* 2019 at 45-52; available at: *http://forestsclearance.nic.in/DownloadPdfFile.aspx?FileName=0_0_71121123412151Accompanyment_EDS_20180127.pdf&FilePath=../writereaddata/Addinfo/.*

the mainstream discourse but also continues to govern the perception in law and among the institutions and the ruling classes about these communities. Colonial laws such as IFA created various administrative categories of forests to regulate access and control movement of *Adivasis* and forest dwellers in the forests. IFA created forest offences based on the breach of restriction of movement in different categories of forests.[3] Accordingly, the criminality of an *Adivasi* depended upon breach of conditions under IFA restricting use of forests.[4] The study under this chapter informs us that the relationship of IFA and CAF Act is essential for sustaining the administrative hegemony of the forest department.

The CAF Act is the outcome of indiscriminate diversion of forest land for industrial, mining, extractive industry and other developmental purposes. In 2001, the Supreme Court in the case of *T N Godavarman Thirumulpad* v. *Union of India*[5] ("***Godavarman* case**"), gave a direction to the Ministry of Environment, Forest and Climate Change, Government of India ("**MoEF&CC**") to formulate a scheme for compensatory afforestation whenever forest land was diverted for non-forest purposes. The user agency, therefore, was required to set aside money for the same.[6] Supreme Court's directions came against the backdrop of huge unspent sums of money paid by user agencies into a fund for compensatory afforestation. In this regard, the Central Empowered Committee ("**CEC**") gave certain recommendations in 2002, which included formation of Compensatory Afforestation Fund ("**CAF**").[7] Thereafter, the Supreme Court in the *Godavarman* case accepting the recommendation of the CEC, passed an order[8] directing the MoEF&CC to establish a new mechanism for the disbursement of CAF between Centre and the States. This is how the CAF Act came into being and the fund was formed. The Supreme Court in *Godavarman* case declared CAF as constitutional and valid because, in the Court's opinion, it is based on inter-generational equity. Therefore, the fund becomes important for ecological regeneration and protection of the environment.[9] Since then, courts have passed many directives regarding the use of these funds and formation of CAF authorities. The interventions of the court finally led to the enactment of the CAF Act in 2016 despite protests by the forest rights groups and *Adivasi* organisations across the country. Two years later, in 2018, CAF Act came into effect with the notification of detailed rules.

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[3] Mahesh Rangarajan, *Fencing the Forest: Conservation and Ecological Change in India's Central Provinces 1860-1914* (Oxford University Press, 1996) at 10-137.

[4] *See* Section 26, IFA which lays down punishment for breach of restrictions in Protected Areas.

[5] WP (Civil) 202/1995 with IA No. 566; available at: *https://main.sci.gov.in/jonew/bosir/orderpdfold/33380.pdf.* Since this a continuous case of *mandamus*, updated Orders in the said case may be accessed from the website of the Supreme Court of India.

[6] *Ibid*. Order dated November 23, 2001; available at: *https://main.sci.gov.in/jonew/bosir/orderpdfold/33380.pdf.*

[7] Kanchi Kohli, Manju Menon, Vikal Samdariya and Sreetama Guptabhaya, *Pocketful of Forest: Legal Debates on Valuating and Compensating Forest Loss in India* (Kalpavriksh and WWF-India, New Delhi, 2011) at 19; available at: *https://wwfin.awsassets.panda.org/downloads/pocketful_of_forests.pdf.*

[8] *Ibid*. At 20-21.

[9] *Supra,* note 5. Order dated September 26, 2005; available at: *https://main.sci.gov.in/jonew/judis/27201.pdf*.

6.3 Restructuring Space and Expanding the Ambit of Criminalisation

On November 8, 2017, the MoEF&CC wrote a letter to the Principal Secretary of Forests in all States and Union territories. The letter contained clarifications and guidelines for the utilisation of non-forest land for the purpose of compensatory afforestation their conversion into Reserved Forests or Protected Forests and handing over their control to the forest department and for the creation of Land Banks to undertake compensatory afforestation without administrative glitches. The letter stated that revenue land, *zudpi jangal, chhote-bade jhaar ke jangal, jangal-jhari* land, civil-*soyam* lands and similar lands as well as degraded forest lands should be notified as Reserved Forest or Protected Forests under the IFA and compensatory afforestation can then be undertaken on the same. The letter also contained guidelines to identify such lands and put them in the Land Banks for making it available for compensatory afforestation to the user agency. Moreover, the letter stated that Land Banks for compensatory afforestation can also include lands falling under wildlife corridors, Protected Areas, habitat of endangered species and catchment areas of rivers, water supply scheme, irrigation and hydro-power projects.[10] The MoEF&CC, in 2019, came out with a *'Handbook of Guidelines for Effective and Transparent Implementation of provisions of the Forest (Conservation) Act, 1980'*. It makes similar clarifications regarding CAF plantation on non-forest revenue lands, *zudpi jungle, chhote and bade jhar, jungle-jhari* land and orange areas. It provided that where plantations are carried out in the above-mentioned category of land, the said land should be transferred and mutated in the name of the State forest department.[11] Such an area will be notified as 'Reserved' or 'Protected Forest' prior to the final forest (Stage II) approval. The provisions of the CAF Act are vaguely worded about whether such activities will be carried out in an area already declared as a Protected Area or whether a new area will be declared a Protected Area or Wildlife Sanctuary or National Park on which such plantation can be carried out or funds could be utilised for protection of biodiversity and wildlife.[12] This gives powerful executive agencies like the MoEF&CC a space to manipulate the use of the CAF Act. Accordingly, one sees that the MoEF&CC's issuance of directions and guidelines, publication of handbooks on compensatory afforestation and creation of Land Banks as a means to justify conversion of non-forest land, waste lands, etc. into Reserved and Protected Forests to bring it within the control of forest department for ultimately carrying out compensatory afforestation.

Through these processes and implementation of the CAF Act, forest dwelling communities become even more vulnerable to criminalisation. The IFA makes access to Reserved and Protected Forests an offence. Therefore, the revenue lands, or degraded forest lands or waste lands, which the community might have been using for generations to meet their needs of fodder for their cattle or growing crops would

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[10] Letter dated November 8, 2017 issued by the MoEF&CC with reference F.No. – 11-423/2011 – FC; available at: *http://forestsclearance.nic.in/writereaddata/public_display/schemes/553905943$11%20423%202011.pdf.*

[11] *Supra*, note 2, at 45-52.

[12] This is being argued with reference to Sections 4(3)(iv) and 6(d), CAF Act.

become a criminal activity once such notification is made.[13] Similarly, in the case of declaration of a Protected Area, offences defined under WLPA and the *Prevention of Cruelty to Animals Act, 1960* also become applicable in the area.[14] The CAF Act lays down that where Protected Areas are diverted for compensatory afforestation, action should be taken for protection of biodiversity and wildlife.[15] Simultaneously, it also states that funds under the CAF can be utilised by the State governments for 'voluntary relocation' of the villages from Protected Areas.[16] As a result, over the last few years there have been numerous cases of forest dwelling *Adivasis* and other communities being pressurised to 'voluntarily' relocate from Protected Areas in return for a meagre compensation. According to the estimates as of July 12, 2019, from a total number of 57,386 families in 50 Tiger Reserves, 18,493 families in 215 villages have been apparently relocated 'voluntarily'. The relocation happened despite protests by families who were given Rs. 10 lakh as compensation under 'Project Tiger' (a Centrally Sponsored Scheme).[17]

Therefore, the forest dwelling communities are dispossessed twice; firstly, through industrial activities and secondly, through compensatory afforestation.[18] In other words, the CAF Act alienates *Adivasis* from community forest lands and revenue lands and expands the scope of criminality by blurring the boundaries of colonial administrative categories of forests and allowing the forest department to take control of non-forest lands or revenue lands as well.

6.4 CAF Act and Impunity of the Forest Department

The plantations under CAF Act have become a major means for the forest department to appropriate non-forest, revenue and waste lands. Over the last three years, the MoEF&CC has released huge sums of money to various States under the CAF Act for plantations. In August 2019, Rs. 47,436 crore was released by MoEF&CC to 27 States. From the total amount, Rs. 34,663.40 crore was allocated to 10 States within the Fifth Schedule Area.[19] It means that 73 per cent of the fund was allocated to these States alone. Apart from that, data from October 2019 (same year) shows that a total of Rs. 74,825 crore was collected, of which Rs. 65,378 was released to the States.[20] The land brought under compensatory afforestation in these 10 States is huge. From

[13] Sections 20(1) and 29(1), IFA.

[14] Sections 18 and 35, WLPA.

[15] Section 4(3)(iv), CAF Act.

[16] Section 6(d), CAF Act.

[17] C R Bijoy, "Democracy in the Forest: Government that is to be", *Law, Environment and Development Journal*, Vol. 17/0, 2021 at 20; available at: *http://www.lead-journal.org/content/a1702.pdf.*

[18] Sanghamitra Dubey and Radhika Chitkara, "India: Plantations Uproot Women From Customary Forests", *World Rainforest Movement,* published on March 7, 2018; available at: *https://wrm.org.uy/articles-from-the-wrm-bulletin/section1/india-plantations-uproot-women-from-their-customary-forests/.*

[19] Press Information Bureau ("**PIB**") release of MoEF&CC dated August 29, 2019; available at: *https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1583452.*

[20] C.R. Bijoy, "How Land Diversion Laws Threaten Forests and Forest Dwellers", *IndiaSpend*, September 25, 2020; available at: *https://www.indiaspend.com/how-land-diversion-laws-threaten-forests-and-forest-dwellers/.*

2014-2019, around 95,794.47 hectares has been used for purposes of compensatory afforestation. In 2019 itself, 34,533.02 hectares of land have been used for developing plantations under compensatory afforestation.[21] This not only tells the extent of use of forest land for non-forest purposes in these States but also indicates the extent of control held by the forest department (to which the funds are transferred), on both forest and non-forest lands in the name of compensatory afforestation. In addition, the Central government announced releasing Rs. 6,000 crore to the States for compensatory afforestation as a part of its Special Economic Package during the COVID-19 pandemic.[22] The government aims at creating jobs among the tribals in urban and rural areas through CAF, which is an oxymoron because the CAF Act denies them access to land, forests and its resources, which is their source of livelihood.

Forcible plantation of saplings by the forest department without taking the consent of the *Gram Sabha* on the individual and common lands claimed by the community has become a normalised practice.[23] If the plantation is in the form of compensatory afforestation carried out on a degraded forest, then it is a'diversion' of forest land. In such cases, prior permission from the Central government is needed for ordering the diversion of forest land for reforestation purposes under Section 2(iv), FCA. However, this process is hardly followed by the forest department. The forest officials are known to commit atrocities against the *Adivasis* and the forest dwelling community in this process *(please refer to the case studies provided in the Boxes)*. They have often been known to resort to burning huts, destroying standing crops and evicting families from their land. While inflicting atrocities on *Adivasis* and forest dwellers, the forest department also criminalises those protesting against it. In the case of *Kutia Kondhs* of Odisha's Kandhamal district[24] and *Adivasis* of Telangana's Bhadradri Khotagudam district[25], the forest department carried out forced plantation on the *Podu* land (used for shifting cultivation) laid fallow at the time. Similarly in Bihar's Kaimur district, protesting *Adivasis* were lathi-charged, shot and criminal cases were filed against six people.[26] This has had a major adverse effect on the lives of community because it is shrinking their ownership and usufruct rights over forests. Their right to food and nutrition is also under threat as their food basket is getting negatively affected by such commercial plantations and lack of access to forests.[27] A pattern emerges from these cases (*for detailed accounts, see Boxes*).

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[21] Answer to the Unstarred Question No. 3150 in Lok Sabha answered on December 6, 2019 by MoEF&CC, at 961; available at: *http://loksabhadocs.nic.in/questionslist/MyFolder/06122019.pdf.*

[22] PIB release of Ministry of Finance dated May 14, 2020; available at: *https://pib.gov.in/PressReleasePage.aspx?PRID=1623862.*

[23] It been the position of the forest rights activists to claim the 'right to be consented' rather than consulted under the FRA. Therefore, we are also referring to the process in terms of 'consent' under FRA.

[24] Case study collected by the author with the help of a local researcher based in Bhubaneshwar, Odisha.

[25] Prudhviraj Rupavath, "Telangana: Tribals Resist 'Haritha Haram' on Their Podu Lands", *NewsClick*, July 22, 2020; available at: *https://www.newsclick.in/Telangana-Tribals-Resist-Haritha-Haram-Podu-Lands.*

[26] Case study documented by the author based on the information available from newspapers and local activists in Gaya and Kaimur.

[27] *Supra*, note 18.

Such forced plantation is also known to destroy the food (flora and fauna) base of wildlife such as elephants, tigers etc. forcing them to search for food in nearby habitations leading to what is called as a 'human-wildlife conflict' in the form of destruction of crops, properties and loss of lives. This is then falsely argued by the forest department as being caused by the forest dwellers' access to forests and hence, calling for the imposition of further restrictions on them to compel their relocation. When afforestation is done on 'grass lands', which are the greatest absorbent of rain water and recharger of ground water, it leads to depletion of water resources, drying up of forest streams etc. forcing the wildlife to seek water from the nearby habitations.

Therefore, instead of becoming a measure of climate change mitigation effort, the idea of compensatory afforestation and the CAF Act have become a legal instrument for reinventing the conflict in forests between the forest department and the *Adivasis*. Thus, CAF plantations have not only led to the multifaceted oppression of the *Adivasis* and forest dwellers at the hands of forest department and police but also to a loss of ecological sustenance and biodiversity.

The CAF Act is a technique deployed by the State governments to extend the exclusive control of the forest department over lands on which it had no control prior to the enactment of the Act and Land Banks Policy for undertaking compensatory afforestation. The CAF Act very clearly states that the *Gram Sabhas* or Village Forest Committee ("**VFC**") shall be 'consulted' for undertaking compensatory afforestation and ancillary activities[28] on forest land under the control of forest department. Firstly, as discussed elsewhere in this chapter, non-forest land which is identified for doing compensatory afforestation is converted into Reserved or Protected Forest to get such land under the forest department's control. Secondly, in such a situation, having consultation with the *Gram Sabha* does not add any value. In fact, provision of seeking consent according to the FRA and the decision of the Supreme Court in *Orrisa Mining Company* v. *Ministry of Environment and Forests*[29] (*also popularly known as the Niyamgiri* case *and referred to at several sections in this report*) is diluted by it. Moreover, it equates *Gram Sabha* with the VFC and provides for a consultation with it as well. A diabolical interpretation of this section can mean that even in the consultation process, *Gram Sabha* can be bypassed by the VFC, which does not have any legal standing under FRA. It also violates the provision, which provides that eviction or removal from forest land cannot happen until the process of recognition of rights guaranteed under Section 3, FRA is complete.[30] This is in serious violation

[28] Compensatory afforestation and ancillary activities include: assisted natural regeneration, artificial regeneration, silvicultural operations for forests, protection of plantation and forests, pest and disease control in forests, forest fire prevention and control operations, soil and moisture conservation work in the forests, improvement of wildlife habitat, relocation of villages from Protected Areas, establishing rescue centres for wildlife, (Rule 5(2)(a) to (l) of CAF Rules) establishment, upgradation and maintenance of modern nurseries, purchase and maintenance of information technology devices for survey, mapping and forest fire controls, construction of residential buildings for forest department's staffers in the forest area, survey and mapping of forest for compensatory afforestation, soil and moisture conservation, catchment area treatment and wildlife management, monitoring and evaluation, awareness about forestry and allied activities, distribution of planning stock for promotion of trees outside forest on government lands (Rule 5(4)(a) to (j) of CAF Rules).

[29] (2013) 6 SCC 476.

[30] See Section 4(5), FRA. FRA does not provide for eviction; it provides for recognition of rights.

of the powers and rights given to the *Gram Sabha* under FRA, as well as under PESA.[31] Therefore, CAF Act violates the constitutional rights of *Adivasis* and OTFDs to self-governance through *Gram Sabhas* under FRA and PESA. It is unconstitutional because it dispossesses *Adivasis* and OTFDs from their forest land including individual land, common lands, *Nistar* land and grazing land for which they have usufruct and ownership rights under PESA and FRA.[32] This is happening in almost all the states including Odisha, Telangana, Chhattisgarh, Jharkhand, Uttarakhand.[33]

ATTEMPTS OF EVICTION AND FORCED PLANTATION BY FOREST DEPARTMENT IN BIHAR

During the COVID-19 lockdown, the forest department carried out forced plantations on forest land claimed by *Adivasis* and OTFDs in various districts of Bihar. The forest department planted saplings on the claimed IFR lands of the forest dwellers in several villages of Banka, Gaya and Kaimur districts.

The forest department has been illegally encroaching on cultivable lands claimed under FRA over which the community has possession, for undertaking plantation. In Sarainar village of Adharua Block of Kaimur, the forest department allegedly destroyed 50 houses to evict people from their land. Not a single forest right has been recognised in the district even though the district has substantial forest cover and forest dwelling communities.

In another village Gullu of the same block, forest department has been pressurising villagers to dig pits on their farm land for afforestation activities. On September 10-11, 2020 in Kaimur, Bihar police officials open fired and lathi-charged the forest dwellers protesting and demanding the implementation of FRA and for declaring Kaimur as a Scheduled Area (among other demands). Several protesters were injured and hospitalised. It was alleged by the forest department that protesters had locked one of the gates of the department's office. Thereafter, police made several arrests and some of them were even charged with rioting (Section 147, IPC), destruction of public property (Section 425, IPC) as well as for the use of arms and ammunition (Section 27, *Arms Act, 1959*). This incident should be understood in the backdrop forced CAF plantation and increasing atrocities by forest department on the community.

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[31] Section 4, PESA.

[32] "Promise and Performance Report: Ten Years of Forest Rights in India", *Citizens' Report* (as part of Community Forest Rights-Learning and Advocacy (CFR-LA) process), 2016 at 22-27; available at: *http://www.cfrla.org.in/uploads_acrvr/X36BEPromise%20and%20Performance%20National%20Report.pdf.*

[33] "Campaign for protecting forest rights in the backdrop of undemocratic Compensatory Afforestation Fund (CAF) Act!", CFR-LA; available at: *https://www.fra.org.in/document/CAMPA%20Booklet_Eng.pdf.*

SPECIFIC TARGETING OF PARTICULARLY VULNERABLE TRIBAL GROUP: THE EXPERIENCE OF ODISHA

Uthanisahi, a village in the Kaptipada block in Odisha's Mayurbhanj district, is inhabited by *Mankidias*. They comprise a Particularly Vulnerable Tribal Group ("**PVTG**")[34]. They depend on collection of Minor Forest Produce, such as *siali* fibre from the forests, for their livelihood needs which, according to them, has been traditionally under their control. In 2015, they claimed habitat rights along with eight other villages with *Mankidia* population. The claim was approved by District Level Committee under FRA in 2016. However, due to opposition from the forest department, the title was not conferred. The forest department proposed reduction in the habitat area as the claimed land also included some parts of the Critical Tiger Habitat. In another round of consultation in 2017 with the district administration, the traditional leaders of nine villages unanimously rejected the proposal of the administration stating that their claim over whole area is important for the security of their livelihood. The *Mankidia* community of Uthanisahi received another setback when they were physically assaulted by Forester and Forest Guard on February 20, 2018. The forest department officials obstructed two *Mankidias* and abused them. They threatened to uproot the entire *Mankidia* community from Simlipal, a usual tactic to instill fear. FIR was registered against the forest officials.

In another case, 35 *Kutia Kondh* (another PVTG) families residing in Burlubaru village of Belghar *Gram Panchayat* of Tumudibandh block in Kandhamal district depend on the forest for food and livelihood needs. These families were granted 'Individual Forest Rights' ("**IFR**") titles on land under their occupation in 2010 itself. The forest department, ignoring their titles, decided to carry out teak plantation without seeking the consent of the *Gram Sabha* under the FRA. They also disregarded the fact that the rights recognition process under FRA was still underway. Similarly, in Kusumunda, Rangaparu, Pandamaska and Sadangi villages of Kandhamal district, *Kutia Kondhs* practice shifting cultivation (*Gudia*) on 70 hectares of land. The forest department decided to carry out CAF plantation on this land even though the rights of the community were still under consideration. When the villagers resisted, they were badly beaten up, FIRs were filed against them and some of them were even arrested. The villagers had to pool money to secure bail, which added to their hardships.

[34] PVTG is a legislatively defined category of communities under the FRA. Communities included in this category are particularly vulnerable to the change brought about by developmental activities and chances of these communities becoming extinct is very high in the event of their removal from their traditional-cultural habitat.

6.5 'Land Banks': A Source for Conflict

Land Bank is a major policy of the Central and State Governments to secure 'ease of doing business'.[35] Land Bank has not been defined in any legislation. It is not a legal concept; rather it is a policy construct. The concept of Land Bank is not new. Since 1990, such policy interventions have been explored by States such as Jharkhand and Chhattisgarh.[36] The first major step was taken in this regard when the *Land Acquisition Amendment Bill, 2007* was introduced in the Parliament, which promised smooth acquisition of land for setting up industries and for developmental activities. However, the Bill lapsed with the dissolution of the 14th Lok Sabha.[37] Land Bank involves creation of a gigantic data set on land, land types and area of land across the country, which can be made available for industrial purposes and also for compensatory afforestation under the CAF Act. Land Banks are utilised by the State governments as a reserve for CAF plantations.[38] The letter dated November 8, 2017 to all Principal Secretaries of Forests in various States and Union territories and the Handbook on FCA produced in 2019 by the MoEF&CC makes it very clear that Land Banks are used for making the land quickly available for CAF plantations so that the Forest Clearance can be easily granted under the FCA. In the years 2014 and 2017, MoEF&CC asked the State governments to identify revenue lands and degraded forest lands for smooth process of undertaking compensatory afforestation. By September 2017, the States located 2.68 million hectares (an area two and a half times the size of Tripura) in Andhra Pradesh, Chhattisgarh, Madhya Pradesh, Jharkhand, Odisha, Tamil Nadu, Rajasthan and Uttar Pradesh.[39] Thus, CAF Act and Land Bank Policy should be studied together in a synchronised manner to understand their overall effect. Moreover, this policy preempts developmental investments. It seeks to build a repository of land, which can be made readily available to the developmental projects and compensatory afforestation.[40]

According to the Annual report (2019-20) of the Department of Promotion of Industry and International Trade,[41] data and technology are key to the current investment climate being promoted by the Central and State governments across India, which means that the investors can make an online application and apply for approval based on the information available on the online portals of the government. This move is set

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[35] The concept of 'ease of doing business' was introduced by the World Bank to secure smooth functioning of the capital without any answerability, transparency and public scrutiny. It seems that India is performing exceptionally well on this chart with 14th rank, at the cost of processes, which ensure environmental protection and constitutional safeguards to *Adivasis* and OTFDs over their land and forests. The 'ease of doing business' is at the heart of outright violations of the environmental regulations, which require environmental and forest clearances in extractive and developmental projects.

[36] Thomas Worsdell and Kumar Sambhav, "Locating the Breach: Mapping the Nature of Land Conflicts in India", *Land Conflict Watch*, 2020, at 32-33; available at: *https://rightsandresources.org/wp-content/uploads/2020/06/Locating_the_Breach_Feb_2020.pdf*.

[37] Land Acquisition (Amendment) Bill, 2007; available at: *https://www.prsindia.org/sites/default/files/bill_files/1197003952_Land_20Acq.pdf*.

[38] *Supra*, note 2 at 45-52.

[39] *Supra*, note 21.

[40] "Ease of investment: One-stop repository of India's land bank launched", *The Economic Times*, August 27, 2020; available at: *https://economictimes.indiatimes.com/news/economy/policy/ease-of-investment-one-stop-repository-of-indias-land-bank-launched/articleshow/77783625.cms*.

[41] *Annual report (2019-20)*, Department of Promotion of Industry and International Trade, 2020; available at: *https://dipp.gov.in/sites/default/files/annualReport_English2019-20.pdf*

in the backdrop of pro-free market discourse on 'red tape'. The industrial lobby and international financial institutions such as World Bank have been creating pressure points in the developing nations of the global south to open up their markets. Land Bank is one among many other policy initiatives of the Central and State governments to attract Foreign Direct Investment ("**FDI**"). Therefore, the compliance with regulatory frameworks such as *Environmental Impact Assessment (2006)* and the process for Forest Clearances are constructed as bureaucratic hurdles and marred with 'red tape' causing loss to the investment and creating hostile condition for the businesses.

Ironically, in the contemporary scenario, Land Bank Policy derives its legitimacy from LARR, which is otherwise known as beneficial or pro-people legislation.[42] The provision relating to acquisition of land in Scheduled Areas says that acquisition cannot take place without the consent of *Gram Sabhas* and no immediate acquisition can be made in such cases.[43] LARR Rules formulated by some of the States like Odisha have incorporated provisions allowing acquisition for Land Banks which, for instance, do not exclude land falling under Scheduled Areas. Odisha LARR Rules, 2015[44] provide that the State government has the power to form Land Banks, and that the *tahsildar* of the area will be in charge of such Land Bank including maintenance of a list of waste land, unutilised acquired land, mutli-cropped land and irrigated land.[45] The said Rules also provide that the land unutilised for a period of five years will automatically be reverted to the State and deposited in the Land Banks.[46] Certain processes are formulated within these Rules for identification of various categories of land so that the information can be put together in an online database created to facilitate investments. Although the provision does not speak specifically about whether forest lands can also be identified and put in the Land Banks, evidence from Odisha and Jharkhand suggests that forest lands, grazing land and common lands have also been brought under the said policy.[47]

6.6 COVID-19 and Systematisation of Land Bank Policy[48]

The impact of the COVID-19 pandemic began to be felt globally by early 2020. Complete national lockdown was announced and enforced by the Central government in India since March 2020 and many crucial activities came to a standstill. Schools, colleges, offices and transport were shut down for at least four months. The effects of the pandemic were not just limited to the cities, they were also visible in the villages. In the *Adivasi* areas *Gram Sabha* meetings could not take place.[49] However, coal mining and operations for other extractive industries were classified as essential services, and,

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[42] LARR, 2013.

[43] Section 41(3), LARR Act, 2013.

[44] *Odisha Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Rules, 2015* (**"Odisha LARR Rules"**).

[45] *Ibid*. Rule 42.

[46] Rule 43(1), Odisha LARR Rules.

[47] Gladson Dungdung, "Land Bank and Forest Rights", *Adivasi Hunkar,* May 29, 2019; available at: *https://adivasihunkar.wordpress.com/2019/05/29/land-bank-and-forest-rights/*.

[48] Please see information available at Industrial Information System ("**IIS**") portal; available at: *https://ncog.gov.in/IIS/login1*. The IIS portal is an initiative of the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry for creating a one stop industrial information database which is a tool of planning as well as enabling investor decision.

[49] "Report on the Impact of COVID-19 Lockdown on Tribal Communities in India", *Ground Xero*, May 7, 2020; available at: *https://www.groundxero.in/2020/05/07/a-report-on-the-covid-lockdown-impact-on-tribal-communities-in-india/*.

therefore, allowed to continue.[50] The legislature and executive agencies of the State also very proactively passed mining law amendment[51] and put out the *Draft Environmental Impact Assessment Notification, 2020*[52] in the public domain. The Finance Ministry in its Special Economic Package, 2020 for COVID-19 relief announced the focus on land, labour and investment by private sector (including FDI). According to the Ms. Nirmala Sitharaman, Minister of Finance, immediate availability of industrial land / Land Bank is a major policy intervention to attract new investments. The creation of Land Banks is important to facilitate 'ease of doing business' and will lead to creation of jobs in the sector during the times of the pandemic, which is resulting in slowdown of the economy.

The government at the Centre and State accordingly are streamlining online databases on industrial land / Land Banks to facilitate easy access to information for industries and businesses. For this purpose, State governments are making information available on the Industrial Information System ("**IIS**")[53] as well as State GIS portals where they update the data related to availability of land, land type and quantity of land. The IIS portal serves as a 'one-stop-centre' for corporate houses to take decisions about engaging in investment. As per the information available on IIS, Fifth Schedule States such as Gujarat, Maharashtra, Andhra Pradesh, Odisha, Rajasthan and Telangana have put lakhs of sq. km of land in Land Banks.[54] It is alarming that States with large areas under the Fifth Schedule and high percentage of forest cover and forest dwelling communities are creating Land Banks in such huge quantity.

Table 7: Number of Industrial Parks and Total Area in Scheduled Area States [55]

No.	State	No. of Industrial Parks Nominated	Area of Land in hectares
1	Andhra Pradesh	16	31,963
2	Gujarat	9	127,739
3	Maharashtra	13	67,177
4	Odisha	11	49,925
5	Rajasthan	10	23,978
6	Telangana	17	19,748
	Total	**76**	**320,530**

Source: Industrial Information System (IIS)

[50] Ministry of Home Affairs, Government of India, 'Revised Guidelines for Lockdown' at 6; available at: *https://www.mha.gov.in/sites/default/files/MHA%20order%20dt%2015.04.2020%2C%20with%20Revised%20Consolidated%20Guidelines_compressed%20%283%29.pdf.*

[51] The amendment (which is the newly inserted Section 8B (clause 2) under the *Mines and Minerals (Development and Regulation) Act, 1957)* exempts the industries from the requirement of acquiring approvals and clearances at the onset of their project after auction. They are free to apply for approvals and clearances within two years of the approval of their lease agreement. Available at: *https://www.mines.gov.in/writereaddata/UploadFile/Gazette%20Notification18032020.pdf.*

[52] *Draft Environment Impact Assessment Notification, 2020* exempts a large number of projects from public consultations. Available at: *http://environmentclearance.nic.in/writereaddata/om/6998FGGHOI_Gaztte_EIA2020_Comments.pdf.*

[53] Please see information available at IIS portal; available at: *https://ncog.gov.in/IIS/login.*

[54] More information is available under *Table 7: 'Number of Industrial Parks and Total Area in Scheduled Area States.*

[55] This table has been formulated by the author by integrating information available as of June 2021 from the IIS Portal; available at: *https://ncog.gov.in/IIS/login1.*

The government is enthusiastically promoting use of online system of integrated data by businesses and industries on Land Banks. Such enthusiasm may certainly be good for businesses, but it is violating the rights of Scheduled Castes ("**SCs**") and Scheduled Tribes ("**STs**") and in Scheduled Areas and tribal dominated areas where common lands and forests are being alienated without their knowledge. The integrated online portals may seem to be transparent method of sharing information; sadly, they are not. Firstly, technology is not equally accessible to all. We can safely assume that such portals are inaccessible for *Adivasis* living in remote areas (whose lands might be up for auction on these platforms) due to illiteracy and impoverishment. Secondly, Land Banks create a culture of selective information sharing and lack of transparency. STs, who are major stakeholders in the Scheduled Areas and non-Scheduled Areas, are being robbed off their constitutional rights under PESA and FRA. Free, prior and informed consent under FRA and PESA protects *Adivasis* and OTFDs from wrongful alienation of land.[56] Land Banks completely distort the process of consent or consultation because land is practically alienated if it is put under the register or the online system. The community is bound to lose access to such land (which is often used by the community for its livelihood purposes) even before it is auctioned or sold by the State to businesses. Another major discrepancy with the data set available is that it often does not specify the purpose for which it will be used, i.e., industrial, other developmental work, or compensatory afforestation. Therefore, even if someone from the community may want to object to such formation of Land Bank, they will be unaware of the intended purpose of such land is being included in the Land Bank.

Quite simply then, Land Banks have become a reason for conflict in the *Adivasi* areas where the state wants to maintain its control over lands. It led to protests in various States. One such conflict played out in Khunti district in Jharkhand where Land Banks were a major trigger of the political meltdown in the region.[57] In an unfortunate misreading of the political climate, the State government registered criminal cases against 10,000 *Adivasis* and forest dwellers in Khunti district in an attempt to control and discipline the *Adivasi* communities (*a detailed discussion in this regard has been made in Chapter 7: Security Laws and Impunity*).[58] We are aware that such political movements are repressed by the State through force of criminal laws to keep the discontent within its limits and to avoid spill overs.

Land Banks have the potential of implicitly criminalising *Adivasi* and OTFDs because after the land is put in a Land Bank and intended to be used for CAF purposes, it comes under the control of the forest department. The forest department then notifies such

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[56] Section 4(i),PESA and Section 4(5), FRA. *See also* Article 10 and 11 of the United Nations Declaration on the Rights of Indigenous People, 2007 These provisions put responsibility to remedy the wrong on the state in cases of violation of right to free, prior and informed consent of the indigenous communities. Available at: *https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.*

[57] The case has been discussed in detail in *Chapter 7: Security Laws and Impunity*.

[58] Supriya Sharma, "10,000 people charged with sedition in one Jharkhand district. What does democracy mean here?", *Scroll.in*, November 19, 2019; available at: *https://scroll.in/article/944116/10000-people-charged-with-sedition-in-one-jharkhand-district-what-does-democracy-mean-here.*

land under the category of Reserved Forest or Protected Forest. Their access to such land can become criminal in nature thereafter if they continue to depend on the forest for fuel (wood), cattle grazing, Minor Forest Produce collection or any such livelihood purposes. It creates conditions for conflict between two unequal parties i.e., the state and the forest dwellers, resulting in further criminalisation of the *Adivasis* and forest dwelling communities. It places the idea of Fifth Schedule of the Constitution of India under threat because it practically bypasses the process of consultation under PESA and FRA.

6.7 Conclusion

The CAF Act and Land Bank Policy show that the developmental State does not respect the Constitutional mandate. These laws and policies can hardly be considered neutral because they serve the interest of a particular class and show the inherent bias of class and race in the structure of the Indian State. Its preference for promoting the interest of the capital, instead of vulnerable communities, is stated in very clear terms. Therefore, conflicts arising because of such policies also have a class character.

The developmental State reinvents the wheel by reimagining forests and expanding the horizons of an *Adivasi's* criminality through the CAF Act and Land Bank Policy.[59] When these laws are studied in conjunction with the colonial and post-colonial laws such as IFA, FCA, WLPA and LARR Rules, their role in the imposition of criminality on *Adivasis* and OTFDs becomes very clear. These laws and policies are a clear manifestation of the brute force used by the forest bureaucracy to maintain its control over forest areas and forest resources.

[59] *Promise & Performance Report: Ten Years of Forest Rights in India, Citizens' Repor*t as part of Community Forest Rights-Learning and Advocacy (CFR-LA) process, 2016, at 22-27; available at: *https://www.fra.org.in/document/Promise%20and%20Performance%20Report.pdf.*

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

Photo: Puja

Chapter 7

SECURITY LAWS AND IMPUNITY

7.1 Background

Modern nation-states use various techniques to 'regulate' and 'regularise' people in order to govern them and maintain the established political structures.[1] In regulating and regularising people, the state tends to 'other' those who threaten the established order and, thereby, its authority.[2] The 'other' is generally the marginal and seemingly inferior people living on the fringes of society who are victims of multifarious injustices. The security state[3] or militaristic state, an extreme adaptation of the nation-state model, believes that those who challenge the normalcy of *status quo,* challenge its sovereign authority. Therefore, such a state resorts to exceptional measures for eliminating the 'threat' to bring 'normalcy' back in life.

The experience of Nazi Germany, for example, suggests that exceptional measures do not apply equally to all persons or citizens; instead, such a state only seeks to subjugate those who are constructed as the threat and with whom the political differences of the state cannot be resolved. In such situations, constitutional functions of legislature and judiciary are compromised, or even suspended. Civil liberties and fundamental rights of citizens are suspended as well. The executive authority is considered supreme and the only authority.

In the contemporary context, many democratic states have been using the narrative of threat to their sovereignty, a narrative that got a wholesome fillip with the global proclamation of the 'war on terror' since the 9/11 tragedy. This narrative normalises the enactment and enforcement of security laws, which give excessive powers to the executive.

In Chapter 3 we examined the constitutional and legislative architecture, which protects *Adivasi* rights to their traditional homelands and resources. However, since the 1990s, the Indian state has systematically attempted to open resource rich Scheduled Areas and forest areas for extractive industries and developmental projects (such as mega hydro-power projects, construction of dams, Special Economic Zones, etc.) In a parallel process, large number of Security Laws have become operational in the last few decades. The surge in the enforcement of Security Laws and the imposition of the developmental agenda of the state is seen to go hand-in-hand.

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[1] David Macey and Michel Foucault, *Society Must Be Defended* (Picador, New York, 2003) at 239-264.

[2] *Ibid*.

[3] 'Security state' here refers to a highly policed and surveillance state, which derives its power from arbitrary laws and procedures and the speech-act of the executive functionaries that leads to "naming and damning" of certain communities as threat giving rise to the hyper-nationalist discourse. In such a socio-political context, the democratic, socio-economic and cultural rights of the citizens stand suspended. The suspension of rights through draconian laws faces challenge on grounds of violation of constitutional morality. Notably, the suspension of rights does not affect the communities equally and its application depends on the social positioning of the communities based on their caste, class, race and gender.

This process has undermined many principles foundational to the modern Indian democracy, and the 'social contract' between the citizens and the state encapsulated in the Indian Constitution. Our social contract is based on the idea of social, political, economic and cultural equality, and principles of freedom and justice.[4] It is based on the principle of substantive equality and guarantees fundamental rights and liberties to the marginalised by inscribing protective measures in the Constitution.[5] The Fifth and Sixth Schedules of the Constitution recognise the right to self-rule based on culture and traditions of the Scheduled Tribes ("**STs**") living in these areas.[6] The *Panchayats (Extension to the Scheduled Areas) Act, 1996* ("**PESA**"), *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* ("**FRA**") and a host of other protective legislations have been enacted that substantiate constitutional guarantees in the form of self-governance rights over land and forests, usufruct and ownership rights over resources.[7]

It is a matter of grave concern for a constitutional democracy that excessive use of Security Laws against *Adivasis* and forest dwelling communities puts these constitutional and legislative protective measures at risk, even redundant in many situations. In this chapter, we study how these laws contribute to the process of criminalisation of *Adivasis* and forest dwelling communities. Since it is difficult to analyse the use of every such law, we will discuss key provisions of Security Laws of general and special nature that are disproportionately used to criminalise *Adivasis* and other forest dwelling communities. We will analyse the law relating to sedition under Section 124A, *Indian Penal Code, 1860* ("**IPC**"), in the backdrop of the *Pathalgarhi* movement. We will also analyse provisions of key Security Laws such as the *Unlawful Activities (Prevention) Act, 1967* ("**UAPA**") and the *Chhattisgarh Special Public Safety Act, 2005* ("**CSPSA**"). Individuals, associations and groups perceived by the state as to be terrorists, unlawful and a threat to public safety are penalised under these laws. Although the language of these laws seems to be neutral, when analysed contextually in the political backdrop of the birth of a security state, it becomes very clear that such laws target marginalised communities for their opposition to the state's policies, which affect their material existence. We find that such laws are disproportionately used against various marginalised groups, such as religious minorities, *Dalits*, *Bahujans*, human rights defenders, *Adivasis* and forest dwelling communities. An interrogation of the methods used to persecute all marginalised groups is beyond the scope of this report, and hence we will interrogate the use of these laws *qua Adivasis* and forest dwelling communities in particular.

We will first discuss the manner in which offences against the state are constructed. We will start our discussion with the general criminal laws, and in particular Section

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[4] See preamble to the Constitution of India.

[5] Articles 14, 15, 16, 19, 20, 21 and 39A as well as Fifth and Sixth Schedule of the Constitution of India.

[6] See PESA.

[7] See, for instance, Section 4(1)(m), PESA and Section 5, FRA. For further information, please see *Chapter 3: A Radical Break from the Past: The Constitution of India and its Interpretation*s; and *Chapter 10: Adivasis and Protective Legislations: Interface with the Criminal Justice System as Complainant.*

124A, IPC. We will then scrutinise the use of special criminal laws such as UAPA and CSPSA against individuals belonging to *Adivasis* and forest dwelling communities and examine the frequent occurrences of human rights violations of such peoples. We will also deconstruct legislations such as the *Central Industrial Security Forces Act, 1968* ("**CISF Act**") and the *Odisha Industrial Security Forces Act, 2012* ("**OISF Act**") that legitimise militarisation in the Central Indian States, leading to a cycle of violence. Finally, we analyse the effect of Security Laws on the constitutional rights of STs and Other Traditional Forest Dwellers ("**OTFDs**").

7.2 Security Laws: Oppression as Commonality

It is a presupposition that modern nation-states are built upon the principles of equality, freedom and fraternity. This presupposition also leads to an assumption - that normalcy is the basic characteristic of a modern nation-state. However, the idea of normalcy is not equally applicable to all those living within its boundaries. For the ideal citizens of the nation-state, life is as normal as it can be; but for those who are identified as a threat to 'order' in a civilised society, normalcy may ever remain an unrealised dream. The relationship of the nation-state with those living on the fringes of society is marked by persistent upheaval, and often violence. And it is here that the reality of the modern nation-state manifests. Thus, those who live on the margins of normalcy, for the simplest expressions of freedom or dissent, find themselves charged with serious offences against the state, ranging from 'sedition' and 'waging war against the state'[8], to those under anti-terror laws such as the UAPA and CSPSA. Marginalised groups are often victims of militarisation and implementation of Security Laws that violate their constitutional and human rights. They may be subjected to torture, coercion and, sometimes, may even be killed by the Central Industrial Security Forces ("**CISF**"), the Odisha Industrial Security Forces ("**OISF**"), or other para-military forces. There is no dearth of examples of such violations. For instance, in May 2021, police firing during a protest against the establishment of a Central Reserve Police Force ("**CRPF**") camp around Silger villages resulted in the death of three villagers in Sukma district of Chhattisgarh.[9] In June 2021, a tribal man was shot dead by the COBRA and Jharkhand Jaguar para-military troops in the district of Latehar in Jharkhand. It is alleged that the man and a few others had gone to the forest for their traditional annual hunt when he was shot dead. The para-military troops claim it to be an encounter of a Naxalite.[10] Such incidences of killings, encounters and violation of human rights are not discrete events; rather they are symptomatic of the systematic violence produced by the dialectical opposition between the state and *Adivasi* communities in these regions.

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[8] Both offences were an integral part of the colonial government's strategy to crack dissent.

[9] Gargi Verma, "Chhattisgarh: Three Dead in Firing on Protest, Villagers Dig Heels in at Sukma Security Camp", *The Indian Express,* May 19, 2021; available at: *https://indianexpress.com/article/india/chhattisgarh-three-dead-in-firing-on-protest-villagers-dig-heels-in-at-sukma-security-camp-7320689/.*

[10] Animesh Bisoee, "Bharmadev was Shot at by the Security Forces, say Activists", *The Telegraph*, June 24, 2021; available at: *https://www.telegraphindia.com/jharkhand/bramhadev-was-shot-at-by-the-security-forces-says-activists/cid/1819847.*

One of the most important locations where criminality is constructed in a modern nation-state is the conflict between the state and its citizens regarding the meaning of development and growth. The very idea of development is discursive. It holds different meanings for the state and for various groups of people. The neo-liberal state prioritises a specific idea of development, which involves promotion of large capital, foreign direct investment ("**FDI**"), market economics, and domination of the means of production by private corporate entities. Since this includes land and natural resources, such an idea of development leads to accumulation by dispossession.

The *Adivasi* idea of development, however, is based on the idea of self-governance rights over land, forests and resources.[11] It is also based upon ideas of inter-connectedness with the environment rather than of property and extraction. In context of Fifth Schedule and forest areas, the local communities find themselves at loggerheads with the state around the idea of development. These communities are generally *Adivasis*, traditional forest dwellers and landless *Dalits,* all of whom depend upon the forest lands for meeting their livelihood needs. These two world views conflict with each other.

The resource rich Fifth Schedule States have borne the brunt of these conflicts for decades, such as through "anti-Naxal" operations such as Operation Green Hunt (in undivided Andhra Pradesh and Jharkhand) or counter–insurgency operations such as *Salwa Judum* (in Chhattisgarh).[12] It is not surprising then that *Adivasi* and forest dwelling communities are 'othered' by the state, by constructing them as anti-development and anti-national, and as a threat to the security of the nation-state. As demonstrated from the analysis under this chapter, the journey from this 'othering' to the systematic imposition of criminality on entire communities from then on is rather a short one.

7.2.1 Sedition and the *Pathalgarhi* Movement

The State of Jharkhand emerged at the turn of the millennium, after a long-drawn peoples' movement asserting *Adivasi* identity as separate and different from that of rest of the then undivided Bihar. A significant portion of the geographical area of the State is governed by the Fifth Schedule and has a large proportion of ST population. Sometime in 2016, the State government sought to make sweeping amendments to the *Chota Nagpur Tenancy Act, 1908* ("**CNTA**") and the *Santhal Pargana Tenancy Act, 1949* ("**SPTA**") to dilute the prohibition on alienation of tribal lands to non-tribals and companies. These amendments to the CNTA and the SPTA were first sought to be

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[11] The concept of self-governance is envisaged under the Fifth Schedule of the Indian Constitution and the PESA whereunder the *Gram Sabhas* in Scheduled Areas have powers to govern forests and land as per their tribal customary law. The idea of self-governance is extended under the FRA, which expands upon the formulation, functioning and powers of *Gram Sabhas*, modernising them by introducing gender-just and secular elements in its form and function.

[12] Nandini Sundar, *The Burning Forest: India's War in Bastar* (Juggernaut Books, New Delhi, 2016) at 89-111. *Salwa Judum* is understood as a 'purification hunt'. It was an anti-insurgency operation designed to combat and neutralise Naxals in the State of Chhattisgarh. Local young men and women including *Adivasis*, were armed as Special Police Officers i.e., SPOs. They helped the police and para-military in this operation. Backed by the State, the SPOs committed innumerable atrocities against the local *Adivasis* who fled their homes and took shelter in adjoining States, like Andhra Pradesh. In 2011, the Supreme Court held that *Salwa Judum* is illegal as well as unconstitutional and directed the State government to stop using SPOs immediately.

made through Ordinances and thereafter, through Amendment Bills passed by the State Legislative Assembly. This move was met with widespread protests and political mobilisation, such that the then Governor of the State, Smt. Draupadi Murmu, refused to give her assent.[13] Eventually, the Amendment Bills were withdrawn by the State government. The general disaffection with the perceived anti-*Adivasi* policies of the incumbent government, however, did not subside. By then, there was a widespread perception that the State government was aggressively promoting FDI in the State for extraction of mineral wealth. This perception was fuelled by the 'Momentum Jharkhand 2017'campaign,[14] which saw the participation of large industrial houses, both foreign and domestic.[15] These developments led to a sense of alienation from the Indian state among the *Adivasis* of Jharkhand, especially the *Mundas* of Khunti district.

Sometime in 2017, a peoples' movement, popularly known as *Pathalgarhi,*[16] came into being as a response to Jharkhand government's idea of governance and development. '*Pathalgarhi*', in essence, is an ancient *Adivasi* custom of the Khunti district[17] and surrounding areas in Jharkhand. Although traditions of *Mundas* and other *Adivasi* communities are mostly oral, in the Khunti district, matters of importance are inscribed on stone slabs, which are then erected at a place of prominence in order to mark an event of significance. This could be events such as birth or death, division of land or setting village boundaries.[18] Since 2016, this custom of marking significant events on stone slabs is being adapted as a form of resistance to state-sponsored ideas of development, and the increasing intrusion into self-governance traditions and laws by the state apparatus. *Pathalgarhi* was reconfigured to become a symbol of asserting and exercising constitutional rights and power by the *Gram Sabhas* in various *Panchayats* and villages of Khunti district.

As the movement spread organically to other parts of the State, and even into surrounding States, it began to encapsulate other legal and policy decisions of the

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[13] Prashant Pandey, "Tenancy Laws: Jharkhand Governor Returns Bill, BJP Leaders Call for Fresh Strategy", *The Indian Express*, June 27, 2017; available at: *https://indianexpress.com/article/india/tenancy-laws-jharkhand-governor-returns-bill-bjp-leaders-call-for-fresh-strategy-4723622/.*

[14] 'Momentum Jharkhand' has been an ongoing program of the State government to promote Jharkhand as an attractive investment destination for Indian and foreign companies.

[15] "MoUs Signed During Momentum Jharkhand should be Constructive: Das", *The Outlook*, February 13, 2017; available at: *https://www.outlookindia.com/newsscroll/mous-signed-during-momentum-jharkhand-shd-be-constructive-das/987561.*

[16] *Pathalgarhi*, or *Pathalgadi* is a customary practice of some *Adivasi* communities where they erect a stone with inscriptions of their customs. The most recent upsurge of this custom has been seen in the three States of Chhattisgarh, Jharkhand and Odisha to deny the land grabs in regions ruled by the local *Gram Sabha* and establish the supremacy of the Constitution, PESA and FRA. The stones or *Pathals*, signify that their region is ruled by the local administration. For more information, see: Sneha Kanchan, "Pathalgadi wave: When tribals fought for their lands", *Deccan Herald*, December 31, 2019; available at: *https://www.deccanherald.com/national/east-and-northeast/pathalgadi-wave-when-tribals-fought-for-their-lands-790213.html.*

[17] Khunti district comes under the Chota Nagpur area and is mostly populated by the *Munda* tribe. Birsa Munda was the leader of *Munda* community during the *Munda* revolt (*Ulgulan*) in 1900s. This region is covered under the protective provisions of the CNTA.

[18] The traditional custom of *Pathalgarhi* described here is based on the interactions with the local researchers and activists from Jharkhand. Their names are being withheld because of security concerns.

government, including:[19]

(i) attempts to amend laws, which effectively take away the protection given to tribal peoples against land alienation;[20]

(ii) putting massive amount of tribal customary land under Land Banks;[21]

(iii) apathy of the State towards taking adequate welfare measures in tribal regions;

(iv) continuous attempt by the State to promote businesses to invest in State resources, which would lead to tribal land alienation; and

(v) disrespect and disregard for the *Adivasi* political identity i.e., their autonomous existence through traditions recognised by the Constitution of India itself.

Adivasi communities started to read and interpret provisions of the Constitution and PESA, and then transcribed them onto the stone '*pathals*' in community events as an expression of their right to self-determination. There were also numerous different interpretations of the law. While some *Pathalgarhi* initiatives were simply an exercise of the fundamental right to free speech (Article 19(1)(a) of the Indian Constitution), other initiatives asserted autonomy over their tribal homelands, often to the exclusion of the state itself. The *Mundas* used *Pathalgarhi* as a political tool of expression of their autonomy to protect their inalienable right to land and forest guaranteed under Article 244 and the Fifth Schedule of the Constitution, read with the CNTA. In other places, *Adivasi* communities declared themselves as autonomous, drawing upon the *Government of India Act, 1935*.[22] In some villages, the *Gram Sabha* prohibited 'outsiders', including police and administrative officials of the Jharkhand government, from entering the village boundaries.[23] In other villages, the stone inscriptions declined the benefits of various government welfare schemes, and repudiated the government's Unique Identification or *Aadhar*[24] as valid identification.[25]

In Jharkhand, the State government interpreted this process of reading, interpreting, and writing of the law, as a criminal offence against the state. The *Pathalgadi* movement was perceived by the Jharkhand government as a threat to its power and

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[19] *Ibid*.

[20] In 2016, *Chota Nagpur Tenancy Amendment Bill* was passed by the Jharkhand legislature, but the Governor did not give assent to it because the Amendment would have led to the violation of the rights of STs in the Chota Nagpur region. The amendment proposed to do away with protective provisions in CNTA such as the use of tribal agricultural land for non-agricultural purposes, removal of the consent of District Collector for alienation of tribal lands and restricting the powers of *Gram Sabha*. Similar amendment was also proposed for the SPTA. For further discussion, please see: *http://www.adivasiresurgence.com/stop-amendment-cnt-spt-memorandum-president-governor/.*

[21] The issue of Land Bank has been dealt with extensively under *Chapter 6: Redefining the Forest and Reinventing the Conflict*.

[22] *Ibid*.

[23] Tarique Anwar, "Pathalgarhi Movement: In Massive Crackdown, 250 Tribals Booked under Sedition", *Newsclick*, January 25, 2019; available at: *https://www.newsclick.in/pathalgarhi-movement-massive-crackdown-250-tribals-booked-under-sedition.*

[24] *Adhaar* is a 12-digit unique identity number that can be obtained voluntarily by citizens of India after enrolment and is based on their biometric and demographic data.

[25] Amarnath Tewary, "The Pathalgarhi Rebellion", *The Hindu*, April 14, 2018; available at: *https://www.thehindu.com/news/national/other-states/the-pathalgadi-rebellion/article23530998.ece.*

authority, and of course, to its developmental goalposts of attracting FDI to the State in the form of extractive industry. In rapid succession, the State government initiated criminal proceedings against members of the *Munda* community as well as village *Gram Pradhans* for propagating *Pathalgarhi*, stating that the act itself is 'seditious' in nature and, therefore, an offence against the state.[26]

Some may take issue with the various interpretations of the Constitution propounded by the *Pathalgarhi* movement. While ignorance of law is no excuse for violation of the law,[27] it still begs the question whether merely interpreting the law incorrectly, or in a manner contrary to the state's own interpretation, can amount to sedition[28] or waging war against the state,[29] both of which are serious crimes.

In 2018, 20 well-known intellectuals, allegedly associated with the *Pathalgadi* movement, were charged with serious offences, including sedition, waging war against the state and conspiracy, and under provisions of the *Information Technology Act, 2000* ("**IT Act**").[30] The First Information Report ("**FIR**") was registered on the basis of various 'Facebook' posts, which some of these individuals had posted while others had simply 'liked'. The accused included activists, writers, professionals (including bankers), mostly belonging to the *Adivasi* communities such as the *Munda* and *Oraon* tribes. Many are well-known defenders of human rights in Jharkhand, having consistently spoken against atrocities committed by the police and administration. This targeted attack on intellectuals was clearly intended to silence dissenting voices that have been out-spoken in their critique of the then government.[31]

The *Pathalgadi* example demonstrates how, in the hands of the state, the criminal justice system can be weaponised against those who oppose the state, or hold views

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[26] Nandini Sundar, "Pathalgadi is Nothing But Constitutional Messianism, So why is the BJP afraid of it?", *The Wire*, May 16, 2018; available at: *https://thewire.in/rights/pathalgadi-is-nothing-but-constitutional-messianism-so-why-is-the-bjp-afraid-of-it.*

[27] That 'ignorance of law is no excuse' is one of the central principles of Indian jurisprudence.

[28] See Section 124A, IPC:
*"**124A. Sedition**: Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government estab¬lished by law in India, shall be punished with im¬prisonment for life, to which fine may be added, or with impris¬onment which may extend to three years, to which fine may be added, or with fine.*
Explanation 1. The expression "disaffection" includes disloyalty and all feelings of enmity.
Explanation 2. Comments expressing disapprobation of the meas¬ures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.
Explanation 3. Comments expressing disapprobation of the admin¬istrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."

[29] See Section 121, IPC:
*"**121. Waging, or attempting to wage war, or abetting waging of war, against the Government of India**: Whoever, wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine.*
Illustration: A joins an insurrection against the Government of India. A has committed the offence defined in this section."

[30] This included the notorious Section 66A of the IT Act, despite the fact that it has been drastically read down by the Supreme Court in *Shreya Singhal* v. *Union of India* AIR 2015 SC 1523.

[31] *Interim report of Coordination of Democratic Rights Organizations ("**CDRO**") and Women Against Sexual Violence and State Repression ("**WSS**") fact finding team*, August 21, 2018; available at: *https://wssnet.org/2018/08/21/press-release-of-the-cdro-and-wss-fact-finding-of-khunti-ghagra-palamu-tiger-reserve-and-sedition-cases/.*

antithetical to the state's perception of its own role. Instead of restraining the powers of state machinery, specifically the police and other executive agencies, the criminal justice system is turned against its own people. Fact-Finding Reports by human rights organisations on the *Pathalgarhi* movement and its aftermath strongly suggest that a combination of statutory provisions, police apparatus, and the criminal justice system have been used in concert to persecute those involved in the *Pathalgarhi* movement.[32]

Thus, in tribal and Fifth Schedule Areas, any kind of opposition to the state and its construction of itself is seen as anti-government, anti-growth, anti-national, and, therefore, criminal. *Adivasis* who stand opposed to the state's idea of development are identified by the state as being criminals. In this manner, the construction of criminality and development are going hand-in-hand with each other.

7.2.2 Enforcing UAPA: Manufacturing the Unlawful *Adivasi*

In the architecture of Security Laws in India, UAPA is not the only law which criminalises difference and dissent. It is preceded by the erstwhile *Terrorism and Disruptive Activities (Prevention) Act, 1987* and the *Prevention of Terrorism Act, 2002,* both of which were specifically designed and enacted to tackle terrorism by giving sweeping powers to the police establishment.

The UAPA, however, has a unique standing of its own, drawing its legitimacy from the global war against terror subsequent upon the 9/11 attacks in New York.[33] In 2008, a preamble was inserted into the Act, which says that the law was enacted to combat international terrorism, with specific reference to Resolution 1373/2001[34] passed in the 4385th meeting of the United Nations Security Council ("**UNSC**"). The preamble also refers to a series of other resolutions passed from 1999 to 2008 by the UNSC requiring member states to freeze assets, prevent entry and transit of terrorists and terrorist organisations, as also prevent supply, sale and transfer of arms and ammunitions to terrorist individuals and terrorist groups.[35] Since then, the UAPA has undergone many changes, increasing in intensity with each amendment in its purported goal of countering terrorism.

Resolution 1373/2001 has been the subject of intense criticism. For one thing, it does *not* define 'terrorism' per se, leaving a lot of room for member states to interpret the term as they wish. A basic and foundational principle of criminal jurisprudence – that the definition of a crime must be clear, definite, and easily understood – stands violated at the threshold. This vagueness has serious consequences for those at the receiving end of the anti-terror project, as the goal posts are founded on shifting sand.

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[32] *Ibid*.

[33] The UAPA was enacted in 1967, but its use has increased during the last couple of decades.

[34] UNSC, *Security Council Resolution 1373 (2001) (on threats to international peace and security caused by terrorist acts)*, September 28, 2001, S/RES/1373 (2001); available at: *https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf.*

[35] See preamble to the UAPA.

Since the UAPA is now the foremost anti-terror legislation in India targeting both terrorist organisations and individuals, it has emerged as one of the most draconian laws criminalising dissent and wrongfully prosecuting communities/groups opposed to the state's ideology and economic agenda.[36]

Difference as Extremism

Any discussion on criminal law must commence with understanding definition of the offence. How, then, does UAPA describe "unlawful activity", "unlawful association" and "terrorist activity"?

"Unlawful activity" is defined as *"any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signed or by visible representation or otherwise)*

(i) which is intended.....to bring about the cession of a part of the territory of India....or which incites any individual or group of individuals to bring about such cession....

(ii) which disclaims.....the sovereignty and territorial integrity of India, or

(iii) which causes of is intended to cause disaffection against India."[37]

In this definition, the law places a clear requirement of intention (*mens rea*) in the ingredients of the offence itself.

Any person engaged in such unlawful activity, or who "*advocates, abets, advises or incites*" an unlawful activity, commits an offence,[38] which is punishable with up to seven years imprisonment and fine.[39] In addition, any person who assists in any unlawful activity is punishable with imprisonment of up to five years and fine. The law defines an "unlawful association" as any association "*which has for its object any unlawful activity, or which encourages or aids persons to undertake any unlawful activity*". It goes on to connect the proscribed activities of such unlawful association to IPC provisions relating to 'offences against the public tranquillity', in particular 'imputations, assertions which are against national integration'.[40]

The Act contains a specific procedure for declaring an organisation as an "unlawful association" on a case-by-case basis. Thereafter, membership of an unlawful association is defined as a criminal offence. This includes not only taking active part in meetings and other activities of the association, but membership simpliciter.[41] Punishment for such offence is upto two years imprisonment and fine.[42] Where such membership

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[36] CDRO, *Terror of Law: UAPA and the Myth of National Security,* April 2002 at 1-46; available at: *https://pudr.org/sites/default/files/2019-01/terror%20of%20law.pdf.*

[37] Section 2(o), UAPA.

[38] Section 13, UAPA.

[39] Section 13(1), UAPA.

[40] Section 2(p), UAPA incorporates Sections 153A and 153B of IPC.

[41] Section 10(a), UAPA.

[42] Section 10, UAPA.

includes active participation in activities resulting in harm to others, the punishment is a minimum of five years, and can also result in imprisonment for life or the death sentence.

a) Sections 15 to 21 of UAPA deal with offences related to terrorism. A "terrorist act" is described in detail in Section 15, as "*any act with intent to threaten or likely to threaten the unity, integrity, security, economic security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country*", which involves death and injury of people;

b) damage to property;

c) disruption of essential supplies and services;

d) detention or kidnapping or abducting or killing of a key functionary of the government.[43]

An elementary understanding of these provisions suggests that for constituting the act of terrorism, both *mens rea* (intention) and *actus reus* (acting upon) are important ingredients. Where a terrorist act results in the death of any person, it is punishable with death penalty or life imprisonment. Even if no death results, a terrorist act mandates a minimum sentence of imprisonment of five years imprisonment and fine.[44] Other related offences include raising funds for terrorist acts, conspiracy, advocating or abetting such acts, preparatory arrangements, recruitment, harbouring and so on.[45] Each of these definitions are over-broad and vague, with the result that any act criticising government decisions or policy, whether in the form of writing pamphlets, public speaking, protest or even singing of revolutionary songs, can constitute an offence.[46] As such, the UAPA tends toward choking the intellectual capacity of ordinary citizens to understand, engage and debate, which is the essence of the constitutional right to freedom of speech and expression.[47]

The Central government is vested with the power to notify "*an organisation or an individual*" as "***deemed** to be involved in terrorism*" (emphasis added).[48] The Ministry of Home Affairs, Government of India ("**MHA**") published a list of organisations in 2019, wherein it has clearly named and notified some 42 terrorist groups in India under the UAPA. The list further specifically includes "*all its formations and front organisations*" with respect to organisations adhering to communist or socialist ideologies.[49] It does

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[43] Section 15, UAPA.

[44] Section 16, UAPA.

[45] Sections 18 to 22, UAPA.

[46] Jayshree Bajoria, "Songs of Dissent, Laws of Control", *Open Democracy*, May 12, 2015; available at: *https://www.opendemocracy.net/en/songs-of-dissent-laws-of-control/https://www.hrw.org/news/2015/05/13/songs-dissent-laws-control.*

[47] Here, the Right to Freedom of Speech and Expression under Article 19(1)(a) should be read with Articles 14, 15, 16 and 21 of the Indian Constitution.

[48] Section 35, UAPA.

[49] See Terrorist Organisations Listed in the First Schedule of UAPA, National Investigation Agency, Government of India (last updated on December 30, 2019); available at: *https://www.nia.gov.in/banned-terrorist-organisations.htm.*

not name them at all. The deeming clause in the statutory provision combined with the broad inclusion of so-called 'front organisations' in the notification give the Central government a *carte blanche* to include just about any association or entity under the umbrella of the UAPA.

For example, members of *Kabir Kala Manch* ("**KKM**"), a cultural group in Maharashtra formed by individuals from the *Dalit* working class, have been repeatedly charged and arrested under various provisions of the UAPA. Although KKM is not notified as a 'terrorist organisation' in itself, it is referred to as a front organisation of the CPI (Maoist) by the law enforcement agencies in criminal proceedings.[50] Similarly, *Sangathans* (groups / collectives) such as *Visthapan Virodhi Jan Vikas Andolan* (a coalition of anti-displacement movements across the country) and *Niyamgiri Suraksha Samiti* ("**NSS**") (a local *sangathan* comprising of and representing the people of *Niyamgiri* opposing bauxite mining by Vedanta in Odisha), have been referred as a front organisation of the Maoist by the MHA. Activists connected to such organisations are targeted under Security Laws, including sedition and UAPA.[51] The ambiguity in the definition of 'formations and front organisations' of a banned organisation makes it easier for the state to target a wide array of individuals and organisations who may espouse contrary views to those of the state. Even the modicum of due process available to notified 'terrorist organisations' is not available to such 'formations and front organisations', who remain unaware of their unlawful status in state records until one or more of their members are arrested and charged under UAPA. It is well-documented that such discretionary and untrammelled power at the hands of the Central government enables it, with impunity, to harass and persecute individuals associated with organisations advocating civil liberties.

Sections 35 and 36, UAPA were amended in 2019, pursuant to which the Central government is empowered to notify individuals as 'terrorist individual' under the Act.[52] It remains to be seen how this approach of the state, of identifying individual terrorists, will play out in the coming years. But this much is clear — under such legal provisions, *Adivasi, Dalit* and organisations with communist or socialist ideologies can be labelled as "front organisations" of notified terrorist organisations whenever Central government so desires, without being under any obligation to give reasons for

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[50] Chandan Haygunde, "Kabir Kala Manch Case: SC Grants Bail to 3 KKM Artistes held for 'Maoist' Links", The Indian Express, January 4, 2017; available at: *https://indianexpress.com/article/india/kabir-kala-manch-case-sc-grants-bail-to-3-kkm-artistes-held-for-maoist-links-4457662/.* See also Sukanya Shantha, "Elgar Parishad Case: NIA Calls Kabir Kala Manch 'Maoist Front', Takes Activists into Custody", *The Wire*, September 8, 2020; available at: *https://thewire.in/rights/elgar-parishad-nia-kabir-kala-manch-maoist.*

[51] Damodar Turi and Anumeha Yadav, "'Father Stan Stood by Me': A Life Devoted to Jharkhand's *Adivasi* and *Moolvasi* Communities", *Newslaundry*, July 6, 2021; available at: *https://www.newslaundry.com/2021/07/06/father-stan-stood-by-me-a-life-devoted-to-jharkhands-adivasi-and-moolvasi-communities.* See also: Vijaita Singh, "Centre Links Two NGOs to Maoists", *The Hindu*, April 16, 2017; available at: *https://www.thehindu.com/news/national/centre-links-two-ngos-to-maoists/article18072465.ece.*

[52] See *Unlawful Activities (Prevention) Amendment Act, 2019*; available at: *https://egazette.nic.in/WriteReadData/2019/210355.pdf.*

the same.[53] This chapter further elaborates on the use of UAPA against *Adivasis* and groups espousing their civil and democratic rights, and how the stringent provisions relating to arrest, investigation, and bail have also contributed to the growing malaise. Under the guise of solidarity with the international war on terror, the UAPA constructs ideological difference as being of imminent danger to the integrity and sovereignty of the nation, clearly reflecting the normalisation of such arbitrary laws.

7.2.3 CSPSA: Repression by Law

In India, debates around internal security gained prominence during the 1990s and were guided by the discourse on nationalism[54] and national integration. Ignoring basic principles of criminal jurisprudence, a spate of special laws was enacted placing enormous power in the hands of the state and the law enforcement agencies. These laws have been enacted by both the Central and State legislatures, including of many tribal dominated States. One such State legislation is the **CSPSA**, which is scrutinised in this section.

The preamble to CSPSA states that it has been enacted *"to provide for more effective prevention of certain unlawful activities of individuals and organisations and matter(s) connected thereto. "*Although all 'Naxalite' or Maoist groups were already banned and declared unlawful under the UAPA, the enactment of this law was justified in the context of the *Salwa Judum*.[55]

Much like the UAPA, the CSPSA also defines "unlawful activity" in the broadest possible way in relation to individuals and organisations as creating disturbance, interfering with public order and tranquillity, interference with the administration of law, engaging in or propagating acts of violence, terrorism or vandalism, creating fear in the public and use of firearms and explosives, among others.[56] It is arguable whether such special law provisions are even necessary, when mainframe laws such as the IPC already include similar offences such as creating disturbances, interference in law

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[53] This is very clearly visible in the *Bhima Koregaon* case (2018) where various activists, lawyers, poets, academics, and professionals and the organisations or networks with whom they are associated with have been charged with the offences under UAPA. They are being persecuted due to their work with the masses and ideologies. Sudha Bharadwaj, a Chhattisgarh-based lawyer and Unionist who has represented numerous *Adivasis* in politically motivated criminal cases has been arrested and charged. Similarly, Late Father Stan Swami who was a well-known social worker based in Ranchi, Jharkhand was arrested by the National Investigation Agency ("**NIA**") in the *Bhima Koregaon* case. He had filed a Public Interest Litigation at the Jharkhand High Court against violation of the principles of natural justice in cases of 500 *Adivasis* across the State. It is ironic that in most of the cases, the *Adivasis* have been charged with the provisions of UAPA. In his own words, in order to set the scores right with Late Father Stan Swami, the State implicated him in the *Bhima Koregaon* case. Stan Swami passed away while still in custody earlier in 2021. This case has been discussed ahead in detail under Section 7.3 of this chapter.

[54] Here nationalism and national integration refer to hyper-nationalism, which is deeply rooted in the idea of a *Hindu Rashtra*. Both these ideas converge with the intent to promote a homogenised identity of India to its citizens as well as to the outside world. The construct of an ideal citizen in this imagined homogenised nation is that of a nationalist Hindu man.

[55] Niranjan Sahoo, "Half a Century of India's Maoist Insurgency: An Appraisal of the State Response", *Observer Research Foundation*, June 13, 2019; available at: *https://www.orfonline.org/research/half-a-century-of-indias-maoist-insurgency-an-appraisal-of-state-response-51933/.*

[56] Section 2(e), CSPSA.

and order and causing obstruction in the duty of any public servant, and provisions relating to terror offences are contained in Central laws such as UAPA.

Also included in the definition of unlawful activity is *"encouraging or preaching disobedience to established law and its institutions"*, which can be easily interpreted to include all forms of dissent and non-conformity as 'unlawful activities' under the Act. Inclusion of acts of dissent, which ought to be commonplace in a democratic polity, in the definition of 'unlawful activities' seems particularly geared towards those who generally oppose the development agenda of the State government. As discussed earlier in this chapter and in other parts of this report, *Adivasis* and other marginalised communities have been opposing this very agenda in many different ways.

An "unlawful organisation" is widely defined under the Act as "*any organisation which indulges in or has for its object, abets or assets or gives aid or succor, or encouragement directly or indirectly, through any medium or device or otherwise to any unlawful activity*".[57] Clearly such a definition places a sweeping power in the hands of the State government to declare all manner of organisations as unlawful. It is worth noting that declaration as an "unlawful organisation", which follows the procedure detailed under Section 3, has serious and long-term consequences. This includes severe penalties, which may include imprisonment up to a term of three years, for any person who is a member of such organisation, seizure of its assets and properties, and forfeiture of funds.[58] Such ambiguous definitions and procedure for notification of an organisation as unlawful makes any form of political organising and movements in the form of writing, protests and ground-level mobilisation against extractive industries and State excesses susceptible to the provisions of the CPSPA.

Failure to precisely and clearly define offences under criminal laws is a violation of the foundational principles of criminal law, and particularly of the right to fair trial both under international law[59] and the Indian Constitution.[60] The requirement of clarity and preciseness in all criminal provisions is well established as a bulwark against arbitrary enforcement,[61] as definitions which are ambiguous or vague result in whimsical and arbitrary application, and abuse of power.

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[57] Section 2(f), CSPSA.

[58] Sections 8, 9, 10 and 11, CSPSA.

[59] See, for example, Article 15, *International Covenant on Civil and Political Rights, 1966* ("**ICCPR**"), which provides that:
"(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

[60] Article 20(1), Indian Constitution:
"No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

[61] *Report of the Secretary General, Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, United Nations document A/58/266, 2003 at 13; available at: *https://www.refworld.org/pdfid/403b1324a.pdf.*

Under CSPSA, subjective interpretation has been given a *carte blanche*; the doors are wide upon to abuse and misuse legal provisions. Indeed, the application of the Act shows that every day, people simply doing their job have faced the brunt of this law, such as a tailor, cloth supplier or doctor who may be providing services to those labelled as Maoists.[62] As with the UAPA, the CSPSA has also been known to be invoked against human rights defenders who have raised their voice against violations of the constitutional and human rights of *Adivasis*. In addition, *Adivasis* protesting the *Salwa Judum*, or alienation of their ancestral lands for extractive industries, or even simply congregating for *Gram Sabha* meetings in their own village, become easy targets of the law. Since obtaining bail has been made next to impossible, these over-wide definitions of offences under the CSPSA are a fertile ground for abuse of power.

As the instances of State excess under the CSPSA began to manifest, it was but a matter of time before the law was challenged before a constitutional court as being violative of the Constitution of India. A writ petition was filed by the People's Union for Civil Liberties ("**PUCL**") in 2009 at the Chhattisgarh High Court challenging the constitutionality of CSPSA on a variety of grounds, including that it was beyond the legislative competence of the State Legislature, that being very wide in its application and arbitrary, it violated the right to equality,[63] and that it puts unreasonable restrictions on fundamental freedoms, in particular the freedom of association.[64]

The High Court rejected this writ petition and passed a judgment upholding the constitutional validity of the CSPSA.[65] The High Court rejected each argument raised by the petitioners, giving little or no rationale for such rejection rather than single sentences. For instance, the petitioners had argued that the CSPSA places restrictions way beyond permissible constitutional limits on the fundamental right to freedom of association. The statement of objects and reasons of the Act states that it was enacted to control unlawful activities of individuals and organisations whose activities adversely affect 'the security and development of the State'.[66] While rejecting this argument, the Court simply stated that 'adverse effect on development' forms part of 'public order'.[67] It, however, failed to elucidate how 'development' can be construed to be part of public order to become the basis of restriction under

[62] 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 Publications, New Delhi, 2018) at 201-290.

[63] Article 14, Constitution of India.

[64] Article 19, Constitution of India.

[65] *People's Union for Civil Liberties* v. *Union of India*, AIR 2014 Chh 133.

[66] *Ibid*. At para 20.

[67] Under Article 19(4) of the Indian Constitution, the fundamental right to freedom of association can be curtailed by the state on the ground of 'public order'.

[68] *Supra*, note 65 at para 63.

Article 19(4) of the Indian Constitution. The Court stated that:

> *"In our opinion,*
> *• The restrictions are reasonable;*
> *• They have been imposed in the interest of public order;*
> *• The Act is not violative of article 19(1)(c) of the Constitution."*[68]

Other detailed constitutional arguments raised by the petitioners are rejected by the High Court in a similarly perfunctory manner. The judgment of the High Court has been challenged in the Supreme Court of India, where it is pending a detailed hearing and adjudication.[69]

It is deeply troubling that the High Court conflated the idea of development with public order, without probing the reality of where the paradigm of development may mean different things to the state, to the *Adivasi* and to the forest dwelling communities. It is incomprehensible that such a verdict emerges from a constitutional court in a State which was carved out as a tribal State from undivided Madhya Pradesh, where the predominant population is *Adivasi*, and a significant proportion of its geographical area is designated as Fifth Schedule Area. As examined in Chapter 3 above, such areas are governed by special constitutional and statutory dispensations, recognising the rights of local *Adivasi* and forest dwelling communities to self-governance. A wealth of judicial precedent acknowledges that such populations can differ with the state where developmental goals are concerned, and in such a landscape their opposition to State-induced development *cannot* be deemed to be a violation of public order. The High Court, however, does not even give a passing nod to the extant law. It remains to be seen whether or not the Supreme Court will examine the CSPSA within the constitutional framework which acknowledges *Adivasi* rights.

Meanwhile, noted Advocate Sudha Bharadwaj, the lead counsel who represented PUCL before the High Court, and would have argued the appeal before the Supreme Court, was incarcerated in 2018 under the dreaded UAPA on a host of unsubstantiated allegations. At the time of writing this report, she had completed three years in custody as an undertrial herself, as the trial is nowhere near commencement, and her applications and appeals for bail have been repeatedly rejected.[70] It is indeed a Kafkaesque enterprise, which incarcerates the lawyer who challenged one security legislation (CSPSA), under an even more draconian security legislation (UAPA). The unwillingness of constitutional courts to strike down an unjust law, or hear petitions against it, have resulted in a deepening erosion of constitutionalism and rule of law regarding the manner in which the state exercises its powers under such special laws.

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[69] *Peoples Union for Civil Liberties Through its General Secretary and Others* v. *Union of India and Another.* Civil Appeal No. 20830 of 2017, Supreme Court of India. The last date of hearing in this matter was on April 8, 2019.

[70] Sudha Bharadwaj is one of 16 accused in the *Bhima Koregaon* case, which has come to symbolise the state's vendetta against lawyers, activists, and human rights defenders who are perceived as a potential threat to the status quo.

THE ILLEGAL ENCOUNTER AT GADCHIROLI[71]

In 2018, 40 people were killed in an illegal encounter in the Gadchiroli district of Maharashtra. The alleged encounters took place on April 22, 23 and 24, 2018 deep in the forests of Gadchiroli. The police claimed that these 40 people killed in the encounter were dreaded Naxals. After the encounter, civil liberty groups visited the area to undertake a fact finding. According to one such report, there were major discrepancies in the narrative of encounter put forward by the local police. The fact finding pointed out that of the 40 people killed, the banned CPI (Maoist) only claimed 13 bodies as their cadre, and at least eight of those killed were civilians. Of those killed, many were young boys, girls and women. A fair number of these people were unarmed. It also notes that even if the police narrative that all those killed were CPI (Maoist) cadres is accepted, the police exceeded its power by indiscriminately killing people without warning and completely out of proportion. That not one police officer was injured during such a major operation spanning three days indicates that there was hardly any retaliation from the alleged Maoists, raising a question on the nature of the alleged 'encounter'. The fact-finding also revealed other disturbing facts. For instance, a day before the encounter, eight children / young adults ranging between the age of 17-21 years from Gattepalli village were travelling towards another village to attend a wedding when they went missing. Afterwards, a girl from this group was identified as a person killed during the encounter on April 22, 2018. It is believed that others met with the same fate.

The process of preserving evidence and safeguarding the investigation in the immediate aftermath of the 'encounter' was also botched up. The police did not release the photographs of most of those killed for identification. No procedure was undertaken to do DNA tests of the unidentified bodies from the encounter or attempt made to take DNA samples from the family members to match them. Instead, it later turned out that the District Hospital was instructed by the police to dispose of the bodies at the earliest, without complying with all protocols.

Despite its apparent brutality, this encounter is not unique, but represents a pattern adopted by various State agencies. The fact-finding report records how, over the years, many persons in Gadchiroli district have gone 'missing' or have been shot dead, and investigations into such disappearances and deaths have been unduly influenced by the para-military and local police.

In 2017, a person was picked up from Mohandi village by the forces and was kept in illegal custody for three days. Since he was the son of the *Patil* (village headman), his life was spared. Later on, six other people from the same village were picked up and an FIR lodged against them. They were charged with "*stopping public servants from their duty (Section 353), rioting and unlawful assembly, criminal conspiracy (Section 147, 143, 148, 149, 120 (B)), attempt to murder (Section 307) as well as sections of Arms Act (Section 5 & 28) and Explosives Act (Section 4 & 5)*"[72]. They were denied bail by the Sessions court.

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[71] This case study is based on the fact-finding report prepared by various civil society organisations. See CDRO, WSS and Indian Association of People's Lawyers, *Encountering Resistance: State Policy for Development in Gadchiroli,* June 2018, available at: *https://pudr.org/sites/default/files/2019-07/Encountering%20Resistance.pdf.*

[72] *Ibid*. At 30.

Also in 2017, another person went missing while in custody of the *Gatta* police station in Gadchiroli district. Another person from Rekanar village was killed in a separate incident of illegal encounter by the police, alleging he was a CPI (Maoist) cadre. The police and CRPF personnel have been pressurising the family to withdraw cases. One of them even offered Rs. 10,000 to the *Patil* of the village for not pursuing the case. In February 2018, one young villager was picked up by the mixed troops of C-60 and CRPF while trying to catch a bird. He was tortured and mercilessly killed. His body was later recovered; his face was completely slashed and found to have two bullet wounds on the body. Later, an officer from the Hedri camp called the *Patil* of the village and offered a government job to any member of the family and asked him to dissuade the family from filing a formal complaint.

These incidents of illegal encounter, torture, disappearances, beatings and implicating villagers in criminal cases must be juxtaposed with the people's struggles against mining operations in the vicinity. A Scheduled Area under the Fifth Schedule, Gadchiroli district is located in the eastern part of Maharashtra, rich with flora-fauna and forests. It also has huge reserves of iron-ore deposits, with 70 per cent of the iron-ore deposit of the entire State being concentrated here. The population largely comprises *Adivasis*, and there is a rich cultural heritage in these lands. The *Madia Gonds,* for instance, believe that their god *Thakurdeo* resides in the hills of Surjagarh. These hills are also identified as holding a large deposit of iron-ore. Therefore, private mining corporations are keenly interested in the region and have been trying to commence mining operations since the last two decades. Lloyds Metal, a Mumbai based company, was granted a mining lease[73] and obtained forest clearance for 348 hectares of forest land. It is important to note that this area falls under Fifth Schedule in Gadchiroli, Maharashtra. Similarly, Jindal Steel Works obtained a 20-year mining lease for 750 hectares of forest land in the district. Other companies also have mining interests in the area.

Needless to say, *Adivasi* and forest dwelling communities have pre-existing forest rights in these forest lands, and strongly resist such mining activity. *Gram Sabhas* of 70 villages that will get affected by the mining operations have been expressing their discontent with the inroads by mining companies. On many occasions, they have pushed back the companies through non-violent means. On other occasions, the Naxals operating in the region have adopted violent methods to express opposition. As a result until 2017, these companies were not able to operate their mines regularly.

It is no coincidence that the State has strategically deployed para-military forces in the district, including in the forest areas, for supposedly fighting the Maoists. Between 2015 and 2018, six para-military camps have been established in the area, leading to heavy militarisation of the district. Consequently, the ability of local *Adivasi* and forest dwelling communities to resist the takeover of their traditional homelands by mining operations is on the decline. In addition, their socio-economic and livelihood activities, such as collection of Minor Forest Produce and firewood, has also been adversely impacted. It is apparent that militarisation, investment in mining, and the violation of rights of local *Adivasi* communities proceed in parallel, especially in resource rich Scheduled Areas. Whether this is coincidence or part of a larger design, is an inference that must be drawn by the intuitive reader.

[73] While the mining lease was originally granted for 20 years, it has recently been extended to 50 years.

7.3 Arbitrary Powers: Procedure as Punishment under the Security Laws

The draconian nature of legislations discussed in the previous section is manifest not only in the substantive and definitional provisions, but even more starkly visible in the legal processes and procedures they prescribe. Significant departures are made from foundational principles of criminal justice, which are enshrined in the Constitution and have been incorporated into the mainframe criminal laws.[74] These procedural departures, and the danger to democratic rights stemming from them, need a close examination.

7.3.1 Powers of Arrest and Invoking Charges

An important location of police power, and through it of state power, is the procedure relating to arrest, whether with or without warrant. The *Code of Criminal Procedure, 1973* ("**CrPC**") under Sections 41, 42 and 151 describes and delineates the power of police officers to arrest persons.

There is a clear demarcation in the law between situations where a police officer may cause an arrest without a warrant (from a Magistrate), and those where such warrant is necessary prior to any arrest being made. The law also specifies situations where a police officer may cause an arrest to prevent a cognisable offence from being committed. In such situations, the permissible period of detention is also prescribed by statute. It is important to note that these provisions, and a host of other protections to arrestees, have been incorporated in the CrPC as an outcome of numerous court orders bringing the erstwhile colonial law in tune with modern principles of fair trial and criminal justice.[75]

It is also important to emphasise that while power of the police to arrest persons can, and is often, abused, there are inbuilt mechanisms in the CrPC for judicial oversight and supervision. As a result, a person wrongly arrested or detained in police custody beyond permissible statutory periods can bring such anomaly to the attention of the judicial officer overseeing the process.[76] At least in theory, where violations occur, there is a remedy available well within reach.

The UAPA installs a "Designated Authority" of the Central government within the criminal justice process. Such officer, or any officer authorised by them, has sweeping powers of arrest, search and seizure, simply on the basis of "*knowing of a design to commit any offence under this Act or has reason to believe from personal knowledge or information given by any person and taken in writing that a person has committed an offence.....*"[77] Such arrest or search can take place at any time of day or night. Once arrested, the arrestee must be informed of the grounds of arrest "*as soon as may be*"

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[74] For a detailed discussion on the criminal justice provisions flowing from the Indian Constitution, see *Chapter 3: A Radical Break from the Past: The Constitution of India and its Interpretations.*

[75] Ratanlal & Dhirajlal, *The Code of Criminal Procedure* (Lexis Nexis, 2013) at 101-131.

[76] *Ibid*.

[77] Section 43A, UAPA.

and must be produced before the nearest police station "*without unnecessary delay*", and all measures necessary in accordance with the CrPC are required to be taken "*with all convenient despatch*".[78] The legislation does not even attempt to prescribe timelines for such post-arrest protocols.

On the contrary, the UAPA specifically states that the provisions contained in it will override the provisions related to arrests, searches and seizures under the CrPC.[79] Such wide powers of arrest to the law enforcement agencies under UAPA erodes even the basic protections against abuse of power under the CrPC, resulting in a lack of accountability towards the principles of criminal justice. Whether it is the power of the designated authority to arrest persons on any manner of information, such as 'personal knowledge', or the power to search their homes, or seize their belongings, or even detain such arrestee well beyond the 24 hour limit under Article 22 of the Constitution, the UAPA provides a statutory authorisation to such police conduct which is otherwise proscribed.[80] It had become a normal practice for *Adivasis* to be detained well beyond 24 hours in Bastar during and in the aftermath of the *Salwa Judum* operations.[81] In the *Bhima Koregaon* case, it is the UAPA which provided the cover for a host of irregularities at the time of arrest, and in the search and seizure operations of the 16 accused intellectuals. These irregularities ranged from faulty search warrants and seizure memos of sensitive digital records, to transit remand applications made in Marathi before courts which function only in English, and a host of other procedural anomalies.[82] And yet, whether it is an unknown *Adivasi* in the forests of Dantewada, or a human rights lawyer in the financial capital city of Mumbai, simply invoking an 'anti-terror' law such as the UAPA is enough to spike media speculation and public hysteria, so that the courts too are hesitant to hold the concerned officers to account.

In recent years, even where the state does not resort to special laws such as UAPA and CSPSA, it has been known to invoke special provisions in the mainframe criminal laws such as IPC against persons who hold views antithetical to its own. Thus, when the State government in Jharkhand took it upon itself to suppress the *Pathalgarhi* movement, it invoked Section 124A, IPC relating to sedition and other IPC crimes against ordinary *Adivasis* participating in the movement. Here, although the police were not empowered to exercise any extraordinary power beyond the CrPC, even the ordinary provisions relating to arrest were openly violated.

In a crackdown in village Ghaghra, Khunti district and adjoining areas in June 2018, the police resorted to mass criminalisation of local *Adivasi* communities. Local activists and lawyers estimate that close to 10,000 people were named as accused in 14 FIRs

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[78] Section 43B, UAPA.

[79] Section 43C, UAPA.

[80] *Supra*, note 77.

[81] PUCL, *Guilty Until Proven Innocent? A Fact-Finding Report on Unlawful Police Activities in Two Panchayats of North Bastar, Chhattisgarh*, May, 2013; available at: *http://www.pucl.org/sites/default/files/reports/guilty_until_proven_innocent.pdf.*

[82] American Bar Association, Centre for Human Rights, *Preliminary Report: Arrest of Indian Attorneys and Activists in Apparent Retaliation of Human Rights Work*, October 2019; available at: *https://www.americanbar.org/content/dam/aba/administrative/human_rights/JD/Asia/preliminary-report-india-bhima-koregaon.pdf.*

for being associated with the *Pathalgarhi* movement.[83] While all these people have not been named in the FIRs, the reference to 'unnamed accused' in these reports enabled the police to arrest any person from the area at any point of time. The village headmen or *Gram Pradhans* and other traditional *Adivasi* leaders were specifically targeted.[84] Adult members of these villages fled into the surrounding forests and went into hiding as sweeping arrests were made, and many arrestees allegedly subjected to torture as well.[85]

The State government sought to rationalise these egregious violations of criminal process by the law enforcement agencies by painting the *Pathalgarhi* movement as 'anti-national'. Thus, invoking IPC provisions relating to sedition against thousands of ordinary *Adivasis* was justified in the moment. It is a different matter that these arrests and detentions led to a spate of petitions in the Jharkhand High Court, seeking the intervention of the Court to restore rule of law and hold the state machinery to account. Many of these cases continue to await adjudication, even three years after the operations.[86] Moreover, after the *Jharkhand Mukti Morcha* and the *Indian National Congress* alliance government led by Sh. Hemant Soren came into power in the year 2019, Soren announced that the Jharkhand government will withdraw the sedition cases put on *Adivasis* involved in *Pathalgarhi*.[87] However, little progress has been made in this regard except that the State government has cleared the resolution pertaining to withdrawal of cases by the Home Department.[88]

7.3.2 Denial of the Constitutional Right to Bail

The most serious challenge faced by those incarcerated under security laws like UAPA or CSPSA, and even for crimes like sedition under the IPC, is the regressive denial of bail. As discussed elsewhere in this report, the right to be released on bail pending trial has been held to be a foundational principle of criminal justice in India. Much has been written critiquing the high bar set under UAPA for release on bail. For the

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[83] Supriya Sharma, "10,000 people charged with sedition in one Jharkhand district. What does democracy mean here?", *Scroll. In*, September 19, 2019; available at: *https://scroll.in/article/944116/10000-people-charged-with-sedition-in-one-jharkhand-district-what-does-democracy-mean-here.* See also "Mass Sedition Cases against 10,000 'unnamed' Adivasi Challenged in High Court", *Scroll.In*, November 19, 2019; available at: *https://scroll.in/latest/944255/mass-sedition-cases-against-10000-adivasis-in-jharkhand-challenged-in-high-court.*

[84] Detailed information about the number of FIRs registered (under Section 124A and other provisions of IPC) with names of the accused was obtained in the year 2020 from the State government under the *Right to Information Act, 2005* ("**RTI**"). The identity of applicant is withheld due to concerns of targeting.

[85] *Supra*, note 31.

[86] Anjana Singh, *'Pathalgadi' Movement and Conflicting Ideologies of Tribal Village Governance* (Routledge, London and New York, 2020) at 180-195.

[87] "In Maiden Cabinet Decision, Hemant Soren Govt Withdraws Pathalgadi Sedition Cases", *India Today,* December 30, 2019; available at: *https://www.indiatoday.in/india/story/in-maiden-cabinet-decision-hemant-soren-govt-withdraws-pathalgadi-sedition-cases-1632426-2019-12-29.*

[88] Abhishek Angad, "Jharkhand CM Clears Home Dept's Resolution on Withdrawal of Pathalgadi Cases", *The Indian Express*, March 27, 2021; available at: *https://indianexpress.com/article/india/jharkhand-cm-clears-home-depts-resolution-on-withdrawal-of-pathalgadi-cases-7247406/.*

present purpose, it is sufficient to state that in addition to those already laid down under the CrPC, the UAPA adds two restrictions to the release of an accused person on bail:

- The court must grant an opportunity to the Public Prosecutor to be heard in an application for bail. This means that a court cannot grant bail simply on an application being filed and placed before it, as it can under ordinary law; and
- The court must peruse the records placed before it by the police / investigating agency, and having done that, must not release the accused on bail if it is *"of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true"*.[89]

In a nutshell, this means that the entire jurisprudence of law relating to bail is excluded. For one thing, the court is mandated to hear the Public Prosecutor, even if this means delaying the matter, while the accused continues to remain in prison. Further, the court must be convinced that the accused is *prima facie* not guilty. Since the accused has a right to apply for bail immediately upon arrest, when the investigation is at a preliminary stage and the trial has not even begun, the only material before the court at this stage is the investigating officer's case diary. The trial is still a long way away and, therefore, the accused has had no opportunity to bring evidence in his defence on record. Yet, the burden is placed on him to try to convince the court of his innocence placing reliance only on this material. It is not surprising then that the persons arrested under UAPA languish for years in custody; the grant of bail in such cases is a rarity.

In recent years, well known activists, lawyers and intellectuals have been accused of "unlawful activities" and incarcerated for long periods, with courts being unable to release them on bail. Further in this report[90], we examine at some length the work done by late Father Stan Swamy to shine a light on the oppressive practices against *Adivasi* prisoners in Jharkhand prisons, including pursuing public interest litigations in the Jharkhand High Court.[91]

Late Father Stan was a well-known activist in Jharkhand who devoted his life to work among the *Adivasis* and highlight the state's unjust treatment of them.[92] His name surfaced in the *Bhima Koregaon* case in the year 2018, when a number of other intellectuals and lawyers were arrested under the UAPA. At that time, his residence-cum-office in Ranchi was raided at least twice, and digital as well as written materials were seized.[93] He was questioned several times and remained under constant threat

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[89] Section 43D(5), UAPA.

[90] For more information, see *Chapter 9: Prisons and the Adivasi in India*.

[91] *Deprived of Rights over Natural Resources, Impoverished Adivasis get Prison: A Study of Undertrials in Jharkhand*, (Bagaicha Research Team, Ranchi, 2015) at 18-47; available at: *http://sanhati.com/wp-content/uploads/2016/02/Undertrials.in_.Jharkhand.pdf.*

[92] Sukanya Shantha, "NIA Arrests 83 Years Old Tribal Rights Activist Stan Swami in Elgar Parishad Case", *The Wire*, October 8, 2020; available at: *https://thewire.in/rights/stan-swamy-arrested-elgar-parishad-case.*

[93] "Explained: Who was Stan Swamy, Arrested in the Elgar Parishad Case, Who died on July 5", *The Indian Express,* July 13, 2021; available at: *https://indianexpress.com/article/explained/who-was-stan-swamy-6717126/.*

of arrest for two years. He was later arrested by NIA in October 2020, even though the country was reeling under the COVID-19 pandemic. At that time, he was already 83 years of age, and suffering from multiple health issues, including Parkinson's disease.[94] Under ordinary law, he would either have not been arrested at all, or released on bail due to his age and health issues. However, since he was arrested under UAPA and charged with serious crimes, his bail applications were repeatedly rejected by the NIA Special Court.[95] His lawyers finally approached the Bombay High Court seeking release on medical grounds, since his health deteriorated rapidly in prison. Even as arguments were being addressed before the Court and his release on bail was being vehemently opposed by the Central government, Father Stan died on July 5, 2021.[96]

Father Stan's death has brought to the forefront of public scrutiny the inhumane provisions of the UAPA, which have impacted hundreds of lives in recent years, both of *Adivasis* and other marginalised groups. Passionate discussions have erupted on social and other media regarding the incongruity of such a law remaining on the statute books in a modern constitutional democracy.

7.3.3 Power of police to attach moveable and immoveable property

The CrPC has specific provisions relating to search and seizure of persons and property by the police, apart from an entire chapter devoted to attachment and forfeiture of property.[97] There are categorical requirements to follow due process at every stage, from requirement of warrants, method to be followed during search and seizure, making of lists, the need for witnesses and so on.[98] Supervision of a judicial magistrate is woven into the procedure. The courts have also held that these provisions must be strictly complied with to prevent abuse of power by the police. The Supreme Court of India, in *Nevada Properties Private Limited* v. *State of Maharashtra,*[99] held that the power of a police officer under Section 102, CrPC to seize any suspicious property used for the commission of any offence, would not include the power to attach, seize and seal an immovable property. It was held that a police officer is an investigator and not an adjudicator or decision maker.

Under UAPA, power is conferred on the Central government to notify any place that, in its opinion, is used for the purpose of an organisation already notified to be unlawful. A

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[94] "Parkinson Patient Stan Swamy's Wait for Straw, Sipper gets Longer as NIA Denies Confiscating Them", *The Indian Express,* November 26, 2020; available at: *https://indianexpress.com/article/cities/mumbai/stan-swamys-wait-for-straw-and-sipper-gets-longer-also-seeks-bail-7069538/.*

[95] Special Case No. 414 of 2020 along with Special Case No. 871 of 2020, Special Court NIA for GR. Bombay dated March 22, 2021; available at: *https://www.livelaw.in/pdf_upload/display28-396838.pdf.*

[96] "'How Many Years Can People be in Jail without Trial?': Bombay High Court at Stan Swamy Hearing", *The Wire*, July 20, 2021; available at: *https://thewire.in/law/how-many-years-can-people-be-in-jail-without-trial-bombay-hc-at-stan-swamy-hearing.*

[97] See Chapter VIIA *(Reciprocal arrangements for assistance in certain matters and procedure for attachment and forfeiture of property)*, CrPC.

[98] See Sections 102– 105, CrPC.

[99] (2019) 20 SCC 119.

District Magistrate ("**DM**") or officer authorised by him can enter such place and make a list of all moveable properties in it, which could include clothes, cooking vessels, tools of artisans, cattle, food and food-grains, and so on. If the DM is of the view that all or any of these items may be used by the unlawful organisation, he can prohibit such use. He can also restrict or prohibit entry of persons to such place. A person aggrieved by such order can approach the District Judge.[100] There are also detailed provisions for seizure and forfeiture of funds that may be used for unlawful activities or terrorism.[101]

The provisions under the CSPSA have an even lower bar when it comes to due process. Powers are conferred on the DM to notify any place, such as a house, building or vessel, as a place used for the purpose of unlawful activities. After such notification, the 'designated officer' can enter such place, take possession of it, evict persons found in it, and also take into possession any moveable property found inside, such as money, securities, livestock or other assets.[102] In case of perishable items and livestock, the DM can also direct immediate sale of such properties. If a person is aggrieved by such seizure or wants their property returned, they must make an application before the same Magistrate who authorised it in the first place, and an appeal against his decision is made to the government, and not to a judicial officer. These provisions are a clear violation of the principles of natural justice and due process.[103]

Both UAPA and CSPSA proceed on the assumption that once an organisation is declared 'unlawful' and, in the case of the former, once an individual is declared 'unlawful', all natural barriers to the entry of law enforcement officers into such properties stand dissolved. The immoveable properties and all moveable properties therein can be peremptorily taken over, seized and even sold. It is noteworthy that at this point, there has been no trial nor has the guilt or otherwise of such individual or organisation been established in a court of law. Indeed, at this point the exact contours or nature of the crime committed may not even be clear. Such powers are a far cry indeed from the constitutional standards of criminal justice, and from the due process rights of an accused under ordinary criminal law.

7.3.4 Sanction for Prosecution

The UAPA contains a special dispensation regarding cognisance of offences by a court. It requires, as a mandatory pre-requisite, that a court can take cognisance of an offence under the UAPA only where 'sanction' for prosecution has been obtained from the government, which could be the Central or the State government depending on the nature of offence. Such sanction for prosecution is granted by the government only after considering the report of the authority specifically constituted for this purpose,

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[100] Section 8, UAPA.

[101] See Chapter V (*Forefeiture of proceeds of terrorism*), UAPA.

[102] Sections 9 and 10, CSPSA.

[103] Sections 10(4), (5) and (6), CSPSA.

which has made "*an independent review of the evidence gathered in the course of investigation and* (made) *a recommendation*".[104]

Strict timelines are prescribed in the relevant Rules[105] for this process. It is provided that such authority shall make its report containing its recommendations to the concerned government *"within seven days of the receipt of the evidence gathered by the investigating officer".*[106] The government, in turn, shall take a decision "*within seven working days after the receipt of the recommendation of the Authority*".[107]

These provisions were probably incorporated in the UAPA as a check on state power, to ensure that law enforcement agencies are subject to a modicum of executive supervision when invoking this law against citizens. But for *Adivasis*, *Dalits* and other minorities who are accused under this law, the provision for sanction for prosecution itself has become an obstruction to justice.

In an in-depth research into undertrial prisoners in Jharkhand, it was found that State authorities systematically delay taking any decision on the requests for sanction for prosecution for months, even years.[108] The result is that trial cannot proceed, even as the accused remain in custody because obtaining bail is so difficult under this law.[109] It is no coincidence that an overwhelming majority of the prisoners, as found in the study, are *Adivasis* accused of being 'Maoists', who may have done nothing more serious than express their dissatisfaction with the implementation of a government scheme in their village or even, in many cases, have done nothing at all.

7.3.5 Shifting the burden of proof to the accused

It is a truism that presumption of innocence, until proven guilty, is a foundational principle of criminal justice. It is also a truism that the burden of proving such guilt is upon the state or prosecution. In criminal law, the definition of a crime contains several necessary ingredients. In order to obtain a conviction, prosecution must prove each ingredient beyond reasonable doubt. Again, this is to protect the individual citizen, even one who may have committed egregious crimes, from the agglomeration of power which is the state and its law enforcement machinery.

However, under special laws such as UAPA and CSPSA, this delicate balance of power is distorted. The burden of proving certain vital ingredients of the offences defined under these laws has been shifted from the prosecution to the accused. Where ordinarily criminal laws require the prosecution to prove its charges against an accused person in their entirety and beyond all reasonable doubt, under these special laws the state's

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[104] Section 45, UAPA.

[105] *The Unlawful Activities (Prevention) (Recommendation and Sanction for Prosecution) Rules, 2008* ("**Sanction Rules**").

[106] Rule 3, Sanction Rules.

[107] Rules 3 and 4, Sanction Rules.

[108] *Supra*, note 91.

[109] For a detailed discussion on the findings of this study, see *Chapter 9: Prisons and the Adivasi in India.*

burden is greatly reduced. After a certain threshold of evidence is established, the court may proceed to make presumptions regarding the further ingredients of the offence and, thereafter, it is for the accused to prove that those ingredients are 'not' satisfied.

Thus, once an organisation is declared an "unlawful association", any person who is a member, takes part in meetings, contributes or solicits contributions, or "*in any way assist the operations of such association*" is guilty of an offence under the Act.[110] Although *mens rea* is a necessary ingredient of any crime, the statute does not place a burden on the prosecution to prove it. Hence, it will be the burden of the accused to produce evidence and establish that he did not have any intention to commit a crime, which the court may or may not accept.

Section 43E, UAPA goes even further, making a presumption of guilt. It provides that when a person is being prosecuted for a terrorist act,[111] it will be presumed that the accused has committed such an act if the prosecution is able to establish that:

- The arms and explosives were recovered from his possession which are similar to those used in the terror act; or
- Finger-prints or any other definitive evidence were found at the site / arms / vehicle, which connect the accused with the terror act.

The law does provide that this presumption be made by the court only until the contrary is shown, i.e., it is a rebuttable presumption. Even so, this is quite different from an ordinary crime where the prosecution would not be able to make any headway based solely on such circumstantial proof.

In much the same way, CSPSA provides that the State government may form an opinion, and declare an organisation to be unlawful.[112] Any person who is a member or takes part in activities, or contributes, or solicits contributions, and even one who is not a member but engages in such activities, commits a punishable offence.[113] Recollect that the CSPSA includes in the definition of "unlawful activity" a whole range of activities, including *"encouraging or preaching disobedience to established law and its institutions"*.[114] As in the UAPA, the essential ingredient of *mens rea* is absent from the statute, thereby shifting the burden on the accused to produce evidence to convince the court that participation in such activities was not intended to cause harm.

The shifting of burden of proof under such special laws has severe implications on the lives of *Adivasis*, forest dwellers, and those who work with them. It must be remembered that the CSPSA was enacted in the backdrop of a State-wide crackdown on so-called Maoist insurgents, through highly militarised operations such

[110] Section 10, UAPA.

[111] Section 15, UAPA.

[112] Section 3, CSPSA.

[113] Section 8(1), CSPSA.

[114] Section 2(e), CSPSA.

as *Salwa Judum*.[115] The *Salwa Judum*, which was a state-sponsored private armed militia, engaged in violence and human rights abuses of such magnitude that the reverberations are experienced till today.[116] It has been pointed out by criminal law practitioners that often the state discharges even its limited burden of proof through sketchy forensic evidence, bordering on "pop-science",[117] shifting the lion's share of the burden onto the accused to 'rebut' this evidence. Since the imbalance in evidentiary burden is contained in the statute itself, when combined with the imbalance of power between the state and *Adivasi* accused, this has led to a tragic miscarriage of justice.

7.4 Data Reflecting the Use of Security Laws for Silencing the Difference

In the present section, we examine data from the National Crime Record Bureau's ("**NCRB**") during the period 2016 to 2020, to explore whether the use of sedition law and UAPA has increased in the recent years. We will focus on the 10 Fifth Schedule States, where a large proportion of the population of *Adivasis* and forest dwellers is concentrated. Further, in some of these States, such as Jharkhand, Chhattisgarh, Madhya Pradesh and Odisha, the movements for *Adivasi* identity and self-rule, like the *Pathalgarhi* movement, have been very strong. *Adivasis* in these States have also seen repression by the Central and State governments in the form of *Salwa Judum* (in Chhattisgarh) and Operation Green Hunt (in Andhra Pradesh and Jharkhand) in the name of fighting Naxalism. However, it is unfortunate that specific data on the use of CSPSA was not available and, therefore, could not be included in this analysis.

In the chapter ahead, we will also come across the information that a large number of para-military forces are also deployed in these States. Insurgency, counter-insurgency and militarisation become a toxic combination, which justifies the criminalisation of *Adivasis* and inflicting atrocities against them. Therefore, it is important to look at the data on crimes to connect all the dots and comprehend disproportionate targeting of *Adivasis* through Security Laws (*for more information also see Chapter 9: Prisons and the Adivasi in India*).

Table 8 below indicates that the registration of offences under UAPA has consistently increased over the last five years, with a downturn in 2020, which could potentially be attributed to the numerous COVID-19 related nationwide lockdowns. There was a particularly sharp spike in 2018 and 2019, both at the national level as well as in the 10 Fifth Schedule States. However, the number of cases registered during this period in Jharkhand really stands out. In 2018, Jharkhand accounted for 93 per cent of the total number of cases registered in the 10 Fifth Schedule States, and 20.7 per cent of the total number of cases in India. The year of 2018 is significant because it was the

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115 *Supra*, note 55.

116 *Nandini Sundar* v. *State of Chhattisgarh* (2011) 7 SCC 547.

117 Webinar on '*The Criminal Law Reforms Committee and the Imagination of Law Reform*', October 1, 2020; available at: *https://www.livelaw.in/top-stories/live-now-webinar-on-the-criminal-law-reforms-committee-and-the-imagination-of-law-reform-163826.*

peak of the *Pathalgarhi* movement in Jharkhand's Khunti district *(see section 7.2 above)*. Even in 2020, when the registration of cases under UAPA took a nationwide downturn, Jharkhand continued to account for 90.5 per cent of the cases registered under all Fifth Schedule States.

Table 8: Number of Cases Registered under UAPA in 10 Fifth Schedule States from 2016 to 2020

State	2016	2017	2018	2019	2020
Andhra Pradesh	0	22	1	4	1
Chhattisgarh	3	1	10	2	3
Gujarat	0	0	0	1	0
Himachal Pradesh	1	0	0	0	0
Jharkhand	77	52	245	105	86
Madhya Pradesh	0	0	6	2	4
Maharashtra	1	1	1	0	1
Odisha	5	0	0	1	0
Rajasthan	1	0	0	0	0
Telangana	0	0	0	1	0
Total for 10 Fifth Schedule States	**88**	**76**	**263**	**116**	**95**
All India Total	**922**	**901**	**1182**	**1226**	**796**

Source: Compiled from Offences against State (IPC and SLL) Crimes in India Reports 2016 to 2020, NCRB

When we examine the pendency and disposal rate of cases under Section 124A, IPC and UAPA during the period 2016 to 2020 (*see Table 9 below*), the patterns emerging give cause for concern. We find that the pendency of cases before the police (for investigation) as well as before the courts (for trial) is very high indeed. In 2020, the pendency of sedition cases for police investigation was 82.2 per cent, and the pendency before courts was 94.5 per cent. Similarly, the pendency of UAPA cases for police investigation was 85 per cent, and the pendency before courts was 94.6 per cent. While the conviction rates of sedition (33.3 per cent) and UAPA cases (21.1 per cent) compared poorly with the national average of 43 per cent, they appeared to be disproportionately high in comparison to the abysmal pendency rates before the police and the courts.

Table 9: Pendency Rates of Cases Investigated, Convicted, and Pending Disposal under Section 124A IPC and UAPA from 2016 to 2020

		2016[118]	2017[119]	2018[120]	2019[121]	2020[122]
SEDITION	*Pendency percentage (police investigation)**	72.1	75.6	71.1	69.4	82.2
	*Conviction rate (by the Courts) **	33.3	16.7	15.4	3.3	33.3
	*Pendency percentage (at the Courts) ****	91.2	89.7	85.6	74.1	94.5
UAPA	*Pendency percentage (police investigation) **	89.6	88	76.5	77.8	85
	*Conviction rate (by the Courts) **	33.3	49.3	27.2	29.2	21.1
	*Pendency percentage (at the Courts) ****	97.8	95.9	93.4	95	94.6

**The 'Pendency percentage' (police investigation) is calculated by the NCRB as proportion of cases pending investigation at the end of the reporting year, to the total number of cases pending investigation in that year, which includes pending cases from previous years and also cases re-opened for investigation.*

***The 'conviction rate' by courts is calculated by the NCRB as the proportion of cases ending in conviction during the reporting year, to the total number of cases where trial was completed in the same year.*

****The 'Pendency percentage' (at the courts) is calculated by the NCRB as the proportion of cases pending trial at the end of the year to the total number of cases pending trial, which includes cases pending trial from previous years.*

Source: Collated from Crime in India Reports 2016-2020, NCRB

[118] NCRB, *Crime in India Report 2016,* Table 10.3 *(Police Disposal of Offences Against the State)* and 10.6 (Court Disposal of Offences Against the State) at 461-466; available at: *https://ncrb.gov.in/sites/default/files/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf.*

[119] NCRB, *Crime in India Report 2017 - Vol. 2* Table 10A.3 *(Police Disposal of Offences Against the State)* and 10A.5 (Court Disposal of Offences Against the State) at 850-858; available at: *https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202017%20-%20Volume%202_0_1.pdf.*

[120] NCRB, *Crime in India Report 2018 - Vol. 2* Table 10A.3 *(Police Disposal of Offences Against the State)* and 10A.5 (Court Disposal of Offences Against the State) at 850-858; available at: *https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%202_1_0.pdf.*

[121] NCRB, *Crime in India Report 2019 - Vol. 2* Table 10A.3 *(Police Disposal of Offences Against the State)* and 10A.5 (Court Disposal of Offences Against the State) at 850-858; available at: *https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%202.pdf.*

[122] NCRB, *Crime in India Report 2020 - Vol. 2* Table 10A.3 *(Police Disposal of Offences Against the State)* and 10A.5 (Court Disposal of Offences Against the State) at 856-866; available at: *https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%202.pdf.*

A deeper examination reveals that the NCRB calculates the 'conviction rate' as a proportion of the number of cases resulting in conviction in a year, to the number of cases where trial was completed in that year. Therefore, in 2020 the total number of UAPA cases which ended in conviction was 27, out of a total of 128 where trial was completed, or 21.1 per cent. However, if we calculate the conviction rate as a proportion of the total number of cases ending in conviction (27) to the gross total number of cases pending trial in 2020, including the previous years (2,642), this rate is a mere 1.02 per cent.

This shocking revelation is supported by none other than the Central government itself. In response to a question raised in Parliament regarding the number of arrestees and convictions under UAPA in the last five years, the Minister of State for Home Affairs stated as under:

> *"The National Crime Records Bureau (NCRB) compiles the data on crime as reported to it by States and Union Territories and publishes the same in its annual publication 'Crime in India'... As per published report of the year 2019, total number of persons arrested under the Unlawful Activities Prevention Act (UAPA) in 2019 is 1948. Further, the total number of the persons arrested and the persons convicted in the years from 2016 to 2019 under the UAPA in the country are 5922 and 132 respectively."*[123]

Thus, the Central government itself acknowledges that only 132 persons out of a total 5,922 arrestees, or 2.2 per cent of the total number of people arrested under UAPA were actually convicted in the period 2016 to 2019.[124]

Clearly, the UAPA is failing in its primary, and what should be its sole, purpose, i.e., tackling terrorism. If the total conviction rate is a pathetic 1.2 per cent and the proportion of arrestees convicted is merely 2.2 per cent, there is something very wrong indeed with this legislation. The performance data of UAPA must be read in conjunction with NCRB prison statistics, which demonstrate that a disproportionate number of undertrials and convicts in India's prisons are *Adivasis* (*see Chapter 9: Prisons and the Adivasi in India).* In recent months, the demand for an overhaul of this law has been raised by public spirited persons in the context of its blatant abuse against minority communities. It is time such a demand was raised also by *Adivasi* and forest dwelling communities, who have faced the brunt of such abuse for many years and at terrible costs.

7.5 Militarisation in the *Adivasi* Areas

Para-military installations and concentration of police personnel in the *Adivasi* and Scheduled Areas are a known phenomenon. The Indian state has identified Central Indian tribal belt as a region prone to 'Left-Wing Extremism' ("**LWE**") and invests

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[123] Statement by Minister of State, MHA (Shri. G. Kishan Reddy) to Unstarred Question No. 1013/2021, answered on February 10, 2021.

[124] "Parliamentary Proceedings: 2.2% of Cases Registered under the UAPA from 2016-2019 Ended in Court Convictions", *The Hindu*, February 10, 2021; available at: *https://www.thehindu.com/news/national/22-of-cases-registered-under-the-uapa-from-2016-2019-ended-in-court-conviction/article33804099.ece.*

heavily on creating infrastructure for para-military forces in these regions as well as to sustain them. While there is lack of comprehensive data on the number of para-military camps established in *Adivasi* areas or the number of military or para-military personnel deployed, it is undeniable that the number of such camps has risen continuously and systematically.

As per news reports, by 2010 there were 27 battalions of the para-military forces deployed in Bastar alone. It is also estimated that the total number of troops including police officers in the Bastar zone was around 20,000.[125] Similarly, other reports aver that since 2011 when Operation Green Hunt was launched in Jharkhand, 10,000 para-military forces including CRPF, COBRA, Jaguar and STF were deployed for the supposed cessation of Maoist activities.[126] Some researchers have attempted to demonstrate how the operation of military and para-military has been expanding in the Central Indian belt (the *Adivasi* region), the North-Eastern region and Jammu and Kashmir. They claim that close to 90 per cent of the entire Central para-military forces are deployed in the 101 districts (declared as "Disturbed Areas") in these three regions. The number of army personnel and para-military troops in these areas is claimed to be five lakh and 8.5 lakh, respectively.[127] The presence of these forces generates an atmosphere of violence and fear. In the aftermath of violence incidents in Khunti, Jharkhand (*described earlier in this chapter*), the villagers of Kochang village, which was the epicentre of the violent incidents, were being pressurised by the police and para-military to provide land for building a base. The villagers were opposed to such demand. In 2019, the village *Gram Pradhan* (headman) was shot dead by unknown people.[128]

7.5.1 Privatisation of the Para-military

Apart from the overwhelming presence of para-military in these areas, the issue of privatisation of para-military operations is an emerging concern, especially since *Adivasi* lands and forests are also in the line of sight of extractive industries for their rich mineral reserves. The CISF is a specialised unit of Central para-military forces, which is entrusted with the duty of providing security to the industrial establishments. Similarly, the OISF is a para-military force constituted by the State of Odisha on the lines of CISF. Their roles and duties are identical to that of the CISF. Both CISF and OISF have been constituted through special enactments, being the CISF Act and the OISF Act, respectively. These laws make provision for the recruitment and maintenance of forces by the state for public sector undertakings as well as private parties.

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[125] Aman Sethi, *Green Hunt: The Anatomy of an Operation, The Hindu*, February 6, 2010; available at: *https://www.thehindu.com/opinion/op-ed/Green-Hunt-the-anatomy-of-an-operation/article16812797.ece.*

[126] Gladson Gungdung, *Mission Saranda: A War for Natural Resources in India,* (Bir Biru Omapay Media & Entertainment, Ranchi, 2015) at 4.

[127] Gautam Navlakha, "Armed Forces as Livelihood and State Power", *Kafila*, December 2, 2015; available at: *https://kafila.online/2015/12/02/armed-forces-as-livelihood-and-state-power-gautam-navlakha/.*

[128] "Gram Pradhan Who Helped Police in Kochang Pathalgarhi Case Killed", *Reporter Post*, July 7, 2019; *available at: http://reporterpost.in/article/jharkhand/5663/gram-pradhan-who-helped-police-in-kochang-pathalgadi-case-killed/.*

CISF Act provides for the constitution of the para-military force for providing security to the public, private and joint venture companies. The Central government is given the responsibility to constitute and maintain this armed force.[129] At its inception in 1969, the CISF was only 3,000 strong, and was mandated to provide security only to the public sector undertakings ("**PSUs**") and government installations. In 1999, the CISF Act was amended, and provision of technical consultancy to the private sector was added to the preamble of the Act. This amendment fundamentally changed the purpose of constituting and maintaining an industrial security force. The amendment intended to provide security to the private sector, including industrial installations, mines, steel plants, hydro-electric project, oil fields and refineries and ports among other things. In this regard, it is important to note that *"CISF is a need-based force and its deployment is dependent on the requirement of the PSUs"*.[130] In 2009, the CISF's jurisdiction was further enhanced and now it can provide security to the joint ventures and private undertakings as well. Thus, the focus of the state has shifted from giving security services exclusively to the PSUs, to providing security to the transnational capital. By early 2000s, CISF was extending its services to the private sector for monetary compensation.[131]

In 2016, CISF was sanctioned to recruit and maintain 180,000 personnel who were deployed all over the country for providing security to various installations.[132] As per the report of a parliamentary committee in 2018, the CISF has a total of 339 units, out of which 49 units are deployed in the LWE areas in nine States, 27 units in parts of North-East India, and seven in Jammu and Kashmir. From the total number of CISF personnel, the sector-wise deployment is as follows: 19 per cent in power; 10 per cent in coal; 10 per cent in petroleum and natural gas; 9 per cent in steel; 2 per cent in industry; and 2 per cent in chemical and fertilizer industries.[133] Large number of CISF personnels are deployed in Chhattisgarh (Bailadila Iron Ore Mine, Kirandul), Jharkhand (coal mines of Central Coalfields Limited, Piparwar), Odisha (alumina refinery of National Aluminium Company Limited, Damanjodi) in the name of providing security against Naxals to these industrial undertakings.[134]

When we trace the genesis and growth trajectory of the CISF and other para-military forces, it runs parallel to the economic liberalisation policies of the Indian state, through the New Economic Policy of the 1990s to the present day. The expansion and entrenchment of the CISF correlates with the efforts of the Indian state to attract and secure private investments in various sectors, including mineral extraction.

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[129] Section 3(1), CISF Act as amended in 1999.

[130] *Two Hundred Fifteenth Report on Working Conditions in Non-Border Guarding Central Armed Police Forces (Central Industrial Security Forces, Central Reserved Police Force and National Security Guard)*, Parliament of India, Rajya Sabha, Department Related Parliament Standing Committee on Home Affairs, 2018 at 3; available at: *https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/15/107/215_2018_12_15.pdf.*

[131] *CISF: 50 Glorious Years in Securing Critical Infrastructure,* CISF Directorate General, 2018 at 7; available at: *https://www.cisf.gov.in/cisfeng/wp-content/uploads/2018-A/CISF_CTB_2018_1.pdf.*

[132] *Ibid*. At 4. As of 2018, the CISF employed 153,000 personnel.

[133] *Supra*, note 130 at 6.

[134] *Supra*, note 131 at 147.

The OISF is also a specialised force formed to provide security to the PSUs and private undertakings and their units. Since the OISF Act is recent enactment, it has made provision for consultancy services to the private sector since its outset.[135] Hardly any data is available on the number of personnel deployed by OISF in the public domain. However, fact-finding reports point out that OISF provides security to the Alumina Refinery of Vedanta Limited in Lanjigarh, Odisha. While such security is purportedly to protect the plant and its employees from presumed 'LWE attacks', the OISF has been known to brutally attack ordinary working-class *Adivasi* villagers from the area (*see Box below*).

Such laws normalise the presence of para-military in areas where they are deployed for the protection of industrial interests. That this is a Fifth Schedule Area, with the entire attendant constitutional and statutory special protections for *Adivasis* and other marginalised groups does not appear to have made a difference.[136] Instead of reaffirming these protections, the state has deployed industrial security forces or other such para-military for invoking brute force against the *Adivasis* who are simply exercising their constitutional rights as citizens. Tactical collaboration between the state and corporate interests makes such para-military forces even more powerful. Under cover of maintaining law and order in the factories and other operational units, the personnel of such specialised forces engage in violence against the *Adivasis* and local working without any consequences.

LANJIGARH VIOLENCE INVOLVING ODISHA INDUSTRIAL SECURITY FORCES[137]

On March 18, 2019 at around 6 a.m., some 40 to 70 villagers from neighbouring villages (Rengapalli, Bandhaguda and Basantpur) were protesting outside Vedanta's Aluminium Refinery at Lanjigarh. They were demanding fee-remission for their children studying at DAV Vedanta International School, which is run by Vendanta as a part of its corporate social responsibility activity for children of families displaced by its industrial activities. The villagers and the Vedanta administration were negotiating to resolve the issue. However, the situation suddenly escalated when the one of the security guards, who was trying to prevent the villagers from entering the plant, allegedly slapped a villager. At the same time, two buses carrying OISF personnel, who provided security at the refinery, were trying to enter the plant gate, and one of buses ran over the feet of a protestor. Angered by these provocations, the protestors started pelting stones at the OISF vehicle, after which the OISF personnel started

[135] See preamble and Sections 2(k), 3(1), 8, OISF Act.

[136] For a detailed discussion on the constitutional and statutory provisions applicable to Fifth Schedule Areas, see *Chapter 3: A Radical Break from the Past: The Constitution of India and its Interpretations.*

[137] This case study has been prepared based on the fact-finding report of the CDRO and Ganatantrik Adhikar Suraksha Sangathan, Odisha (GASS) prepared in 2019. See *Corporate Loot and People's Resistance in Niyamgiri: A fact Finding Report on Niyamgiri-Lanjigarh Area by CDRO and GASS*, July 2019; available at: *https://pudr.org/sites/default/files/2019-08/niyamgiriORIGINAL22.pdf.*

to indiscriminately beat the protestors, and other passers-by, women and workers who were trying to get inside the factory. People were running helter-skelter in all directions to escape the beatings. Some ran towards a nearby pond and jumped.

During this mayhem, a worker of the factory was allegedly beaten up by these OISF personnel with *lathis* and iron rods. In order to escape the beatings, he ran towards the pond along with others and jumped in. It is alleged that the OISF personnel dragged him out of the pond and beat him brutally, breaking his legs and crushing his private parts. After this, they threw him inside the pond, causing his death. His body was recovered from the pond and a post-mortem was conducted at a local hospital, after which his body was handed over to the family. His wife lodged an FIR the same day, against the Chief Security Officer, Chief Manager and security personnel under various provisions of the IPC. While no progress was made in this case, Vedanta promised Rs. 25 lakh as compensation to the wife of the deceased.

On the night of March 18, 2019, around 8 pm, the villagers again gathered at the gate of the refinery. There was heavy presence of security guards at the refinery gate. The same night, another person, a *Havildar* of the OISF, was found dead inside the refinery campus. The police lodged an FIR in this case implicating 22 named persons and 300 unnamed persons for rioting and arson, alleging that they tied his legs and burned him by setting the security control room on fire.

The violence which occurred on that single day is not without context. Vedanta Limited is a multinational company based in United Kingdom but for long has been involved in the region for mining and industrial activities. It uses security forces to safeguard its operations. Vedanta engages in natural resource extraction, processing and supply of iron ore, steel, copper, aluminium, zinc, lead, silver, power, oil and gas.[138] The company engages in natural resource extraction in several countries of the Global South including India, Sri Lanka, Zambia, Namibia, South Africa, UAE, and Liberia, through subsidiaries.[139] In India, Vedanta operates through its subsidiary, Vedanta Aluminium Limited.

The company entered into a Memorandum of Understanding with the Government of Odisha for mining of bauxite and production of iron, among other things. This included an aluminium refinery with the capacity of one million tonnes per annum ("**mtpa**") and a thermal power plant at Lanjigarh in Kalahandi district. The bauxite requirement of three mtpa was to be mined from the Niyamgiri Hills, through the Orissa Mining Corporation, a PSU.

The Niyamgiri Hills are home to the Particularly Vulnerable Tribal Groups ("**PVTGs**"), the *Dongaria Kondhs* and *Kutia Kondhs*, and are also considered sacred in their tradition. As a result, these *Adivasi* communities have been opposing the Vedanta operations from the outset. They have opposed the environmental clearances

[138] *Annual Report and Accounts FY 2015*, Vedanta Resources Plc, 2015 at 147; available at: *https://www.vedantaresources.com/ShareholderInfoDoc/22883_vedanta_ar2015_final.pdf.*

[139] *Ibid*.

granted by the Ministry of Environment and Forests (MoEF, as it then was) to various components of the project (starting in 2003) and also the various forest clearances (Stage 1 clearance was granted in 2004). A team of four members headed by Sh. N C Saxena was constituted by the Central government and to look into the realisation of rights of the forest dwelling people. The Committee found innumerable and egregious violations of environmental and forest conservation laws. It also pointed out that the *Adivasis* living in the area were not consulted during the process of seeking various clearances, in clear violation of a host of laws applicable to such Fifth Schedule Areas, including the FRA. It concluded that mining of bauxite in the Niyamgiri Hills will result in adverse effects on the *Dongaria Kondhs* and *Kutia Kondhs*.

After proceeding through circuitous litigation, eventually the Supreme Court of India delivered the final judgment in the *Niyamgiri* case[140] in 2013, directing that the MoEF shall take a decision regarding forest clearance to Vedanta's bauxite mines based on the decision of the *Gram Sabhas*, which are the rightful authority to take such decision. The judgment marked a huge victory for the *Adivasis* of Niyamgiri as well as in other parts of the country. The *Gram Sabhas* of Niyamgiri took unanimous decisions to oppose the mining, and consequently, all clearances to the project were revoked.

The efforts of the company and the State government to re-open the issue, however, have continued and even increased in intensity. Since 2013, attacks on activists associated with NSS, have increased manifold. Members of NSS have been implicated in UAPA and sedition cases, even as the state has increased its para-military presence in the area by establishing units in various villages on the foothills as well as further up the Niyamgiri mountains. Some of these camps have been set up without the consent of the *Gram Sabha,* and in violation of the rights recognition process under FRA. In some instances, forcible eviction of forest dwellers has also occurred. For instance, in Trilochanpur village, the CRPF camp was operating out of the local *Panchayat* premises, even though this was against the wishes of the community. When the CRPF decided to construct a permanent camp in the village, and it became clear that community would not consent, the State resorted to filing false cases under various laws to compel the villagers to give away their land and forests.

Thus, the incident of March 18, 2019 is only one manifestation of militarisation in the tribal areas and the continuous oppression faced by the local *Adivasi* population. Once proud and free, the *Adivasis* are condemned to seek employment as contract workers at the same company to which they have lost their lands, their livelihood and their very identity.

[140] *Orissa Mining Corporation* v. *Ministry of Environment and Forests* (2013) 6 SCC 476.

7.6 Conclusion

In Chapter 9 below, we examine how a disproportionate number of undertrial and convict prisoners in Indian jails are from marginalised communities, such as *Adivasis, Dalits* and Muslim minorities. These communities are no match against the architecture of security laws, such as UAPA and CSPSA, and other laws defining 'crimes against the state' such as Section 124A, IPC, when combined with the full force of the state and its law enforcement arms.

Such laws, although overtly general in application, are designed to target the marginalised communities including *Adivasis* who are at odds with the development paradigm of the state. When an entire regime of security laws criminalises certain communities *en masse*, simply because these communities are opposed to the inroads being made by the state and large capital into their constitutionally protected lands, the results are catastrophic. Obscuring the rich cultural diversity of *Adivasi* and forest dwelling communities, their identity is reduced to the convenient trope of Naxals or extremists. All constitutional and legal protections to *Adivasis* and their homelands stand discarded once this conflation with such 'anti-nationals' is complete.

It is for this reason that we argue that, on the face of it, these Security Laws stand opposed to the basic principles of the Indian Constitution and the rights guaranteed under it, especially the rights of *Adivasis* and forest dwellers to their traditional lands and resources. Instead of safeguarding the interest of the nation, these laws are employed to violate the rights of its citizens. We assert that in a modern constitutional democracy, such Security Laws, insofar as they contravene basic principles of criminal justice and constitutional rule of law, are obsolete.[141]

It is also important to remember that the Constitution of India emerged from a vigorous and robust process of argumentation, introspection, reflection and negotiation. This process of formation of our Constitution was marked by the participation of numerous stakeholders, including disenfranchised groups, alienated cultures, and also *Adivasis* through their engagement in the Constituent Assembly. The process of debating and writing the Indian Constitution was not merely a balancing act accommodating often competing interests, but nothing short of a miraculous encapsulation of a nation's idea of its own identity. The Indian Constitution envisaged an asymmetric federal system and gave constitutional spaces for progressive evolution of autonomy. This is the premise on which the constitutional and statutory provisions relating to *Adivasi* self-governance and autonomy over land and forests are premised. These provisions were made precisely in anticipation of the need to protect *Adivasis* and forest dwellers from powerful actors which may exist in the future, such as the forest bureaucracy, dominant class-caste elites, global capital, and the government itself.

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[141] The concept of obsoleteness of terror laws like UAPA, CSPSA, NSA and Sedition (under Section 124A, IPC) has been borrowed from Angela Davis's *Are Prisons Obsolete?* Davis asks a very pertinent question in her book regarding the relevance of prisons as a punitive and reformatory measure in the criminal justice system. In USA, disproportionate numbers of people of color are in the prison which is the evidence of racial profiling. Thus, prisons become not just a place which takes away the democratic rights and freedom of people belonging to certain class and race but also a symbol of racial discrimination and slavery.

The prescience of the Constituent Assembly and the founders of the Constitution was never more apparent than today. The struggle for control over land, forests and resources between the state and large capital on one hand, and the *Adivasi* and forest dwelling communities on the other hand, has reached unprecedented proportions. The tribal heartland of India is seeing a collision of world views, between the *Adivasis* who view their relationship with the land as one of stewardship, and the state and its law enforcement machinery that views these same lands as a ripe arena for resource extraction. While *Adivasis* and forest dwellers assert their moral authority invoking the Constitutional guarantees promised at the time of the formation of the Indian state, the state asserts its authority to enforce its sovereign will through a regime of Security Laws and law enforcement machinery.

Chapter 8

VIOLENCE AGAINST *ADIVASI* WOMEN: AN UNRAVELING OF THE SOCIAL STRUCTURE

8.1 Background

It is said that the more things change, the more they remain the same.[1] When we examine the status of *Adivasi* women in 21st Century India, this observation, sadly, rings true. After more than seven decades of independence, the plight of women in India remains unchanged. Though women across all sections in India face violence, it is important to acknowledge that women do not constitute a homogenous group; the dynamics of caste, class, social status, and religion permeate this discourse. Violence against the marginalised, particularly the *Dalit* and *Adivasi* women, is inherent. They face systematic discrimination primarily because of their disadvantaged position in the social hierarchy, unravelling the widely pervasive casteist mindsets. In a social structure such as India's, these atrocities cannot be classified as isolated incidents; they are a product of intersectional factors such as caste, class, religion and ethnicity, among others.

Brutalities against *Adivasi* women are also an outcome of the systematic conflict with the state and its entities. These conflicts arise with the assertion of rights over land, forests and resources. Operation of regressive legislations such as *Indian Forests Act, 1927* ("**IFA**") and *Wild Life (Protection) Act, 1972* ("**WLPA**") in forest areas along with a plethora of security legislations[2] has been instrumental in feeding systematic discrimination against *Adivasi* women. The exercise of powers accorded to authorities under these laws has led to a situation where it seems as if *de facto* sanction has been granted to all manner of atrocities, such as looting, assault, and sexual violence against women.

The way *Adivasi* women have responded to such continued harassment is also a story within a story. These are the cases where perseverance and solidarity among women's organisations have strived to change the outcomes. The discourse on sexual violence and impunity concerning *Adivasi* women is limited. Within that limited discourse, there is no mention of the courage with which the *Adivasi* women stand up against the oppressor for years to achieve the slightest of victory.

This chapter examines the implications of regressive legislations on *Adivasi* women. This examination is done through the lens of use of excessive power by the State, and the impunity that shields such conduct. One case study after another in this chapter brings out the peculiar nature in which criminal justice system operates against *Adivasi* women where criminal trials remain pending for decades.

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[1] A phrase attributed to French writer Jean-Baptiste Alphonse Karr in 1849, a year after the French Revolution of 1848.

[2] For more context on Security Laws, refer to *Chapter 7: Security Laws and Impunity.*

8.2 Culture of Violence and Impunity

The analysis of Security Laws in the previous chapter explains how they have led to abuse and extra-legal violence. It is the experience that in the name of protecting the integrity and security of the state, the government carries out raids to combat 'Left-Wing Extremists' or 'Naxalites'. In these raids across 'conflict zones', where State has been granted extraordinary power over individuals, violence is committed against *Adivasi* and forest dwelling women inhabiting the areas along with mass looting of the settlements. Sexual violence is used not only as a form of torture, but also invoked against entire communities as a weapon of war. *Adivasi* women in this social location, being the lowest in rung of class and gender hierarchies, face multiple forms of discrimination and violence. They are, therefore, the most vulnerable.

Reports of daily violence unleashed on women as part of 'lawful' raids by security personnel and police from the Bastar region of Chhattisgarh (which combines rich mineral deposits with a high tribal population density) provide a sense of the daily struggle experienced in these regions. As and when the suspicion of an on-coming raid is sensed, men flee into the forests to protect themselves from criminal charges, which have long term consequences. It is the women who are left behind to safeguard their children and property, who face the force of such combing operations, putting them in a strikingly weak position.

In many instances, the underlying conflict relates to land and resources, over which multiple stakeholders lay claims, often with the support of the local police and administration. When the local *Adivasis* and forest dwelling communities object, they are subjected to police brutality and backlash, with women being specifically targeted in the struggle for dominance. In other cases, the special forces hide their acts of atrocities under the cover of an operation to arrest a 'Naxalite'.

That it is the same police to which the *Adivasis* are expected to turn to for redressal of the violation of their rights exposes glaring loopholes in the justice delivery system. In the process of centralisation of power in the hands of the state functionaries, formal structures of justice collapse. This process is explained through a case study from South Bastar in Chhattisgarh.

INCIDENTS FROM SOUTHERN CHHATTISGARH

In 2015, from October 19/20 to 24, day and night combing operations were jointly conducted in villages of Bijapur district, South Chhattisgarh, by security forces and local police. Affected villages included Chinnagelur, Peddagelur, Gundam, Burgicheru and Pegdapalli. A women's rights organisation, Women Against Sexual Violence and State Repression, conducted a fact-finding visit to the inaccessible villages deep in the forests, and recorded the incidents.[3] The report confirmed rape of three women from these villages - a minor girl of 14 years, a pregnant woman, and an old woman. The report states:

> *"The young girl was grazing cattle with other women when she was chased by the security forces. Overpowered and blindfolded, she was raped by at least three people before she became unconscious. The four-months pregnant woman was stripped by the security forces on October 21, 2015 and repeatedly dunked in the stream, and then gang raped."*[4]

An older woman was also raped after she protested the loot of her poultry and other household items.

Apart from the incidents of rape, as many as 15 women in Chinnagelur, Peddagelur, Gundam, Burgicheru reported sexual assault, harassment and physical assault, where they were stripped, beaten and dragged. Women also reported the destruction and looting of property. Some women testified before the Collector, the Superintendent of Police and the Assistant Superintendent of Police of Bijapur and accordingly, FIR was registered under relevant sections of the *Indian Penal Code, 1860* ("**IPC**") and *Protection of Children from Sexual Offences Act, 2012* ("**POCSO**"). However, no arrests were made for more than three months.

The National Human Rights Commission ("**NHRC**") initiated *suo motu* proceedings based on a news report,[5] and, after conducting an inquiry, issued a press release on January 07, 2017, stating that:

> *"The National Human Rights Commission has found 16 women, prima facie victims of rape, sexual and physical assault by the State police personnel in Chhattisgarh even as it awaits the recorded statement of about 20 other victims... The Commission has observed that it is of the view that, prima-facie, human rights of the victims have been grossly violated by the security personnel of the Government of Chhattisgarh for which the State Government is vicariously liable."*[6]

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[3] Women Against Sexual Violence and State Repression, *Rampant looting and sexual violence by security forces in villages in Bijapur, South Chhattisgarh - October 19/20 – 24, 2015*; available at: *https://wssnet.files.wordpress.com/2016/04/peddagelur-bijapur-report-nov-20151.pdf.*

[4] *Ibid*. At 2.

[5] The news report based on which the NHRC took cognisance: "Bijapur: 'Policemen raped women, indulged in loot", *The Indian Express*, November 2, 2015; available at: *https://indianexpress.com/article/india/india-news-india/bijapur-policemen-raped-women-indulged-in-loot/.*

[6] National Human Rights Commission, *NHRC finds 16 women prima facie victims of rape, sexual and physical assault by police personnel in Chhattisgarh; Asks the State Government why it should not recommend interim relief of Rs. 37 lakh to the victims*, January 7, 2017; available at: *https://nhrc.nic.in/press-release/nhrc-finds-16-women-prima-facie-victims-rape-sexual-and-physical-assault-police.*

It is a matter of grave concern that the NHRC found 34 victims of police brutality listed in only three FIRs. Although the NHRC could only record statements of 14 victims, it found that all of them reiterated the grave allegations mentioned in the said FIRs.

The case was reported in October 2015 and NHRC issued its report in January 2017. It is reported that a Criminal Writ Petition has been filed in the High Court of Chhattisgarh.[7] All this while, the affected communities keep living under the hope of justice.

THE ONGOING TRIAL IN VAKAPALLI CASE

On September 20, 2007, an anti-*naxal* force, the 'Greyhounds', 21 in number belonging to Andhra Pradesh Special Forces and equipped with firearms, entered village Vakapalli, Visakhapatnam District, Andhra Pradesh, at about 6:30 am on the pretext of arresting a Naxalite. The timing was such that the village men had gone to the fields and women were in the village. It has been alleged that uniformed personnel caught hold of 11 *Adivasi* women belonging to the *Kondh* tribe wherever they were and raped them.[8]

Following the incident, once the men returned to the village, they accompanied the women to the Office of Sub Collector and Sub Divisional Magistrate, Paderu, Visakhapatnam District where the incident was reported. Upon instructions, a case was registered under Section 376(2)(g), IPC and Section 3(2)(v) of *The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989* ("**Atrocities Act**"). After medical examination, it was noted by the medical officers at King George Hospital, Vishakhaptanam, that the women had no signs of recent sexual intercourse.[9]

The Andhra Pradesh *Girijan Samakhya* moved the High Court stating that there has been lapse on the part of the government to initiate action against the special police party.[10] In pursuance of the directions issued by the High Court, the investigation was entrusted to the Superintendent of Police, Crime Investigation Department ("**SP-CID**") Andhra Pradesh, Hyderabad. The Court delivered its Order by relying on the report submitted by the SP-CID, which suggested that no offence of rape was committed by the police personnel and the petition was disposed of by sharing the said report with the Petitioner. The Order also noted that if the Petitioner is not satisfied, they may avail any other remedy available in the law.[11]

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[7] *See* "After NHRC Report, Chhattisgarh High Court Pulls Up Security Forces for Bastar Sexual Violence", *The Wire*, February 17, 2017; available at: *https://thewire.in/women/after-nhrc-report-chhattisgarh-high-court-pulls-up-security-forces-for-sexual-violence-in-bastar.*

[8] Case facts summarised in order dated 26 April 2012 in A. *Ravi Kumar and Others* v. *Smt. Pangi Sridevi*, Criminal Petition No. 5598 of 2008, Andhra Pradesh High Court.

[9] *Ibid.*

[10] See *Andhra Pradesh Girijan Samakhya* v. *Union of India and Others*, Writ Petition No. 18142 of 2007, Andhra Pradesh High Court.

[11] *Ibid*. See Order dated November 14, 2017.

The aggrieved women filed a protest petition-cum-complaint under Section 200, *Code of Criminal Procedure, 1973* ("**CrPC**") before the Judicial Magistrate of First Class ("**JMFC**"), Paderu, Visakhapatnam District. The petition stated that the report by SP-CID is biased, that the lack of medical evidence of sexual intercourse is not fatal to the complaint, and requested the court to reject the report of SP-CID and begin trial afresh. JMFC, Paderu, by Order dated August 27, 2008 considered the protest petition and proceeded to take cognisance of the offences under Section 376(2)(g) read with Section 149, IPC and Sections 3(1)[(x)-(xii)] and 3(2)(v), Atrocities Act. The reasoning provided by the JMFC was that to take cognisance at this stage, there was no requirement of any more evidence and that only medical evidence is not a basic element in this case.[12]

As the order directed the registration of case, the accused filed a Criminal Petition in the Andhra Pradesh High Court under Section 482, CrPC seeking quashing of the Order of JMFC.[13] The case against the accused was stayed for four years. In 2012, the Andhra Pradesh High Court ruled that only 13 of the 21 accused personnel could be tried in connection with this case. Immediately after this Order of the High court, the 13 accused personnel approached the Supreme Court through a Special Leave to appeal against the said Order. It was in 2017, that the Supreme Court dismissed the petition filed by the accused personnel expressing its remorse over the case being dragged for 10 years in such a serious matter. The Apex Court also directed the Special Court in Visakhapatnam to expediate trial.[14]

The *Vakapalli* Case is still pending before the Special Court in Visakhapatnam that handles cases under the Atrocities Act. The victims had to undergo another legal battle in the High Court to seek appointment of a public prosecutor of their choice. The battle is long to fight as crucial documents in the case are now untraceable.[15]

Another setback to this case came in 2020 when the draconian law *Unlawful Activities (Prevention) Act, 1967* ("**UAPA**") was invoked against activists of an organisation called Human Rights Forum ("**HRF**") who were allegedly accused of influencing the Vakapalli rape survivors to depose falsely against the personnel of the Special Forces. HRF was actively involved with other organisations in seeking justice for 11 tribal women in the *Vakapalli* Case.[16]

The *Vakapalli* Case highlights that the *Adivasi* women did not stand intimidated by the continuous force of the authorities to withdraw their case. The resources with which the security personnel have been able to halt the trial in the case for more than

[12] *Supra*, note 8.

[13] *Supra*, note 8. See Order dated April 25, 2012.

[14] *A. Ravi Kumar and Others.* v. *Pangi Sridevi and Others*, Supreme Court of India, Special Leave to Appeal (Criminal) 6221 of 2012, Order dated September 1, 2017.

[15] See "Key documents 'untraceable' in Vakapalli case", *The Hindu*, January 21, 2020; available at: *https://www.thehindu.com/news/national/andhra-pradesh/key-documents-untraceable-in-vakapalli-case/article30615966.ece.*

[16] See "FIRs against human rights activists a move to stifle voice of lawful dissent", *The Hindu*, November 28, 2020; available at: *https://www.thehindu.com/news/national/andhra-pradesh/firs-against-human-rights-activists-a-move-to-stifle-voice-of-lawful-dissent/article33196405.ece.*

10 years by approaching one court after another, did not only freeze the justice delivery process but also destroyed crucial time-bound evidences in such a serious case.

As discussed earlier in this report, before a public official can be prosecuted, sanction for such a prosecution must be given by the government. Following the huge public outcry against the brutal gang rape of '*Nirbhaya*' in December 2012 in the National Capital of Delhi, the Central government constituted a committee chaired by a retired Chief Justice of India, the Late Justice J S Verma ("**Verma Committee**"), to suggest changes to various criminal laws with a view to enhance protection of women from sexual violence and ensure accountability of state functionaries. The Parliament incorporated some of the suggestions made by the Verma Committee pertaining to changes in both substantive and procedural provisions of the criminal law. One such amendment pertains to the failure of police to register an FIR on receiving information regarding rape, which has also now been made an offence.[17] Additionally, the requirement of government sanction for prosecution of public servants accused of sexual offences has also now been removed.[18]

However, certain key recommendations of the Verma Committee regarding offences against women in border areas and conflict zones were not translated into law.[19] The Verma Committee noticed systemic impunity for sexual crimes committed by security personnel in the name of internal security. In its report, the Verma Committee stated that:

> *"12. To this end, we make the following recommendations for immediate implementation:*
>
> *a. Sexual violence against women by members of the armed forces or uniformed personnel must be brought under the purview of ordinary criminal law;*
>
> *b. Special care must also be taken to ensure the safety of women who are complainants and witnesses in cases of sexual assault by armed personnel;*
>
> *c. There should be special commissioners – who are either judicially or legislatively appointed – for women's safety and security in all areas of conflict in the country. These commissioners must be chosen from those who have experience with women's issues, preferably in conflict areas. In addition, such commissioners must be vested with adequate powers to monitor and initiate action for redress and criminal prosecution in all cases of sexual violence against women by armed personnel;*
>
> *d. Care must be taken to ensure the safety and security of women detainees in police stations, and women at army or paramilitary check points, and this should be a*

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[17] Section 166A, IPC.

[18] Explanation to Section 197(1), CrPC.

[19] *Report of the Committee on Amendments to Criminal Law*, January 23, 2013. Chapter V, at 142-51; available at: *https://adrindia.org/sites/default/files/Justice_Verma_Amendmenttocriminallaw_Jan2013.pdf.*

subject under the regular monitoring of the special commissioners mentioned earlier;

e. *The general law relating to detention of women during specified hours of the day must be strictly followed;*
f. *Training and monitoring of armed personnel must be reoriented to include and emphasize strict observance by the armed personnel of all orders issued in this behalf;*
g. *There is an imminent need to review the continuance of AFSPA and AFSPA-like legal protocols in internal conflict areas as soon as possible. This is necessary for determining the propriety of resorting to this legislation in the area(s) concerned; and*
h. *Jurisdictional issues must be resolved immediately and simple procedural protocols put in place to avoid situations where police refuse or refrain from registering cases against paramilitary personnel."*[20]

These important recommendations have not found any reflection in subsequent legislative amendments. Consequently, in conflict areas, where access to the formal justice system is already erratic, impunity of police and para-military forces continues unabated.

These instances of violence highlight that engagement with police administration is arduous and riddled with bias. One such case is that of Soni Sori *(See Box)*, where the physical and emotional torture, sexual assault and continued surveillance suffered by one courageous woman is a painful testimony of what *Adivasi* women have undergone and continue to endure.

The case of Soni Sori highlights the barbarism that lurks under the cover of impunity and the shocking absence of due process and fair trial at every stage in the criminal justice system. It unfolds the violence and oppression against *Adivasi* women, and how the 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. Make no mistakes that these assaults are on the body of the community of *Adivasis*, as a whole, by a muscular state.

[20] *Ibid.* At 149-151.

THE STORY OF SONI SORI

"I did not read books to become an activist - the jail time made me one", says Soni Sori, a schoolteacher and *Adivasi* rights activists from Chhattisgarh belonging to a tribal community.[21] She lives in the Dantewada district, in the southern-most part of Bastar in Chhattisgarh. Its main natural wealth consists of forests and minerals. In September 2011, Dantewada police accused Soni Sori and her nephew, Lingaram Kodopi, of being couriers between the 'Left-Wing Extremists' and a mining company operating in the area, the Essar Group. Sori and Kodopi were accused of a variety of serious crimes including sedition, conspiring to wage war against the government and belonging to an unlawful organisation.[22]

Fearing police torture, Sori fled to Delhi, but was soon arrested. Transit remand was granted by a Delhi District Court overriding arguments that she would be tortured in custody. She was produced before a Dantewada court. Although she again expressed her fear, she was handed over to the local police for questioning.[23] Over the course of the two days that she spent in police custody, she was brutally tortured. She petitioned the Supreme Court for protection and for a medical examination. As an interim measure, the Supreme Court directed that Sori be medically examined in a hospital outside Chhattisgarh that is in Kolkata.[24] The medical examination in Kolkata confirmed her allegations, revealing both sexual and non-sexual injuries. One can only hazard a guess about the horrors she underwent by the fact that the medical examination found multiple remnants of stones forced into her private parts. After the necessary treatment at AIIMS Delhi, she was transferred to Raipur Central Prison and, thereafter, to Jagdalpur Central Prison.

After almost two years in prison, Sori's bail application was denied by the Chhattisgarh High Court.[25] During this time, Sori's husband passed away and she was not even allowed to return home to perform his last rites. It was only in November 2013, that the Supreme Court granted her conditional bail, requiring her to remain in Delhi and not return to Chhattisgarh,[26] separating her from her family even after release from prison. She was finally able to return to her home in Chhattisgarh in February 2014, when the Supreme Court changed her bail conditions.[27] Sori has been acquitted in six out of eight cases filed against her, but the remaining criminal cases are still pending.

Sori has emerged from prison a force to be reckoned with. Apart from social activism, Sori has also entered the fray of electoral politics, even contesting parliamentary elections in 2014. The journey has not been easy. In February 2016, Sori was attacked with an acid-like chemical on her face in Dantewada.[28] She recovered after another lengthy medical treatment and continues undaunted in her advocacy for the rights of *Adivasis* and their entitlement to full citizenship.

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[21] "*Who is Soni Sori?, STAND UP FOR SONI SORI*", 2013; available at: *https://sonisori.wordpress.com/aboutsoni/*.

[22] Sections 121, 124(1) and 120B, IPC; Sections 8(1), (2), and (3), Chhattisgarh Special Public Safety Act, 2005; and Sections 10 and 13, UAPA. *Lingaram Kodopi* v. *State of Chhattisgarh* (2014) 3 SCC 474; *Soni Sori and Another* v. *State of Chhattisgarh* (2014) 3 SCC 482.

[23] Case history submitted by counsel for Soni Sori to the Supreme Court was summarised in *Soni Sori and Another* v. *State of Chhattisgarh* (2011) 14 SCC 658, Order dated October 20, 2011.

[24] *Ibid*.

[25] *See* Order dated July 8, 2013 passed by Chhattisgarh High Court in Miscellaneous Criminal Case No. 3017 of 2013.

[26] *Lingaram Kodopi* v. *State of Chhattisgarh* (2014) 3 SCC 480: (2014) 2 SCC (Cri) 220, Order dated November 12, 2013.

[27] *Lingaram Kodopi* v. *State of Chhattisgarh* (2014) 2 SCC 474: (2014) 2 SCC (Cri) 215. Refer judgment dated February 7, 2014.

[28] "Tribal Activist Soni Sori Attacked With 'Acid-Like Chemical' In Chhattisgarh", *NDTV online*, February 21, 2016; available at: *https://www.ndtv.com/india-news/unidentified-men-allegedly-hurl-acid-like-chemical-on-soni-sori-in-chhattisgarh-1279564.*

8.3 Abuse of Authority in Forest Areas

As examined earlier in this report, legislations specific to forest areas, such as the IFA and WLPA, have led to concentration of immense and unchecked power in the hands of the forest officials. These powers have become lethal with the lack of separation of powers and minimal judicial oversight of the forest bureaucracy. Communities residing in the forests are vulnerable to these establishments, and more so in the cases of women as their interface with forests for day-to-day subsistence is greater than men.

Inside forest areas, *Adivasi* and forest dwelling communities are perceived as encroachers, and a stigma of criminality is attached to their very identity. With all these factors weaving together, the brunt of such systemic stigmatisation is borne essentially by the *Adivasi* women.

This question is best answered by examining a case study. The *Van Gujjar* community *(See Box)* in Uttarakhand is a Muslim nomadic pastoral community. *Van Gujjars* are recognised as STs in several other States, but unfortunately, have been excluded from this category in Uttarakhand. The identity of *Van Gujjar* women is, therefore, located on multiple margins — *Adivasi*, Muslim and nomadic.

These atrocities on the *Van Gujjar* women (*as described in the Box*) occurred when the entire country was in a situation of national lockdown due to the COVID-19 pandemic and even the courts were functioning via video conferences. Thus, the avenues for the *Van Gujjars* to seek legal remedies were limited.

The threat of dispossession from their lands to the *Van Gujjars* has been unrelenting and continuous. The entire State machinery, including forest and wildlife officials, is arrayed against a community which is already extremely vulnerable because of its minority community status in an increasingly communalised polity. The stay order from the Supreme Court did not deter the officials from undertaking brutal assault on the community (*see Box*). The tension between the community and the state renders women and their bodies a site of domination. This case, yet again, demonstrates that when *Adivasi* women seek protection from the judicial system, not only are they denied the right to file cases, but also find themselves charged and arrested in false cases. This is the primary reason for the underreporting of cases by *Adivasis* and other forest dwellers.

LIVING UNDER CONTINUOUS THREAT: THE STORY OF *VAN GUJJARS*

The *Van Gujjars* are pastoral nomadic tribes belonging primarily to the Himalayas; they are found in the States of Uttarakhand, Himachal Pradesh and Jammu and Kashmir. The *Van Gujjars* of Uttarakhand have been in continuous conflict with the forest department and have faced continuing threats of evictions. Many of these communities belong to denotified tribes, which were earlier classified as criminal tribes under the colonial government.

This particular incident is from Rajaji National Park, which was first declared a 'Wildlife Sanctuary' under WLPA in 1983, upgraded to a 'National Park' and finally declared a 'Tiger Reserve' in 2015. Between 2011 and 2017, the Uttarakhand government issued orders to vacate to almost 250 families.[29] In 2018, the Uttarakhand High Court termed the settlement of the *Van Gujjars* as illegal and ordered their eviction.[30] Some measure of relief came when the Supreme Court in September 2018 stayed the order of the High Court.[31]

However, harassment by the forest department did not discontinue. On June 16-17, 2020 forest officials visited families living in Asharodi Forest Range and tried to demolish their *deras* (makeshift huts).[32] When it was presented by a woman to the officials that the Supreme Court had stayed the order of eviction and that their claims under FRA are pending, she was allegedly beaten with sticks and dragged on the ground by her hair. In the police complaint submitted by the community, it is mentioned that the officials had sticks, batons and guns. A medical certificate issued by the hospital noted the villagers had "active bleeding" and "lacerations".[33]

The police refused to register an FIR on the complaint of the villagers. Instead, the police lodged an FIR against the villagers for a host of serious IPC offences, including rioting armed with deadly weapons, provocation and disrupting public peace, criminal intimidation, voluntarily causing grievous hurt to public servant during the discharge of his duties and attempt to murder.[34] Thereafter, seven villagers including four women were taken into custody on June 18, 2020 and it was alleged that one woman and her father were tortured in custody. It took several weeks for all those arrested to be released on bail.

On June 29, 2020, civil society organisations moved a complaint before the NHRC highlighting the blatant violation of legal and human rights of *Van Gujjars*.[35]

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[29] Rakesh Agrawal, "No Rights to Live in the Forest", *Economic & Political Weekly*, January 4, 2017, Vol. 49, Issue No. 1; available at: *https://www.epw.in/journal/2014/1/reports-states-web-exclusives/no-rights-live-forest.html*; and "Uttarakhand government making intense efforts for relocation", *The Times of India*, 24 September 2017; available at: *https://timesofindia.indiatimes.com/city/dehradun/uttarakhand-government-making-intense-efforts-for-relocation-of-van-gujjar-from-rajaji-tiger-reserve/articleshow/60817911.cms.*

[30] *Himalayan Yuva Gramin Vikas Sansthan* v. *State of Uttarakhand & Others WP* (PIL) No. 06 of 2012, Uttarakhand High Court; Order dated August 16, 2018.

[31] *Tarun Joshi and Others* v. *The State of Uttarakhand and Others*, SLP (Civil) Diary No(s). 31981/2018. See Order dated September 10, 2018.

[32] "Uttarakhand: Van Gujjars injured, property destroyed in clash with forest officials", *Sabrang*, June 19, 2020; available at: *https://sabrangindia.in/article/uttarakhand-van-gujjars-injured-property-destroyed-clash-forest-officials.*

[33] Sushmita, "Uttarakhand Van Gujjars allege forest officials assaulted women; probe underway", *Down to Earth*, June 30, 2020; available at: *https://www.downtoearth.org.in/news/forests/uttarakhand-van-gujjars-allege-forest-officials-assaulted-women-probe-underway-72036.*

[34] *Ibid*.

[35] "CJP moves NHRC against police and forest officials in Dehradun for assaulting tribals", *Citizens for Justice and Peace and All India Union of Forest Working People*, June 29, 2020; available at: *https://cjp.org.in/cjp-moves-nhrc-against-police-and-forest-officials-in-dehradun-for-assaulting-tribals.*

8.4 Analysis of NCRB Data

The National Crime Records Bureau ("**NCRB**") data on crime / atrocities committed against Scheduled Tribes ("**STs**") does not further categorise it based on gender. Therefore, for the purposes of analysis, data pertaining to crimes specific to women have been reviewed:

Table 10: Crimes Committed Against *Adivasi* (ST) Women Across Different Categories of Offences from 2018 to 2020

Category of Crime	Number of cases registered		
	2018	2019	2020
Assault on Women with Intent to Outrage Modesty (Sections 354, 354A, 354B, 354C, 354D IPC and Sections 8, 10 POCSO)	857	880	885
Insult to Modesty of Women (Section 509, IPC)	18	24	24
Rape (Section 376, IPC and Sections 4, 6 POCSO)	1,008	1,110	1,137
Attempted Rape (Sections 376 and 511, IPC)	17	21	25
Total Sexual Crimes Against *Adivasi* (ST) Women	**1,900**	**2,035**	**2,071**
Total Number of All Crimes Against STs	**6,528**	**8,257**	**8,272**

Source: NCRB Crime in India Reports 2018, 2019, 2020 - Chapter 7C

As the data did not classify crimes against STs based on gender, these figures are limited to specific crimes against women and therefore, are not conclusive. Even with the constraint of information and under-reporting of cases, the data indicates an obvious departure from the commonly held perception that majority of crimes against *Adivasis* relate either to land related conflicts, public insult or intimidation. Clearly, *Adivasi* women are bearing the brunt of the crimes committed against the community.

The data under *Table 10* above demonstrates that a significant proportion of the total number of offences committed against STs constitute rape, sexual violence and assault against *Adivasi* women. In 2020, 25 per cent of total crime against STs 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 with data from 2019.

Given the paucity of data, this analysis of the interface between *Adivasi* women and the criminal justice system is bound to be limited. However, it is apparent that within the larger disparity and discrimination faced by the community as a whole, the

Adivasi woman finds herself at an additional disadvantage; the collective vulnerability of her community becomes the instrument with which her persecution is intensified. 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. It is nothing short of a miracle that *Adivasi* women continue to withstand the egregious assault and emerge strong as some of the most powerful leadership that indigenous peoples in India have ever known.

Chapter 9

PRISONS AND THE *ADIVASI* IN INDIA

9.1 BACKGROUND

As discussed elsewhere in this report, several international law covenants and declarations speak to the rights of indigenous peoples in contact with the criminal justice system, apart from the *International Covenant on Civil and Political Rights, 1966*[1] which is available to all. The International Labour Organisation ("**ILO**") *Convention 107*[2] requires special protection of *Adivasis* from preventive detention, and advocates for alternative punishments to imprisonment (Article 10), and *ILO Convention 169*[3] reiterates this requirement (also Article 10). The *United Nations Declaration on the Rights of Indigenous Peoples, 2007*[4] ("**UNDRIP**") mandates that *Adivasis* should be able to promote and develop indigenous dispute resolution mechanisms, as per their custom and when they interact with mainstream justice systems, all necessary steps should be taken to resolve disputes through just and fair procedures taking into consideration their unique cultures and traditions (Article 34). These are further buttressed by the *United Nations Standard Minimum Rules for Treatment of Prisoners, 2015*[5] (also known as the "**Nelson Mandela Rules**").

The conditions of prisons across nations continue to be appalling despite their development; India is no exception. Despite a plethora of constitutional, statutory and other protections for prisoners, these protections continue to exist largely on paper. The basic human rights of individuals in prisons are persistently violated, and there is a continued ignorance of the provisions of law, such as those under the *Code of Criminal Procedure, 1973* ("**CrPC**")[6], and the stipulations from numerous court decisions which attempt to ameliorate the situation.

It is a truism that the criminal justice system operates under a general bias against the economically and socially marginalised; these inherent biases in the system become

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[1] United Nations General Assembly ("**UNGA**"), *International Covenant on Civil and Political Rights*, Resolution 2200A (XXI), December 16, 1966; available at: *http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx*.

[2] ILO, *Indigenous and Tribal Populations Convention, 1957* (No. 107); available at: *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107*.

[3] ILO, *United Nations Indigenous and Tribal Peoples Convention, 1989* (No. 169); available at: *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169*.

[4] UNGA, *United Nations Declaration on the Rights of Indigenous Peoples*, October 2, 2007, A/RES/61/295; available at: *https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html*.

[5] *United Nations Standard Minimum Rules for the Treatment of Prisoners, 2015* A/RES/70/175; available at: https://www.un.org/en/events/mandeladay/mandela_rules.shtml.

[6] Some important provisions of the CrPC, for instance, are:

- Section 235(2), which places an obligation upon the judicial officer to hear the accused separately on the question of sentence, after having reached a verdict finding him guilty.
- Section 436A, which allows the release of prisoners when the trial has not concluded for a time exceeding half of punishment prescribed for the offence he is charged with. The provision allows release by the Court on his personal bond with or without sureties.

acute when dealing with *Adivasis* and tribals as accused persons. Across the country, not only are a disproportionate number of prisoners (both convicts and undertrials) poor, but they are also disproportionately tribal.

According to data released by the National Crime Records Bureau[7] ("**NCRB**"), at the end of 2019, a total of 4,78,600 prisoners were lodged in 1,350 prisons across India. Overcrowding of prisons is an endemic problem with the national average occupancy rate at 118.5 per cent. Undertrial prisoners formed the largest proportion of prison population across the country, with 69.05 per cent of the total prisoners across all jails being undertrials, and convicts accounting for 30.11 per cent. The remaining prisoners were classified as 'detenues'.[8]

The proportion of *Adivasi* prisoners ought to mirror, to a greater or lesser degree, the proportion of tribal people in the national population, since it is nobody's case that *Adivasis* are a particularly recidivist social group prone to crime. This is far from the reality. The Scheduled Tribe ("**ST**") population constitutes just 8.6 per cent of the total population.[9] However, out of a total of 3,30,487 undertrials in all the prisons across India, 10.5 per cent (34,756) were STs. The proportion of ST convicts was even higher at 13.7 per cent.[10]

Although some information regarding the proportion of tribals in prisons is available in the 10 States under the Fifth Schedule of the Indian Constitution, district-wise data is not readily accessible. Hence, it is not possible to ascertain how the scheduled districts fare as opposed to districts which are not scheduled.

Table 11 below examines the proportion of ST population to total population in each of the 10 Fifth Schedule States and juxtaposes these with the proportion of ST convicts and ST undertrials to total prison population in said States. Note that there are special constitutional and statutory protections for STs in each of these States, which are recognised administratively as regions with considerable autonomy for indigenous peoples and their traditional governance mechanisms. Yet one finds that the proportion of *Adivasi* prisoners, whether undertrials or convicts, is substantially higher than their proportion to the State population. It is important to remember that 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. This is evidenced through case studies from Bastar and Jharkhand, as discussed below. The ripple effect of unjust incarceration on *Adivasi* people is simply beyond quantification.

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[7] *Prison Statistics for 2019,* NCRB, Ministry of Home Affairs, Government of India; available at: *https://ncrb.gov.in/en/prison-statistics-india-2019.*

[8] *Ibid*. See *Chart 2.1 (Share of Different Types of Prisoners as on December 31, 2019)* at 33.

[9] *Statistical Profile of Scheduled Tribes in India,* Ministry of Tribal Affairs, Government of India, 2013; available at: *https://tribal.nic.in/Statistics.aspx.*

[10] *Supra*, note 7. See Table 2.10D (Caste of Convicts as on December 31, 2019) at 64 and Table 2.11D (Caste of Undertrial Prisoners as on December 31, 2019) at 68.

Table 11: Proportion of ST Convicts and Undertrials compared to proportion of ST population in the 10 Fifth Schedule States

Name of Fifth Schedule State	Percentage of ST population to total population[11]	Convicts[12]			Undertrials[13]		
		Total Convicts	ST Convicts	Proportion of ST Convicts	Total Undertrials	Total Undertrials	Proportion of ST Undertrials
Andhra Pradesh and Telangana[14]	**7%**	4876 (2,788 +2,088)	586 (329 +257)	**12%**	9,153 (4,769 +4,384)	1,374 (773 +601)	**15%**
Chhattisgarh	**30.62%**	8,262	2,906	**35.2 %**	9,829	3,471	**35.3%**
Gujarat	**14.75%**	4,592	813	**17.7%**	9,799	1,468	**15%**
HImachal Pradesh	**5.71%**	948	127	**13.4%**	1,425	66	**4.6%**
Jharkhand	**26.21%**	5,871	1,985	**33.8%**	12,759	3,336	**26.1%**
Madhya Pradesh	**21.09%**	20,253	5,303	**26.2%**	24,157	5,894	**24.4%**
Maharashtra	**9.35%**	9,096	1,335	**14.7%**	NA	NA	**-**
Odisha	**22.85%**	3,725	1,145	**30.7%**	13,803	3,720	**26.9%**
Rajasthan	**13.48%**	6,189	1,177	**19%**	15,378	2,774	**18%**

Source: Census 2011 and NCRB Prison Statistics 2019.
Note: Table 11 collates Census 2011 data and NCRB 2019 data, as no comparable population ratio data for 2019 is available.

It is also noteworthy that in 2019, a total of 3,223 persons were incarcerated under the category of 'detenues', of whom 183 were tribals.[15] Since this category likely relates to persons in preventive detention, it is a matter of concern, requiring further investigation.

Another cause for concern is the poorly staffed administration in these prisons. Across the country, we see a trend of unfilled posts among jail staff, with the actual strength (60,787) being considerably lower than the sanctioned strength (87,599). While this may not be of great significance when it comes to general prison management staff, it is quite worrying when the actual strength of medical staff (1,962) falls short of the

[11] *Supra*, note 9. See *Table 1.6* at 121.

[12] *Supra*, note 7. See *Table 2.10D (Caste of Convicts as on December 31, 2019)* at 64.

[13] *Supra*, note 7. See *Table 2.11D (Caste of Undertrial Prisoners as on December 31, 2019)* at 68.

[14] Since 2011 Census data is available only for undivided Andhra Pradesh, the data for these two States (Telangana and Andhra Pradesh) is being examined together.

[15] *Supra*, note 7. *See Table 2.12D (Caste of Detenues on December 31, 2019)* at 72.

sanctioned strength (3,320).[16] At the best of times, this shortfall is alarming. During the COVID-19 pandemic, it has become a matter of immediate critical importance.

A majority of the 1,350 jails in the country are patterned in the traditional strict incarceration model. However, in keeping with the modern reformatory approach, 'open jails' have been established in some parts of the country where prisoners are permitted a certain amount of freedom to interact with the outside world. This could include daytime jobs, permission for their families to reside with them within the jail complex, and so on. Naturally, a place in an open jail is highly coveted. Subject to a rare exception, only convicts who have already completed a certain portion of their term are housed in open jails, on strict conditions of good behaviour.[17]

Unfortunately, there are only 86 open jails in all categories of prisons across India (State, District, sub-jail, etc.), with a total capacity of only 6,113 prisoners. Even this category of prisons is filled only to 70.67 per cent capacity, having only 4,320 prisoners.[18] Of these, the largest number of open jails are in Rajasthan, which has 39 open jails. Other States such as Maharashtra, Madhya Pradesh, and Gujarat have 19, six and three open jails respectively.[19] However, there is no disaggregated data regarding the proportion of *Adivasi* prisoners in these open jails, despite the numerous international law commitments to ensure that alternatives to imprisonment be found for *Adivasi* prisoners.

Neither the NCRB, nor any other source, maintains disaggregated data on numerous important indicators relating to *Adivasi* prisoners, including prison-wise data on the proportion of *Adivasi* prisoners (although such information is readily available for women prisoners, foreigners and mentally ill persons), comparative data relating to categories of crime, conviction rates, release on bail, and length of incarceration. It is impossible, therefore, to make a country wide assessment to measure the impact of incarceration on *Adivasi* prisoners in general, and *Adivasi* prisoners in Scheduled Areas and Tribal Areas in particular.

In this context, two invaluable case studies have emerged from Jharkhand and Chhattisgarh. Both these States have a high density of *Adivasi* population, and a significant proportion of their geographical area falls under the Fifth Schedule of the Constitution. These States were carved out from larger States of Bihar and Madhya Pradesh respectively in 2000, after prolonged peoples' movements demanding separate statehood in recognition of the *Adivasi* identity of the regions. These studies are examined below.

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[16] *Supra*, note 7 at (xx).

[17] Only convicted prisoners are permitted to be housed in open jails. The majority of jail inmates being undertrials, therefore, do not have any access to such prisons. In addition, strict provisions regarding eligibility for transfer to open jails are found in many State Jail Manuals and Prison Rules. Minor infractions can result in withdrawal of such privileges and transfer back to a closed prison.

[18] *Supra*, note 7. See *Table 1.3 (Jail-wise Capacity, Inmate Population and Occupancy Rate as on December 31, 2019)* at 22.

[19] *Supra,* note 7. See *Table 1.1 (Types of Jails in the Country as on December 31, 2019)* at 19.

9.2 *Adivasis* and the Criminal Justice System in Bastar

In this section, an effort has been made to examine the issue of *Adivasis* and their interaction with the criminal justice system in general, and the prisons in particular, in the Bastar Division located in South Chhattisgarh. This examination relies heavily upon the research and initiatives undertaken by the Jagdalpur Legal Aid Group ("**JagLAG**"), and research conducted by Advocate Vrinda Grover.[20]

South Bastar in Chhattisgarh has been a crucible of the Maoist armed struggle, which seeks to overthrow the Indian state. Consequently, this area is administratively classified as a 'Left-Wing Extremism' ("**LWE**") affected area. Although the State has consistently refused to deploy the armed forces, it has deployed large contingents of para-military and police forces, making it one of the most militarised regions in the world. To illustrate, prior to the general election in 2014, the number of security forces deployed in South Chhattisgarh were upped from 60,000 to 1,60,000 personnel. This brought the ratio of security personnel to civilian population to a staggering 1:19.[21]

The tribal population in this region[22] ranges between 55 per cent and 80 per cent, most of whom continue to practice traditional agricultural and forest related livelihood activities in the midst of persistent political tension and violence in the area between the State authorities and the 'Naxalites'. It bears repetition that the area is governed by the Fifth Schedule of the Constitution, and a plethora of protective legislations, which purport to vest considerable control over the natural resources in the region in the *Adivasis*. At the same time, the lands are rich with mineral deposits.[23]

It will be demonstrated below how the criminal justice system has become inured to the normalisation of violence and has adopted practices that are patently illegal but considered acceptable in light of the surrounding circumstances. With the justice system being compromised in a multiplicity of ways to deal with increasing 'Naxalite cases', it is the everyday activities of the rural tribal populations which have been most severely impacted.

9.2.1 Mystification of the Criminal Justice System

For reasons entrenched in historical discrimination, *Adivasis* are at a distinct disadvantage when engaging with the legal system in general, and the criminal justice system in particular; they are simply unable to comprehend it. Apart from being illiterate and ill-versed in worldly ways, they are often unable to understand

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[20] 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 Publications India, New Delhi, 2018).

[21] *Ibid*. At 209. Grover notes that at the peak of the conflict in Afghanistan in 2011, the security personnel to civilian ratio was 1:73, whereas in South Chhattisgarh even during so called 'normal' times, it is at 1:50.

[22] *Supra*, note 9 at 134 to 136. According to the Census 2011 data, the proportion of tribal population in the Bastar region ranges from 55.4 per cent in Kanker, 65.9 per cent in Bastar, to 76.9 per cent in Dantewada and a whopping 80 per cent in Bijapur.

[23] It is estimated that Bastar has 18 per cent of India's iron-ore deposits, in addition to other valuable minerals such as uranium, limestone, and diamonds.

the language of the courts, which is usually riddled in jargon and in the language of the dominant class, rather than the *Adivasi* language or dialect. Even otherwise, no attempt is made to explain the mystified legalese and processes, which they continue to dance through like marionettes.

In Bastar, this phenomenon has had the additional consequence of large number of false cases being registered against *Adivasi* accused by the police, secure in the knowledge that they will not be able to extricate themselves until they have served many months, even years, in prison. In many such cases, special laws such as the *Unlawful Activities (Prevention) Act, 1967* ("**UAPA**") and the *Arms Act, 1959* ("**Arms Act**") have been invoked, even in cases where the charges involve ordinary crimes under the *Indian Penal Code, 1860* ("**IPC**"). In others, simply labelling them as 'Naxal cases' is enough to ensure all procedural protections are practically suspended, even though no such category exists, or can exist, in law.

A High-Level Committee constituted by the Central government submitted a detailed report[24] on the socio-economic status of *Adivasis* in the country, where it observed:

> *"In Chhattisgarh, for instance, the committee found that a large number of tribals have been languishing in jails for long years without their trial concluding. When the under-trial women in Jagdalpur jail were asked to explain with what offences they had been charged, the answer almost invariably was 'naxal offence'. There is of course, no such offence defined in law. Here too, after the first FIR lodged against them, there would be further FIRs filed over a period of time implicating them in various episodes of violence. Persons charged with naxal offences find it extremely difficult to get bail, and so end up spending long years in jail. Trials do not conclude in many cases because official witnesses were absent. This may happen because a member of paramilitary force cited as a prosecution witness had been repatriated with his unit and was no longer in that state."*[25]

Seemingly innocuous provisions of the law take on ominous portents in the aforesaid context. JagLAG found numerous instances of shocking misuse of Section 109, CrPC.[26] This provision is preventive in nature and aimed at ensuring that persons who may be behaving in a suspicious manner are produced before the local Magistrate to provide signed promises of good behaviour. The police in Bastar, however, uses this provision to arrest persons without a warrant, resulting in long periods of incarceration until either the judge or the lawyer recognises that they should not be in jail at all.

Take the story of *Kawasi*, a 65-year-old elderly man in Jagdalpur Central Jail known to the jail authorities as *Kawasi Kumal*.[27] The police chargesheet contains a familiar narrative, where a security patrol of 106 policemen ran into a Naxal battalion of 50-60

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[24] *Report of the High Level Committee on Socio-Economic, Health and Educational Status of Tribal Communities of India,* Ministry of Tribal Affairs, Government of India, Delhi, May 2014.

[25] *Ibid*. At 356.

[26] Section 109, CrPC provides for giving security for good behaviour before a Magistrate. The maximum period for which such security can be provided is one year, and there is no provision for imprisonment except on the express warrant of such Magistrate.

[27] JagLAG, *Fourth Update: "The Importance of Being Kumal"* (Jagdalpur, 2013).

members on the December 9, 2010 in the jungles of Madded in Bijapur district. As per the official version, the police were forced to fire in self-defense after the Naxals opened fire, with 236 rounds being used in the ensuing gun-battle. Eventually, the security personnel repelled the attack. While retreating, the Naxals obligingly identified each other by name, crying loudly to each other *"Run Sujatha, Suneeta, Mangesh, Yogesh, Dileep, Chander, Budhram and Kumal."*

Afterwards, when the police were searching the area, they came upon a bullet-ridden body in the forest next to a large quantity of explosives, and other Naxal paraphernalia, and the corpse was identified as that of a Naxalite. Next to the corpse crouched an old man, clutching a bow and some arrows, and he readily confessed that his name was *Kumal* and that he was indeed part of the Naxals who attacked the police.

Kumal was arrested and booked under serious charges of attempt to murder, as well as various provisions under the Arms Act and the *Explosives Act, 1884*. There were no other civilian witnesses, no empty shells were retrieved, and the post-mortem revealed that the deceased had died 24 hours prior to the alleged 'encounter'.

A year in prison passed before a legal aid lawyer was finally appointed for *Kumal*, but even thereafter, no witnesses were presented at the trial until the end of 2012, that is, a full two years after his arrest. Eventually, prosecution witnesses appeared only pursuant to warrants being issued by the Court.

The many absurdities in the case against him, and his increasing infirmity and age were not seen as sufficient grounds for release on bail by either the Sessions court or the High Court. While rejecting his application for bail, the High Court of Chhattisgarh at Bilaspur noted that the accused was "arrested from the spot" of the incident, and stated:

> *"Considering the enormity of the naxal activities going on the area, concerned for the fact that the applicant is named in the FIR, this Court is not inclined to release him on bail. Consequently, the application is rejected."*[28]

Much later, it was discovered that the name of this elderly accused is not *Kawasi Kumal*, but *Kawasi Rajkumar*. The human tragedy of an aging tribal man ending up incarcerated due to a wrong identification is bad enough. What is unconscionable is that his legal aid lawyers pursued the case for more than three years without realising that their client has been wrongly identified. As JagLAG observed, *"could it be that they never bothered to speak to him at all?"*[29]

There are countless such stories, which demonstrate how the criminal justice system has alienated the *Adivasi* people it encounters at multiple levels, leaving them vulnerable to myriad abuses, with little or no remedy. But what does incarceration in a prison in South Bastar really look like? We examine this question below.

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[28] Order dated December 1, 2011, in M.Cr.No. 3696/2011, High Court of Chhattisgarh at Bilaspur.

[15] *Supra*, note 27 at 3.

9.2.2 Prisons in South Bastar

Overcrowding in prisons in Chhattisgarh stands at 150.15 per cent, one of the highest in the country and compares poorly to the national average of 118.5 per cent.[30] Being a tribal area, it is hardly surprising that most prisoners in Bastar jails are STs, although even here disaggregated data of tribal and non-tribal prisoners is not systematically maintained. It is, therefore, a matter of grave concern that in South Bastar, overcrowding has reached even more alarming proportions. JagLAG found that in Jagdalpur Central Jail had an occupancy rate of 227 per cent, while the Dantewada Jail held prisoners four times its capacity, and in the Kanker Jail, occupancy rate stood at a whopping 428 per cent.[31]

Even a superficial glance at the data available demonstrates that this unconscionable overcrowding is a result of disproportionate number of undertrial prisoners. According to information compiled from Right to Information applications,[32] as of December 31, 2012, the ratio of undertrials to convicts in the three main prisons of South Bastar was as follows:

Table 12: Numbers and Ratio of Undertrials and Convicts in Bastar Jails

	Undertrials	Convicts	% Undertrials	% Convicts
Jagdalpur Central Jail	990	627	62%	38%
Kanker District Jail	271	7	97.5%	2.5%
Dantewada District Jail	610	3	99.51%	0.49%

Source: Compiled by JagLAG from Prison Statistics of 2012, NCRB, RTI data obtained from individual jails, and their own investigations as on October 31, 2012.

They also found that there were times when the proportion of convicts in Dantewada Jail reached zero, throwing the very functioning of the jail, which is highly dependent on convict workers, into chaos.

Why is this happening? The organisation made some efforts to examine the underlying reasons for this unusual spurt in incarceration of undertrials. It found, to begin with, that there were a number of other indicators that were completely off the charts.

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[31] JagLAG, *Third Update: "Prison Data: Statistics and Stories"* (Jagdalpur 2013).

[32] The Right to Information Act, 2005 recognises the right of any Indian citizen to require public authorities to provide information regarding their functioning, and the authority concerned is mandated to provide such information, upon payment of a small fee, except in strictly circumscribed situations. A right to information or RTI application refers to an application made under this statute seeking information from a specific authority.

(i) Denial of release under statutory provisions, including bail

While across India, the largest proportion of undertrial prisoners, on an average, spend under one year in prison, in Dantewada and Jagdalpur Jails, the period was found to be much longer. More than half the undertrials, spent one to five years in jail waiting for their trial to complete. The primary reason for this was that the courts were not granting bail to these prisoners and / or were taking longer to dispose of cases of those who are in jail.

The all-India trend, as also in Chhattisgarh is that the number of prisoners released on bail is many times higher than the number of prisoners acquitted in a given year. In contrast, JagLAG found that in South Bastar jails taken as a whole, the proportion of prisoners released on bail is approximately the same as the number acquitted. The trend is completely reversed in Dantewada Jail, where the number of prisoners acquitted far outstrips the number released on bail. In the very rare cases that bail is granted, the accused are not released from prison as they are unable to furnish sureties, even though statutory provisions and numerous court decisions affirm that undertrials can be released on bail on personal bond. Even jail authorities have raised this issue with local courts, requesting alteration of bail conditions but to no avail.

Despite repeated and specific directions by the Supreme Court[33] to release prisoners in strict compliance with Section 436A, CrPC,[34] the actual implementation of this enabling provision demonstrates systemic inertia, or worse. In 2019, out of 330,487 undertrials across India, a total of 1,535 prisoners were identified as being eligible for release on personal bond under Section 436A, CrPC. However, a mere 635 prisoners across the country were actually released under this provision.[35]

When it comes to implementation of Section 436A, CrPC in South Bastar prisons, JagLAG found systemic obstructions. Jail records of prisoners do not contain the most basic information, such as a copy of the charges framed by the Court. Even where charges are found mentioned in the jail records, only the generic provision is mentioned, and the more specific sub-clauses, where quantum of punishment is specified, are missing. Since calculation of half the possible period of imprisonment is impossible when the specific nature of offence itself remains unrecorded in prison records, releasing prisoners in terms of Section 436A, CrPC becomes an impossibility.

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[33] *In Re: Inhuman Conditions in 1382 prisons*, WP (Civil) No. 406 of 2013, Supreme Court of India, pending.

[34] Section 436A, CrPC states that:
"***436A. Maximum period for which an under trial prisoner can be detained:*** *Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:*
Provided *that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:*
Provided further *that no such person shall in any case be detained during the period of investigation inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.*
Explanation *– In computing the period of detention under this section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall be excluded."*

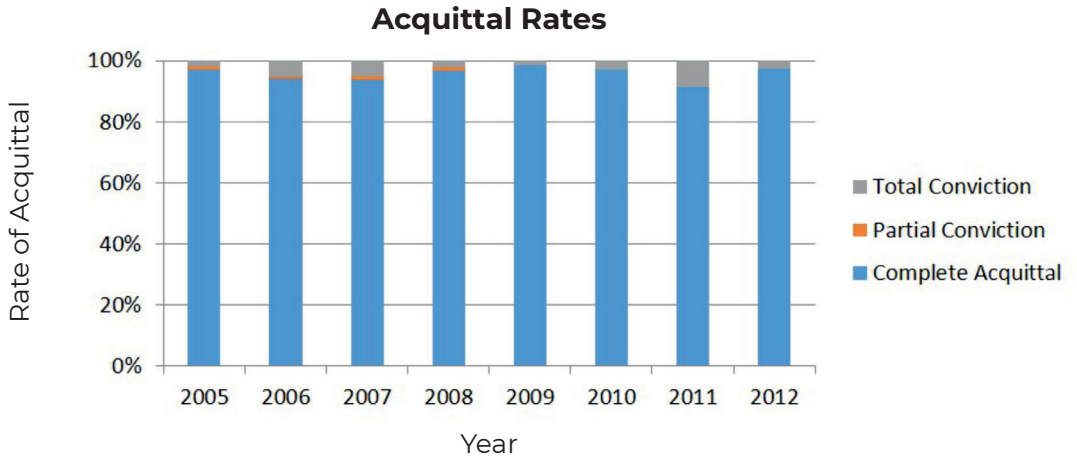
[35] *Supra,* note 7 at 166.

(ii) False arrests and the perversion of presumption of innocence

The legal system is purportedly based upon the principle of innocence until proven guilty. However, in the case of tribal accused in Bastar, the converse appears to be the norm with persons assumed to be guilty until they are finally acquitted by the court. In addition to this, a devise that has been developed and deployed by the law enforcement officials in Bastar is the "many others" phrase. To explicate: in an unusually large number of cases, the FIR is registered against one or more named individuals and "many others". The police then proceeds to arrest more people in the same case at intervals. This not only provides an opportunity to arrest people falsely, knowing they will not be released on bail or discharged since these are 'Naxalite cases', but is also an opportunity to delay the trial proceedings when they appear to be drawing to a close. Therefore, it is not unusual for one or more completely new accused persons to join the proceedings at strategic points in the trial, such as when a key witness has turned hostile, or the prosecutor is clearly unable to establish the charges and the court is at the point of delivering a final verdict. The introduction of new accused means the trial must begin again.[36]

(iii) High rate of acquittal combined with long periods of detention

At the same time, criminal prosecutions in South Bastar courts saw an extraordinarily high rate of acquittals. Combined data from 2005 to 2012 demonstrates a rate of acquittal ranging from 91.5 per cent to 98.7 per cent, with the average rate of acquittal for Bastar being 95.7 per cent.[37] A majority of these acquittals are the result of reasoned judgments where the accused are acquitted due to lack of evidence.



[36] The JagLAG analysed court records from the years 2005 to 2012 in the Dantewada Sessions Court and found that the average number of accused was approximately seven persons per case (6.94 per case). They also found that the numbers were increasing with each year. Therefore, while the number of cases with one to two accused person(s) fell from over 50 per cent to less than 30 per cent seven years later, the number of cases with more than 10 accused had risen in 2012 when compared to 2005 - for more information, see: JagLAG, *Second Update: "Prison Visits: 'Annexure: Disposal of cases 2005-2012'"* (Jagdalpur, 2013). In Bhairamgarh Police Station there have been two cases where there were 96 and 97 accused respectively – see: JagLAG, *First Update* (Jagdalpur, 2013).

[37] JagLAG, *First Update* (Jagdalpur, 2013).

The JagLAG made detailed case studies and examined hundreds of case papers. It found that the justice system, far from acknowledging that persons from *Adivasi* communities require special and specialised assistance, treated them with heightened suspicion and hostility. In case after case, it was found that FIRs were registered by the police on specious and frivolous facts. Little or no investigation was done and sketchy, incomplete chargesheets were filed before the courts. Whether the accused were provided with robust legal representation or not, courts proceeded to frame charges on the mere suggestion of prosecutors that these are 'Naxalite cases', even though no such legal category exists. Trials continued for years due to protracted delays resulting from no-shows by State witnesses such as doctors, policemen, and other official witnesses. Finally, after a serpentine journey through many twists and turns, most cases ended in judgments where the accused were acquitted. It may be remembered that these are primarily young *Adivasi* men in their twenties, who have been held in custody as undertrials for periods disproportionately longer than the national average, and then found to be innocent and acquitted. This is demonstrated by a case study included in the Box below.

Yet neither the police, nor the prosecutors, nor the judiciary find this incongruous. Indeed, a jail official informed lawyers from the JagLAG during a routine jail visit that the tribal prisoners are so happy in jail that they do not want to be released, because they get TVs and fans and don't need to work in the fields.[38]

(iv) Shortage of courts, policemen, vehicles and more

A court visit is precious and important to *Adivasi* prisoners for a variety of reasons. Over and above the necessity of an accused *Adivasi* participating and observing the trial proceedings, a court visit may also be the only opportunity they get to meet their lawyers (often these are legal aid lawyers who are considerably pressed for time), and their families, who often find it difficult to visit the jails. These are also important opportunities to bring to the attention of the court if they are undergoing torture, forced confessions, or other forms of coercion, apart from providing a welcome respite from prison walls.

Given that the majority of prisoners are undertrials and need to be produced in court in ongoing trial proceedings, the overload on the prisons and the overburdening of the courts in Dantewada district go hand-in-hand. The prison authorities and the judicial officers argue that since most of these prisoners are viewed as 'Naxalites', and therefore dangerous, they have to be provided with special security guards and armed police vans for transportation from the prison to the court and back on the date of the hearing. The number of vans and police personnel required is simply not available, and this leads to delays in the trial, which cannot proceed in the absence of the accused. Whether or not this is true, the fact remains that protection of the right of the undertrials to a fair trial, which means a speedy trial in which they are able to participate in a meaningful way, is not being ensured.

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[38] JagLAG, *Second Update: "Prison Visits: 'Welcome to Heaven!' Really?!"* (Jagdalpur, 2013).

THREE YOUNG MEN: THE CASE OF IRPA NARAYAN, MIDIYAM LACHHU AND PUNEM BHIMA

This trajectory of this case study, drawn from periodic Status Updates shared by JagLAG, involves three young men embroiled in a case dating back to 2008. It demonstrates the multiple layers of structural violence perpetrated upon *Adivasi* accused by the criminal justice system.

The FIR, registered in Basaguda Police Station, Bijapur District, reads like countless other FIRs from this conflict-torn region. It claimed that on February 3, 2008, a combined team of Central Reserve Police Force ("**CRPF**") and district police patrolling the Gayatapara jungles came under heavy gunfire from the Naxalites. The police party fired back in self-defence and eventually drove the Naxalites away. Once the firing had ended, a search of the area revealed a young man with bow and arrow, who told them that his name was Irpa Narayan and confessed to participating in the Naxalite attack on the police. He was promptly arrested, and an FIR made out against 'Irpa Narayan and 40-50 unknown Naxalites'. The police narrative was supported by four other testimonies in the chargesheet from different members of the patrolling team, each parroting the exact same story.

Mysteriously, on February 27, 2008, two other men, Midiyam Lachhu and Punem Bhima from Soornar village were also arrested in the same case. These men were not mentioned in the FIR, or the chargesheet, or any of the testimonies - no-one had given any evidence about their involvement with any group, no seizure had been made from them. No material or documentary evidence against them was offered in the entire chargesheet; yet these two, along with Irpa Narayan, were charged with serious crimes of 'rioting and participating in unlawful assembly with the intent to attempt murder of the police party'.

The Long Wait

For six long years, these three men waited for their trial to begin. Till April 2014, not one single witness had been produced in this case.

What caused the delay in the trial? The chargesheets in this case were promptly submitted to the court just within the stipulated 90-day time limit.[39] But the next step – the committal of the case for trial to the court of appropriate jurisdiction, something that usually only takes one hearing by the Magistrate - took an inexplicable 18 months. The charges were framed more than two years after the three men had been arrested.

The trial program proposed by the prosecution named five witnesses, three of whom were part of the police / CRPF team that arrested Narayan, and the remaining two were Investigating Officers of the police station. From April 2010 onwards, more than

[39] Under Section 167(2), CrPC, if the investigating agency fails to complete the probe and submit a chargesheet before the concerned criminal court within 60 days or 90 days, as the case may be, the accused prisoner is entitled to be released on bail. The courts have held that this is an indefeasible right, and no leniency can be shown to the investigative agencies for missing the statutory deadline.

30 opportunities were given to the prosecution to summon these police / CRPF officials stationed in the next district, but till 2014, no one had appeared. No strictures were passed against them during this period. The sheer indifference towards court summons not only belies a complete disregard for the rights of the undertrial, but also highlights the impunity enjoyed by the security forces.

Forgotten

Midiyam Lachu and Punem Bhima, the two men from Soornar, were forgotten by everyone soon after their arrest. The police forgot them – they simply forgot to write about them in the chargesheet, and the two never came to testify. Their state-appointed legal aid lawyer forgot them – he never read through their files, never figured out that the chargesheet contained no evidence against them, never argued in the court that they cannot be charged at all. And their families forgot them – in these six years, Lachu's only surviving family member, his aged mother, once made the arduous ten-hour journey to visit him in court, where she handed over her entire wealth of several thousand rupees to the legal aid lawyer for his defence.[40] The young wife of Punem Bhima, who had a 6-year-old son when Bhima was arrested, never managed to navigate the numerous villages and jungles to visit him in jail.

It was only in January 2014 that it was brought to the court's notice during a bail hearing that the names of these two men had not appeared anywhere in the chargesheet, and there was no evidence against them. Initially, the judge expressed surprise that the trial had progressed for six years without a mention of the two men and started blaming the Public Prosecutor. The Public Prosecutor shot back that it was the Hon'ble Court itself which had framed the charges against the duo without bothering to go through the file. Eventually, the two were granted bail (when, in fact, they should have been discharged), but continued to be in jail thereafter since they did not have the wherewithal to arrange for sureties. Finally, they were released on bail when this was brought to the attention of the Court by lawyers associated with JagLAG.

Irpa Narayan was not forgotten by his family – his young wife, who was pregnant when he was arrested, came to jail regularly and tirelessly pursued his lawyer. On two occasions, the bail application was dismissed because of the 'serious' nature of the crime, and the fact that Narayan was arrested from the site and that too, armed with dangerous weapons (bow and arrows)!

Eventually, all three accused were acquitted. But the questions arising from their long ordeal remain. How does one establish one's innocence if the trial never proceeds; if the witnesses never come? If the crime is "serious", whose responsibility is it to ensure that it gets proved? For how long can a person be denied bail merely citing seriousness of a crime, which the prosecution is not interested in proving?

[40] It is worth noting here that legal-aid lawyers are paid their entire professional fees and expenses by the State and are not supposed to accept any payment or gratification from the clients they represent.

(v) Denial of right to health to prisoners

A general feature of prisons in India is that the health facilities made available to prisoners is mechanistic at best, and more often than not, abysmal. One indicator of prisoners' access to healthcare is the number of inmates per medical staff. In 2019, the all-India average for number of inmates per medical staff stood at 1:243, which, by itself, is quite shocking. In Chhattisgarh the number of prisoners per medical staff was 1:317, and in Jharkhand this number was 1:216,[41] a marked improvement from 1:1,375 just one year before.[42] These averages, however, veil the fact that in many prisons in *Adivasi* areas, the medical facilities fall far short even of these unacceptable numbers. For instance, neither the Dantewada District Jail nor the Jagdalpur District Jail had a full-time doctor.[43] Even though the Jagdalpur Jail is across the street from the District Hospital, there is often a delay of hours, even days, in giving prisoners medical care since armed police guards, which are required to escort prisoners, are often not available.

JagLAG also found a high incidence of deaths of inmates in these prisons, most of which were purportedly of "natural causes". Preliminary investigations reveal that the mandatory inquest by a Judicial Magistrate under Section 176(1A), CrPC[44] was not being conducted. In many cases, even an inquest by the Executive Magistrate was a mere formality.

9.2.3 Lessons from prisons in Bastar

The Bastar division reflects the reality of many *Adivasi* areas in the country; these areas often coincide with either LWE activity or some other form of organised armed struggle against the state. The *Adivasis*, who would like nothing better than to be left alone, find themselves the victims of crossfire, with the judicial system actively participating in their incarceration instead of upholding their constitutional and statutory rights.

The impact of these protracted incarcerations on the lives of *Adivasis* is incalculable. While incarceration itself lacerates the essence of an *Adivasi*, it also means long years

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[41] *Supra*, note 7. See *Table 11.2 (Number of Inmates Per Staff as on December 31, 2019)* at 235. Table 11.2 also notes that total number of prison staff in India was 60,787, and the average number of inmates per prison staff was seven. In Chhattisgarh and Jharkhand, the average number of inmates per prison staff was 10 and 19 respectively.

[42] *Prison Statistics India 2018,* NCRB, Ministry of Home Affairs, Government of India; available at: *https://ncrb.gov.in/en/prison-statistics-india-2018-0. See Table 11.2 (Number of Inmates Per Staff as on December 31, 2018) at 227*.

[43] *Supra*, note 38.

[44] Section 176, CrPC states that:-
"***176. Inquiry by Magistrate into cause of death:***
(1) When the case is of the nature referred to in clause (i) or clause (ii) of sub-section (3) of section 174, the nearest Magistrate empowered to hold inquests shall, and in any other case mentioned in sub-section (1) of section 174, any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence.
(1A) Where,--
(a) any person dies or disappears, or
(b) rape is alleged to have been committed on any woman,
while such person or woman is in the custody of the police or in any other custody authorised by the Magistrate or the Court, under this Code in addition to the inquiry or investigation held by the police, an inquiry shall be held by the Judicial Magistrate or the Metropolitan Magistrate, as the case may be, within whose local jurisdiction the offences has been committed."

spent away from their families, their homes, their lands, and their forests, effectively depriving them of a sense of self. Long distances between their homes and the prisons means their families are unable to visit them regularly, if at all, and sometimes the families do not even know where they are. When they are finally released after many years in prison, they return to villages and homes, which have been devastated by the financial and psychological burden of this separation. And there are no reparations for what has been lost.

9.3 Case Study of Undertrial Prisoners in Jharkhand

As mentioned earlier, the State of Jharkhand was carved out of the undivided State of Bihar in 2000, after a lengthy peoples' movement seeking a separate State for the *Adivasis* in the region. A significant geographical area of the State falls under the Fifth Schedule of the Constitution, and traditional mechanisms for dispute resolution, including in the sphere of criminal justice, continue to hold sway (*see Chapter 3*). Like Chhattisgarh, Jharkhand also holds enormous repositories of mineral reserves, which, to a large extent, coincide with *Adivasi* lands and forest areas. It is in these areas that the historical processes of oppression, both economic and social, against *Adivasi* populations continue to play out in modern configurations.

Unsurprisingly, therefore, these very regions are also the theatre where armed LWE groups, and equally determined police and para-military forces, have been engaged in a long drawn territorial struggle for domination over these lands. The violations of numerous civil and political rights of so-called 'supporters' of the LWE groups are well documented, needing no reiteration.

9.3.1 Prison Statistics Pertaining to Jharkhand

In the year 2019, Jharkhand had a total of 30 jails in 24 districts, with a total prison capacity of 16,795 persons. However, the total occupancy was at 18,654, which is 111.1 per cent of the actual prison capacity as on December 31, 2019.[45] These prisons are poorly staffed, with only one prison staff for 19 jail-inmates compared to one prison staff attending to seven prisoners as per the national level data.[46] There was only one open jail in the State, where the inmate population was well below capacity at 39 per cent.[47] The proportion of convicts to total number of prisoners stood at 31.5 per cent while the proportion of undertrials was 68.4 per cent.[48] The percentage of undertrial tribal prisoners according to social groups stands at 26 per cent.[49] The percentage of convicted prisoners also shows a similar pattern as 33.8 per cent are STs.[50]

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[45] *Supra*, note 7. See *Table 1.1 (Types of Jails in the Country as on December 31, 2019)* and *Table 1.2 (Capacity, Inmate Population and Occupancy Rate of Jails as on December 31, 2019)* at 19-20.

[46] *Supra*, note 7. See *Table 11.2 (Number of Inmates Per Staff as on December 31, 2019)* at 235.

[47] *Supra*, note 7. See *Table 1.9 (Capacity, Inmates Population and Occupancy Rate of Open Jails as on December 31, 2019)* at 29.

[48] *Supra*, note 7. See *Table 2.2 (Percentage Share of Different Types of Prison Inmates as on December 31, 2019)* at 47.

[49] Supra, note 7. See *Table 2.11D (Caste of Undertrial Prisoners as on December 31, 2019)* at 68. There are 3,336 ST undertrial prisoners as against a total of 12,759 undertrial prisoners in Jharkhand.

[50] *Supra*, note 7. See *Table 2.10D (Caste of Convicts as on December 31, 2019)* at 64. There are 1,985 ST convict prisoners, as against a total of 5,871 convict prisoners in Jharkhand.

9.3.2 *Adivasi* prisoners in Jharkhand prisons

The pathetic conditions in Jharkhand prisons, with regard to overcrowding, enormous vacancies in posts, lack of medical and other facilities, etc. were brought to the attention of the Jharkhand High Court through public interest litigations, which were treated as continuing mandamus by a clearly mortified judiciary.[51] Numerous orders were passed, setting up Court Committees to conduct jail visits and report to the court, directing investigation into mismanagement, and so on.

These were, however, generalised petitions, which did not focus on the key issue - that a disproportionate number of prisoners were *Adivasis*, who also happened to spend a disproportionate period incarcerated, being denied release on bail pending trial.

Meanwhile, numerous news reports were emerging, which asserted that there were thousands of *Adivasis* imprisoned in Jharkhand jails, who had been arrested as 'extremists', and charged with different kinds of offences under various laws. There appeared to be considerable anecdotal evidence that the police were actually picking up villagers at random, on the grounds that they were either (i) helpers of Maoists, or (ii) persons possessing 'Naxalite literature'. This, despite judicial precedent that vague allegations of being a 'Naxalite supporter' (without additional allegations of specific acts) or possessing 'Naxalite literature' are not criminal offences under the law.[52]

9.3.3 Study of Undertrials in Jharkhand by Bagaicha

Between 2014 and 2015, a group of social activists and lawyers, under the umbrella of a non-governmental organisation called 'Bagaicha', conducted an investigation into 102 criminal cases against undertrials who were charged with a variety of offences for being so-called LWE members and supporters. The study brought to light some alarming results ("**Bagaicha Report**").[53] It found that the criminal justice system in general, and the prison system in particular, was being used to incarcerate persons accused of being 'Naxalites' for long periods of time, in criminal cases which eventually ended in acquittals or turned out to be false.

Through their investigations, it was found that the kind of offences which such persons were charged involved very specific types of crimes (*see Box below*).

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[51] See, for instance, *Sabhapati Prasad Kushwaha* v. *State of Jharkhand and Others* WP (PIL) No. 3114 of 2012; *Court on its Own Motion* v. *State of Jharkhand* WP (PIL) No. 2774 of 2013; *Court on its Own Motion* v. *State of Jharkhand* WP (PIL) No. 6125 of 2017, all currently pending before the Jharkhand High Court.

[52] See, for instance, *Joseph Kandula and Another* v. *State of Jharkhand,* judgment dated January 16, 2020 in Criminal Rev. No. 1422 of 2019, Jharkhand High Court. In a recent decision, a criminal court in Karnataka acquitted two persons accused of being Naxalites. One of the key pieces of evidence against them was a book found in their possession, on the revolutionary leader Bhagat Singh. *See State of Karnataka* v. *Vittala Malekudiya*, judgment dated October 21, 2021, in Sessions Case No. 125/2017.

[53] *Deprived of rights over natural resources, impoverished Adivasis get prison: A Study of Undertrials in Jharkhand* (Bagaicha Research Team, Ranchi, 2015); available at: *https://cjp.org.in/wp-content/uploads/2021/07/Report-on-the-study-of-Undertrials.pdf.*

TYPICAL CHARGES LEVELED AGAINST PERSONS ACCUSED OF BEING NAXALITES / NAXALITE-HELPERS

The following list of statutory provisions has been collated from the Bagaicha Report and the writ petition filed before the Jharkhand High Court (WP (PIL) No. 4212 of 2017):

- *Sections 121, 121A, 122, 123, 124A, and 153B, IPC:* Offences relating to 'waging war against the state', 'sedition' and making 'imputations prejudicial to national integration'. Previous sanction of the Central or State government is required before a court can take cognisance of such an offence (Section 196, CrPC).
- *Sections 147, 148 and 149, IPC:* Offences related to rioting and unlawful assembly.
- *Sections 302, 307, 323, 324, 325, 326, 332, 333 and 353, IPC:* Murder, attempted murder, causing hurt or grievous injury, causing injury to a public servant.
- *Sections 431 and 435, IPC:* Causing damage to roads, bridges etc. through use of explosives or otherwise.
- *Sections 17(1), 17(2), Criminal Law Amendment Act, 1908*[54]*:* Prohibition of membership of an unlawful association, or taking part in meetings, contributing or soliciting contributions or assisting the operations of these associations.
- *Sections 10, 13, 16, 18, 20, 38 and 39, UAPA:* The UAPA is the generic law under which all manner of unlawful activities, unlawful associations, and more recently 'unlawful persons', are dealt with. Previous sanction of the Central or State government, as the case may be, is required before cognisance can be taken (Section 45, UAPA).
- *Sections 25(1A), 25(1B)(a), 27 and 35, Arms Act:* Manufacture, sale, repair, transfer, transportation etc. of any kind of prohibited arms and ammunition. Previous sanction of the District Magistrate is required for prosecution of a person.
- *Sections 3, 4 and 5, Explosive Substances Act, 1908:* Causing explosion which endangers or is likely to endanger human life or making and keeping such explosives. Before a Court can proceed to the trial of such an offence, the prior consent of the District Magistrate is necessary (Section 7, Explosive Substances Act).

It is important to note that most of these offences mandate prior sanction from the government / prior consent of the District Magistrate before a court of law can take cognisance. These provisions were probably incorporated in the law to ensure a certain degree of protection of ordinary citizens against state abuse of power. However, the

[54] This colonial legislation describes itself in its Long Title as *"An Act to provide for the more speedy trial of certain offences, and for the prohibition of associations dangerous to the public peace."* It empowers the State government to declare unlawful any association which, in its opinion, interferes with the administration of law or with the maintenance of law and order, or constitutes a danger to the public peace (Section 16). Section 17 thereunder states:
"***17. Penalties:*** *(1) Whoever is a member of an unlawful association, or takes part in meetings of any such association, or contributes or receives or solicits any contribution for the purpose of any such association, or in any way assists the operations of any such association, shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both. (2) Whoever manages or assists in the management of an unlawful association, or promotes, or assists in promoting a meeting of any such association, or of any members thereof as such members, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both."*

researchers were shocked to find that the state authorities inordinately delayed taking any decision on these requests for sanction. As a result, these so-called protective provisions began to be used to *delay* proceedings for years on end, while the accused remained in prison. Given the serious nature of the charges, the courts were unwilling to release the prisoners on bail, and since the mandatory sanction for prosecution was not obtained, charges could not be framed and the trial could not commence. The accused, meanwhile, remained for years in an inchoate state where he was neither an 'undertrial' nor free.

A disproportionate number of such undertrials were found to be *Adivasis* and other marginalised groups. To quote:

> *This study discloses several undisclosed, striking realities about alleged "Naxalite" undertrials in Jharkhand. Disproportionately large numbers of Adivasis, Dalit and other backward castes (generically referred to as Adivasi-Moolvasis) have been trapped in several false cases especially when they try to assert their constitutional and human rights that are often violated by those who consider themselves "upper" castes/ classes and the state system that serves the interests of those who follow the highly manipulated and prejudiced logic of "uppers" versus "lowers" in Indian society."*[55]

The study found deliberate misuse of the criminal justice procedures to repress alleged 'Naxalite' undertrial detainees inside Jharkhand jails, and listed some of the findings in this regard:

> *"(1) instance of blatant torture while in custody, in gross violation of the rights of prisoners,*
>
> *(2) administrative procedures that amount to blocking and inhibiting pre-trial and trial proceedings while under detention,*
>
> *(3) serial foisting of cases/re-arrests,*
>
> *(4) exceedingly faked-up cases that do not deserve cognizance of even arrest, not to speak of case committal,*
>
> *(5) prejudiced denial of bails,*
>
> *(6) under-trial detention amounting to unwarranted conviction,*
>
> *(7) large proportion of acquittals indicates gross misuse of the criminal justice system, and*
>
> *(8) convictions by the lower courts (whether dismissed by the higher courts or not) that reflect upon the sordid state of adjudication."*[56]

Of the 102 accused included in the study, 69 per cent were STs, whose main occupation was agriculture (63 per cent) and casual labour (17 per cent), with a whopping 59 per cent earning Rs. 3,000 per month (approximately USD 40). Interestingly, 19 of them were democratically elected representatives of *Panchayati Raj* Institutions ("**PRIs**"). This was a startling finding, given that these are areas governed by the *Panchayats (Extension to Scheduled Areas) Act, 1996* ("**PESA**") and a host of other protective legislations, which place the traditional and elected representatives of the village community at the centre of governance.

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[55] *Supra*, note 53 at 2.

[56] *Supra*, note 53 at 3.

The study also found strong indications of fabrication of cases by the police, quite apart from the numerous narratives emerging through interviews with the accused, their families and lawyers and material obtained through RTI applications. A significant majority of the respondents (57 per cent) were arrested from their homes, and a large proportion of the rest were arrested during travel or while in town shopping (30 per cent). A smaller number said they surrendered voluntarily (8 per cent) or came to the police station when summoned (5 per cent). However, an overwhelming majority of the chargesheets submitted by the police aver that these arrests were made from 'deep within the forests'. This fabrication is repeated over and over again, in an unsubtle attempt to link the arrestees to the Naxalites.

After examining available materials, and speaking to the respondents, their family members and co-villagers, the Bagaicha Report arrived at the conclusion that 97 per cent of the respondents had not committed the crimes they were accused of.

Responses were received from 12 out of the 26 jails in Jharkhand regarding the prisoners who were being held as undertrials for a variety of so-called 'Maoist' offences. Out of a total of 682 prisoners in jail undertrial for these offences, 250 undertrials were tribal, 101 undertrials were SCs, and 295 belonged to Other Backward Classes.[57]

9.3.4 Writ petition filed in the Jharkhand High Court

After the release of the report, the organisation and their lawyers attempted to address the problems identified by them through already existing legal aid structures, such as the Jharkhand Legal Services Authority ("**JHALSA**"). Their efforts were rebuffed on a variety of grounds, including that the information was 'incomplete'. They redoubled their efforts to obtain more information from the prisons, as well as from family members, defence lawyers practicing a variety of trials courts, and directly from the undertrials. Collating all this information, a detailed writ petition was filed in 2017 focusing on the incarceration of *Adivasi* undertrials in Jharkhand prisons under the guise of their so-called involvement with 'Maoists'. At the time of filing the writ petition, the number of prisoners implicated in such cases across the state of Jharkhand was estimated at 500. One of the prisons, Chaibasa District Jail in West Singhbhum, provided a detailed response relating to 108 prisoners. This response provided granular information regarding why there were such enormous delays in these cases, and also provided an insight into the different ways in which the legal system is stacked against the *Adivasi* accused, thus ensuring long periods of incarceration (*see Box below*).

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[57] *Supra*, note 53 at 38. The report notes that 14 jails sent no reply to the RTI applications, and even the replies sent were incomplete. Accordingly, a statutory appeal was filed before the Inspector General of Prisons, but no action was taken. Even more importantly, three jails in Kolhan division (Chaibasa, Jamshedpur and Ghatshila) which are in Jharkhand's mineral corridor gave no response to the RTI applications. The report notes that this failure is crucial since it is a predominantly *Adivasi* region with abundant forest and mineral resources, and falls under "red-corridor," from where a significantly huge number of *Adivasis* have been arrested.

ANALYSIS IN BAGAICHA REPORT OF INFORMATION RELATING TO 108 CRIMINAL CASES RECEIVED FROM CHAIBASA JAIL

On February 28, 2019, a total of **72 prisoners** were identified in the categories described in the Box on *Typical Crimes* above, against whom **108 criminal cases** across six police stations in the district were pending in various courts (at the Sessions Judge and Judicial Magistrate level).

- Disposal was held up in **101 of the above 108 cases** due to some procedural delay. Of these, 58 cases were at the trial stage and had been pending for three to ten years. The causes for delay at the trial stage were found to be as follows:
  - Undue leniency shown by judges in granting adjournments at the request of public prosecutors or when official witnesses failed to turn up, sometimes for multiple hearings. On a few occasions, the courts had issued warrants against the witnesses who failed to turn up, but there was no follow up even if the witnesses continued to fail to appear.
  - Where multiple accused were being tried at the same time in a particular case, one of the accused would be shifted to another jail for a different case pending against him, after which he would not be produced in court, thus holding up the trial for all the co-accused.
  - Sometimes, transfers from one jail to another were effected simply for the convenience of the jail administration, and not to appear in another pending case. In certain high-profile cases, such transfers were carried out with the objective of delaying the trial.
- Disposal of **25 of the 108 cases** was found to be stuck at the stage of framing of chargesheet, not just for a few weeks or months, but for as long as three to four years. Common reasons for this delay were:
  - Co-accused have either turned defaulter or absconded. In such situations, the courts failed to exercise their power to separate the trial of the absent accused person from those who are present (under Section 299 CrPC).
  - In cases where the accused has not been arrested at all and could not be located by the police, the court insisted that the proceeding would not progress until the co-accused secured his arrest/ surrender, tantamount to holding them hostage.
  - Sanction for prosecution / permission of Executive Magistrate not obtained by police, sometimes for years on end, and failure of the Judicial Magistrate to exercise his powers to sever such alleged offences from the chargesheet and proceed to frame charges and commit the case for trial.
- After such prolonged pre-trial and trial proceedings, even after the accused were acquitted, they were often unable to secure release, as on the eve of their release, or sometimes at the gate of the prison itself, new cases would be foisted upon them. These could be new cases altogether, or pending cases in which such person was newly incriminated.

The analysis in the Box above, along with a plethora of material and documentation in support of these averments, was submitted before the Court, including case-by-case information on each of the 108 cases analysed from Chaibasa jail. The petitioners argued:

> *"That the petitioners beg to submit that the deprived and ignorant members of the indigenous/downtrodden communities from the scheduled tribes, scheduled castes and other backward classes are actually a specific deprived category of people who need to be cared for and served with special sensitivity. They are quite unaware of, and unaccustomed to, the machinations of the state and the functions of the judiciary, which others in many other parts of the country may be relatively aware of and accustomed to. The said communities are also severely lacking in the economic resources necessary to engage expensive lawyers, or even to make full payment of the fees sought by the lawyers who they may have engaged. The Constitution of India also recognizes their special status, as under Schedule V. Commensurate extra attention would, therefore, have to be paid to these communities not only by the state while invoking the provisions of the criminal law against them, and but also by the judiciary in Jharkhand while implementing and complying to the Code of Criminal Procedure, and the various practices in and around the courts at least as long as the members of these communities remain in judicial custody."*[58]

The writ petition also described how incarceration of *Adivasi* and other marginalised groups had a cascading effect upon their families, their economic stability, their social security, and generally caused immense pain and sorrow, sometimes with devastating results. Far too often, family members located in remote forested villages were simply unable to make the journey to visit their loved ones in jail. Those few who managed to make this journey had a different nightmare in store, described below:

> *"That the practices in the jails of Jharkhand were so inhuman that the detenues did not get the opportunity to meet their family members and friends in any human or decent manner. Interviews, whenever allowed, were held in worse circumstances than if one may be visiting a zoo meant for caged animals. The detenues to be interviewed were all kept behind a thick mesh of wire and steel, often in darkness, at a great distance, and dozens of them would have to pore out through that mesh to see their loved ones and out-shout one another to be heard. Private communication through letters, and confidentiality, privacy, comfort and dignity while talking to one's legal advisors were completely ruled out."*[59]

Holding the trial courts squarely responsible for this shocking situation, the writ petition sought a series of directions from the High Court, including release of the prisoners on interim bail, on personal bonds, pending the completion of their trials. They also sought the constitution of a Commission of Enquiry to conduct a fact-finding into the situation in all the prisons in Jharkhand, based upon the findings drawn from Chaibasa.

The High Court was quick to issue notices to the State government and seek its detailed response on affidavit, also drawing attention of the government's lawyers to specific

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[58] *Stan Swamy and Another* v. *State of Jharkhand and Others*, WP (Civil) No. 4212 of 2017, High Court of Jharkhand at Ranchi, pending, at para 41.

[59] *Ibid.* At para 46.

directions on prisoners' rights issued by the Supreme Court. The response affidavits filed by the government, however, have been skeletal and devoid of information or concern, and as judges have come and gone, there has been a lull in the proceedings.

No small part has been played by the concerted efforts by the government, this time the Central government through the National Investigation Agency ("**NIA**"), to implicate the lead petitioner in the case, an 84-year-old Jesuit priest, in a conspiracy case commonly known as the '*Bhima Koregaon* case'. Between 2018 and August 2020,[60] Stanislaus Lourduswamy (or *"Father Stan"* as he was commonly known) was interrogated several times, and his minimalist dwelling subjected to raids where his computer and other frugal electronic items were seized.[61] On October 8, 2020, he was arrested from his home near Ranchi and transported to a prison in Mumbai, Maharashtra, despite pleas from civil society not to endanger his life by taking him into custody while India was in the grip of the corona virus pandemic.

On July 5, 2021, even as his lawyers argued yet another plea to release him on bail due to his rapidly failing health, Father Stan breathed his last, becoming the oldest political prisoner in India to die in judicial custody.[62]

What will happen to these writ proceedings before the Jharkhand High Court, and the prisoners on whose behalf relief was sought, when the lead petitioner himself died an excruciating and untimely death in another prison on the other side of the country, is anybody's guess.

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[60] Rupesh Kumar Singh, "NIA Interrogates Father Stan Swamy in Bhima Koregaon Case", *Gauri Lankesh News*, August 7, 2020; available at: *www.gaurilankeshnews.com.*

[61] Shoumojit Banerjee, "Bhima Koregaon case: Pune police raid activist Fr. Stan Swamy's Ranchi home", *The Hindu*, December 12, 2019; available at: *https://www.thehindu.com/news/national/bhima-koregaon-case-pune-police-raid-activist-stan-swamys-ranchi-house-for-second-time/article27840185.ece.* See also, Sneha Philip and Smarinita Shetty, "'My life hangs by a thread': Activist Stan Swamy on Bhima Koregaon, Adivasi resistance in Jharkhand", *Scroll.in*, September 28, 2019; available at: *https://scroll.in/article/937926/my-life-hangs-by-a-thread-activist-stan-swamy-on-bhima-koregaon-adivasi-resistance-in-jharkhand.*

[62] Father Stan Swamy was the lead petitioner in the writ proceedings before the Jharkhand High Court. For the last nine months of his life, he was incarcerated in Mumbai, Maharashtra. Already suffering from a host of health issues, including advanced Parkinson's disease, the incarceration caused an alarmingly rapid decline in his health. His lawyers and well-wishers had to struggle for several months before the investigating agency finally relented and allowed him the use of a straw and sipper to drink water, and access to warm clothing in winter. Several petitions to release him on bail failed, as he was charged under the infamous UAPA, where bail criteria are so stringent, even constitutional courts find it difficult to grant bail (for a detailed discussion on the impact of security laws such as UAPA on *Adivasis* and their struggles, see *Chapter 7: Security Laws and Impunity*). Eventually he filed a petition seeking bail on medical grounds and appeared before the Mumbai High Court via video-conference a few days before his death, asking for permission to return to Bagaicha so that he can 'die among his own'. This wish could not be granted in time.

For a detailed account of Father Stan's last days, as chronicled by one of his cellmates and co-accused, see Arun Ferriera, "How the system broke Stan Swamy: A cell mate recalls the activist's last days in prison", *Scroll.in*, August 12, 2021; available at: *https://scroll.in/article/1002315/how-the-system-broke-stan-swamy-a-cell-mate-recalls-the-activists-last-days-in-prison.*

9.4 In conclusion

Legal services authorities, established under the *Legal Services Authorities Act, 1989*, exist across the country. They are very much present in the beleaguered regions examined in this chapter, that is, South Bastar in Chhattisgarh and Chaibasa in Jharkhand. JagLAG found that legal aid lawyers were hard pressed to meet the challenges presented by the overwhelming structural problems described above without specialised training, support and innovative interventions. Often, they pay little more than routine attention to these cases, missing critical opportunities to ensure the release of their clients from prison. In response to the surge in LWE in the area, jail authorities started the practice of photographing every person who visits these prisons, in purported interest of security. This had a chilling effect on lawyers, as no legal professional wants to be labeled a 'Naxalite supporter' for regularly visiting jails in the area. Therefore, while legal aid programmes are conducted inside the jails at intervals to which the lawyers are invited as 'resource persons', rarely do lawyers venture to meet their clients in the prison premises. In Jharkhand also, when the JHALSA was presented with the detailed findings of the study conducted by Bagaicha, it expressed its inability to take the issue forward, perhaps due to similar apprehensions.

The problem of overcrowding of prisons and delay in disposal of cases cannot be solved by adopting a mechanistic approach to the problem. Simply setting up more courts, or introducing more police personnel, or building bigger jails, or even providing more lawyers, without actually addressing the structural biases within the criminal justice system against the *Adivasi* people for being 'different', is an exercise in futility. This bias came into public attention in 2014, when the Buch Committee, established by the Government of Chhattisgarh to identify *Adivasi* undertrials for early release, submitted an interim report. In this report, the Buch Committee, after reviewing 235 cases (out of a total of 960 cases referred to it) recommended early release of 175 *Adivasi* prisoners. Based upon its recommendations, the State prosecutors submitted petitions before the concerned trial courts. Shockingly, despite pleas made by the prosecutors in writing as well as during oral arguments, many judicial officers refused to release these prisoners.[63]

In March 2019, the Chhattisgarh government set up another Committee, this time headed by a retired Judge of the Supreme Court of India, Justice (retired) A K Patnaik, to examine all cases registered against *Adivasis* under the IPC, NSA, UAPA and other central laws in the Maoist affected districts of the State.[64] At the time, it was estimated that such cases involved over 23,000 tribals, of whom over 16,475 tribals were accused by the police in a range of cases and another 6,743 were being held as undertrials.[65]

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[63] *Supra*, note 20, at 238. Grover describes the case of a 68 year-old *Adivasi* undertrial, *Bhogami Lakku*, on whose behalf a petition for release was submitted after numerous delays, based upon the recommendations of the Buch Committee. The Additional Sessions Judge who was trying the case refused to release him on bail. Before a revision or appeal could be filed, *Bhogami Lakku* died in Dantewada jail.

[64] The Patnaik Committee is examining cases from Kanker, Kondagaon, Narayanpur, Bastar, Sukma, Dantewada, Bijapur and Rajnandgaon districts of Chhattisgarh.

[65] Seema Chishti, "Panel set to review cases against 23,000 tribals in Chhattisgarh Naxal belt", *The Indian Express*, October 16, 2019; available at: *https://indianexpress.com/article/india/panel-set-to-review-cases-against-23000-tribals-in-chhattisgarh-naxal-belt-6070978/*.

According to an official statement, the Patnaik Committee recommended withdrawal of prosecution[66] in 627 cases against *Adivasis*, of which 594 cases were actually withdrawn from the courts as of May 31, 2021, providing relief to 726 persons. In some cases, plea bargaining[67] has been recommended.[68] Whether the recommendations of this Committee will receive the same frosty response from the judiciary as did the Buch Committee, remains to be seen.

The ineluctable conclusion is that when it comes to ensuring substantive equality and non-discrimination for tribal peoples in their interaction with the criminal justice system, there has been a colossal failure of the state. This includes the government machinery in general, and the law enforcement machinery and the judiciary in particular. Innumerable provisions of binding international covenants mandate the right to fair trial and a speedy trial to every person as a basic human right. Even more legion are the judgments delivered by constitutional courts delineating the rights of prisoners to free legal aid, health, and so on.[69] Finally, there are the covenants which lay down the international standards relating to the rights of indigenous peoples, such as the UNDRIP, which recognises the right of indigenous peoples to protect their distinctive juridical systems[70] as also mandate the need to establish redressal mechanisms.[71] UN Convention 169 requires that measures be taken to ensure that the individuals can understand the legal proceedings as well as be understood, and that the justice system is tailored to make concession for the customs of the people and provide punishments alternative to imprisonment.[72] As the two case studies examined

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[66] Section 321, CrPC.

[67] Section 265A, CrPC.

[68] "A total of 594 cases against tribals withdrawn in naxal-hit areas in Chhattisgarh", *The Hindu*, June 4, 2021; available at: *https://www.thehindu.com/news/national/other-states/a-total-of-594-cases-against-tribals-withdrawn-in-naxal-hit-areas-in-chhattisgarh/article34728429.ece.*

See also Ritesh Mishra, "Chhattisgarh govt panel recommends withdrawal of cases against 91 tribals in Maoist belt", *Hindustan Times,* Raipur Edition, March 9, 2020*;* available at: *https://www.hindustantimes.com/india-news/chhattisgarh-govt-panel-recommends-withdrawal-of-cases-against-91-tribals-in-maoist-belt/story-wjqQmbYghCchirQdG1QJUL.html.*

[69] See, for instance, Aparna Chandra, Mrinal Satish, Ritu Kumar and Suma Sebastian (eds), *Prisoners' Rights*, Vol. 1 and 2 (Human Rights Law Network, New Delhi, 2011). These volumes compile hundreds of judgments passed by the Supreme Court and various High Courts in the country protecting the rights of prisoners. Available at: *https://hrln.org/publication/prisoners-rights-4th-edition-vol-i.*

[70] Article 34, UNDRIP states:
"Indigenous peoples have the right to promote, develop and maintain their institutional struc¬tures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cas¬es where they exist, ***juridical systems or customs,*** *in accordance with international human rights standards."* (emphasis added).
Available at: *https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.*

[71] Article 11, UNDRIP states:
"1. Indigenous peoples have the right to practise and revitalize their cultural traditions and cus¬toms. This includes the right to maintain, pro¬tect and develop the past, present and future manifestations of their cultures, such as ar-chaeological and historical sites, artefacts, de¬signs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide ***redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples****, with respect to their cultural, intellec¬tual, religious and spiritual property taken with¬out their free, prior and informed consent or in violation of their laws, traditions and customs."* (emphasis added).
Available at: *https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.*

[72] Article 10 of ILO 169 states:
"1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.
2. ***Preference shall be given to methods of punishment other than confinement in prison****."* (emphasis added)
Available at: *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.*

in this chapter demonstrate, the criminal justice system not only fails to meet any of these standards when it comes to *Adivasis*, but actively and perversely violates them at every turn.

Why is this happening? In her seminal study relating to South Bastar, Advocate Vrinda Grover categorically links these indicators to the extractive economic development policies of the government, observing:

> *"In south Chhattisgarh, three graphs can be overlaid that show a simultaneous and similar trajectory: the number of MoUs (Memoranda of Understanding) endorsed for extraction and acquisition; the number of CAPF and other security forces posted in the area: and the Adivasi undertrial population."*[73]

Grover describes how *Adivasis* who have had the courage to stand up to the Naxalites while refusing to be co-opted in the machinations of the state apparatus, are charged with multiple false cases, arrested, tortured, and brutalised within an inch of their lives.[74] When none of these strategies succeed in breaking the spirit of the *Adivasis* in their struggle to protect their lands and way of life, the state incarcerates the lawyers who have chosen to stand by them and support their challenge to state brutality and impunity in court.[75]

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[73] *Supra*, note 20 at 214.

[74] *Supra*, note 20. *See Box A.2* (The Custodial Torture of Soni Sori) at 270, and *Box A.3* (Lingaram Kodopi's Case) at 277.

[75] Chitrangada Chaudhury, "The Sudha Bharadwaj the Govt Doesn't Want You To Know", *Article 14*, August 28, 2020; available at: *https://www.article-14.com/post/the-sudha-bharadwaj-the-govt-doesn-t-want-you-to-know.*

A woman looking at a mining field at Goa 1999

Photo: Mongabay India

Chapter 10

ADIVASIS AND PROTECTIVE LEGISLATIONS: INTERFACE WITH THE CRIMINAL JUSTICE SYSTEM AS COMPLAINANT

10.1 Background

Several legislations, both at the national and State level, exist to protect the lands and resources of *Adivasi* communities. Almost without exception, these legislations not only proscribe certain conduct, but also create criminal offences where such laws are violated. The purpose of ascribing criminality to certain acts of illegality is to send out a clear message from the legislature that certain forms of illegal behaviour against *Adivasis* will not be tolerated. For example, legislations which prohibit the transfer of *Adivasi* lands to non-*Adivasis*, provide not only for restoration of such illegally transferred lands to the original *Adivasi* owner, but also create a criminal offence for which the transferee faces prosecution and, if convicted, an imprisonment term.

Under this chapter, we will examine some of these legal arrangements through a critical lens, in order to determine if the desired objective is being met. This includes the regime of laws which prohibit / regulate the transfer of *Adivasi* lands to non-*Adivasis*, the labour law regime protecting construction and migrant workers as well as prohibiting human trafficking, and the law criminalising a variety of atrocities against *Dalits* and *Adivasis*. Finally, we examine how *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* ("**FRA**") has brought a glimmer of hope in an otherwise bleak house.

10.2. Prevention of Land Alienation and Restoration of Lands

While the nature of livelihood relationships with land vary across tribal peoples and regions in the country, a common thread that binds *Adivasis* is the close social, cultural and economic connect with land. According to the 59th round of National Sample Survey Office's data on percentage share of Household Ownership Holdings ("**HOH**") across different social groups, the percentage share of HOH among Scheduled Tribes ("**STs**") is 0.708 hectare, compared to an all-India average of 0.563 hectare. This trend is similar for rural households as well as urban households.[1] This data relates to privately-owned lands. If we were to examine the use by *Adivasi* communities of forest lands, commons, and other community-owned lands, the dependence would be significantly higher. It is also well documented that with the influx of non-tribal communities in tribal areas, the depletion in land holdings under tribal people's control has been rapid.[2]

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[1] See *Report of the High-Level Committee on Socio-Economic, Health and Educational Status of Tribal Communities in India* (also known as the "*Xaxa Committee Report*"), Ministry of Tribal Affairs, Government of India, at 98.

[2] Dr. B D Sharma, *Twenty Ninth Report of the Commissioner for Scheduled Castes and Scheduled Tribes*, published in 1990, in a painfully honest manner, details the failure of the law and the legal system to protect *Adivasis* from the most heinous rights violations at multiple levels.

As discussed elsewhere in this report, Paragraph 5 of the Fifth Schedule to the Constitution of India requires that transfer of lands from *Adivasis* to non-*Adivasis* must be regulated, and where required, completely prohibited. In compliance with this constitutional mandate, most States have enacted legislations restricting / prohibiting the transfer of land from *Adivasis* to non-*Adivasis* in Scheduled Areas, and also in non-Scheduled Areas in certain cases. Most of these legislations, apart from proscribing transfer of land from *Adivasis* to non-*Adivasis*, also define violation of this proscription as a criminal offence. For example, the *Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulations, 1956* ("**OSATIP**") states that transfer of immovable property by a tribal to a non-tribal shall be null and void (Section 3) and also states that any person found to be in possession of such land, or having transferred such land without requisite permission, shall be punishable with rigorous imprisonment which may extend upto two years, or a fine upto Rs. 5,000, or both.

Unfortunately, these land alienation laws have not been effective in preventing the expropriation of *Adivasi* lands. A primary reason is that these legislations rely heavily upon their activation by the affected parties, namely the *Adivasis*. Little or no provision is made for proactive initiatives by the State or the *Panchayati Raj* institutions. Given that the justice system is far from a comfort zone for indigenous peoples, the number of cases that are brought to litigation are a mere tip of the iceberg.

According to the Ministry of Rural Development Annual Report 2007-2008,[3] the status of land alienation cases and restoration (in the 12 States from which information was received) at the time was as follows:

- 5.06 lakh cases of tribal land alienation registered, covering 9.02 lakh acres of land;
- Out of the above, the courts had disposed of 2.25 lakh (or 44.5 per cent) cases covering a total area of 5.00 lakh acres of land, in favour of tribals; and
- 1.99 lakh cases (or 39.3 per cent), covering an area of 4.11 lakh acres, had been rejected by the courts.

This data is elaborated under *Table 13* and demonstrates that 39.3 per cent of cases filed by *Adivasis* for restoration of alienated lands were rejected by the courts, an alarming figure given that *Adivasis* tend to have poor access to the judicial system and to legal advice and representation in the first place. There is a huge gap between the cases decided in favour of *Adivasi* petitioners (225,343 cases extending over 500,376 acres of land), and the cases in which land was actually restored to the original *Adivasi* owner (203,064 cases extending over 418,128 acres of land). The gap between these two variables is vital as it demonstrates that even in those cases where *Adivasi* plaintiffs were able to succeed after a long and arduous legal battle, the actual restoration of possession remains a further hurdle to be crossed.

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[3] *Annual Report 2007-2008*, Ministry of Rural Development, Government of India, Delhi, 2008 at 171; available at: *https://rural.nic.in/sites/default/files/anualreport0708_eng.pdf.*

Table 13: Status of Land Alienation Cases and Restoration of Land

	State	No. of cases filed in court	Area	Cases disposed of by Court	Area	Cases rejected	Area	Cases decided in favour of STs	Area	Cases in which land was restored to STs	Area	Cases Pending in Court	Area
1	2	3	4	5	6	7	8	9	10	11	12	13	14
1	**Andhra Pradesh**	65,875	287,776	58,212	256,452	31,737	150,227	26,475	106,225	23,383	94,312	7,663	31,324
2	**Assam**	2,042	4,211	50	19	-	-	50	19	50	19	1,992	4,192
3	**Bihar**	86,291	104,893	76,518	95,151	31,884	49,730	44,634	45,421	44,634	45,421	9,773	9,742
4	**Chhattisgarh**	47,304	NR	46,807	NR	NR	NR	21,348	43,803	21,269	43,620	79	181
5	**Gujarat**	20,704	75,966	19,819	73,317	497	1,353	19,322	71,965	376	1,942	885	2,649
6	**Jharkhand**	5,382	4,002	1,362	NA	283	NA	1,079	860	1,079	860	4,020	NA
7	**Karnataka**	42,582	130,373	38,521	115,021	16,687	47,159	21,834	67,862	21,834	67,862	4,061	15,352
8	**Madhya Pradesh**	53,806	158,398	29,596	97,123	29,596	97,123	NR	NR	NR	NR	24,210	61,275
9	**Maharashtra**	45,634	NR	44,624	99,486	24,681	NR	19,943	99,486	19,943	99,486	1,010	NR
10	**Orissa**	105,491	104,742	104,644	103,556	43,213	46,677	61,431	56,879	61,364	56,854	847	1,186
11	**Rajasthan**	2,084	6,615	1,257	3,978	53	187	187	587	187	587	1,067	2,355
12	**Tripura**	29,112	25,441	9,040	7,269	20,043	18,131	9,040	7,269	8,945	7,165	95	104
	Total	506,307	902,417	430,450	851,372	198,674	410,587	225,343	500,376	203,064	418,128	55,702	128,360
	Total in hectares		365,351		344,685		166,129		202,581		169,283		51,968

Source: Annual Report 2007-08, Department of Land Resources, Ministry of Rural Development, Government of India at 276, Annexure xviii.

As demonstrated by *Table 13* above, trends across States also show considerable variation. The status of implementation of the land alienation legislation in Andhra Pradesh is representative of what is taking place in other States. Since the *Andhra Pradesh Scheduled Areas Land Transfer Regulation, 1959* (to which detailed amendments have been made from time to time) came into effect, a total of 65,875 cases of land alienation have been filed in the State before the Court of the Special Deputy Collector, Tribal Welfare. These cases involved 287,776 acres of land. Of the 58,212 cases which were decided by the courts, 31,737 cases (54.52 per cent) were decided against *Adivasis* involving 150,227 acres of land. It is a matter of concern that of the 26,475 cases (involving 106,225 acres) decided in favour of *Adivasi* applicants, only 23,383 (involving 94,312 acres of land) were restored to the *Adivasi*. Hence, restoration could be achieved only in 35.5 per cent of the total number of cases filed. Clearly, this is not encouraging, and the restoration of land even at the end of serpentine litigation processes remains the weak link.

Appeals add another dimension of delay to the process. In January 2007, about 300 cases were pending in Andhra Pradesh High Court involving about 2,500 acres of land under the said Regulation.[4]

However, it is important to note that the tribal land Regulation has captured popular imagination in the State of Andhra Pradesh in ways beyond individual petitions for land restoration. The 1997 decision of the Supreme Court of India in *Samatha* v. *State of Andhra Pradesh*[5] centred around the objective, purpose and meaning of this Regulation in the larger context of the forests being a part of tribal homelands and hence, protected by this law. The principles of interpretation laid down in that decision have come to be applied in a wide array of situations.

In Chhattisgarh, the total number of land alienation cases registered in different courts was 47,304. While the number of cases rejected is not available, the number of cases decided by the courts in favour of *Adivasis* is 21,348, and actual possession was restored to the tribal people in a majority of these cases (21,269 cases involving 43,620 acres of land).

In Gujarat, however, while a majority of the total number of cases filed were disposed of by the court (19,819 out of 20,704) with very few rejections (a mere 497), lands could be restored to *Adivasi* owners only in 376 cases. This was an abysmal 1.8 per cent of the total number of cases filed, covering a mere 1,942 acres of land. There is no explanation provided for this shocking performance.

Odisha (or Orissa, as it was then known) had the highest number of cases at 105,491. A very large proportion of the cases were decided against the *Adivasi* applicant (43,213 cases comprising 41 per cent of the total). But, of the cases decided in favour of the *Adivasi* applicants (61,431 cases), an overwhelming majority were actually restored to

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[4] "Half of tribal land grabbed", *The Deccan Chronicle*, January 29, 2007.

[5] (1997) 8 SCC 191. See also *Chapter 3: A Radical Break from the Past: The Constitution of India and its Interpretations*.

the *Adivasi* owner (61,364 cases). It would be important to examine the OSATIP and its functioning to determine the reasons behind this positive result.

The anomaly presented by Madhya Pradesh bears scrutiny. Out of a total of 53,806 cases involving 158,398 acres of land filed in the court under the *Madhya Pradesh Land Revenue Code, 1959*, the courts rendered a negative verdict in all the 29,596 cases decided. According to the Ministry of Rural Development, the remaining 24,210 cases were pending in the court at the time for reasons unknown.

Despite powerful legislations such as the *Santhal Parganas Tenancy Act, 1949* and the *Chota Nagpur Tenancy Act, 1908* which protect *Adivasi* lands from alienation to non-tribals, Jharkhand continues to see an increasing number of cases being filed before the Special Area Regulation Court. In 2008, the number of cases filed stood at 5,382. It is reported that there is a dearth of lawyers to take up land-related cases of the tribal people, which delays adjudication.

Rajasthan has a peculiar problem relating to contradictory provisions in different laws of the State. On the one hand, the *Rajasthan Tenancy Act, 1955* does not permit transfer of agricultural land belonging to *Adivasis* to non-tribals, with the term "transfer" being widely defined to include sale, gift, bequest, mortgage, sub-letting or exchange. Rigorous punishments are provided for the violation of these provisions.[6] On the other hand, a separate set of Rules[7] make it legally permissible for all land-owners, whether *Adivasi* or non-tribal, to convert their agricultural land into residential and commercial categories and, thereafter, sell it to a third party. It is evident that the latter nullifies the former.

Meanwhile, the courts have not been able to stem the alienation of *Adivasi* lands in Rajasthan. According to the above data, there were 2,084 cases of land alienation involving 6,615 acres of land filed in the courts in Rajasthan till 2008. Of these, 1,257 cases were disposed of by the courts of which only 587 acres of land relating to a mere 187 cases could be restored to the *Adivasi* owners.

Some States, which do not find mention in the government data, have provided important insights of their own. The State of Himachal Pradesh prohibits transfer of *Adivasi* lands to non-tribals under the *Himachal Pradesh (Transfer of Land Regulation) Act, 1968*. However, the State government has adopted the position that no case of transfer of *Adivasi* land to non-tribal has come to its notice. Therefore, it perceives no necessity to review the existing provisions of the Act. The government also insists that the State laws are consistent with the provisions of Section 4(m)(iii) of the *Panchayats (Extension to the Scheduled Areas) Act, 1996*.[8] It is not possible to address a problem whose very existence is denied.

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[6] See Sections 42, 43, 46A and 49A of the *Rajasthan Tenancy Act, 1955*.

[7] These are the *Rajasthan Land Revenue Allotment, Conversion and Regularisation of Agricultural Land for Residential and Commercial Purposes in Urban Areas Rules, 1981* and the *Rajasthan Land Revenue Conversion of Agricultural Land for Non-Agricultural Purposes in Rural Areas Rules, 1992*.

[8] *Second Report for the Year 2006-07*, National Commission for Scheduled Tribes, Government of India, 2007; available at: *https://ncst.nic.in/sites/default/files/2019/Annual_Report/2*.

In its 2014 Report, while examining the implications of the above data regarding the status of court cases under various land alienation laws, the High-Level Committee established by the Central government and chaired by Prof. Virginius Xaxa, observed:

> *"The above data gives an idea of cases that have been filed and shows that the progress of restoration of tribal land is not satisfactory. Moreover, there may be many instances of land alienation, for which cases have not been initiated. The Committee on 'State Agrarian Relations and the Unfinished Task- Land Reforms' set up by the Government of India has observed that the 'process of restoration of alienated land is worse than alienation' and further notes that, the 'Courts, bureaucrats and mostly public men, are often formidably interlocked against the tribals.'*
>
> *There is a need for the State to be proactive in restoring land to tribals for ensuring fast disposal of cases and proactive in plugging loopholes in tenancy laws, removing ambiguities in law and in modifying Survey and Settlement procedures to take into account tribal interests and particularly being vigilant to prevent instruments of the State from conniving with the unscrupulous for defrauding tribal people of their land. Further, States need to take action to suitably amend tenancy laws to empower Gram Sabhas in Schedule V areas to protect tribal land."*[9]

Clearly, the legal system has not been able to protect the rights of *Adivasis* to their lands, as one after another, carefully crafted legislations have failed. One of the main reasons is that the courts have a narrow understanding of the constitutional purpose of these laws. This was starkly revealed in a 2009 decision of the Supreme Court of India, arising out of the failure of the Government of Kerala to implement its own commitments to restore lands to the original *Adivasi* owners which had been alienated through sale to non-*Adivasis*. The Supreme Court examined Article 21 of the Constitution, the *ILO conventions 107 and 169*[10] and the *United Nations Declaration on the Rights of Indigenous Peoples*[11], and arrived at the following finding:[12]

> *"It is now accepted that the Panchsheel doctrine which provided that the tribes could flourish only if the State interfered minimally and functioned chiefly as a support system in view of passage of time is* ***no longer valid****. Even the* ***notion of autonomy*** *contained in the 1989 convention has been rejected by India."*[13] (emphasis added)

The court went on to note that there is cogent evidence that the *Adivasis* in Kerala are far better off than their counterparts in other States and, therefore, thought it safe to conclude that many of them have been absorbed into various institutions in the state

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[9] *Supra*, note 1 *(Xaxa Committee Report)* at 282.

[10] These are (i) ILO Convention 107 or *Indigenous and Tribal Populations Convention*, June 26, 1957; available at: *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107*; and (ii) ILO Convention 169 or *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, June 27, 1989; available at: *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.*

[11] United Nations General Assembly, *Declaration on the Rights of Indigenous Peoples*: A/RES/61/295 adopted on October 2, 2007; available at: *https://www.refworld.org/docid/471355a82.html.*

[12] *State of Kerala* v. *Peoples Union for Civil Liberties and Others* (2009) 8 SCC 49.

[13] *Ibid*. At para 18.

of Kerala and in other parts of the country, even though there was no such evidence placed before it. The court concluded:

> *"Indisputably, the question of restoration of land should be considered having regard to their exploitation and rendering them homeless from the touchstone of Article 46 of the Constitution of India. For the aforementioned purpose, however, it may be of some interest to consider that the insistence of autonomy and the view of a section of people that tribals should be allowed to remain within their own habitat and not be allowed to mix with the outside world would depend upon the type of Scheduled Tribe category in question."*[14]

From the above observation, it does appear that the courts often accede to notions of mainstreaming, which the Fifth Schedule as well as other constitutional and statutory provisions relating to ST and *Adivasis* were meant to resist. Meanwhile, after 2008, the Central government discontinued the practice of collecting and collating data relating to land alienation cases from the different States. The National Crime Records Bureau ("**NCRB**") also does not collect information regarding criminal cases registered against non-*Adivasi* transferees of *Adivasi* lands, even though purchasing land illegally from an *Adivasi* is a criminal offence under a variety of laws. The current status of *Adivasi* land alienation and restoration, therefore, remains shrouded in mystery, even as the constitutional purpose of these legislations remains unfulfilled.

10.3 Manifestations of Modern-day Slavery: *Adivasis* in the Working Class in India

One of the enduring images of the 2020 COVID-19 pandemic lockdown in India will remain that of hundreds of thousands of migrant workers walking from urban and industrial areas to their homes in the villages. Such scenes of human suffering, upheaval and tragedy had not been seen in modern India. These are comparable only to the partition of India at the time of Independence in the mid-20th Century. The plight of migrant workers, and the cavalier way the industrial sector discarded them at the first sign of crisis made national and international headlines.[15]

The fact remains that migrant workers have been exploited to the point of slavery for decades. They are the people who are increasingly pushed into poverty even as India plumbs new depths in the Inequality index.[16] A very large proportion of the migrant

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[14] *Ibid.*

[15] See, for instance, Vivek Mishra, "Reporter's diary amid COVID-19: The Long Walk Home", *Down to Earth*, June 1-15, 2020; available at: *https://www.downtoearth.org.in/news/economy/reporter-s-diary-amid-covid-19-the-long-walk-home-71647*; Chahak Gupta,"170 and counting: Migrant workers killed by the lockdown", *newslaundry.com*, June 3, 2020; available at: *https://www.newslaundry.com/2020/06/03/170-and-counting-migrant-workers-killed-by-the-lockdown.*

[16] *Fighting Inequality in the Time of Covid-19: the Commitment to Reducing Inequality Index 2020*, Development Finance International and Oxfam International, Oxford, 2020; available at: *https://d1ns4ht6ytuzzo.cloudfront.net/oxfamdata/oxfamdatapublic/2020-10/CRII%202020%20Report.pdf.* According to this report, India's international ranking on the Inequality Index in 2020 was at 129 out of 153 countries.

workers in India are *Dalits* and *Adivasis* who are compelled to travel to distant urban and industrial centres in search of work when livelihood options in the agricultural and rural sectors dry up. Many migrant workers comprise of *Adivasis* and forest dwellers who have been displaced due to various developmental and mining projects without proper rehabilitation.[17]

Adivasi regions, with their poor socio-economic indicators and worse opportunities for economic stability, have also been preyed upon by human traffickers. Every few months an incident of human trafficking bursts into the news, and equally rapidly fades from public memory. The *Adivasi* areas of Jharkhand, Chhattisgarh, Odisha, Andhra Pradesh, and Madhya Pradesh are well known for the regular trafficking of young children, women and men, many of whom find themselves trapped in oppressive working conditions, or even sold into the sex trade.

The Constitution of India, under Article 23, prohibits the exploitation of labour through the practice of *begar*, a form of forced free labour akin to slavery which was widely practiced under British colonial rule, and sanctioned under the caste system.

Several legislations have been enacted to protect migrant workers, including *Adivasis*, and to prosecute traffickers. This includes Sections 370 and 370A of the *Indian Penal Code, 1860* ("**IPC**") along with other provisions, which defines the crime of human trafficking and provides strict punishments. There are also specific enactments such as the *Bonded Labour System (Abolition) Act, 1976* ("**BLSA**") and the *Child Labour (Prohibition and Regulation) Act, 1986* ("**CLPRA**") which specifically proscribe certain forms of trafficking. In 2020, numerous pre-existing labour laws dealing with issues such as minimum wages, contract labour, inter-State migrant workers and construction workers, have been repealed, and subsumed under four omnibus labour law codes, which at the time of writing this report are yet to come into force.[18]

Judicial precedent emerging from the Supreme Court of India establishes, in no uncertain terms, that exploitative labour practices which violate the constitutional mandate and the statutory provisions, in particular the law relating to payment of minimum wage, are modern day slavery, and must be addressed in the strictest manner possible.[19] The last thirty years, since the device of 'public interest litigation' was developed by Indian constitutional courts, have seen numerous court decisions issuing directions for the rescue and rehabilitation of workers from different conditions of bondage, and expressing anguish when these conditions remain unchanged.

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[17] See Foreword by Virginius Xaxa in Varsha Bhagat-Ganguly and Sujit Kumar (eds), *India's Scheduled Areas: Untangling Governance, Law and Politics* (Routledge, Oxon: United Kingdom, 2020) at xvi. Prof. Xaxa observes:
"Of the total of 21.3 million people estimated to have been displaced during 1951–1990 in the states of Andhra Pradesh, Bihar, Gujarat, Maharashtra, Madhya Pradesh, Rajasthan, and Orissa, 8.54 million, that is, 40 percent are stated to be from tribes."

[18] The stated intent of the codification is to widen the net of protective labour laws to include unorganised sector workers. However, it is feared that these sweeping changes will only continue the abysmal situation of *Adivasi* workers with little or no change. *The Code on Wages, 2019* has repealed the *Minimum Wages Act, 1948*, among other labour laws. The *Occupational Safety, Health and Working Conditions Code 2020* has repealed the *Contract Labour (Regulation and Abolition) Act, 1970*, the *Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979*, and the *Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996* along with several other laws. Other Codes in this series include the *Code on Social Security, 2020*, and the *Industrial Relations Code, 2020.*

[19] *Bandhua Mukti Morcha* v. *Union of India and Others* (1984) 3 SCC 161 at para 24.

However, we see very few prosecutions under the criminal offence provisions in these legislations. The NCRB, in its latest report for the year 2020,[20] records that under the BLSA, a total of 1,231 cases were registered in 2020, as opposed to 1,155 cases in 2019, 778 cases in 2018, 463 cases in 2017 and 128 cases in 2016. Of the total number of cases which went to trial, however, only 16 cases resulted in convictions.[21] Under the CLPRA, a total of 476 cases were reported from across the country in 2020, but only 80 cases resulted in convictions (which includes cases pending from previous years).[22] Offences registered under the other legislations for protection of workers' rights were probably too few to merit mention in the NCRB report.

10.3.1 Case study on Construction Workers in Cities: 1982 to 2010

It is difficult to comprehend that in the third decade of the millenium, we are still talking about the persistence of modern-day slavery in India. Failure to use the criminal law provisions in these legislations is perhaps the key reason why there has been no advancement in the ground reality around migrant workers in India. This entropy is demonstrated through a study of the writ proceedings brought to the Supreme Court and Delhi High Court, seeking to address the abysmal working and living conditions of hundreds of migrant workers engaged to ready the National Capital of Delhi and its stadia for the Asiad Games in 1982 and the Commonwealth Games in 2010. Separated by 28 years, more than a generation of workers, lawyers, prosecutors, activists and judges, the case study beggars belief.

In 1982, the People's Union for Democratic Rights ("**PUDR**"), a civil rights organisation based in Delhi, requested three social scientists to investigate violations of labour rights at the construction sites of Asiad Games to be held in Delhi. On the basis of the report prepared, PUDR wrote a letter to the Supreme Court about the numerous labour law violations by state authorities. The Supreme Court converted the letter into a writ petition under Article 32 of the Constitution, and arrayed the Union of India, Delhi Development Authority, the New Delhi Municipal Corporation and Delhi Administration as party respondents since these State entities were responsible for the construction works. Most of the workers involved were migrant labourers from Bihar, Odisha, Tamil Nadu, Andhra Pradesh, Madhya Pradesh and Rajasthan. A significant number of them included *Adivasis* as well, from Kalahandi, Mayurbhanj and Keonjhar districts in Odisha and Singhbhum in present day Jharkhand.

The Supreme Court delivered the decision in *Peoples' Union for Democratic Rights* v. *Union of India*[23] ("***Asiad Workers* case**") in 1982.This judgment was unique in many

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[20] *Crime in India 2020*, NCRB, Ministry of Home Affairs, Government of India; available at: *https://ncrb.gov.in/en/Crime-in-India-2020.*

[21] *Ibid*. Volume 3 at 1119. Interestingly, the NCRB calculates the conviction rate as a percentage of the number of cases ending in conviction as a proportion of the number of cases where trials were concluded. Since the number of trials completed under the BLSA were 18, and 16 cases ended in conviction, the conviction rate is shown as a healthy 88.9 per cent. If the conviction rate were compared to the number of cases registered in a year, a more realistic picture would emerge.

[22] *Supra,* note 20 at 1033, 1119.

[23] (1982) 3 SCC 235.

ways for the unprecedented actions and positions that the Supreme Court took in order to provide easy access to justice to the affected workers,[24] and must be examined through several lenses.

An important area of examination relates to the expansion of the notion of *locus standi*, thus enabling access to the constitutional courts for the poor and marginalised through simple letter petitions, even postcards, with the assurance that failure to comply with procedural complexities would not prevent the Court from taking necessary action.[25] This was a truly remarkable innovation and continued to demonstrate remarkable results for many decades.[26]

The most important aspect of this landmark judgment, however, must be its relevance for future generations of workers who were expected to reap the benefits of the far-reaching legal principles expounded on labourers' rights vis-à-vis the state. The judgment laid down the legal principle that outsourcing of work to a contractor will not absolve the state of its constitutional and statutory responsibility towards the workers. In its capacity as the principal employer, the government will have to ensure that workers engaged in projects commissioned by it get the basic minimum provisions as stipulated in the law, including minimum wage.

Another area of examination is the relevance of the orders passed by the Court for those Asiad Games workers on whose behalf it was filed. As far as the workers of the Asiad Games of 1982 were concerned, the Supreme Court's final judgment directing that they be paid back wages by the state authorities was delivered at a time when most of the construction work was over, and the workers had dispersed. Therefore, most workers for whose rights violations the petition had been filed were deprived of any benefits that were rightfully to be given to them.[27]

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[24] The *Sunil Batra case* (*Sunil Batra* v. *Delhi Administration* (1980) 2 SCR 557) was the first in which a letter was converted into a writ petition. This took place in 1979. Thus, even though the *Asiad Workers* case was not the first time that a letter was converted into a PIL, it was by no means a normal practice at that time. With the decision in *Asiad Workers* case, the Supreme Court opened its portals to those who remained faceless, voiceless, and invisible under the oppressive weight of their social, economic, and historical exclusion from the mainstream of Indian society. For the indigent and marginalised, the road to justice had, till then, been a difficult battle involving mounting procedures. It was also the first time in judicial history that three ombudsmen were appointed to enquire into the violations and to report to the Supreme Court on a weekly basis, setting the framework for appointment of Commissions and Commissioners in future cases by the Supreme Court to assist in addressing complex social, environmental and economic issues brought before it through PIL.

[25] *Supra*, note 22. See para 9. The respondents in the *Asiad Workers* case raised the ground that the petitioner, a civil rights organisation, is not capable of filing the petition because it is not the affected party. The Court ruled out this objection by saying that in our country where the barriers to accessing justice through the legal system are very high for the poor, it is only in the interest of equitable justice that other members of the society be allowed to raise the petition on behalf of affected groups. The Court said that if the vulnerable sections of society are unable to realise their civil and political rights and are being represented by someone else for that purpose in the Courts, it should be welcomed. The legal system and processes should not be allowed to be hijacked by the elite.

[26] For example, in the case of *Nilabati Behera* v. *State of Orissa* (1993) 2 SCC 746, the mother of the deceased wrote a letter to the Supreme Court alleging the custodial death of her son while under custody of the police. Proactive measures taken by the Court to investigate resulted in monetary compensation to the mother, and a judgment which advanced the jurisprudence of constitutional tort in India.

[27] *Waiting and Waging: A Tale of Life, Death and Justice* (Peoples' Union for Democratic Rights, Delhi, 1989); available at: *https://pudr.org/waiting-and-waging-tale-life-death-and-justice.*

A detailed examination of the jurisprudential developments in this area of law is far beyond the scope of this report. However, it is possible to gain some understanding of these developments by looking at the situation of workers during another state-sponsored international sports event which took place 28 years later, also in the national capital of Delhi - the Commonwealth Games of 2010.

A 2010 fact-finding by PUDR, the same organisation which was the petitioner in the 1982 *Asiad Workers* case, revealed that the same violations of constitutional, statutory and human rights of workers was taking place at multiple construction sites for the prestigious 2010 Commonwealth Games. This time the organisation filed a PIL before the Delhi High Court under Article 226 and 227 in 2010.[28] The myriad rights violations were brought before the Court including the fact that most of the workers who were involved in the construction works at the Commonwealth Games sites were inter-State migrants from Uttar Pradesh, Madhya Pradesh, West Bengal, Jharkhand, Rajasthan, Bihar and Odisha, from the most marginalised communities, including *Adivasis*.

Table 14 juxtaposes excerpts from reports placed before the Court by the Ombudsmen in 1982 and by the Monitoring Committee in 2010, both created as per the respective orders of the courts in the PILs. The information pertains to compliance with labour laws.

The said tabulation demonstrates that the jurisprudential principles laid down by the Supreme Court in the *Asiad Workers* case in 1982, which had been reiterated and cited with approval in several judgments immediately following it, have had no lasting impact. The blatant violations of constitutional and fundamental rights, statutory laws and of basic human rights by the state machinery in the same city which hosted the 1982 Games, continued with impunity almost three decades later during the 2010 Commonwealth Games in Delhi, which by then had become the National Capital Territory.

In the wake of the nationwide lockdowns imposed by the Indian government during the COVID-19 pandemic in 2020 and 2021, tens of thousands of migrant workers were forced to walk hundreds of kilometers to their village homes after being rendered unemployed and homeless. Even as the promises of job security, safe working conditions, and secure wages remain a mirage, the Central government has undertaken the exercise of amending labour laws across the board to reduce these protections further.[29]

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[28] WP (Civil) No. 524 of 2010 *Peoples' Union for Democratic Rights and Others* v. *Union of India and Others*, WP (Civil) No. 524 of 2010 in Delhi High Court. The WP was disposed of by a detailed judgment dated September 20, 2012.

[29] K Sahadevan,"Indian Labour in the Time of COVID Is One of Changing Perspectives and Disappearing Identities", *The Wire*, July 15, 2020; available at: *https://thewire.in/labour/india-labour-laws-workers.*

Table 14: Comparison of the Conditions of Workers in the National Capital of Delhi preparing for the Asiad Games (1982) and the Commonwealth Games (2010)[30]

Particulars	Asiad Games 1982[31]	Commonwealth Games 2010[32]
Number of workers	125,000 workers	100,000 workers
Minimum Wages	The wages paid to the workers were not uniform. Oriya workers working in the site are mainly from Banipur, Ranipur in Orissa who work under *Dadan* system. These workers received Rs. 120 per month from the *zamadars*. Apart from this amount, they also received the cost of food from the *zamadars*. All the workers stated that they were promised Rs. 10.25 per day by the *zamadar*. However, they added that in practice they do not get this entire amount in their hands. They bought the provisions they required during the week on loan, and every week the *zamadar* gave them some money according to their needs.	It was difficult to confirm whether minimum wages were being paid to all workers. In many cases, the workers were not receiving overtime at all, and wherever received, it was single (at the rate of ordinary wages) as against double the rate of ordinary wages which is the statutory requirement. In case of inter-State workers, notified minimum wages were not being paid. Wages were withheld and, in its place, '*kharcha*' (expenses) was being paid for day to day maintenance expenditure of workers.
Women workers	Some of the women workers reported that they get lower wages from the *zamadar* than the male workers. The amount that women workers got was Rs. 6 per day. One woman worker reported that she was ill for two days and she was paid Rs. 15 only for four days' work which amounts to Rs. 3.75 per day.	Women were not getting the same wages for same or similar nature of work as men, contrary to the requirement under Section 4, *Equal Remuneration Act, 1976*.
Working hours	There was no holiday and work had to continue for 24 hours a day in order to meet the deadline.	In large number of cases, there was no weekly day off, i.e, workers were getting six days wages for seven days of work.
Safety measures and accidents	Several staff members of Jeewan Nursing home were interviewed, as well as two house surgeons and the medical superintendent. *The staff thought that at least 100 major accident cases had been treated at the nursing home*	While most sites visited issued basic safety gear, it was common to observe that the workers were not using boots or gloves. Wherever workers were found to be using boots, a sum of Rs. 300 to Rs. 800 was reported to be

[30] This tabulation has been created and compiled by Megha Bahl, Advocate, towards a research project commissioned by the erstwhile Planning Commission of India and Ministry of Tribal Affairs, Government of India on the *'Status of Access to Justice for Tribals'* for a Tribal Human Development Report. This report remains unpublished to date.

[31] Column two comprises excerpts from the *Reports of the Ombudsmen* given in: PUDR. *"The Other face of Asiad '82"*, 1982.

[32] Column three comprises excerpts from the report submitted on February 3, 2010 by the Committee (Constituted by the Hon'ble High Court of Delhi in *People's Union for Democratic Rights and Others* v. *Union of India and Others* WP (Civil) No. 524/2010) *on matters pertaining to working and living conditions of workers in Commonwealth Games Construction Sites.*

	back then during the last 18 months or so. The nursing and other staff as well as the doctors felt that the cases were much more in 1981 and that the number had gone down around the time the interviews were conducted. The cases treated at the nursing home ranged from fracture of the leg, pelvis and ribs to fracture of the skull with brain damage. One doctor remembered at least two cases belonging to the last category.	deducted from the wages of the workers. Most of the accidents were not reported to the Commissioner Workmen's Compensation.
Medical facilities	Some of the workers told the Committee that though the contractor has provided a doctor who comes to the site everyday for two or three hours, their *zamadar* does not allow them to go to the doctor when they fall ill. Hence, they have to buy medicines outside and pay for them.	Medical examination of workers at regular and prescribed intervals was not usually taking place. Health facilities such as first aid centres at the work sites were few and far between; a first aid box was all that was available.
Safe drinking water and sanitation	The workers as well as the *zamadars* interviewed by the Committee were unanimous in denouncing the contractors for not providing these (toilet) facilities. Nor was any special washing facility provided, and the same hand pumps were used for drinking water and washing clothes.	Overall hygiene, environmental sanitation and cleanliness was deplorable. There was no bathroom. Workers had to take baths in the open, from a few taps fixed by the side of the wall near the entrance gate. There was no proper arrangement for cleaning and sweeping, including cleaning of toilets.
Wage cards / Proof of Employment	Though the contractors claimed that the workers were given a wage card, all the workers stated that none of them was given any card.	At all sites, no wage slips were found to have been issued. No employment card or identity card had been issued to the workmen; they were in possession of gate passes to enable them to enter the worksite.
Displacement Allowance	Neither the contractors nor the PWD representatives seemed to know about the 'displacement allowance.' In fact, they did not know much about the *Inter-State Migrant Workers' Act, 1979* ("**Migrant Workers Act**")	The following provisions of the Migrant Workers Act continued to be honoured in the breach: journey allowance; displacement allowance; wages during journey period.

Source: Compiled from reports of the Ombudsman before the Supreme Court in the Asiad Workers case, and the Court appointed Committee before the Delhi High Court in the Commonwealth Games case.

10.4 Human Trafficking

The perennial problem with some of the most endemic rights violations taking place in India is the lack of reliable and consistent data. Thus, while it is a matter of 'common knowledge' that minor children and women are being trafficked from *Adivasi* areas for the purpose of exploitation of labour, including sexual exploitation, obtaining reliable information on the extent of this phenomenon is very difficult. According to a recent study:

> *"Jharkhand has emerged as India's trafficking hub with thousands of tribal women and girls being trafficked out of the state every year to Delhi, Punjab and Haryana and beyond. An estimated 33,000 girls are trafficked each year from Jharkhand. Most of such victims of trafficking and exploitation are below 18 and illiterate or semi-literate and are forced to work in households, brothels, restaurants and factories. The causes of trafficking are mainly poverty, lack of livelihood opportunities, backwardness and low awareness among the tribal communities....While most of these girls go out for work, there has been a rise in the case of sex trafficking in the state too."* [33]

Definition of Human Trafficking

Until 2013, there was no definition of "human trafficking" under Indian law. After the tragic gang rape and death of '*Nirbhaya*' in December 2012, the Verma Committee[34] was appointed to make recommendations for amendments to the law to address the alarming increase in sexual violence against women. In its seminal report on sexual violence in India, the Committee records one of its most scathing findings as follows:

> *"It now stands undisputed that one of the main reasons for human trafficking is for Commercial Sexual Exploitation (CSE) of these children and women. This view has been reaffirmed by the Supreme Court in the decision of Bachpan Bachao Andolan v. Union of India. Offences committed initially on them never come to light. Over time the sexual abuse becomes part of their life. It then gets termed as prostitution and then the abuse borders on being consensual. It is this vicious circle of missing children/women-trafficking-abuse-prostitution which needs to be curbed with urgent measures."*[35]

Taking a holistic approach to the issue of sexual violence, the Committee made a number of recommendations on related subjects. One such was the recommendation for the inclusion of Section 370 and 370A, IPC, which was accepted by the Parliament. This provision adopts the definition of 'trafficking in persons' from the *United Nations Palermo Protocol*.[36]

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[33] Sribas Goswami, "A Study on Human Trafficking with Special Focus on Tribal Women of Jharkhand", *European Researcher Series A*, 2017 at 176- 177.

[34] After the '*Nirbhaya*' rape and murder case in December 2012, the nation was gripped by unrest, galvanising the Indian government to establish a three-member Committee to examine existing law relating to rape and sexual violence against women and make recommendations. The Committee was headed by former Chief Justice of India J.S. Verma, and the other two members were former Chief Justice of Shimla High Court Leila Seth, and Senior Advocate Gopal Subramaniam. The Verma Committee, as it came to be known, submitted a detailed report on January 23, 2013 entitled '*Report of the Committee on Amendments to Criminal Law*' ("**Verma Committee Report"**).

[35] See *Verma Committee Report* at 152; available at: *https://criminallawreforms.in/reports/other-reports/2013%20-%20Report%20of%20the%20Committee%20on%20Amendments%20to%20Criminal%20Law.pdf.*

[36] *The United Nations Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime, 2000* (ratified by India in May 5, 2011) defines 'trafficking in persons' under Article 3(a)as:

"the recruitment, transportation, transfer, harbouring receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

However, it is not as if prior to 2013 there was no law governing human trafficking in India. A multiplicity of statutes exist where forced trafficking of any kind is treated as a criminal offence, and the trafficking of children in particular invites harsh punishment.[37] These laws were clearly not working, and court directions issued from time to time in this regard were not having the desired result.[38]

Missing children, in particular, have been identified as a serious phenomenon. Despite extensive lockdowns and travel restrictions across the country due to the COVID-19 pandemic, in 2020 alone, a total of 48,972 children were reported as missing, and when added to the number of children missing from previous years, the number was an alarming 108,234.[39]

As one writer observed, it is apprehended that many of these missing children have been pushed into begging or prostitution rackets,[40] and the Supreme Court itself has issued directions that missing children reports must be treated as suspected cases of abduction or trafficking.[41] Missing children end up being exploited in various ways like being employed as cheap labour, trafficked for sex, organ trade, beggary, and so on.

In the light of increasingly intransigent situation, a non-government organisation *Bachpan Bachao Andolan* filed a writ petition under Article 32 of the Constitution before the Supreme Court of India.[42] The petitioner submitted that a large number of children are being trafficked from Nepal and places in India for performing at circuses in India. There is no labour or welfare law that protects and safeguards the rights of such children. They are harassed and sexually assaulted at the circus sites and are kept under deplorable living and working conditions.

The petitioner sought state intervention through regulation (as opposed to banning) of such circuses, and for the provision of welfare measures to all those who are working in the circuses. Towards this end, the petitioner sought various directions from the Court, including a declaration that intra-State trafficking of young children, their bondage and forcible confinement, regular sexual harassment and abuse are cognisable offences under the IPC and other relevant laws.

The Supreme Court treated the matter as a continuing mandamus for many years, issuing directions from time to time to the Central and State governments, and

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[37] Some of the key legislations in this regard are the *Immoral Trafficking (Prevention) Act, 1956*; Sections 366A, 366B, 372 and 373, IPC; *Prohibition of Child Marriage Act, 2006*; CLPRA; and the *Juvenile Justice (Care and Protection of Children) Act, 2000*. Other relevant statutes are the *Transplantation of Human Organs Act, 1994* and BLSA.

[38] See, for instance, Order dated November 14, 2002 in *Hori Lal* v. *Commissioner of Police*, WP (Criminal) 610 of 1996, Supreme Court of India.

[39] *Supra*, note 20. See *Table 15.1: Missing and Traced Children (Below 18 Years) (State/UT-wise) - 2020* under Volume 3 at 995.

[40] Sankar Sen, "No One Is Looking For Them", *The Pioneer*, August 19, 2014; available at:*http://www.dailypioneer.com/columnists/item/no-one-is-looking-for-them.html.*

[41] Vide Order dated May 10, 2013 in *Bachpan Bachao Andolan* v. *Union of India* WP (Civil) No. 75 of 2012, the Supreme Court directed that in case of complaints with regard to any missing children made in a police station, the same should be reduced to a First Information Report with an initial presumption of either abduction or trafficking, and appropriate steps should be taken to see that follow up investigation is taken up immediately thereafter.

[42] *Bachpan Bachao Andolan* v. *Union of India*, WP (Civil) No. 51 of 2006, Supreme Court of India. This writ petition was treated as a continuing mandamus, and came up for hearing several times over several years.

scrutinising compliance of such directions. A detailed judgment was passed in April 2011,[43] where the Court noted the underlying problems and violation of laws and issued detailed directions for rescue and rehabilitation of children. An examination of the Court orders[44] passed over the next four years reveals that while the Court continued to keep up the pressure on both the Central and State governments, the response from the state machinery was lukewarm, at best.[45] The same issues which were raised by the petitioner in 2006 and translated into a judgment of the Court in 2011, were again raised in the Verma Committee Report in January 2013.

In its final judgment on January 30, 2015, the Court noted that a meeting had been convened by the Central Ministry of Women and Child Development on January 12, 2015 where "*unfortunately...responses were received only from 7-8 States / Union Territories*."[46] Despite this, the Supreme Court finally disposed of the writ petition on the same date with yet another set of guidelines for the executive to follow.[47] There have been no further hearings to interrogate whether these guidelines are being complied with.

10.4.1 Status of Prosecution for Human Trafficking

The NCRB data on human trafficking in 2020 shows some alarming trends. A total of 1,714 cases of human trafficking were reported in the year for the country as a whole, of which 1,045 (70 per cent) were from the 10 States under Fifth Schedule alone (*see Table 15*).

At the national level, the ratio of male to female victims is quite disproportionate at 1:1.46. When we look at the disaggregated data for the Fifth Schedule States, most States (with the exception of Chhattisgarh, Gujarat, Odisha and Rajasthan) demonstrate an even larger proportion of female victims. In States like Jharkhand and Maharashtra, the number of women victims is alarmingly high.

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[43] *Bachpan Bachao Andolan* v. *Union of India*, (2011) 5 SCC 1. Further series of orders are reported in (2011) 15 SCC 645 at 646, 647. See also United Nations Office on Drugs and Crime, *Responses to Human Trafficking in Bangladesh, India, Nepal and Sri Lanka* (UNODC, 2011); available at: *https://www.unodc.org/documents/human-trafficking/2011/Responses_to_Human_Trafficking_in_Bangladesh_India_Nepal_and_Sri_Lanka.pdf.*

[44] See, for instance, detailed Orders dated September 23, 2011; April 18, 2014 and December 12, 2014 in WP (Civil) No. 51 of 2006, Supreme Court of India.

[45] In purported compliance of the Court's orders, the NCRB is supposed to maintain a national directory of missing children online. When this was checked, most of the entries were found to be blank, and those categories where entries have been made were cursory and clearly incomplete.

[46] *Bachpan Bachao Andolan* v. *Union of India*, (2015) 17 SCC 186 at para. 15.

[47] *Ibid*. At para 17.

Table 15: Data relating to Human Trafficking Cases, Victims Trafficked, Persons Arrested and Convictions in 10 Fifth Schedule States in 2020

	No. of Cases	No. of Victims Trafficked			No. of Persons arrested	No. of Persons Convicted
		Male	Female	Total		
Andhra Pradesh	171	15	220	235	619	13
Chhattisgarh	38	55	55	110	105	0
Gujarat	13	75	12	87	68	0
HImachal Pradesh	4	2	11	13	8	0
Jharkhand	140	53	248	301	333	58
Madhya Pradesh	80	15	117	132	309	5
Maharashtra	184	6	506	512	567	2
Odisha	103	454	287	741	189	0
Rajasthan	128	762	56	818	273	0
Telangana	184	38	401	439	752	2
Total for 10 Fifth Schedule States	1,045	1,475	1,913	3,388	3,223	80
Total for India**	1,714	1,912	2,797	4,709	4,966	101

Source: Compiled from Chapter 14: Human Trafficking, in Crime in India 2020, National Crime Records Bureau, Ministry of Home Affairs, Government of India, at 973-981.

***The data for all 29 States and 7 UTs in India (as existed in 2020) is included here.*

Disaggregated data on the purpose of human trafficking, collated by the NCRB, shows that the overwhelming majority of victims (a total of 1,466), were trafficked for sexual exploitation for prostitution, of whom the largest numbers were from Maharashtra (541), Andhra Pradesh (200) and Telangana (363). It is observed that another 1,452 victims were trafficked for the purpose of forced labour, 846 for domestic servitude, 187 for forced marriage, and 14 for child pornography.[48]

It is important to remember that these cases are a mere tip of the iceberg, as a large number of cases remain unreported, or unregistered, falling through the cracks in the criminal justice system as people from socio-economically marginalised communities are wont to do. It is in this context that the number of convictions (101) as opposed to

[48] *Supra*, note 20. See *Table 14.5 (Purpose of Human Trafficking) 2020* under Volume 3 at 989 - 990.

the number of persons arrested (4,966) is the true abomination. Maharashtra, with the largest number of trafficking cases, the largest number of women trafficked for sexual exploitation, and the largest number of arrests, saw a total of only two convictions.[49] Need one say more?

10.5 The Prevention of Atrocities Act

At the outset, it must be stated that there is very little reliable disaggregated data relating to the implementation of *The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989* ("**Atrocities Act**") and other criminal legislations which impact the tribal peoples. Disaggregated data upto a certain level is maintained and published by the NCRB from time to time. There has also been an effort to examine the functioning of this law by the National Commission for Scheduled Castes and Scheduled Tribes (and subsequently, the National Commission for Scheduled Tribes). The Atrocities Act and its functioning have, nevertheless, been subjected to intense scrutiny by civil society groups and organisations working with *Dalits* (known as Scheduled Castes ("**SCs**") in official parlance). This analysis provides important insights into the functioning of the Atrocities Act with regard to the rights of *Adivasis* and forest dwellers.[50]

10.5.1 Framework of the Atrocities Act

The Long Title of the statute describes itself as *"(a)n Act to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for special courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto."*

The statute delineates a list of "atrocities" under Section 3, which when committed by a non-ST / non-SC against an ST / SC constitute criminal offences (*see Box for an illustrative list of such offences*). The punishment for a person found guilty of such a crime is severe, with a minimum sentence of imprisonment of six months, which can be extended up to five years. The statute also provides for imposition of collective fines, adopting the provisions of the *Protection of Civil Rights Act, 1955* in this regard. Where offences are committed by public servants, the statute provides for a more stringent punishment of a minimum of one year imprisonment.

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[49] *Supra*, note 20. See *Table 14.7 (Disposal of Persons Arrested under Human Trafficking) 2020* under Volume 3 at 992.

[50] For a detailed examination of how the Atrocities Act interfaces with the FRA, see Gayatri Raghunandan, *Use of the Prevention of Atrocities Act to Advance Forest Rights: A Handbook* (Vasundhara and Legal Resource Centre, Delhi, 2019).

ILLUSTRATIVE LIST OF ACTS WHICH, WHEN COMMITTED BY A NON-ST / NON-SC AGAINST AN ST / SC, CONSTITUTE AN OFFENCE OF 'ATROCITY' UNDER THE ATROCITIES ACT[51]

- Forcing an SC or ST to drink or eat inedible or obnoxious substance (Section 3(1)(a))
- Acts with intent to cause injury, insult or annoyance....by dumping excreta, waste, carcass or other obnoxious substance in neighbourhood (Section 3(1)(c))
- Forcible removal of clothes or parading naked or with painted face or body or similar act (Section 3(1) (d))
- Use of force or intimidation to vote or not to vote for a particular candidate (Section 3(1)(l))
- Instituting false, malicious or vexatious suit, criminal or other legal proceeding (Section 3(1)(p))
- Giving false or frivolous information to a public servant, thereby causing such public servant to cause injury or annoyance to an SC or ST (Section 3(1)(p))
- Intentionally insulting or intimidating with intent to humiliate in public (Section 3(1)(r))
- Assault or use of force against a woman with intent to dishonour her or outrage her modesty (Section 3(1)(w))
- Corruption or fouling of water of any spring, reservoir or any other source so as to render it unfit for use (Section 3(1)(x))
- *Wrongful occupation or cultivation or transferring to himself, of any land owned, allotted, notified to any SC or ST (Section 3(1)(f))*
- *Wrongful dispossession of land or premises, or interference with enjoyment of rights over land, premises or water, including forest rights (Section 3(1)(g))*
- *Compelling or enticing to do 'begar' or other form of forced labour or bonded labour (Section 3(1)(h))*
- *Denial or obstruction of customary right of passage to a public place, or a place they have a right to use (Section 3(1) (y))*
- *Forcing or causing to leave his house, village or other place of residence (Section 3(1)(z))*

(**Note:** *Actions marked in italics have particular relevance for Adivasis and forest dwellers.*)

Provision is made for the creation of Special Courts[52] for the purpose of prosecuting offences under this Act and for appointment of Special Public Prosecutors[53] for such

[51] For a complete list of atrocities, see Section 3, Atrocities Act.

[52] Section 14, Atrocities Act.

[53] Section 15, Atrocities Act.

courts. *The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995* ("**1995 Rules**") also provide for the following mechanisms:

- Identification of atrocity prone areas;[54]
- Appointment of Investigation Officers;[55]
- Setting up of SC / ST Protection Cells at State level;[56]
- Appointment of Nodal Officers at the State level;[57] and
- Appointment of Special Officers at the District level.[58]

Detailed norms are also laid down in the 1955 Rules for monetary relief to be provided to victims of such atrocities.

From a reading of the Atrocities Act and 1995 Rules, it is immediately apparent that the law is primarily focused on atrocities committed against SCs or *Dalits*, which have traditionally been understood to include a variety of practices of 'untouchability'. Article 17 of the Indian Constitution prohibits the practice of untouchability and requires that it be a criminal offence, which mandate the present law duly satisfies. Only a few provisions (*indicated in italics in Box above*), are relevant for the kind of oppression and alienation of traditional resources faced by *Adivasis*. Disaggregated data is simply not available on use of these provisions by *Adivasis* to protect their customary rights to land, forests and homelands.

10.5.2 Analysis of Overall Implementation of the Atrocities Act

As stated earlier, *Dalit* rights activists closely monitor the implementation of the Atrocities Act over the years, and their analysis provides important insights into the dysfunctionality of the law when it comes to *Adivasis* and forest dwellers. A recently released report by the National *Dalit* Movement for Justice documents numerous cases of atrocities, ranging from instances of rape and murder to public shaming and insults. While only a few of the incidents documented in the report relate to violence against *Adivasis*, those that are recorded tell horrific stories of physical violence as a form of economic exploitation.

One such incident, emerging from Karnataka, came to light when a labourer managed to escape inhuman conditions of bondage by scaling a 12 feet wall and sought help. When the police raided the location, they discovered 52 *Dalit* and tribal persons, including 16 women and four children, who were "enslaved" in a small but heavily guarded shed, and living in inhuman conditions. They were forced to work as labourers for 19 hours a day without wages across various locations in the State. A gang of auto drivers would prey upon migrant workers at railway stations, offering

[54] Rule 3, 1995 Rules.
[55] Rule 7, 1995 Rules.
[56] Rule 8, 1995 Rules.
[57] Rule 9, 1995 Rules.
[58] Rule 10, 1995 Rules.

them a day's work at high wages. But as soon as they arrived at the shed, they would be stripped of their clothes and belongings — including identity cards, phones and money — and locked up. Any attempt to escape was met with brutal violence. Most of the victims were from Karnataka, Telangana and Andhra Pradesh.[59]

Another chilling incident recorded in the report relates to a group of *Adivasis* in Sonbhadra district of Uttar Pradesh, who were engaged in a struggle to reclaim their traditional lands for many decades. Members of a dominant caste had manipulated land records and taken over *Adivasi* lands. One day the dominant caste members opened fire and shot dead 10 *Adivasis*, while several others sustained bullet injuries. Compensation in cash as well as land was provided to the families of the deceased. A case was registered under the Atrocities Act. The matter is pending before the Sonbhadra Special Court at the stage of chargesheet.[60] Whether it will result in a conviction remains to be seen.

The report has also made painstaking time-series analysis of the data released by NCRB regarding the implementation of the Atrocities Act. It reports:

> *"On the other hand over the years the number of cases of atrocities against SCs and STs have only increased. Over the decade to 2018, crime rate against Scheduled Castes or Dalits rose by 6%; from 20.1 crimes per 100,000 Dalits reported in 2009, to 21.3 crimes in 2018, according to 2018 National Crime Records Bureau (NCRB) data, the latest available. Meanwhile, the crime rate against Adivasis or Scheduled Tribes remained static with a nominal decrease by around 1.6 %, from 6.4 crimes per 100,000 Adivasis in 2009 to 6.3 crimes in 2018. As many as 3,91,952 crimes against Scheduled Castes were reported between 2009 and 2018. As many as 72,367 crimes against Adivasis (Scheduled Tribes) were reported between 2009 and 2018."*[61]

According to the NCRB reports, from the time of its enactment, the proportion of cases registered as atrocities against SCs under the Atrocities Act has continued to be significantly higher than cases registered as atrocities against STs (*see Table 16 below*).

Table 16: Crimes / Atrocities Against Scheduled Castes and Scheduled Tribes registered 2016-2020 [62]

	2016	2017	2018	2019	2020
Crimes / Atrocities Against SCs	40,801	43,203	42,793	45,961	50,291
Crimes / Atrocities Against STs	6,578	7,125	6,528	7,570	8,272

Source: NCRB, 2020.

[59] "Karnataka Shocker! 52 Tribals and Dalits sexually abused, whipped like animals for 3 years", *Mirror Now Digital*, December 20, 2018; available at: *https://www.timesnownews.com/mirror-now/society/article/karnataka-shocker-52-tribals-and-dalits-sexually-abused-whipped-like-animals-for-3-years/334037*.

[60] *Quest for Justice: Implementation of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 and Rules 1995: Status Report (2009-2018)* (National Dalit Movement for Justice, New Delhi, 2020) at 37.

[61] *Ibid*. At 22.

[62] *Supra*, note 20 under Volume 2 at 517, 613.

In 2016, Parliament enacted significant amendments to the Atrocities Act, including incorporation of a new provision under which dispossession of a person from their forest rights, or interference in their enjoyment of their forests rights, has also been included in the definition of atrocities.[63] Given the wealth of evidence that forest rights are being violated in myriad different ways across the country, one would have expected a surge in the number of cases being registered by *Adivasis* under this provision. However, there has not been any significant change in the number of cases being registered. *Table 17* below records the number of cases registered in the 10 Scheduled Area States from 2016 to 2020. Clearly, the Atrocities Act is not being used by the STs to address incidents of violence and oppression against them, their lands and resources.

Table 17: State-wise Crimes / Atrocities against Scheduled Tribes 2016-2020[64]

	2016	2017	2018	2019	2020
Andhra Pradesh	405	341	330	330	320
Chhattisgarh	402	399	388	427	502
Gujarat	281	319	311	321	291
Himachal Pradesh	2	3	1	1	3
Jharkhand	280	237	224	342	347
Madhya Pradesh	1,823	2,289	1,868	1,922	2,401
Maharashtra	403	464	526	559	663
Odisha	681	700	557	576	624
Rajasthan	1,195	984	1,095	1,797	1,878
Telangana	375	435	419	530	573

Source: NCRB, 2020.

Conversations with civil society and community leaders indicate that the reason why data relating to *Adivasis* reflects stagnation is not because many crimes are not being committed against *Adivasis*, but because indigenous communities tend to be chary of approaching the justice system for redressal. The many ways in which the criminal justice system is weighted against the poor in general, and the *Adivasi* complainant in particular, is a discouragement in itself.

It is also useful to examine the data regarding the manner in which the cases registered are investigated, tried and finally disposed of within the criminal justice system.

[63] See Section 3(1)(g), Atrocities Act.

[64] *Supra*, note 62.

Table 18: Disposal of cases of Crimes / Atrocities Against Scheduled Castes and Scheduled Tribes in 2020[65]

		Crimes / Atrocities Against SCs	Crimes / Atrocities Against STs
All Crimes / Atrocities Against SCs and STs*			
Total no. of Crimes registered		50,291	8,272
Cases sent to Trial	**Sent to Trial in 2020**	39,138	6,484
	Pending Trial since previous year	1,91,515	30,168
	Total Number pending Trial	2,30,653	36,652
Trials completed in 2020		7,637	1,219
Convictions		3,241	347
Conviction rate		42.4%	28.4%
Cases regarding Occupation / Disposal of land belonging to SCs and STs**			
Total number of crimes registered		87	33
Cases sent to Trial	**Sent to Trial in 2020**	30	5
	Pending Trial since previous year	710	100
	Total Number pending Trial	740	105
Trials completed		18	2
Convictions		0	0

Source: NCRB 2020

**This includes crimes registered solely under the Atrocities Act, and also those where provisions of the IPC have been included along with the Atrocities Act.*

***This refers to one category of the cases registered exclusively under the Atrocities Act.*

Table 18 above demonstrates that while the number of cases registered, investigated, and eventually taken to trial are consistently higher when it comes to the SCs, it remains true for both categories that there is an enormous pendency of cases from previous years, and a small proportion of cases actually reach finality.

[65] *Supra*, note 20. This table has been collated from Volume 2 at 517-563; 613-659

A total of 191,515 cases relating to SCs were pending trial at the beginning of 2020 when an additional 39,138 new cases were added to the queue. Eventually, trials were concluded in just 7,637 cases, hardly making a dent on the pendency. A similar pattern is reflected in the data relating to atrocities against *Adivasis* or STs.

Conviction rates are conveniently calculated taking the number of convictions as a proportion of the trials completed. Thus, while the conviction rate for atrocities against SCs at 42.4 per cent compares favourably to the national average of 43 per cent, the conviction rate for atrocities against STs is an abysmal 28.4 per cent.

If we calculate the conviction rate as a proportion of the total number of cases sent to trial during the year 2020, it plummets to 8.28 per cent and 5.35 per cent respectively for atrocities against SCs and STs.

However, the true picture of what is taking place within the justice system is reflected by the fact that only 1.4 per cent of the total number of cases pending trial (including those pending since previous years) regarding atrocities against SCs, and only 0.95% of the cases pending trial regarding atrocities against STs, resulted in convictions. This is the true atrocity!

We also culled out data regarding the primary provision of this law protecting the land rights of *Dalits* and *Adivasis*, i.e., the provision regarding occupation or disposal of lands.[66] When it comes to wrongful dispossession of *Adivasis* from their lands, a total of 33 cases were registered across the country, of which five cases made it to the list of 100 cases pending trial, bringing the total number of cases pending trial to 105. Two cases under this category were concluded in the year 2020, with no convictions. The situation with land cases involving *Dalits* met the same fate, with 18 trials completed and no convictions, out of a total of 740 pending trial, of which 87 were new cases registered in 2020 itself.

The performance of the justice delivery system as far as prosecution of atrocities against SCs and STs is concerned, can then only be described as dismal.

10.5.3 Barriers to Successful Implementation of the Atrocities Act

The key barrier to the implementation of the Atrocities Act in its letter and spirit remains the deep-rooted historical prejudices in Indian society that, for centuries, have excluded the participation of *Dalits* and *Adivasis* in governance, sharing of political power, distribution and control of economic resources, and so on.

Dominant castes and classes use a multiplicity of violent methods to prevent the social and political mobility of marginalised groups such as *Dalits* and *Adivasis*. This includes systematic discrimination, physical and sexual violence, and the abhorrent practice of untouchability, among others. The aim is to ensure they remain imprisoned inside

[66] Sections 3(1)(f) and (g), Atrocities Act.

socially and economically oppressive structures. Against the tribal peoples, these mechanisms also include persistent attacks on their traditional lands and resources, and a host of ever-evolving forms of oppression.

According to the National Commission for Scheduled Castes and Scheduled Tribes,[67] basic compliances with statutory mandates were found to be lacking. Some of the trends in the implementation of the Atrocities Act observed at the time of writing its report were as follows:

> *"1. Monitoring and Vigilance Committees at State and District levels have either not been constituted or its meetings are not held on a regular basis.*
>
> *2. Annual Reports are not submitted by the Ministry of Social Justice and Empowerment as per law. The Second report pertaining to 1991-92 was laid in the Parliament in June 1998.*
>
> *3. A large number of deserving cases are not registered under the SCs & STs (Prevention of Atrocities) Act, 1989 due to ignorance of law or under pressure from interested parties.*
>
> *4. Appointment of Special Prosecutors is often influenced by political considerations.*
>
> *5. Supreme Court judgment on the ineligibility of a Sessions Court to directly take cognizance of the case without committal proceedings by the Magistrate will further delay the disposal of the case and defeat the objectives of this Act.*
>
> *6. States are not implementing relief and rehabilitation package."* [68]

The Commission accordingly suggested a range of corrective measures to improve the effectiveness of the law. Thereafter, important amendments were carried out to the Atrocities Act as well as the 1955 Rules to streamline law enforcement, monitoring mechanisms as well as the judicial processes in an effort to make this important law more effective. However, violations continue with impunity.

In 2018, a judgment[69] delivered by a two judge-bench of the Supreme Court shocked the conscience of the nation when it uninhibitedly articulated strong prejudices within dominant elites against *Dalits* and *Adivasis*. In this decision, the Court directed that no FIR shall be registered under the Atrocities Act without a preliminary enquiry being conducted by a senior police officer (Deputy Superintendent of Police) even though the settled law requires that the police must register an FIR when being informed about the commission of a cognisable offence.[70] The Court further directed that no accused person shall be arrested for an offence committed under this law without the written permission (with reasons) of a government official.[71] Again, this

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[67] *Sixth Report of the National Commission for Scheduled Castes and Scheduled Tribes, for the years 1999-2000 and 2000-2001*, Government of India.

[68] *People's Report on Implementation of SCs & STs (PoA) Act 1989 and Rules 1995 (2009-2011)* (National Coalition for Strengthening PoA Act, New Delhi) at 5.

[69] *Subhash Kashinath Mahajan* v. *State of Maharashtra* (2018) 6 SCC 454.

[70] This has been held by a five-judge bench of the Supreme Court in *Lalita Kumari* v. *Government of Uttar Pradesh* (2014) 2 SCC 1.

[71] *Supra,* note 69. According to the *Subhash Kashinath Mahajan* judgment, in the case of a public servant, the approval of the appointing authority is required to be obtained, and in case of a non-public servant, the approval of the Senior Superintendent of Police. Further, the reasons for such approval must be scrutinised by the Magistrate at the time of production before permitting further detention. It may be noted that these directions have subsequently been set aside by the Supreme Court, and also obviated by amendments to the Atrocities Act enacted by the Union Parliament.

directive flies in the face of settled law that a police officer does not require a warrant to arrest a person who has committed a cognisable offence.

The 2018 judgment was met with shock and dismay, and led to nationwide protests, some of which resulted in violent clashes between the protestors and upper caste groups, resulting in at least nine deaths.[72] Responding to the upsurge of public anger, the Parliament quickly amended the Atrocities Act to incorporate provisions which effectively negated the Supreme Court's directions.[73]

The Supreme Court also subsequently responded with careful consideration, disposing of a spate of review petitions with a reasoned decision setting its own March 2018 judgment aside.[74] The question remains: will these positive developments in normative law be reflected in the reality of *Adivasi* and *Dalit* lives?

10.6 Connecting the Atrocities Act to the FRA

The FRA marks an paradigm shift in the law by stating, in no uncertain terms, that *Adivasis* and forest dwellers who had been treated as encroachers on their own lands under colonial and post-colonial forest law regime, are now holders of forest rights in these same lands. With this Act of Parliament, a long-standing historical injustice is sought to be remedied. Towards this end, the FRA also establishes a mechanism for rights recognition located firmly outside the mainstream justice system and grounded in traditional systems of decision-making and evidentiary rules.[75] Further, the law establishes an alternative to the fortress conservation model entrenched in Indian law, seeking to replace it with a system where communities of indigenous peoples and forest dwellers take leadership and ownership of processes of ecological conservation.

The FRA also creates a new criminal offence – contravention of any provision of the Act or its Rules concerning recognition of forest rights is now a crime. However, before a Court can take cognisance of such an offence, a rather long drawn out procedure has to be followed. To begin with the *Gram Sabha* of forest dwellers must pass a resolution describing the offence and send it to the State Level Monitoring Committee ("**SLMC**"). Only if the SLMC fails to take any action within 60 days, can a court of law take cognisance of the offence. Further, the punishment is a lenient one, being a fine of upto Rs. 1,000.[76] It is not surprising, therefore, that there have been no recorded cases

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[72] *Supra*, note 60 at 35. It is noted that a *Bharat Bandh* (national shutdown) was called by *Dalit* organisations on April 2, 2018, to protest against the Supreme Court judgment, and in some areas the protests turned violent resulting in mass arrests, numerous injuries to the protestors, and nine deaths when police opened fire on the protestors, primarily *Dalits*.

[73] *The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2018* introduced a new Section 18A to the parent legislation stating that no preliminary enquiry shall be required for registration of an FIR, and the Investigating Officer shall not require prior approval before making an arrest. The Statement of Objects and Reasons for this Act clearly cites the April 2018 judgment of the Supreme Court as the trigger.

[74] *Union of India* v. *State of Maharashtra* (2020) 4 SCC 761.

[75] Shomona Khanna, "Historical Wrongs and Forest Rights: Nascent Jurisprudence on FRA and Participatory Evidence Making", in Varsha Bhagat-Ganguly and Sujit Kumar (eds), *India's Scheduled Areas: Untangling Governance, Law and Politics* (Routledge, New York, 2020).

[76] Sections 7 and 8, FRA.

of *Adivasi*s and forest dwellers attempting to initiate criminal proceedings under this provision in the last 14 years, even though violations of the FRA are rampant.

This reluctance of *Adivasi* and forest dwelling communities to take violations of the FRA to court are, however, beginning to change after the 2016 amendments to the Atrocities Act. A substantive expansion of the definition of "atrocity" has meant that the wrongful dispossession of an SC or ST from their land and interference with the enjoyment of their rights, *including forest rights*, is an offence inviting a minimum term of imprisonment of six months, and where the crime is committed by a public servant, a minimum sentence of one year imprisonment.[77] The definition incorporates the definition and meaning of 'forest rights' from the FRA.

The offence is cognisable and non-bailable. Additionally, anticipatory bail is not available. Thus, the law now leaves no room for ambiguity — violation of forest rights of *Dalits* and tribal peoples by persons who are non-SCs / non-STs is a very serious crime. Whether there has been an increase in registration of cases at police stations, and how many of these have reached the logical conclusion of trial and conviction, is hard to say at the present time.

These legal advances, however, are far from quiescent. The transformative potential of the FRA has been noted in a recent judgment of the Supreme Court in the *Niyamgiri* case[78] where the constitutional and statutory scheme relating to the rights of *Adivasi*s over land and its resources has been explicated at some length. The Court traces the right of forest dwelling *Adivasis* to be consulted before their traditional lands are diverted for commercial non-forest purpose, to the fundamental right to protect and preserve religious and cultural rights under Article 25 of the Indian Constitution. The Court has also held that the prior consent of the *Gram Sabha* is a necessary ingredient of the law.

In recent years, there have been several reported instances of *Adivasis* and forest dwelling communities invoking the provisions of these two statutes together in order to assert the moral high ground when confronted with bureaucrats who assert their authority under the now out-dated forest laws. Communities have invoked these provisions in *Gram Sabha* resolutions, in appeals before statutory bodies, in complaints before the SLMCs, and even in representations addressed to the Governor of the State and the President of India seeking to galvanise their authority under the Fifth Schedule of the Constitution. Forest department officials who have come to

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[77] Section 3(1)(g) read with Section 3(2) of the Atrocities Act. Of great use is a detailed explanation of the meaning of the term "wrongful" for the purpose of this particular crime, as under:

"(A) against the person's will;

(B) without the person's consent;

(C) with the person's consent, where such consent has been obtained by putting the person, or any other person in whom the person is interested in fear of death or of hurt; or

(D) fabricating records of such land."

[78] *Orissa Mining Corporation* v. *Ministry of Environment and Forests* (2013) 6 SCC 476.

carry out 'coup felling' in forests where communities have asserted their forest rights have found themselves stopped in their tracks, their tools seized, and complaints registered against them in the local police station. Where the officials have sought to prosecute community members for 'obstructing government servants from carrying out their duties', a crime under the IPC, the accused have turned up *en masse* to court arrest and refused to plead guilty as they were once wont to do. They asserted that they are the rightful stewards of the forests now and it is the forest officials who have encroached upon the law and the land.[79] The templates of power are clearly being reformatted as awareness of the shift in criminal law reaches the forest villages in India.

[79] *State* v. *Pabitra Rava and Others*, Order dated April 3, 2013 in G.R. No. 404 of 2013, Additional CJM Alipurdwar, West Bengal. Cited in Shomona Khanna, *Compendium of Judgments on the Forest Rights Act 2007 – 2015* (Ministry of Tribal Affairs: Government of India, New Delhi, 2016).

Chapter 11

IN CONCLUSION: THE BEGINNING OF A STUDY IN CRIMINALITY

Every chapter of this report, each with its own scheme of operation, has unfolded myriad laws, their purposes, provisions and impact on forested communities. In narrating the experiences that emerge from the ground, most chapters document only stories of horror and shame. Any report from Chhattisgarh or Jharkhand is filled with sexual violence unleashed on women as part of the lawful raids by security personnel or members of the police force. The bodies of women have, in fact, become sites of conflict and portrayal of authority.[1] An episode of gang rape in the village of Khunti has the potential of being converted into a conspiracy against the Government of India.[2] And any other attempt of differing with the ideologies of national development is met with violence and criminalisation.

This report, which is an outcome of the 'Study on the Criminalisation of *Adivasis* and Other Forest Dwelling Communities', began with recounting the oppressive history of such experiences and their translation into our legal system. Towards the end, this report has laid out bare the regime of protection that stands tall and high today. Within this course, the standards of legitimacy and illegitimacy saw sporadic movements, while being completely absent in a few places. At some places, like those where a regime of protection of environment and wildlife was operational, we were unable to determine where legitimacy lay or whether it was a matter of concern at all. At other places, like those of the public safety statutes[3] and stories from the prisons of Bastar,[4] legitimacy was nowhere to be found. There was only a standing threat of violence. Other than tiny specs of hope from isolated incidents where the law has worked in favour of the *Advivasi* communities, the larger experience has been that of targeted criminalisation of these communities and anyone else who stood with them. What the chapters in this report have done is to painstakingly show us a modest picture of criminality and the fate of a forest dweller in it. They have introduced a plethora of laws and issues that need a much deeper understanding and dedicated engagement. To call the study under this report a conclusion would be grossly pretentious, for the discourse has only just begun. But if we do not pause at this moment, further work would face delay and any more deference in this regard would be extending the injustices we have just laid out.

So, the purpose of this concluding note is to exhibit some of the themes that emerge from this preliminary study of criminality. Different chapters have shown the different manners in which criminality exists as a norm in law and how it operates on the

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[1] *Chapter 8: Violence Against Adivasi Women: Unravelling of the Social Structure* uncovers the culture of violence against *Adivasi* women and the meaning of it in the conflict between the state and the community.

[2] *Chapter 7: Security Laws and Impunity* recounts events from Khunti village of Jharkhand where the community and the State has been in conflict for the movement of *Pathalgarhi* and an act of rape was used as a tool to arrest and detain leaders of the movement.

[3] *Ibid*. Chapter 7 is dedicated to a detailed description of these laws.

[4] *Chapter 9: Prisons and the Adivasi in India* tells stories from some of the most conflict prone regions in the country.

ground. The structure of legislations and rules, along with the attitudes of the police, the forest bureaucracy and the courts — all depict an underlying idea of development by discrimination. The following paragraphs summarise key observations that emerge from the study in this report. They also reiterate these themes and draw out the inter–relationship between discrimination and development, and the engagement of criminality and violence within these dynamics.

1. Once a Criminal, Always a Criminal

While the law of forests has traveled through time and adapted itself to new faces of globalisation and development, the perception of a forest dweller continues to be stuck in time and place, retaining its colonial routine. And this perception, as we have seen at length, specifically under *Chapter 2: History: A Witness to the Alienation of the Adivasis* and *Chapter 4: Norm of Criminality*, continues to be woven into the fabric of the law, no matter how contemporary the law may claim to be. The *Criminal Tribes Act, 1871* declared over 150 *Adivasi* communities as criminal and dangerous. It legitimised use of violence against them. *The Compensatory Afforestation Fund Management and Planning Authority Act, 2016* while being developmental in nature, allowed the Forest Department to actively use violence against the forested communities for being 'barriers' to the development processes. From 1871 to now, the perception of an *Adivasi* seems to have altered little; they were considered dangerous to the colonial regime then and continue to remain dangerous for the state even today as it aims to meet objectives of development. A forest dweller, who is considered to be an encroacher is also, somehow, a seditious criminal capable of waging a war against the state — a stark reminder of continuing identity violence. The fight for autonomy back then was no different than it is today; rather the only difference being that the *Adivasi* is pitted against an established order, which has all the trappings of legitimacy and moral authority that a colonial state did not.

2. A Perception that Lingers

By an Order dated February 13, 2019, the Supreme Court of India directed evictions of those people whose claims under *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* ("**FRA**") had been rejected with finality. It was presumed that if forest titles could not be granted to certain individuals or communities, their occupation of land amounted to encroachment. And we have seen how the Indian law treats encroachers — rewarding them with land is considered equivalent to rewarding a pickpocket.[5] Soon after, on February 28, 2019, the said Order was put "on hold" to determine whether due process had been followed in the process of claim rejection and examine what was the law of evictions in India,

[5] *Almitra Patel* v. *Union of India* (2000) 2 SCC 166, where it is observed that*: "The promise of free land, at the taxpayers cost, in place of a jhuggi, is a proposal which attracts more land grabbers. Rewarding an encroacher on public land with free alternate site is like giving a reward to a pickpocket."* This has been discussed in detail under *Chapter 4: A Norm of Criminality.*

since that remained blatantly unclear. Despite its withdrawal, Order dated February 13, 2019 reflects a perception that has consequences reaching far and wide and that recurrently occurs in the minds of our judicial system.[6] The normative framework of law, as we have observed in detail under *Chapter 3: A Radical Break from the Past: The Constitution of India and its Interpretations*, offers a constitutional regime of protection to all people standing at the margins of our nation–state. The guaranteed operation of fundamental rights along with constitutional provisions that specialise in offering protection and granting autonomy, like the Fifth Schedule, have carved out a framework that not only recognises the specialised position of these communities, but also crafts a regime of protection over them. The Indian Constitution bestows the state with a difficult responsibility — to both provide autonomy to communities of the forest, and extend protection to them, especially when they need it the most. Legislations like the FRA and the *Panchayats (Extension to Scheduled Areas) Act, 1996*, as discussed in the last chapter, are manifestations of this twin responsibility and the way it needs to be conducted.

The perception of criminality and encroachment, however, clouds this responsibility. A difficult idea is also difficult to propagate and to follow. The lingering perceptions become habits and are not easily overlaid. No matter how clearly the principle may be laid out in the fundamental law of this country, it still suffers from a crisis of identity. Therefore, ghosts from the colonial past have had an easy access to the interpretation of these ideas. Presumptions that unproblematically allow people to turn into criminals that are prospectively dangerous and encroachers on the property of others cast a shadow on even the most respected judicial minds of this country. When in 2019, the Apex Court declared evictions as a matter of course, without having any clarity on what the law of evictions is and how it operates in forested spaces, it manifested a deep-seated, lingering rejection of identity. This was a rejection of the identity of forest dwellers and their status within our constitutional regime of autonomy and protection. If the identity of criminal–encroacher has worked for all these years and the country has done nothing but progressed, it must also work for all years to come.

3. What is written is what is done

> *"Legitimacy does not concern itself so much with whether governmental exercise of power is lawful. Rather, what is at issue is the manner and purpose of the exercise of constitutional power and the justification of such an exercise."*
>
> K G Kannabiran[7]

While operational problems within the workings of our criminal justice system are endemic and cause a significant amount of disarray in practice, the matter does not end with them. If Kannabiran is right in saying that the *"manner and purpose of the exercise of constitutional power and the justification of such an exercise"* determines

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[6] Two instances of this trend are: *Nature Lovers Movement* v. *State of Kerala and Others* (2009) 5 SCC 373; and *T N Godavarman Thirumalpad* v. *Union of India* (2002) 9 SCC 502.

[7] K G Kannabiran, *The Wages of Impunity: Power, Justice and Human Rights* (Orient Longman, Delhi, 2004).

standards of legitimacy, then the problem is structural. The reigning norm is, in itself, filled with bias. The perceptions and attitudes of people who run justice systems are as significant as are the attitudes of people who write and draft the law. When undertrials linger in the prisons of Jharkhand, their state of affairs cannot alone be attributed to operational glitches. For, if a provision meant to protect a person from unfair prosecution — like when serious offences cannot be taken cognisance by court unless prior sanction is obtained from the government — becomes the very reason for *Adivasi* prisoners to linger in prisons for years on end,[8] then one needs to worry about the state of the law as a whole.

The written law, fair and square, is as much responsible for injustice and discrimination as is the perception of police and the court — no matter how constitutional or protective or developmental the law may seem to be. An overlapping trajectory in South Chhattisgarh of the number of Memorandums of Understanding for extraction and acquisition, the number of Central Reserve Police Force and security personnel posted in the area and the amount of *Adivasi* undertrial population, is a stark reminder of how the processes of development have an underlying current of discrimination in them. It is the dynamics of the norm and operation. What is written and what is done; that determines the fate of *Adivasis* and traditional forest dwellers in India.

When we began to unfold the laws that prospectively criminalise *Adivasis*, we found out that criminality is woven into the fabric of law in a multitude of ways. Whether the notion is as direct as the *Madhya Pradesh Jail Manual, 1987*[9] or as indirect (and developmental in purpose) as the scheme of Land Banks, where the State government retains control over declaring types of land and the types of people that can occupy them,[10] violence and criminality occur as shape shifters, but remain ever so inevitable. Legitimate claim over asserting authority and using violence have been retained by the state in all laws, whether it is the *Indian Forest Act, 1927*, the *Wild Life (Protection) Act, 1972* or any of the Public Security legislations. Producing Naxalism, Naxalites, Maoism and Maoists is part of the same discourse and cannot be segregated from the context within which it occurs. What is written in the law and in the minds of the populace is what is done and conducted on ground. All ideas of fairness and justice fall short when we speak in the realities of violence and legitimacy.

4. When an Accused and When a Complainant: The Chronicles of Equality

Interface of anyone with the criminal justice system usually occurs at two different positions. One, where they are an accused, a criminal in law; another, when they are the victims of atrocities and violence, standing as complainants in front of the

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[8] This was one of the findings of the Bagaicha Research Team, Ranchi in 2015 and finds an analysis under *Chapter 9: Prisons and Adivasi in India*.

[9] Rule 411 of the Manual has been discussed under *Chapter 4: A Norm of Criminalit*y while discussing the law of Habituality, Vagrancy and Beggary.

[10] *Chapter 6: Redefining the Forest and Reinventing the Conflict* offers a detailed discussion on the use of Land Bank policy and its impact in the COVID-19 climate.

system to seek justice. In a world ruled by equality, these two positions should be both accessible and possible for everyone who engages with the law. The former should provide a level of protection from false prosecution and the latter should enable a fair trial. As the preceding chapters have iterated, the interface of an *Adivasi* with the justice system does not even begin to meet the standards of equality. Their presence in the system as an accused juxtaposed with their presence as complainant suffers heavily from the criminality syndrome prevalent in our legal system.

In fact, the interface of a forest dweller with the criminal justice system does not even have to go as far as them being an accused in a case. The mere threat of accusing them and initiating formal proceedings of law against them is an everyday reality.[11] They occur as potential criminals, habitual offenders, encroachers, potential peace–breakers, accused, undertrials — all quite conveniently. Chapters 4 through to 6 have laid out, in detail, the many, many manners in which an *Adivasi* can become an accused in the law.

Whether the law is general or special, protective or developmental, colonial or post–colonial, the possibility and means of wrapping an *Adivasi* within the clutches of law are more than plenty. The same rigour in spirit and letter, however, evades the laws that seek to protect *Adivasi* communities and forest dwellers from atrocities and violences unleashed on them as a matter of historical course.

Chapter 10: Adivasi and Protective Legislations: Interface as Complainants examined provisions of *The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989* ("**Atrocities Act**") along with the paradigm shifting legislation, FRA. It lists the details with which the law has laid down the many kinds of atrocities that are possible against people who have been historically oppressed and belong to the margins of a civilised society. However, the letter, spirit and procedure of law stands compromised at every step of the way. Neither is sufficient data available to make a sensible analysis of what happens when an *Adivasi* files a case under the Atrocities Act, nor have the recent workings of the judicial system[12] been able to overturn the lingering perception of their criminality. Although the sheer spirit and courage of the *Adivasi* and forest dwelling community has utilised this law to assert their rights as much as is possible within the scheme of things, one needs to worry about the kind of systems we have generated. How is it that, even in terms of quantity — assuming that we can worry about the quality of these laws and all the operational troubles at a later stage — the number of laws that criminalise the *Adivasi* far outweigh and outnumber those that provide them protection?

We leave these questions for future researchers in the hope that this report on the *'Criminalisation of Adivasis and the Indian Justice Systems'* is the beginning of a systematic study in criminalisation.

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[11] Some of these instances have been narrated under *Chapter 4: A Norm of Criminality*. Stories from the *Pardhi* Tribe in Madhya Pradesh are representative of this point.

[12] The cases of three young men: Irpa Narayan, Midiyam Lachhu and Punem Bhima, are discussed in *Chapter 9: Prisons and the Adivasi in India*.

A sacred grove in a forest 2019

Photo: Puja

Epilogue

THE NORTH-EAST: OF UNFAMILIARITY AND SHARED HISTORIES

The alert reader would detect a palpable void in the preceding chapters of this volume. While it assembled some of the most problematic spaces in criminal law, this report with its eleven chapters did not capture the issues and concerns of a sizeable portion of the *Adivasi* population in India. We have grappled with this void from the start. While we were able to explore the data and materials from across the country regarding the interface between *Adivasis* and the criminal justice system, we were unable to find a reflection in the North-East of the categorical trends described in this report for the Fifth Schedule States. The moment we figuratively crossed the chicken-neck, the analytical tools we found so evocative in the 'mainland' tribal narrative seemed to dissolve in the context of the North-East.

The North-East Indian States, spread over a geographical area of 2,62,179 sq. kms, are home to some 200 ethnic communities recognised as Scheduled Tribes ("**STs**") under the Indian Constitution. This accounts for 12 per cent of the ST population of the country. The tribal peoples of the North-East, who prefer to describe themselves as 'indigenous peoples' or simply 'tribals', are an embodiment of heterogeneity. Besides racial and linguistic differences, this region has a unique history with distinct and volatile political narratives. Many have highly developed governance structures, which retain and build upon vibrant traditional governance mechanisms. Unlike the rest of the country, including the Fifth Schedule Areas, the traditional unrecognised self-governing structures in the North-East continue to exercise governance powers over livelihood resources, to a greater or lesser degree. The region is replete with instances of traditional indigenous leadership mechanisms, which continue to exercise power within the post-independence structures of government. Some examples include the *Mei* among the *Karbis* of Assam, *Kebang* among the *Adis* in Arunachal Pradesh, *Jaintias* in Meghalaya, *Khullakpa* among the *Kaboi* in Manipur and *Durbar Shong* among the *Khasis*.[1]

The boundary between the North-East and the rest of India is also marked by the Constitution. Most of the States in the region have special and different constitutional status, with varying degrees of local autonomy — what is usually described as asymmetrical federalism.[2] The region redefined the contours of autonomy in the history of India's politics. It is governed by a series of provisions that have been specifically crafted for these States, depending on the political processes that led to their formation. Nagaland, for example, was created in 1963 after an agreement between the Indian state and the Naga Peoples' Convention, which resulted in Article

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[1] North East Council, *Poverty Eradication / Alleviation in North East India: An Approach* (National Institute of Rural Development, North Eastern Regional Center, Guwahati, Assam) at 2; available at: *http://www.indiaenvironmentportal.org.in/files/Cover_Page9550048814.pdf.*

[2] Louise Tillin, "Asymmetric Federalism" in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of The Indian Constitution* (Oxford University Press, New Delhi, 2016).

371A of the Constitution. Likewise, Article 371G emerged for Mizoram. Both these provisions, among other things, provide the State legislatures, the power to accept or reject Central legislations on a variety of subject matters. Article 244 read with the Sixth Schedule of the Constitution allows for the formation of autonomous administrative divisions, which have been given considerable legislative, administrative, and even judicial powers inside their respective geographical jurisdictions within the State. There are 10 Autonomous District Councils under the Sixth Schedule of Article 244 of which three are in Assam, three in Meghalaya, one in Tripura and three in Mizoram. There are, in addition, 12 Autonomous Councils created by State enactments, of which six are in Assam and another six in Manipur. These too have emerged out of a multiplicity of social and political movements, some of them fraught with violence. A detailed examination of the constitutional and statutory provisions, which delineate distribution of governance between the Central, State, and the local government structures in the North-East is quite beyond the scope of this report.

For these reasons, the situation of tribal populations in the North-East is quite different from the rest of the country. Naturally, this divergence extends to how the criminal justice system operates in that region, requiring an independent study in its own right. We hope there will be others who will pick up the baton and venture into this important enquiry.

Further, we also acknowledge that there exists an ambiguous continuity in the borders of separation between the tribal populations in the North-East and those in the rest of India, albeit operating with varying degrees of intensity. Just like many other States with a high density of *Adivasi* population, the North-East has a continuing history of heavy militarisation. This includes not only the Central para-military forces, but also, in some cases, the Indian Army itself. Large swathes of the region have been declared 'disturbed areas', and the dreaded *Armed Forces (Special Powers) Act, 1956* has been repeatedly deployed. The proximity of these States to the international border provides the convenient rationale of 'national security'.[3] At other times, the deployment of armed forces is justified as a necessary corollary of the varied armed struggles which have fragmented the political history of the region. Scholars like Nandini Sundar have elucidated how displacement and resettlement were used as a counter-insurgency mechanism on a large scale in Mizoram and Nagaland.[4] They outline for us how the Indian state presumed all people, whether civilian or combatant, as being potentially hostile and, therefore, criminally dangerous to the peace of that region, as well as the peace of the entire country. Much has already been written about this process.[5]

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[3] Shomona Khanna, *Nation State Boundaries and Human Rights of People in South Asia* (South Asians for Human Rights, Colombo, 2017) at 133; available at: *https://www.academia.edu/33957181/Nation_State_Boundaries_and_Human_Rights_of_People_in_South_Asia?email_work_card=title.*

[4] Nandini Sundar, "Interning Insurgent Populations: The Buried Histories of Indian Democracy", *Economic and Political Weekly*, Vol. XLVI No. 6, February 5, 2011; available at: *https://www.academia.edu/6449404/Interning_Insurgent_Populations_The_Buried_Histories_of_Indian_Democrac.*

[5] C.R. Bijoy, Shankar Gopalakrishnan and Shomona Khanna, *India and the Rights of Indigenous Peoples* (Asia Indigenous Peoples Pact, Thailand, 2010) at 25.

This trend has, however, not been articulated in the context of criminalisation of tribal and forest dwelling populations in the region. And perhaps, there is a simple reason for this. The tribal communities of the North-East have fought long and hard for autonomy over their land and resources on the one hand, while also ensuring that the extension of the colonial forest governance regimes, exemplified by the *Indian Forest Act, 1927* ("**IFA**"), was kept limited. It is not that the *Adivasi* communities in the rest of the country do not have a long history of struggle for autonomy, but the success of the North-East has been unprecedented in this regard.

The difference between the North-East and the rest of India, therefore, lies in the line of inquiry. The manner in which the process of criminalisation has been articulated for mainland India in this report cannot be simply replicated for the North-East. For the *Adivasi* and forest dwelling communities in mainland India, criminal law and the justice system have been entangled with their struggle for autonomy. In order to ask the question of criminalisation in the North-East, we need to first understand if it relates to tribal autonomy, identity and their lands and resources. The region differs in the constitution of criminal law and the justice system. The history of violence also differs, as does the role of the justice system and the manner in which it has been accessed and responded to violations of rule of law.

Nevertheless, there are underlying similarities between the two regions. On any expression of dissent of opposition of state policies, whether in the context of developmental projects or issues of governance, there is a readiness with which the state labels it seditious.[6] The tribal and *Adivasi* populations in the North-East and the rest of India must continue to speak to each other and learn about how the criminal justice system has been bent towards domination of these populations. The lessons of history must be shared with each other, lest we are condemned to repeat it in new and evolving forms.

Nagaland, for example, has a total geographical area of 16,579 sq. km. As per 2019 data, a total of 12,486 sq. km (or 75.31 per cent) of this area is forested. However, only 491 sq. km (or 3.9 per cent) of the total forest area is under government control under the IFA.[7] This has meant that the State legislature has refused to adopt the application of *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* to the State, and tribal organisations have not felt the need to demand otherwise.

An even smaller proportion of the forests in Nagaland fall under the purview of the *Wild Life (Protection) Act, 1972* ("**WLPA**") with just one National Park and four Wildlife Sanctuaries spread over a total of 245.93 sq. km, which constitute 1.48 per cent of

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[6] Namrata Biji Ahuja, "Is anti-sedition law killing journalism in the northeast?", *The Week*, August 8, 2021; available at: *https://www.theweek.in/theweek/cover/2021/07/29/is-anti-sedition-law-killing-journalism-in-the-northeast.html.*

[7] *Status of Forests.* Department of Environment, Forests and Climate Change, Government of Nagaland; available at: *https://forest.nagaland.gov.in/status-of-forests/.*

the State's geographical area.[8] Since 2018, there has been a sudden and inexplicable increase in the number of Community Reserves[9] in the State, increasing from just three in 2009 to a whopping 120 in 2020 covering 852.4057 sq. kms.[10] This number continues to grow. Although the geographical area covered by these Community Reserves does not appear to be significant, they represent an inroad of the State's forest bureaucracy into the heart of community owned and managed forests. Even more importantly, they represent the insidious tendrils of the criminal law provisions under the WLPA and the mainstream criminal justice system into areas where communities had hitherto tackled violations through their own traditional dispute resolutions mechanisms.[11] Bringing the WLPA into operation in such community forests has consequences. We must recall that the WLPA empowers the Chief Wildlife Warden as *"the authority who shall control, manage and maintain all (Community Reserves)"* and take *"such steps as will ensure the security of wild animals .... and the preservation of the (Community Reserve)"*. He is also empowered to take *"such measures, in the interests of wildlife, as he may consider necessary for the improvement of any habitat"*.[12] But are community leaders aware of these consequences when they sign such 'voluntary' Memoranda of Understanding with the State forest departments? Are they aware that over time, the forest law architecture, which until now was largely inapplicable in Nagaland forests, will spread its tendrils in small insidious ways through the length and breadth of these Community Reserves? Do they accept that the very foundations of the autonomous governance mechanisms, which have received constitutional protection through arduous political struggle, could be severely impacted? We hope they will benefit from the cautionary tales elucidated in this report before repeating the historical errors of other *Adivasi* regions.

The necessity to learn from historical processes goes both ways. For instance, recent years have seen a renewed demand from within the 10 Fifth Schedule States for the issue of Rules under the *Panchayats (Extension to the Scheduled Areas) Act, 1996* ("**PESA**") with Madhya Pradesh being the most recent to notify such Rules, albeit in a surprise move involving no consultation with local *Adivasi* populations or their leadership. The rule-making process is at an advanced stage in Chhattisgarh, having gone through a rigorous consultative process with communities and traditional leaders across the tribal populations of the State. Like the PESA Rules emerging from other Fifth Schedule States, these too have focused almost exclusively on the *Gram Sabhas* and the traditional village governance structures, and the provisions

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[8] *Protected Areas of India.* ENVIS Centre on Wildlife and Protected Area.; available at: *http://wiienvis.nic.in/Database/Protected_Area_854.aspx*.

[9] Community Reserves are declared under Section 36C, WLPA by the State government, in areas (not being a National Park, Wildlife Sanctuary or Conservation Reserve) *"where the community or an individual has volunteered to conserve wildlife and its habitat"*.

[10] *Community Reserves*. ENVIS Centre on Wildlife and Protected Areas; available at: *http://wiienvis.nic.in/Database/cri_8228.aspx.*

[11] For a detailed discussion on the criminal law provisions of the WLPA, see *Chapter 5: Authority, Criminality and the Laws in Forests.*

[12] Sections 33(b) and (c), WLPA.

of existing *Panchayati Raj* laws dealing with them. There is little or no effort to dismantle structures of governance and power located at the State, the District, or even at the *Panchayat* level. Section 4(o), PESA provides an important imperative to the State Legislature to *"endeavour to follow the pattern of the Sixth Schedule to the Constitution while designing the administrative arrangements in the Panchayats at district levels in the Scheduled Areas"*. Yet little effort has been made to draw upon the learnings of the diverse, and often robust mechanisms for power sharing between the different layers of the state and the traditional indigenous governance and dispute resolution mechanisms. This, even though examples and variations of such mechanisms in the North-East are replete.

We are hopeful that this report will provide an opening to this vital conversation, that these two regions of *Adivasi* and tribal populations will share their learnings with each other. It is only then that the constitutional aspiration of substantive equality, which plants its feet firmly in history while keeping its eye on the future, will draw closer to reality.

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[11] Some of these instances have been narrated under *Chapter 4: A Norm of Criminality*. Stories from the *Pardhi* Tribe in Madhya Pradesh are representative of this point.

[12] The cases of three young men: Irpa Narayan, Midiyam Lachhu and Punem Bhima, are discussed in *Chapter 10: Prisons and the Adivasi in India*.

women collecting Minor Forest Produce in Kandhamal district, Odisha 2017

Photo: Tarun Kumar, Samudrishti

Annexure A

LIST OF LEGISLATIONS CRIMINALISING *ADIVASIS*[1]

Category I: Legislations creating Forest Offences

1. Andhra Pradesh Forest Act, 1967
2. Bombay Reserved Trees Cutting and Removal Rules, 1936
3. Bombay Forest Rules, 1942
4. Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act, 1958
5. Chota Nagpur Tenancy Act, 1908
6. Indian Forest Act, 1927
7. Madhya Pradesh Forest Contract Rules, 1927
8. Madhya Pradesh Forests (Hunting, Shooting, Fishing, Poisoning Water and Setting Traps or Snares in Reserved or Protected Forests) Rules, 1963
9. Madhya Pradesh Forest Appeal Rules, 1965
10. Madhya Pradesh Kashtha Chiran (Viniyaman) Adhiniyam, 1984 (*Madhya Pradesh Saw Mills Act*)
11. Madhya Pradesh Imarti Lakadi (Bahati Hui, Kinare Atki Hui, Dubi Hui Bina Swami Ki) Niyam, 1986 (*Madhya Pradesh Timber Related Rules*)
12. Madhya Pradesh Forest Protection Reward Rules, 2004
13. Madhya Pradesh Village Forest Rules, 2015
14. Rules Regulating the Conditions of Sale by Auction of Timber/ Fuelwood. Charcoal from the established depots (Madhya Pradesh), 1989
15. Orissa Communal Forest and Private Lands (Prohibition of Alienation) Act, 1948 and Rules, 1949
16. Orissa Preservation of Private Forest Act, 1947 and Rules, 1963
17. Orissa Forest Act, 1972
18. Orissa Forest (Fire Protection) Rules, 1979
19. Orissa Forest Saw Mills and Saw Pits (Control) Rules, 1980
20. Orissa Timber and other Forest Produce Transit Rules, 1980
21. Orissa Forest (Detection, Enquiry and Disposal of Offence) Rules, 1980
22. Orissa Forest Rest House Occupation Rules, 1983
23. Orissa Village Forests Rules, 1985
24. Orissa Saw Mills and Saw Pits (Control) Act, 1991 and Rules, 1993
25. Policy on Procurement Trade of Non-timber Forest Produce (Orissa), 2000
26. Rajasthan Forests Act, 1953
27. Sonthal Parganas Act, 1855 and 1857

[1] This is an indicative list compiled by the authors of this report.

Category II: Legislations regulating the Access, Control and Transfer of Minor Forest Produce

1. Bihar Kendu Leaves (Control of Trade) Act, 1973
2. Chamba Minor Forest Produce Exploitation and Exports, 2003
3. Forest (Conservation) Act, 1980
4. Himachal Pradesh Forest (Sale of Timber) Act, 1968
5. Himachal Pradesh Forest Produce (Regulation of Trade) Act, 1982
6. Himachal Pradesh Surcharge on Purchase of Forest Produce Act, 1969
7. Indian Forest Act, 1927
8. Madhya Pradesh Tendu Patta (Vayapar Viniyaman) Adhiniyam, 1964 and Rules, 1966 (*Madhya Pradesh Tendu Patta Regulation of Trade Act and Rules*)
9. Madhya Pradesh Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969 and Rules, 1973 (*Madhya Pradesh Forest Produce Regulation of Trade Act and Rules*)
10. Madhya Pradesh Fixation of Rates for Timber and Other Minor Produce (Extension) Rules, 1974
11. Madhya Pradesh Grazing Rules, 1986
12. Mandi Minor Forest Produce Exploitation and Export Act, 1997
13. Madhya Pradesh Adim Jan Jatiyon ka Sanrakshan (Vrakshon me Hit) Adhiniyam, 1999, and Rules, 2000 (*Madhya Pradesh Scheduled Tribes Interest in Trees Act and Rules*)
14. Madhya Pradesh Fodder (Export Control) Order, 2000
15. Madhya Pradesh Transit (Forest Produce) Rules, 2000
16. Madhya Pradesh Vrikshon Ka Parirakshan (Nagariya Kshetra) Adhiniyam, 2001 and Rules, 2002 (*Madhya Pradesh Preservation of Trees (Urban Areas) Act*)
17. Madhya Pradesh Forest Produce (Conservation of Biodiversity and Sustainable Harvesting) Rules, 2005
18. Madhya Pradesh Protected Forest Rules, 2015
19. Orissa Kendu Leaves (Control of Trade) Act, 1961 and Rules, 1962
20. Orissa Forest Contract Rules, 1966
21. Orissa Kendu Leaves Manual, 1973
22. Orissa Excise (Mahua Flower) Rules, 1976
23. Board's Excise (Fixation of Fees on Mahua Flower) Rules, 1976 (Orissa)
24. Orissa Timber and other Forest Produce Transit Rules, 1980
25. Orissa Protection of Scheduled Castes and Scheduled Tribes (Interest in Trees) Act, 1981
26. Orissa Forest Produce (Control of Trade) Act, 1981 and Rules, 1983
27. Orissa Village Forest Rules, 1985
28. Orissa Saw Mills and Saw Pits (Control) Act, 1991 and Rules
29. Orissa Forest Development (Tax on Sale of Forest Produce by Government or Orissa Development Corporation) Act, 2003

30. Orissa (Rewards for Detection of) Forest Offences Rules, 2004
31. Joint Forest Management Resolution, 2011
32. Rajasthan Tendu Leaves (Regulation of Trade) Act, 1974

Category III: Laws creating Offences of Property

1. Andhra Pradesh Public Premises (Eviction of Unauthorized Occupants) Act, 1961 and 1968
2. Bombay Land Improvement Schemes Act, 1942
3. Coal Bearing Areas (Acquisition and Development) Act, 1957
4. Coal Mines (Conservation and Development) Act, 1974
5. Coal Mines (Special Provisions) Act, 2015
6. Gujarat Private Forests (Acquisition) Act, 1972
7. Gujarat Public Premises (Eviction of Unauthorized Occupants) Act, 1972
8. Himachal Pradesh Private Forests Act, 1954
9. Madhya Pradesh Land Revenue Code, 1959, and Rules made thereunder, including:
    (i). Rules regarding plantation of fruit bearing trees in unoccupied land;
    (ii). Forest Produce Rules;
    (iii). Prohibition or Regulation of Cutting of Trees Rules, 2007;
    (iv). Rules Regulating the Control, Management, Felling or Removal of Forest Growth;
    (v). Regulation of the Felling and Removal of Timber in Villages Adjoining Government Forests Rules, 2007; and
    (vi). Rules Regarding Regulation of Fishing, Hunting etc.
10. Madhya Pradesh Land Distribution Regulation Act, 1964
11. Madhya Pradesh Lok Vaniki Rules, 2002 (*Madhya Pradesh Social Forestry Rules*)
12. Mines Act, 1952
13. Odisha Prevention of Dangerous Activities of Communal Offenders Act, 1993
14. Orissa Communal Forest and Private Lands (Prohibition of Alienation) Act, 1948
15. Orissa Land Grabbing (Prohibition) Ordinance, 2015
16. Orissa Prevention of Land Encroachment Act, 1972 and Rules, 1985
17. Orissa Prevention of Land Encroachment Act, 1972
18. Waste Lands (Claims) Act, 1863

Category IV: Legislations creating Offences of Habituality, Vagrancy and Beggary

1. Andhra Pradesh Suppression of Disturbances Act, 1948
2. Andhra Pradesh Habitual Offenders Act, 1962
3. Andhra Pradesh Prevention of Begging Act, 1977

4. Bihar Borstal Act, 1961
5. Bombay Prevention of Beggary Act, 1959
6. Chhattisgarh Daikaiti aur Vyapataran Prabhavit Shreta Adhiniyam, 1981
7. Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1968 (Andhra Pradesh)
8. Gujarat Habitual Offenders Act, 1959
9. Gujarat Prevention of Begging Act, 1959
10. Gujarat Prevention of Anti-Social Activities Act, 1985
11. Himachal Pradesh Habitual Offenders Act, 1969
12. Himachal Pradesh Restriction of Habitual Offenders Act, 1973
13. Madhya Pradesh Bhiksha Vritti Nivaran Adhiniyam, 1973 (*Madhya Pradesh Prevention of Beggary Act*)
14. Orissa Restriction of Habitual Offenders Act, 1952 and Rules, 1969
15. Rajasthan Rehabilitation of Beggars or Indigents Act, 2012

Category V: Laws seeking to protect Wildlife, Other Animals and the Environment

1. Andhra Pradesh (Andhra Area) Wild Elephants Preservation Act, 1873
2. Cattle Trespass and Bombay District Felice (Amendment) Act, 1950 (Maharashtra)
3. Cattle Trespass (MP Amendment) Act, 1960
4. Elephants Preservation Act, 1879
5. Madhya Pradesh National Parks Act, 1955
6. Wildlife (Protection) (Madhya Pradesh) Rules, 1974
7. Madhya Pradesh Wildlife (Wild Pig) Eradication Rules, 2003
8. Madhya Pradesh Forest (Recreation and Wildlife Experience) Rules, 2015
9. Wild Life (Protection) (Orissa) Rules, 1974
10. Orissa Forest (Grazing of Cattle) Act and Rules, 1980
11. Prevention of Cruelty to Animals Act, 1960
12. Rajasthan Camel (Prohibition of Slaughter and Regulation and Temporary or Export) Act, 2015
13. Vano ke Sanrakshan Evam Vijas Hetu Jansahyog prapta Karne Ke Liye Punrikshit Sankalp, 2001 (Resolution for obtaining public assistance for conservation and development of forests) (Madhya Pardesh)
14. Wildlife Protection Act, 1972
15. Wild Life (Transaction and Taxidermy) Rules, 1974

Category VI: Laws Controlling Public Safety and the Para-Military Forces

1. Armed Forces Special Powers Act, 1958
2. Armed Forces (Assam and Manipur) Special Powers Act, 1858
3. Arms Act, 1959
4. Andhra Pradesh Public Security Act, 1992
5. Assam Rifles Act, 2006
6. Central Reserve Police Force Act, 1949
7. Chhattisgarh Special Public Safety Act, 2005
8. Chhattisgarh Auxiliary Armed Police Force Act, 2011
9. Gujarat Home Guards Act, 1947
10. Jharkhand Home Guards Act, 2005
11. Orissa Maintenance of Public Order Act, 1950
12. Odisha Industrial Security Force Act, 2012
13. Orissa Private Security Agency Rules, 2009
14. Private Security Agencies (Regulation) Act, 2005
15. Rajasthan Home Guards Act, 1963
16. Rajasthan Dacoity Affected Areas Act, 1986

Category VII: Preventive Detention Laws

1. Andhra Pradesh Preventive Detention Act, 1970
2. Preventive Detention Act, 1950
3. Rajasthan Preventive Detention Act, 1970

Category VIII: Legislations seeking to Obtain Developmental Goals

1. Chhattisgarh Anadhiknit Vikas Ka Adhiniyam, 2002
2. Compensatory Afforestation Fund Act, 2016
3. Gujarat Special Economic Zones Act, 2004
4. Indore Special Economic Zone (Special Provisions) Act, 2003
5. Madhya Pradesh Bhumi Seva Adhiniyam, 1981 (*Madhya Pradesh Land Services Act*)
6. Madhya Pradesh Bhumi Vikas Rules, 1984 (*Madhya Pradesh Land Development Rules*)
7. Rajasthan Special Economic Zones Act, 2015

Category IX: Legislations creating Offences in Taxation

1. Andhra Pradesh Excise Act, 1968
2. Chhattisgarh Excise Act, 1915
3. Central Excise Act, 1944
4. Denatured Spirit Rules made under Madhya Pradesh Excise Act, 1915
5. Madhya Pradesh Bhang Rules, 1960 (*Madhya Pradesh Cannabis Rules*)
6. Madhya Pradesh Cotton Transport Rules, 1967
7. Madhya Pradesh Karadhan Adhiniyam, 1982 and Madhya Pradesh Karadhan (Van Vikas Upkar) Rules, 1982 (*Madhya Pradesh Taxation Rules*)
8. Odisha Excise Act, 2005
9. Punjab Excise (HP Amendment) Acts 1965, 1995, 1999 and 2001
10. Rajasthan Excise Act, 1950

Category X: State Police Laws

1. Himachal Pradesh Police Act, 2007
2. Gujarat Police Act, 1951
3. Gujarat State Reserve Police Force Act, 1951

Annexure B

LEGISLATIONS CREATING OFFENCES OF BEGGARY, HABITUALITY AND VAGRANCY

Legislations	Who can be prosecuted under the Act	Offences Created and their Nature	Powers for Arrest, Detention and other Restrictions	Institutionalisation Process	Quasi-Judicial Processes	Process of Judicial Trial	Bar of Jurisdiction and Good Faith of Officers
Andhra Pradesh Habitual Offenders Act, 1962	HO would be one who has been sentenced on conviction in three different occasions and such sentence has not been reversed in appeal. Also, HO is one who habitually breaches peace or abets it (S. 2(e) of the Act and 110(e) CrPC)	Disobedience to the orders passed under the Act are described as offences	DC has the power to register HO and require their attendance at any time; power to take finger prints, photos at any time; SG also has the power to restrict movements of HO. PO can arrest without warrant if HO is found outside their area of limitation or absconds from CS (S. 4- 8)	SG to establish and maintain CS. SG can also direct a HO for corrective training if it feels that it is necessary for their reformation and prevention of crime. For HO under 40 years of age, corrective training to be between two and five years (S. 13 and 14)	DC is required to register offenders. For this purpose, the DC has powers to collect finger prints, seek attendance, etc. A representation against such order can be made to the SG. The entire process of institutionalisation is executive (S. 3, 4, 10 and 11)	When HO is arrested, they are to be produced before Magistrate within 24 hours of the arrest. Magistrate can pass requisite orders (S. 18)	Courts are barred from testing the validity of any direction passed under the Act. A legal proceeding is also barred against any person who proceeds under good faith under the Act (S. 19 and 20)
Bombay Prevention of Beggary Act, 1959	Persons found to be begging; soliciting or receiving alms or does not have visible means of subsistence and seems likely that the person exists by receiving alms. Also, persons dependent on beggars (S. 2(1))	Begging; being dependent on a person who sustains by begging can also attract detention. (S. 6 and 11) All offences to be cognisable and non-bailable (S. 31)	PO has powers to arrest without warrant a person found begging. PO or AO of the CI/RC can arrest without warrant any person who leaves the CI or RC without permission. (S. 27) PO also has the power to seize any animals that were exposed with the object of obtaining alms (S. 30)	CI and RC have to be constructed by SG. If the summary trial cannot be completed forthwith, the court can adjourn and remand the person in any place and custody as may be convenient. (S. 5) Court needs to forward the person for detention or imprisonment as per order (S. 25)	SG can extend detention of beggars who are 'incurably helpless' (blind, crippled or otherwise IC) once the court has passed an order of detention against them. C Insp. of a CI can suggest the court to pass an order of disciplinary imprisonment (S. 10 and 20)	Summary Trial: For a person convicted for the first time for begging, the court has to order two to three years of detention. Second time conviction will warrant detention for 10 years in CI which can be converted into imprisonment. (S. 5, 7 and 11)	None

Abbreviations in Annexure B: **AO** Authorised Officer(s), **C Insp.** Chief Inspector, **CI** Certified Institution, **CrPC** Code of Criminal Procedure, 1973, **CS** Corrective Settlements, **DC** District Collector, **DM** District Magistrate, **HC** Habitual Criminal, **HO** Habitual Offender, **IC** Incurably Helpless, **IPC** Indian Penal Code, 1860, **M/CH** Murder or Culpable Homicide, **NO** Notified Offender, **PO** Police Officers, **RC** Receiving Centers, **RO** Registered Offender, **S.** Section(s), **SG** State Government, **u/s.** under Section(s), **VH** Village Headman, **VP** Village Patel, **VW** Village Watchman

Legislations	Who can be prosecuted under the Act	Offences Created and their Nature	Powers for Arrest, Detention and other Restrictions	Institutionalisation Process	Quasi-Judicial Processes	Process of Judicial Trial	Bar of Jurisdiction and Good Faith of Officers
Gujarat Habitual Offenders Act, 1959	HO is one who has been convicted on three separate occasions within a period of five years for a substantive term for one of those offences. And such sentence has not been revered in appeal (S. 2(e))	Failing to comply with the orders passed under this Act without a lawful excuse are described as offences and the burden of proving that there existed a lawful excuse is on the HO. Certain HO can be punished for being found under suspicious circumstances or were about to commit an offence (S. 17 and 20)	DC has the power to register offenders under the Act and for that purpose, HO can be directed to appear before the DM, furnish any information, provide finger prints, photos etc. SG can also issue restriction orders for HO and restrict their movement and alter such orders. PO or Police *Patil* or Village Policeman can arrest without warrant if HO is found outside their allowed area or escapes from CS (S. 4, 5, 6, 11 and 12)	CS are to be established by SG. The SG also has powers to direct a person to receive corrective training. For HO under 40 years of age, corrective training to be between two and five years (S. 14 and 15)	SG can order DM to register offenders and then the DM acquires all powers necessary for the process like seeking appearance, furnishing information etc. A representation against such order can be made to the SG. The SG can restrict movements of HO, or cancel / alter such orders. SG can also order RO to take corrective training (S. 3, 4, 6, 7, 10 and 15)	A Magistrate may undertake proceedings as per S. 112 to 117, CrPC, but only if the SG has not made any order under the Act with respect to that HO (S. 13)	Court cannot question validity of any order or direction passed under this Act. Also, no suit can lie against SG for any action taken in good faith under this Act. However, if a Police *Patil* or VW fails to arrest a HO, they can be punished with Simple Imprisonment for one month or Rs. 500 fine (S. 21, 22 and 23)
Himachal Pradesh Habitual Offenders Act, 1969	HO is one who has been convicted on three separate occasions within a period of five years for a substantive term for one of those offences. And such sentence has not been revered in appeal (S. 2(e))	Failure to comply with certain orders passed under the Act is an offence and the HO can be arrested without warrant. HO found outside area of restriction or CS can also be arrested without warrant. Certain HO can be punished for being found under suspicious circumstances or were about to commit an offence (S. 17, 18 and 20)	DC has the power to register offenders under the Act and for that purpose, HO can be directed to appear before the DM, furnish any information, provide finger prints, photos etc. Registered offenders have to notify change or residence and report themselves. SG also has powers to restrict movements for HO (S. 3, 4, 7 and 11)	CS are to be established by SG. SG also has powers to direct a person to receive corrective training. For HO under 40 years of age, convicted of an offence or required to furnish a bond for good behavior, corrective training is to be between two and five years. There is also a provision for enhanced punishment for certain offenders for a period of 10 years or life (S. 14, 15 and 19)	DM is required to prepare register of HO and for that purpose has all powers. A representation against such order can be made to the SG. SG also has the power to restrict movements of HO. SG can also direct a HO for corrective training on the report of the DM (S. 4, 5, 11 and 15)	A Magistrate may undertake proceedings as per S. 112 to 117 of CrPC, but only if the SG has not made any order under the Act with respect to that HO (S. 13)	Court cannot question validity of any order or direction passed under this Act. Also, no suit can lie against SG for any action taken in good faith under this Act (S. 21 and 22)

Legislations	Who can be prosecuted under the Act	Offences Created and their Nature	Powers for Arrest, Detention and other Restrictions	Institutionalisation Process	Quasi-Judicial Processes	Process of Judicial Trial	Bar of Jurisdiction and Good Faith of Officers
Madhya Bharat Vagrants Habitual Offenders and Criminals (Restriction and Settlement) Act, 1952	A HC is one who has been sentenced to substantive term of imprisonment on at least three occasions. An order for good behavior u/s. 110, CrPC is included (S. 2(4))	Contravening the orders passed under the Act is an offence	PO/VP can arrest without warrant any person who is found beyond the limits of his restrictions or escapes from settlement (S. 20)	SG has the power to establish industrial, agricultural or reformatory settlements. SG or DM can make an order directing a person to be placed in a settlement. In case of a HC, period of settlement can be up to seven years. Any person can also volunteer to reside in a settlement. If the settlement period is more than three years it shall be reviewed on expiration of three years (S. 17, 18 and 19)	SG has power to notify HO and this power can be delegated to DM. The DM can restrict movements of HC. Also, an order to place HC in settlements can be made (S. 13, 14 and 17)	In any cases of S. 109, 110 CrPC, the Magistrate shall require the person to show why an order of restriction should not be made against him. The Magistrate shall make such order of necessary in public interest. Court of Magistrate can also cancel or modify such order. On conviction for contravention, one, two or three years imprisonment depending upon no. of convictions. Enhanced punishment upto Life Imprisonment can also be given in certain cases (S. 7, 8, 11, 22 and 23)	Any VP, VW, owner or occupier of land, or the agent who fails to comply with the duty to report a HC, shall be deemed to have committed an offence punishable u/s. 176 IPC (S. 25)
Orissa Restriction of Habitual Offenders Act, 1959	A HO means a person who has been sentenced to a term of substantive imprisonment on two or three occasions, as per the nature of offence. For offences like M/CH, conviction on two separate occasions will suffice. For others like theft and counterfeiting, a conviction on three occasions is required. An order for security of good behavior u/s 110 CrPC is included. The SG notifies a list of HOs for the State (S. 2(a))	Contravening the restrictions imposed on the HO by the SG; escaping from any settlement where a HO has been placed (S. 11)	The DM has the powers to notify a person as HO and a HO's movement can be restricted by the SG, if it deems so. The SG can also direct the HO to be placed in a settlement and can also discharge any person from a settlement. PO/VH/VW may arrest without warrant if any restriction is contravened or the HO escapes from settlement (S. 4, 5 and 11)	No detailed procedure described. But settlements are to be constructed by the SG	All processes of notifying a HO, imposing restrictions, power to cancel such restrictions are within the powers of the SG. SG can also place NO in settlements (S. 3, 4, 5, 6 and 7)	Any NO who is arrested has to be taken before a Magistrate, who, on proof of facts, shall pass requisite orders (S. 11)	No court can question the validity of the notification passed under this Act. Also, no legal proceeding can lie against a person who acts under the Act in good faith (S. 13 and 13A)

Source: The table has been created by the authors

Annexure C

LEGISLATIONS CREATING OFFENCES OF PROPERTY

Legislations	Offences and its Charges	Good Faith of Public Officers	Quasi-Judicial Proceedings	Procedure of Investigation	Procedure of Trial	Penalty
Andhra Pradesh Public Premises (Eviction of Unauthorized Occupants) Act,1968	**C-I.** Unauthorised occupation of public premises including a situation where any authority to occupy has expired or terminated; **C-II.** Occupation of public premises from which the person has been evicted (S. 4(1) r/w 2(h)(12))	No suit, prosecution or other legal proceeding shall lie against officer in respect of anything done in good faith (S. 16)	EO can evict any person by recording reasons upon satisfaction that public premises has been unauthorisedly occupied. *Note:* EO must serve a show notice along with grounds on which eviction is to be made (S. 4 and 5)	EO has been given same powers as a Civil Court with respect to summoning; discovering and production of documents etc. Power to obtain information has also been given to the EO or any other officer authorised by the EO (S. 8 and 13)	None	**C-I.** Eviction by the EO **C-II.** Imprisonment up to one year or fine up to Rs. 1,000 and summary eviction by Magistrate (S. 12)
Orissa Prevention of Land Encroachment Act, 1972	Unauthorisedly occupying any land which is government property (S. 4)	No legal proceeding shall lie against any person for anything done in good faith (S. 17)	*Tahsildar* is the AO to proceed with the assessment of rent and summarily evict any person in unauthorised occupation. *Note: Tahsildar* must serve notice to the person before taking proceedings under the Act (S. 4, 7 and 9)	None	None	UO will have to pay a maximum penalty of Rs. 100 per acre of land for each occupied year along with the assessed rent. Decision has to be taken by *Tahsildar*. In case of a landless person, no such penalty will be imposed. (S. 6) AR and penalties may be reduced or remitted by the Collector. (S. 6A) Summary eviction, forfeiture of property and levy of fine on any person under unauthorised occupation of land (S. 7)

Abbreviations in Annexure C: **AO** Authorised Officer, **AR** Assessment Rent, **C** Category, **EO** Estate Officer, **r/w.** read with, **S.** Section(s), **SCN** Show Cause Notice, **UO** Unauthorised Occupant

Legislations	Offences and its Charges	Good Faith of Public Officers	Quasi-Judicial Proceedings	Procedure of Investigation	Procedure of Trial	Penalty
Madhya Pradesh Land Revenue Code, 1959	Unauthorised occupation of any unoccupied land, *Abadi*, service land, or any land which is property of government (S. 248)	None	*Tahsildar* is the AO to levy fine and summarily evict any person. (S. 248) *Note:* SCN must be served and no women shall be arrested or detained	None	None	Paying the rent; levy of fine and summary eviction by the *Tahsildar* (S. 248)

Source: The table has been created by the authors

Annexure D

LEGISLATIONS SEEKING TO PROTECT WILDLIFE, OTHER ANIMALS AND THE ENVIRONMENT

Legislations and their Jurisdiction	Offences and its Charges	Presumption of Guilt	Good Faith of Public Officers	Procedure of Investigation	Procedure of Trial	Penalty
Wild Life (Protection) Act, 1972	**C-I.** General violation of the act such illegal entry in the NP or Sanctuary; causing destruction damage; causing fire in NP, Sanctuary, Community Reserve, Conservation Reserve etc. **C-II.** Offences committed with respect to animals in in Schedule I or Part II of Schedule II, altering boundaries in a Sanctuary or NP. **C-III.** Offences committed with respect to trade, commerce in trophies, animal articles derived from an animal listed in Schedule I or Part II of Schedule II. **C-IV.** Offences committed in the core area of a Tiger Reserve or hunting in a Tiger Reserve, altering boundaries. (S. 51) All offences are cognisable and non-bailable	Where it is established that a person is in possession, custody or control of any captive animal, animal article or meat, it shall be presumed that such a person is in unlawful possession, custody or control of such a trophy unless the contrary is proved by the accused. As such, the burden of proof is not on the prosecuting authority but on the accused (S. 57)	No suit, prosecution or any other legal proceedings shall lie against employees of CG and SG for acts or damages caused in good faith (S. 60)	Power of entry, arrest, search and detention has been given to authorised officers under the Act. Moreover, additional powers of investigation are granted such as issuing search warrants, enforcing attendance of witness, receiving and recording evidence, compelling discovery and production of documents (S. 50)	Court can take cognisance of offence when complaint is made by certain officers and members specified in the Act (S. 55)	**C-I.** Imprisonment up to three years / fine up to Rs. 25,000 *Second or subsequent offence*: Imprisonment minimum three years up to seven years and fine minimum Rs. 25,000. **C-II.** Imprisonment minimum three years up to seven years and fine minimum Rs. 10,000. **C-III.** Imprisonment minimum three years up to seven years and fine minimum Rs. 10,000. **C-IV.** Imprisonment minimum three years up to seven years and fine minimum Rs. 50,000 up to Rs. 2 lakh. *Second or subsequent offence:* imprisonment of minimum seven years and fine minimum Rs. 5 lakh up to Rs. 50 lakh

Abbreviations in Annexure D: **BOP** Burden of Proof, **C** Category, **CA** Competent Authority, **CG** Central Government, **CrPC** Code of Criminal Procedure, 1973, **DFO** Divisional Forest Officer, **NP** National Park, **RI** Rigorous Imprisonment, **RF** Reserved Forest, **S.** Section(s), **SG** State Government

Legislations and their Jurisdiction	Offences and its Charges	Presumption of Guilt	Good Faith of Public Officers	Procedure of Investigation	Procedure of Trial	Penalty
Orissa Forest (Grazing of Cattle) Rules 1980 framed under Orissa Forest Act, 1972	Pasturing of cattle in RF is not permitted except where DFO has issued a permit with conditions that the cattle in the penned area will be government property. Violation of terms of permits such as taking cattle exceeding 50 in number, not carrying permit with oneself, or causing damage to trees are offences under the Act (R. 3, 5 and 7)	None	The 1972 Act protects the forest officers from any suit, prosecution or other legal proceedings when act has been done in good faith (S 79)	None	None in the Rules but the Act provides for Summary Trial. Offences which have punishment up to one year or fine not exceeding Rs. 1,000 or both (S. 71)	The penalties under the Act range from imposition of fine up to Rs. 2,000 to imprisonment up to one year. Additionally, there exists provision to evict such persons from the forest (R. 9)
Rajasthan Camel (Prohibition of Slaughter and Regulation and Temporary or Export) Act, 2015	Slaughtering of camel; possession, sale or transport of camel meat and products; exporting of camel within the state or outside without permit from the CA; causing bodily pain, hurt to any camel and intentionally injuring any camel (S. 3, 4, 5, 9 and 10)	BOP on the accused (S. 11)	Protection to any person who has done anything with good faith under this act from suit, prosecution or other legal proceedings (S. 14)	CA has the liberty to enter and inspect places where there is a reason to believe that an offence has been committed or likely to be committed as per CrPC. (S. 12)	None	*Slaughtering of Camel:* RI for one to five years and fine up to Rs. 20,000. *Possession / Sale / Transport / Export of camel or its meat:* RI of six months to three years and fine up to Rs. 5,000. *Intentional hurt to Camel:* RI up to two years and fine up to Rs. 3,000. *Intentional injury:* one to three years and with fine up to Rs. 7,000 (S. 8, 9 and 10)
Cattle Trespass (MP Amendment) Act, 1960	Non-adherence to the SG direction to keep cattle in confinement or detention after sunset still sunrise (S. 12-B)	None	None	None	None	Contravention of notification by the SG can lead to imposition of fine up to Rs. 100 when the offence is committed for the first time. Upon second or subsequent offence, the fine can be imposed up to Rs. 500 or imprisonment extending up to six months or both (S. 12-B)

Source: The table has been created by the authors

Annexure E

LEGISLATIONS CREATING OFFENCES OF FOREST PRODUCE PURCHASE, TRANSPORTATION, PROCUREMENT AND SALE

Legislations	Who can be prosecuted/fined under the Act	Offences Created and their Nature	Powers for Search, Seizure and detention	Quasi-Judicial Processes	Process of Judicial Trial	Bar of Jurisdiction and Good Faith of Officers
The Orissa Forest Contract Rules, 1966	Contractor when they fell trees illegally; remove FP through unprescribed routes, and breach the contract before its termination	Only tortious liability in form of compensation to DFO	Assistance to FO for arresting agents who have breached rules, orders and regulations of FD	None	None	None
Orissa Forest Produce (Control of Trade) Act, 1981	Any person who does not comply with the Act or its Rules or attempts or abets the contravention of the Act or Rules	▪ Contravention of the provisions of the Act ▪ Violation of specific conditions put for purchase, transportation, registration of growers, manufacturers, traders and consumers and disposal of FP. *Penalty / Punishment:* For offence under this Act and rules- imprisonment upto one year and / or fine up to Rs. 5,000. FP will also be forfeited to the government as a part of penalty, and termination of the registration of the manufacturer, trader and consumer for upto three years (S. 16)	Any PO above the rank of ASI or any AO by SG can carry search and seizure operations in which they can stop and search persons, boats, vehicles. They can also seize FP on suspicion of contravention of the Act or Rules. (S. 15(1)) S. 100, CrPC to be applicable (S.15(2))	DFO can be authorised by SG to accept compensation from any person suspected of committing an offence under the Act or Rules, release confiscated FP and discharge such suspected person (S. 19)	Court can take cognisance upon receiving a report from DFO (S. 18)	No suit, proceedings against a person acting in good faith (S. 20)
The Orissa Excise (Mahua Flower) Rules, 1976	Any person who contravenes provisions relating to control on collection, storage, possession, sale, import and export of *Mahua* (R. 3, 4, 5, 6 and 9)	Infringement of the rules meaning violation of conditions relating to the collection, storage, possession, sale and the restriction on the import and export. (R. 17) *Punishment:* Quantum of punishment not specified (R. 17)	Inspection of premises authorised for storage, possession of *Mahua* and accounts, documents relating to import, transport permits and passes (R. 15)	None	None	None

Abbreviations in Annexure E: **AA** Appellate Authority, **AO** Authorised Officer, **ASI** Assistant Sub-Inspector, **CF** Conservator of Forests, **CrPC** Code of Criminal Procedure, 1973, **DCF** Deputy Conservator of Forests, **DFO** Divisional Forest Officer, **EC** Excise Commissioner, **FD** Forest Department, **FO** Forest Officer, **FP** Forest Produce, **FR** Forest Ranger, **IFA** Indian Forest Act, 1927, **JM** Judicial Magistrate, **PO** Police Officer, **R.** Rule(s), **RI** Rigorous Imprisonment, **SDM** Sub Divisional Magistrate, **SI** Sub Inspector, **SG** State Government

Legislations	Who can be prosecuted/fined under the Act	Offences Created and their Nature	Powers for Search, Seizure and Detention	Quasi-Judicial Processes	Process of Judicial Trial	Bar of Jurisdiction and Good Faith of Officers
The Orissa Protection of Scheduled Castes and Scheduled Tribes (Interest in Trees) Act, 1981	Contractor can be made liable for wrongful removal or felling of trees on the basis of an illegal contract or contravention of order passed by DFO (S. 10)	*Penalty / Punishment:* RI upto six months and / or fine upto Rs. 2,000. Magistrate can also order compensation amounting to 50 per cent or more from the total sum recovered to the owner of the tree. (S. 10) Offences are cognisable (S. 11)	None	None	None	None
Orissa Kendu Leaves (Control of Trade) Act, 1961 and Rules, 1962	Any person who contravenes any provisions of the Act relating to regulation and restriction of the collection, sale and purchase of *Kendu* leaves; non-registration and lack of maintenance of accounts by the grower; collection of *Kendu* leaves by a person having no interest in the land (S. 3, 4, 7, 8, 9 and 10)	Contravention of any provision of the Act or Rules; attempt or abetment to commit a prohibited Act is an offence (S. 14 and 15). Offences are cognisable (S. 16). *Penalty / Punishment:* Imprisonment upto one year and/ or fine upto Rs. 500 along with forfeiture of *Kendu* leaves (S. 14)	ASI or AO can carry search and seizure operations in which they can stop and search persons, boat, vehicle. They can also seize the *Kendu* leaves on suspicion of contravention of the Act (S. 13)	None	Court can take cognisance upon receiving a report from DFO (S.16)	No suit against a person acting in good faith. No suit against government for any damage, injury or loss by virtue of the provisions of this Act (S.17)
Odisha Excise Act, 2008 and Odisha Excise Rules, 2017	Any person who contravenes any provisions relating to the manufacture and sale of intoxicant; keeping intoxicant without a license by the Collector; possession of intoxicant more than two quintals without a license; selling of intoxicant without a license. (S. 14, 17 and 18 read with R. 206 and 207) Special provisions to apply in Scheduled Areas	Non-compliance to the provisions specifying the quantity of intoxicant which can be possessed; operations without required licenses. (S. 14, 17 and 18 read with R. 206 and 207) Infringement of Rules is punishable under the Act (S. 220)	Collector or SDM or JM first class or Special Court can authorise by warrant any PO or Excise Officer to search and seize any intoxicant, material, stills, utensils or implements or any such article (S. 79)	The authority granting license, permit or pass may suspend the license, permit or pass for reasons such as conviction of an offence under this Act or any other revenue law or for any non-bailable or cognisable offence. (S. 47(d)) Proceedings before Collector or any AO under the Act to be deemed as judicial proceedings under CrPC (S. 98)	Special Courts for speedy disposal of cases (S. 87)	No suit against an officer acting in good faith. No JM can take cognisance of the case without prior sanction of SG (S. 97)

Legislations	Who can be prosecuted/fined under the Act	Offences Created and their Nature	Powers for Search, Seizure and Detention	Quasi-Judicial Processes	Process of Judicial Trial	Bar of Jurisdiction and Good Faith of Officers
MP *Tendu* Patta (Vayapar Viniyaman) Adhiniyam, 1964 and Rules, 1966 **[MP *Tendu* Patta (regulation of trade) Act, 1964 and Rules, 1966]**	Any person who contravenes any provisions relating to purchase, sale, collection, disposal, price fixation by any person including the grower engaged in selling or purchasing *Tendu* leaves	*Penalty / Punishment:* Contravention of provisions under the Act: Imprisonment of minimum three months upto one year and / or fine minimum Rs. 5,000 up to Rs. 50,000. The court can also prescribe lesser penalty / punishment and forfeit confiscated *Tendu* leaves. (S. 15) Attempt or abetment of any contravention of the provision under the Act or Rules to be punishable as the offence itself. (S. 16) Contravention of provisions by manufacturer or exporter of *bidi* or *Tendu* leaves: termination of agreement, cancellation of registration and refusal on granting any license for maximum three years (R. 8(7))	FO or PO of a rank of ASI can carry out search and seizure operations in which they can stop and search persons, boat, vehicle. They can also seize the *Tendu* leaves on suspicion of contravention of the Act (S. 14 read with S. 102 and 103 CrPC)	Appeal can be filed to CF against the order of confiscation of *Tendu* leaves within 30 days. (S. 14A) CF can also take suo moto action for appeal and the AA can pass an interim order for custody, preservation, disposal of the *Tendu* leaves	Court can take cognisance upon receiving a report from DFO. (S. 17) The aggrieved party may file revision against the final order of the AA in the Court of Sessions (S. 14B)	No suit against a person acting in good faith. No suit against SG for any damage, injury or loss by virtue of the provisions of this Act (S. 18)
MP Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969 and Rules, 1973 [MP Forest Produce (regulation of trade) Act, 1969 and Rules, 1973]	Any person who contravenes any provisions relating to purchase, sale, collection, disposal, price fixation of FP (S. 5, 7, 9, 10, 11 and 12)	*Penalty / Punishment:* Contravention of the provisions under the Act: Imprisonment up to two years and / or fine of Rs. 25,000. The court can also prescribe lesser penalty / punishment and forfeit confiscated FP (S. 16) Attempt or abetment of any contravention of the provision under the Act or Rules to be punishable as the offence itself (S. 17)	Any authorised FO or PO of a rank of ASI can carry out search and seizure operations in which they can stop and search persons, boat, vehicle. They can also seize FP on suspicion of contravention of the Act (S. 15 read with S. 102 and 103 CrPC)	Appeal can be filed to AA against the order of confiscation of *Tendu* leaves within 30 days. AA can also take *suo moto* action for appeal and the AA can pass an interim order for custody, preservation, disposal of the *Tendu* leaves. (S. 15A) FO has the power to take compensation up to twice the value of the FP from the accused person under the suspicion of commission of an offence for releasing such produce (S. 19)	Court can take cognisance upon receiving a report from DFO. (S. 18) The aggrieved party may file revision against the final order of the AA in the Court of Sessions (S. 15B)	No suit against a person acting in good faith. No suit against SG for any damage, injury or loss by virtue of the provisions of this Act (S. 20)

Legislations	Who can be prosecuted/fined under the Act	Offences Created and their Nature	Powers for Search, Seizure and Detention	Quasi-Judicial Processes	Process of Judicial Trial	Bar of Jurisdiction and Good Faith of Officers
MP Transit (Forest Produce) Rules, 2000	Any person contravening the Rules; issuance of transit passes without any authority (R. 22)	*Penalty / Punishment:* Contravention of the Rules: Imprisonment upto one year and / or fine upto Rs. 10,000	FO upon suspicion that FP is transported in contravention to the Rules may stop, detain, examine and check FP (R. 20)	None	None	None
Himanchal Pradesh Forest Produce (Regulation of Trade) Act, 1982	Any person who contravenes provisions of this Act such as selling, transporting disposing FP violating the Act (S. 4, 5, 7, 9 and 11)	*Penalty / Punishment:* Contravention of the provisions of the Act: Imprisonment up to one year and / or fine up to Rs. 5,000. (S. 12) Attempt or abetment of any contravention of the provision under the Act to be punishable as the offence itself (S. 13)	FR or SI upon suspicion that FP is transported in contravention to the Rules may search and seize any person, boat, vehicle used or intended to be used for transporting FP (S. 11)	DFO has been empowered to compound offences upon payment of compensation (S. 15)	Court can take cognisance upon receiving a report from DFO (S. 14)	No suit against a person acting in good faith. No suit against SG for any damage, injury or loss by virtue of the provisions of this Act (S. 16)
Himanchal Pradesh Forest Produce Transit (Land Routes) Rules, 2013	Any person who transports FP without an imprint of registered mark or without obtaining pass from the DFO or does not produce a challan or pass on being asked for by FO (R. 3, 8, 13 and 14) Exemption to the right holder when it is collected according to the recorded rights	*Penalty / Punishment:* Contravention of the Rules: Imprisonment up to six months and / or fine up to Rs. 5,000 along with seizure of FP under IFA (R. 18)	DFO can impose restriction on the movement of FP. (R. 9) FO or PO upon suspicion that FP is transported in contravention to the Rules may detain, seize FP and other articles such as vehicles, camels, mules (R. 13 and 14)	None	None	None

Legislations	Who can be prosecuted/fined under the Act	Offences Created and their Nature	Powers for Search, Seizure and Detention	Quasi-Judicial Processes	Process of Judicial Trial	Bar of Jurisdiction and Good Faith of Officers
Bihar Excise Act, 1915	Any persons who contravenes provisions relating to import, export, transport, manufacture, possession, consumption and sale of intoxicants (S. 47-64)	*Penalty / Punishment:* Contravention of provisions: Imprisonment for the offences range from three months to three years and fine range from Rs. 500 to Rs. 5,000. Additional imprisonment punishment up to one year can also be provided. (S. 47-64) Offences under this act are non-compoundable	EC, Collector, Magistrate, PO, Officers from Salt, Customs and Land Revenue Department are empowered to search and seize the shops and articles used for manufacturing and sale. (S. 69 and 70) The Collector and Magistrate have powers to search and seize the articles upon suspicion that an offence is committed without warrant. (S. 71, 72 and 73) PO, Excise Officer, Officer from Salt, Customs and Revenue Department have the powers to arrest without warrant for commission for certain offences committing (S 70)	Power to the collector to confiscate for disposal or sale or destruction of article seized (S. 67B and 67F)	The Sessions Judge has been empowered to pass an enhanced penalty, notwithstanding S. 29 of CrPC (S. 67C)	No suit against a government or excise officer in any civil court for any damage, injury or loss done while acting in good faith (S. 95)
Bihar Kendu Leaves (Control of Trade) Act, 1973	Anyone contravening the restrictions on purchase or transport of *Kendu* leaves levied by the Act. It also authorises only SG and its officers and agent to purchase *Kendu* leaves from the grower, transport them, fix a price	*Penalty / Punishment:* Contravention to provisions: Imprisonment up to one year and / or fine Rs. 1,000. (S. 16) Offences under the Act are compoundable (S. 17)	ASI or FO can stop and search any person, boat, vehicle. They can also enter and search any place, survey, demarcate or make a map of any land. These officials are also authorised to seize and sell *Kendu* leaves by way of public auction (S. 14 read with S. 102 and 103, CrPC)	FO is authorised to hold enquiry where they have the power to receive and record evidence and such evidence is admissible in the court of Magistrate. (S. 15) DCF is given power to compound offences upon receiving compensation (S. 17)	Court can take cognisance upon receiving a written complaint from DFO (S. 18)	No suit, prosecution or other legal proceedings against any person for actions done in good faith (S. 19)

Source: The table has been created by the authors

Annexure F

LIST OF STATE LEVEL LAWS / REGULATIONS FOR PREVENTION OF TRIBAL LAND ALIENATION AND ITS RESTORATION[1]

No.	State	Legislations in Force	Main Features
1.	All India	The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989	Applies to the whole of India except the State of Jammu and Kashmir. Section 3(1)(f) of this Act makes it a punishable offence to wrongfully occupy or cultivate any land owned by or allotted to a member of a ST, or gets land allotted to him, transferred. S. 3(1)(g) makes it an offence to dispossess a forest dweller from their forest right or interfere in the enjoyment of such forest right
2.	Andaman and Nicobar Islands	The Andaman and Nicobar Protection of Aboriginal Tribes Regulation, 1956	Mandated to protect the STs in the four tribal reserves, this Regulation empowers the government to prohibit and regulate the entry of outsiders, and restricts the transfer of lands to non-tribals in the Reserves
3.	Andhra Pradesh	The Andhra Pradesh (Scheduled Areas) Land Transfer Regulation, 1959, amended by The Andhra Pradesh (Scheduled Areas) Land Transfer (Amendment) Regulations of 1970, 1971, and 1978	Prohibits all transfer of land to non-tribals in Scheduled Areas. Authorises government to acquire land in case a tribal purchaser is not available. There is, however, no legal protection to ST land outside the Scheduled Areas[2]
4.	Assam	The Assam Land and Revenue Regulations 1886, amended in 1981	Chapter X of the Regulation prohibits alienation of land in tribal belts and blocks
5.	Arunachal Pradesh	Bengal Eastern Frontier Regulation, 1873, as amended	Prohibits transfer of tribal land
6.	Chhattisgarh	(a) Sections 165 and 170 of Madhya Pradesh Land Revenue Code, 1959 (b) Madhya Pradesh Land Distribution Regulation Act, 1964	Sections 165 and 170B of the Code protect STs against land alienation. The 1964 Act is in force in the Scheduled Areas
7.	Dadra and Nagar Haveli	Dadra and Nagar Haveli Land Reform Regulation, 1971	Protects tribal interest in lands

[1] This table has been compiled using a variety of sources, including C R Bijoy, "The *Adivasis* of India: A History of Discrimination, Conflict and Resistance", *PUCL Bulletin*, February 2003; available at: *http://www.pucl.org/Topics/Dalit-tribal/2003/adivasi.htm*; Department of Land Resources, Ministry of Rural Development, Government of India, *Report of the Committee on State Agrarian Relations and Unfinished Task of Land Reforms* (New Delhi, 2009); available at: *http://dolr.nic.in/agrarian.htm*; and C R Bijoy, Shankar Gopalakrishnan and Shomona Khanna, *India and the Rights of Indigenous Peoples* (Asia Indigenous Peoples Pact, Bangkok, 2012).

[2] The constitutional validity of these Regulations has been upheld by the Supreme Court in *Samatha* v. *State of Andhra Pradesh* (1997) 8 SCC 191 and *P Rami Reddy and Others* v. *State of Andhra Pradesh and Others* (1988) 3 SCC 433.

No.	State	Legislations in Force	Main Features
8.	Gujarat	The Bombay Land Revenue Code as amended by Bombay Land Revenue (Gujarat Second Amendment) Act, 1980	Sections 73A, 73AA, 73AB, 73AC and 73AD prohibit transfer of tribal lands and provide for restoration of alienated land, in entire State of Gujarat
9.	Himachal Pradesh	The Himachal Pradesh Transfer of Land (Regulation) Act, 1968	Prohibits transfer of land from tribals to non-tribals
10.	Jharkhand	(a) Chhota Nagpur Tenancy Act, 1908 (applies to old Ranchi district, mostly comprising *Mundas* and *Uraons*) (b) Santhal Parganas Tenancy (Supplementary Provision) Act, 1940 (c) Bihar Scheduled Areas Regulation, 1969 (d) Wilkinson's Rule, 1837 (applies to *Hos* of Singhbhum)	Prohibit alienation of tribal land and provide for restoration of alienated land
11.	Karnataka	The Karnataka Scheduled Caste and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1975	Prohibits transfer of land assigned to SCs and STs by government. No provision to safeguard SC / ST interest in other lands[3]
12.	Kerala	The Kerala Scheduled Tribes (Regulation of Transfer of Land and Restoration of Alienated land) Act, 1975	Act of 1975, made applicable with effect from June 1, 1982 by notification of January 1986, prohibits transfer of land of tribals and provides for its restoration[4]
13.	Lakshadweep	The Laccadive Islands and Minicoy Regulation I of 1912; Lakshadweep (Protection of Scheduled Tribes) Regulation, 1964	Alienation of tribal lands prohibited in entire Union Territory of Lakshadweep[5]
14.	Madhya Pradesh	(a) Sections 165 and 170 of Madhya Pradesh Land Revenue Code, 1959 (b) Madhya Pradesh Land Distribution Regulation Act, 1964	Sections 165 and 170B of the Code protect STs against land alienation. The 1964 Act is in force in Scheduled Areas of Madhya Pradesh

[3] Constitutional validity examined and upheld by Supreme Court in *Manche Gowda and* Others v. *State of Karnataka and Others* (1984) 3 SCC 301.

[4] The constitutional challenge to this legislation was decided by the Supreme Court in *State of Kerala and Another* v. *People's Union for Civil Liberties and Others* (2009) 8 SCC 46.

[5] *Bamban* v. *I I Officer* AIR 1957 Madras 433.

No.	State	Legislations in Force	Main Features
15.	Maharashtra	(a) The Maharashtra Land Revenue Code, 1966, as amended in 1974 (b) The Maharashtra (Restoration of Lands to Scheduled Tribes) Act, 1974	Prohibits alienation of tribal land and provides for restoration of both illegally and legally transferred lands of a ST[6]
16.	Manipur	The Manipur Land Revenue and Land Reforms Act, 1960	Section 153 forbids transfer of tribal land non-tribals without permission of the District Collector. Act has not been extended to the hill areas and, therefore, hill area tribals are not covered by this protection
17.	Meghalaya	Meghalaya Transfer of Land (Regulation) Act, 1971	Prohibits alienation of tribal land
18.	Nagaland	Bengal Eastern Frontier Regulation, 1873 and Assam Land and Revenue Regulation, 1866, as amended vide Nagaland Land and Revenue Regulation (Amendment) Act 1978	Prohibition of transfer of tribal lands
19.	Odisha	The Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulation, 1956. The Orissa Land Reforms Act, 1960	Prohibits transfer of tribal land and provides for its restoration, both in Scheduled Areas (1956 Regulation) as well as non-Scheduled Areas (1960 Act)
20.	Punjab	The Punjab Land Alienation Act, 1916	Prevents alienation of tribal lands to non-tribals[7]
21.	Rajasthan	The Rajasthan Tenancy Act, 1955, The Rajasthan Land Revenue Act, 1956	Sections 175 and 183B specifically protects tribal interest in land and provides for restoration of alienated land to them
22.	Sikkim	Revenue Order no. 1 of 1917 The Sikkim Agricultural Land Ceiling and Reform Act, 1977	Order of 1917 still in force. Chapter 7 of 1977 Act restricts alienation of lands by STs but is not in force
23.	Tamil Nadu	Standing Orders of the Revenue Board BSO 15-40. Law against land alienation not enacted	BSO 15-40 applies only to Malayali and Soliga tribes. Prohibits transfer of assigned land without approval of District Collector

[6] Constitutional validity examined and upheld by Supreme Court of India in *Lingappa Pochanna Appelwar* v. *State of Maharashtra* (1985) 1 SCC 479.

[7] Constitutional validity upheld by the courts in *Lala Khazanchi Shah* v. *Haji Niaz Ali* AIR 1940 Lahore 126; *Wazir Mohd and Others* v. *Said Alam and Others* AIR (34) 1947 Peshawar 25; *Ram Swarup* v. *Ram Chander and Others* AIR 1976 Punjab and Haryana 246.

No.	State	Legislations in Force	Main Features
24.	Tripura	Tripura Land Revenue and Land Reform Act, 1960, as amended in 1974	Act prohibits transfer of ST land to others without permission of the Collector. Only lands transferred after January 1, 1969 are covered under restoration provision
25.	Uttar Pradesh / Uttarakhand	Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, as amended by UP Land Laws (Amendment) Act, 1981	Provides protection to tribal land. However, amending Act stayed by Allahabad High Court in *Swaran Singh* v. *State Government* (1981)
26.	West Bengal	West Bengal Land Reforms Act, 1955, as amended	Chapter II-A prohibits alienation of tribal land and provides for restoration

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