The Legal Regime and Political Economy of Land Rights in the Scheduled Areas of India

Namita Wahi
Ankit Bhatia
Centre for Policy Research Land Rights Initiative

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A. INTRODUCTION: THE CENTRAL QUESTION

India holds the unique distinction of being both the world's largest constitutional democracy and the fastest growing economy[1]. Barring a two year period of emergency, India has remained continuously democratic for over 70 years.[2] India's constitutional democracy stipulates a parliamentary system of representative government that reflects the will of the majority of her people, but the Constitution safeguards the rights of, and creates special protections for, India's many religious and ethnic minorities. One such minority are tribal communities, comprised mostly, but not exclusively of what are known as the "Scheduled Tribes".

Article 366(25) of the Constitution defines *Scheduled Tribes* to mean "tribes or tribal communities or parts of or groups within such tribes or tribal communities" as are deemed to be Scheduled Tribes under Article 342 of the Constitution. Article 342 vests the President with the power to declare by public notification "the tribes or tribal communities or parts of or groups within tribes or tribal communities" as STs for a state or union territory. Pursuant to Article 342, the President made two orders, in relation to the Part A and Part B states, the Constitution (Scheduled Tribes) Order, 1950 and in 1951, another order with respect to the Part C states, called the Constitution (Scheduled Tribes) Order, 1951. These orders were modified in subsequent years pursuant to state reorganisation. Through a series of subsequent orders, the President has notified 744 STs in 25 states and 5 union territories of India. The STs constituted 7% at the time of independence but 70 years later, they now constitute 8.6% of the total population.

The STs or *adivasis* consist of a number of heterogeneous tribal groups that have historically been outside the mainstream of Hindu society, partly because of their "distinctive culture and way of life as a group" and partly because of their "geographical isolation".[3] Their geographical isolation arose from the fact that the STs lived in hilly or forested areas that were relatively less accessible to the majority of the population that was settled in the plains. Variously described as "primitive" and "backward", the STs are also considered to have much lower levels of economic and social development compared to the rest of the Indian population. E.g. while the national average of literacy and health indicators (Infant Mortality Rate) is 73%, and 57 respectively, the literacy and health ratios (Infant Mortality Rate) of STs is 59% and 62.1 respectively.

The specialised constitutional regime delineating the rights of the STs is differentiated from the rest of the Indian population along several parameters. *First*, the STs have both individual and group representation within the Indian federal constitutional framework. Article 330 of the Constitution read with the Representation of People's Act, 1950 provide for reservation of electoral constituencies in ST majority districts for STs in both Parliament and state legislative assemblies. The only other group to have this privilege of special representation in the form of separately reserved constituencies within the constitutional framework are the Scheduled Castes, who are historically disadvantaged communities within the mainstream of the dominant Hindu society.

[1] http://www.livemint.com/Politics/u4qe2jXFEdfr8zIdoR6GYO/India-to-be-fastest-growing-economy-again-in-2018-World-Ban.html
[2] India went through a period of constitutional emergency from June 1975 to 1977.
[3] These characteristics were enunciated in the 1931 Census: J.H. Hutton, 'Census of India, 1931: Vol. 1, Part 1 Report', (1933); followed by the Reports of the First Backward Classes Commission (Kalelkar), 1955: Kalelkar et al, 'Report of the Backward Classes Commission', Journal of Indian School of Political Economy, (1955); the Advisory Committee on the Revision of the SC and ST lists, 1965: B.N. Lokur et al, 'The Report of the Advisory Committee on the Revision of the Lists of Scheduled Castes and Scheduled Tribes', Department of Social Security, (1965); and the Joint Parliamentary Committee of on the Scheduled Castes and Scheduled Tribes Order (Amendment Bill), 1967.

Second, the Constitution stipulates affirmative action provisions that reserve 7% seats in government funded educational institutions and government jobs for the STs[4], which is in accordance with their proportional percentage in the population at the time of independence. The Scheduled Castes also enjoy this privilege of proportionate population reservations in educational institutions and government jobs.

Finally, Articles 244(1) and 244(2) of the Constitution carve out tribal majority areas from the geographical land mass of India, that are designated as Scheduled areas in the Fifth and Sixth Schedules of the Constitution respectively. Here the Scheduled Tribes are unique because unlike the rest of the population and unlike even the Scheduled Castes who have group based representation and affirmative action provisions, the Scheduled Tribes are the only minority group that have specially recognised rights to land.

The Fifth Schedule provides for the administration of tribal majority areas in ten states within peninsular India that have tribal minority populations, that is the population of STs is in a minority, compared to the population of the remainder of the state. The currently designated Fifth Scheduled Areas are in the states of Andhra Pradesh, Telangana, Gujarat, Jharkhand, Chhattisgarh, Himachal Pradesh, Madhya Pradesh, Maharashtra, Orissa, and Rajasthan.

The Sixth Schedule provides the broad framework for the administration of tribal areas in the north eastern states of Assam, Meghalaya, Tripura and Mizoram. Two of these states, Meghalaya and Mizoram, are tribal majority states, whereas Assam[5] and Tripura[6] are tribal minority states. The Schedule envisages the creation of Autonomous Districts and Autonomous Regions (within the districts) to be administered democratically by the indigenous tribal population of such scheduled areas as opposed to the state legislatures. Meghalaya is the only state in the country where the President has declared the area of the entire state as Sixth Scheduled Area.

The special constitutional provisions were made in recognition both of the STs historic distinctiveness and geographic isolation from the dominant mainstream of Hindu society, but also on account of their systematic "underdevelopment" as compared to the rest of the Indian population. Unlike the majority of the Indian population that was engaged in settled agrarian activities, the STs were historically engaged in a variety of traditional occupations including shifting cultivation, collecting forest produce, hunting gathering etc. This necessitated a protective framework that would empower them to engage effectively with the more "advanced" dominant mainstream society without fear of exploitation.

Following the adoption of the Constitution, a series of legislation was also enacted by Parliament and state legislatures to safeguard tribal rights to land[7] by prohibiting transfer of land in the Scheduled Areas from tribals to non tribals. States like Sikkim, West Bengal, and Uttar Pradesh that do not have any designated scheduled areas under the Fifth and Sixth Schedules have also enacted legislation prohibiting transfer of land belonging to tribals, to

[4] Articles 15(4) and 16(4).
[5] 12.45% of the population of Assam is ST according to the 2011 Census.
[6] 31.76% of the population of Tripura is ST according to the 2011 Census.
[7] Andhra Pradesh Scheduled Areas Land Transfer Regulation, 1959: Andhra Pradesh Scheduled Areas Land Transfer Rules, 1969; Madhya Pradesh Land Revenue Code, 1959:; Maharashtra Land Revenue Code, 1966: &
Maharashtra Land Revenue Codeand Tenancy Laws (Amendment) Act, 1974 (Mah. XXXV of 1974); Maharashtra Restoration of Land to the Scheduled Tribes Act, 1975: http://rajbhavan-maharashtra.gov.in/rajbhavan/pdf/20_Act.pdf ; Himachal Pradesh Transfer of Land (Regulation) Act, 1968: http://himachal.nic.in/WriteReadData/l892s/13_l892s/1392700211.pdf; Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of transfer of certain lands) Act, 1978: http://dpal.kar.nic.in/pdf_files/2%200f%201979%20(E).pdf; Manipur Land Revenue and Land Reforms Act, 1960: http://lawmin.nic.in/ld/P-ACT/1960/A1960-33.pdf ; Orissa Scheduled Area Transfer of Immovable Property (by Scheduled Tribes) Regulation, 1956 & (Amendment), 2002: https://www.igrodisha.gov.in/pdf/regulation2.pdf
& Orissa Land Reforms Act, 1960: http://lawsofindia.org/pdf/orissa/1960/1960OR16.pdf

non tribals.[8] Moreover, the enactment of the Panchayat Extension to Scheduled Areas Act, 1996 has devolved greater political autonomy to tribals within the Fifth Schedule Areas. Also, the Forest Rights Act, 2006 seeks to safeguard the rights of tribals and other forest dwelling communities to forestland. The law was enacted to overturn the centuries of injustice involved in the outlawing of forest dwelling communities, mostly STs, by the forest laws of the nineteenth and twentieth centuries[9] by the British colonial state. Moreover, a series of legislation was also enacted by Parliament and state legislatures to protect the Scheduled Tribes against atrocities.[10]

In a country that is rapidly developing and is currently the world's fastest growing economy, we find that the Scheduled Tribes have historically remained some of the most vulnerable and impoverished groups in India, who, based on statistical data, have disproportionately borne the burden of economic development. Poverty and landlessness is rampant amongst the STs. More than half (51%) of all STs are below the poverty line, and 65% of the STs are landless as per the 2011 Census.

Moreover, even though STs constitute 8.6% of the total population, it is estimated that they constitute 41% of the people who have been displaced from 1951 to 1990 due to the construction of dams, mines, industrial development and the creation of wildlife parks and sanctuaries.[11] Therefore, it is clear that these groups have disproportionately borne the burden of economic development, presumably because of their special relation to land which other groups do not have. And yet statistical evidence to document the correlation between dams, mining and other forms of economic activity with the displacement of the STs does not exist.

The above description of the plight of the Scheduled Tribes leads us to question as to why despite the existence of special constitutional and legal provisions safeguarding tribal representation and also the rights of the STs to land and natural resources, as well as special affirmative action provisions for the STs, they continue to remain the most displaced, most vulnerable and impoverished of all groups in India.

There is a plethora of literature on the Scheduled Tribes that have focused on their cultural identity[12], the historical injustices perpetrated against them by the British colonial state[13], their poverty[14], vulnerability[15], displacement and alienation from the Indian State. But there is very little that has been written about the Scheduled Areas, or the specialised relationship between the Scheduled Tribes and the Scheduled Areas. In fact, we do not even know how much of India's geographical land is in the Scheduled Areas.
Yet land, and especially forestland is central to tribal identity, representation and development. The Scheduled Tribes have been engaged in a variety of traditional occupations where they have lived off forestland, whether it is hunting gathering, collecting minor produce, shifting cultivation and increasingly now settled cultivation. Land for many, if not most Scheduled Tribes, is integral to their identity, culture and social and political life. Displacement of the STs

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[8] The Uttar Pradesh Land Laws (Amendment) Act, 1982: http://www.lawsofindia.org/pdf/uttar_pradesh/1965/1965UP12.pdf @ pp.60 of the document; West Bengal Land Reforms Act, 1955: http://www.hooghly.gov.in/dllro/pdf/W.B.%20L.R%20ACT,1955.pdf; Sikkim Agricultural Land Ceiling and Reforms Act, 1977: https://www.sikkim.gov.in/stateportal/UsefulLinks/Gazette1979.pdf ;
[9] These include the Indian Forest Act, 1865, Indian Forest Act, 1868 and 1927.
[10] These include primarily, the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989: http://lawmin.nic.in/ld/P-ACT/1989/The%20Scheduled%20Castes%20And%20the%20Scheduled%20Tribes%20%20(Prevention%20of%20Atrocities)%20Act,%201989.pdf , and state amendments to the same,
and various state amendments to the Code of Criminal Procedure, 1973.
[11] https://tribal.nic.in/writereaddata/AnnualReport/AnnualReport2016-17.pdf p. 47
[12] Stuart Corbridge, Competing inequalities: the scheduled tribes and the reservations system in India's Jharkhand. *The journal of Asian studies*, 59(01), pp.62-85 (2000).
[13] M.K. Kamal, Study on Land Alienation in Scheduled Areas of Andhra Pradesh. *NIRD-UNDP Research Project* (2000).
[14] Y. Kijima, Caste and tribe inequality: evidence from India, 1983–1999.*Economic Development and Cultural Change*, 54(2), pp.369-404 (2006).
[15] G Khurana, Approach to Education of Scheduled Tribes. *The Education Quarterly*, 20(1) (1978).

from their land does not only make them economically vulnerable, it threatens to destroy their cultural identity as a tribal group. This omission is particularly puzzling given that the STs are the only group in the country that have recognised constitutional protections for their land rights. This Report seeks to redress this omission.

But the Report goes further than that. Through an investigation of the constitutional, legal and policy frameworks grounding the specialised protection of the STs, and the administrative and financial apparatuses that effectuate those protections, as well as compilations of data on the preponderance of dams and mines in the Scheduled Areas, the Report presents some insights on why the STs have been increasingly marginalised by the processes of economic development.

First, the Report notes that the various policy and legal initiatives taken by the British colonial state that criminalised the activities and livelihoods of the tribal peoples, even as the British sought to classify them within the parameters of the mainstream Indian society which was engaged in settled cultivation. The century of historical injustices against the tribals perpetrated by the British colonial state during the 19th century began to be redressed post the 1930s, but concrete steps to alleviate the condition of the STs, and restore to them the dignities enjoyed by them prior to colonial rule did not happen till the adoption of the Indian Constitution.

Second, the Report finds that though India was a pioneer in recognising special protections for tribal or indigenous peoples in the Constitution, the fragmented protections for the Scheduled Tribes and Scheduled Areas in the Constitution contradict the centrality of land to the identity, economy and culture of the Scheduled Tribes. The creation of these fragmented protections was in turn a product of two factors. First, it arose in part from the reality of the tribal situation, in that even at the time of drafting of the Constitution, many tribal communities were no longer located within the grographically isolated scheduled areas, while many non tribal communities were resident there, some for several generations. The Constitution makers had to create safeguards both for the tribal populations resident in the Scheduled areas and those that were residing outside the Scheduled Areas. Second, it arose from the inherent contradiction in creating geographically protected areas for the Scheduled Tribes, while at the same time imposing no limitations on the movement of tribals outside those areas, and no restrictions on the movement of non tribals to those areas. Indeed, given that the Constitution guaranteed to all citizens the fundamental right to move freely throughout the territory of India, it is not clear how it could have imposed such a limitation.

Third, the Report finds a fundamental contradiction between two narratives that have characterised the policies of the British colonial state and the independent Indian state. The first narrative, that I call the "identity" narrative, identifies the tribals as a "distinctive group outside the mainstream Hindu society both in terms of their cultural traits and geographical isolation", who are keen to preserve their distinctiveness and their isolation. The second narrative called the "backwardness/development" narrative identifies the tribal way of life, as backward compared to the mainstream Indian population and seeks to improve their economic and social indicators to "integrate" or "assimilate" them within the mainstream population. The Report notes that both the "identity" and "backwardness" narratives characterised the drafting of the constiutional protections for the STs, post independence policy making was guided primarily by the "backwardness" narrative. However, the Scheduled Tribes have regarded the "backwardness" narrative as both paternalistic and patronising and this narrative does not seem to capture the aspirations of the tribal people to "develop according to their own genius".

Finally, through an excavation of archival data pertaining to the extent of geographical area in the Scheduled areas, the representation of Scheduled Tribes in Parliament and state legislatures, and an evaluation of the shortfalls in financial allocations to the tribal peoples, along with a plotting of the intensity of dams and mining in the Scheduled

areas which has caused the displacement of the tribal peoples, without them having a share in the fruits of the processes of economic development, the Report shows how state policy making guided by the "backwardness" narrative has failed, and driven the STs into more landlessness, dsiplacement and deprivation.

B. TRIBAL COMMUNITIES, EXCLUDED AREAS AND THE BRITISH COLONIAL STATE: 1871 TO 1947

The British colonial state's preoccupation with classifying the Indian population faced many challenges, but none greater than the problem of classifying the tribal communities. The Report of the Ethnological Committee, 1868, classifies tribal communities in India into the Kolarian (northern) and Dravidian tribes. Through a comparative study of the customs and dialects of various tribal communities described as "aboriginal", the Report concludes that it was impossible to generalise anything about the tribal communities, since their manner and customs were peculiar to those communities. Though there were affinities of dialect amongst many of the northern tribes, the classification of the tribes was based as much on their geographic location as much as their peculiarities of custom.

The Census Report, 1871, originally classified the tribes as "aboriginal tribes", under the three categories of "Aborigines", "Semi-Hinduised Aborigines", and "hill tribes". The same year, the British also enacted the uniquely draconian Criminal Tribes Act for North India, which criminalised millions of tribal communities as "habitually criminal" simply upon their birth in a particular community, imposing restrictions on the movements of every member of these groups, and forcing adult males from these communities to report weekly to the local police station. In 1876, this Act was extended to the Bombay Presidency and in 1911, to the Madras Presidency covering all of British India.[16] The Criminal Tribes Act, 1871, is notable in its admission that the problem of criminality amongst the tribes classified as criminal was primarily an economic one. Under the Act, the local governments would submit to the Government of India, a list of tribes that would be classified wholly as criminal and these groups would have to be registered with the government and their movements restricted in accordance with the provisions of the Act. The penalties against the criminal tribes were stiffened between 1871 and 1911.

However, the British gradually acknowledged that the term "aboriginal" didn't quite capture the identity of the tribal communities. The Memorandum on the Census Report, 1881, even as it classified the tribes as "aboriginal", stated that the use of this terminology was "dubious". "Aboriginal" indicated more that these groups did not belong to the dominant Hindu, Muslim or Christian religions, rather than a unified religion of their own. The Report on the Census, 1901, enumerated three criteria for identification of various communities: religion, profession, and geographical location. Based on religion, the Report referred to tribal communities as aborigines or animists; on the basis of their geographical location, hill tribes, mountain tribes, or forest tribes; and on the basis of profession, nomad and wandering tribes, gipsies, or wild tribes (who profess primitive agriculture and depend on forest produce). The 1901 Census for the first time attempted a definition of tribe. The Census defined "tribe" as "a collection of families or groups of families bearing a common name which as a rule does not denote any specific occupation; generally claiming common descent from a mythical or historical ancestor and occasionally from an animal, but in some parts

[16] H. Waterfield, 'Memorandum on the Census of British India of 1871-1872', (1875)
Memorandum on the Census of India 1871, (Henry Waterfield, Census Commissioner).
The classifications under the section religion were: Hindu, Sikh, Muslim, Buddhists and Jains, Christians, Others, and Religion not known. According to the Memorandum, the five million people classified as "others" were chiefly composed of the hill tribes and aborigines, noting that "it [was] very difficult to draw the line between Hindooism and the rude religion of some of these tribes, and very possibly many have been classed under the one, when they might with equal propriety have been ranked in the other category'. " The category "Hindus" also included a sub category on "Aboriginal Tribes and Semi-Hinduised Aborigines."

of the country held together rather by the obligations of blood-feud than by the tradition of kinship; usually speaking the same language and occupying, professing, or claiming to occupy a definite tract of country."[17] Tribes were classified as "animistic" or "primitive".

This definition of tribe for the first time indicated also the geographical connection of the tribe and particular tracts of land. By the time of the 1911 Census, the British defined "tribes" not as a "collection of families" but in distinction to "caste". According to the Census, unlike caste whose basis was "economic or social", the basis of the tribe was political. Though the members of a tribe believed that they had a common origin, what held them together was "community of interest" and the "need of mutual defence". The "tribe" would also freely admit aliens who "were willing to throw in their lot" with them. The other major change was that "animistic" was now classified as a sub category within "primitive". The 1921 and 1931 Censuses made only minor changes to the understanding and classification of tribal communities, and the 1941 Census was disrupted by budgetary constraints during World War II. For instance, the 1921 Census replaced the category of, "animistic" by "Tribal religion".

As the British colonised India piecemeal over the course of a century, they came across people pursuing livelihoods distinct from the settled agriculture practices of the vast majority of people. These tracts were declared as "backward areas", and special laws were applicable to them on the executive discretion of the Governor General in Council or the Chief Commissioner of the provinces. These laws prescribed simple and elastic forms of judicial and administrative procedures. In 1874, the British Parliament enacted the Scheduled Districts Act, 1874, which was the first measure to deal with these areas as a class. The Act formally vested the Governor General in Council with the power to decide whether provincial laws should be applied to the particular districts listed in the First Schedule to that Act. The Scheduled Districts Act, 1874 with its broad powers of executive discretion came about because of the widely held belief that exposure to ordinary laws would subject the tribal peoples to two dangers, both of which arose from the fact that they were "simple, primitive, , unsophisticated and frequently improvident." The first was that they would lose their agricultural land to the more "civilised" non tribals, and secondly, that they were likely to get into the "wiles of the moneylenders".[18]

This paternalistic approach towards the political administration of the Scheduled Districts continued throughout the twentieth century when in response to the demands for independence and autonomy by the Indian freedom movement, the British introduced limited reforms. The Montagu Chelmsford Report of 1918, which recommended dyarchy for India, wherein some branches of the executive would be responsible to elected provincial legislators, while the remainder remained answerable to the Viceroy, only mentioned the Scheduled districts to note that the reforms would not apply to them. This was because the people were "primitive", and there was no material on which to found "political institutions". [19]

The Government of India Act, 1919 divided these tracts into two categories. Some areas including the Laccadive Islands and Minicoy in Madras, the Chittagong hill tracts in Bengal, the small area of Spiti in the Punjab, and Angul in Orissa, were completely excluded from the purview of elected provincial legislatures and fell within the jurisdiction of the Governor acting with his executive council, the Ministers being excluded from having any share in the responsibility of the administration of these areas. A system of modified exclusion was applied to the other backward areas, the reserved half of the dyarchical government being vested with power to apply, or to refrain from applying

[17] E.A. Gait, 'General Report of the Census of India, 1901', (1904)
[18] B. Shiva Rao, 'The Framing of India's Constitution – Select Documents', Universal Law Publishing Co. Pvt. Ltd., Volume 5, (2nd edition, 2004; ed. Subhash C. Kashyap) at 569.
[19] *Id.* at 570.

any new provincial enactment. While tribal members were represented in the provincial legislatures, the Simon Commission, 1930 noted that the whole of the Assam backward tracts were represented in the provincial legislature by a single nominated member, who for a considerable period was a Welsh missionary.[20]

Thus, the focus of government policy with respect to these backward tracts was to ensure to these primitive inhabitants, security of land tenure, freedom in the pursuit of their traditional means of livelihood, and a reasonable exercise of their ancestral customs. [21]

The Simon Commission, 1930[22], for the first time recognised that perpetual isolation from the mainstream population was not the long term solution for this problem. So, the Commission observed:

"*The responsibility of Parliament for the backward tracts will not be discharged merely by securing to them protection from exploitation and from preventing those outbreaks which from time to time have occurred within their borders. The principal duty of the administration is to educate these peoples to stand on their own feet, and this is a process which has scarcely begun.*"

The Government of India Act, 1935 classified these backward areas as "excluded areas" and "partially excluded areas". In addition to these areas, the Act also defined certain "tribal areas", which were notified as "areas along the frontiers of India or Baluchistan which are not part of British India or Burma or of any Indian or foreign state." The "tribal areas" in the Northwest frontier became part of Pakistan post-independence and need not concern us here. But in the areas on the northeast frontier, namely the Assam "tribal areas", vast tracts of land had no British administration and were subject to encroachment by Tibetan tax officials.[23]

On a parallel trajectory, the British state was preoccupied with the situation of the criminal tribes. At the time of introduction of the Criminal Tribes Act, 1911, there was recognition of the fact that crime had declined significantly amongst the tribes and that they had taken to a more settled life. The main objectives of the Act were to safeguard society from the anti-social activities of the criminal tribesmen and also to reform these tribesmen. The All India Jails Committee Report, 1919[24], highlighted that the role of government policy was more their rehabilitation and resettlement than protection of society from their criminal activities. In 1924, a new Criminal Tribes Act was enacted which consolidated the legislative changes made in various provinces.

The Report of the UP Criminal Tribes Act, 1947[25], noted that there was no data that suggested that even 25% of the members of the notified criminal tribes were involved in a life of crime. Therefore, it recommended a complete repeal of the Criminal Tribes Act and denotification of all listed tribes. Instead, the Committee recommended the adoption of a "Habitual Offenders and Vagrants Act" in the province that would be applicable to all tribes irrespective of caste, class, religion, sex and creed.

[20] *Id*. at 570.
[21] *Id*. at 570.
[22] The Simon Commission Report, 1930, vol. II, paras 127-34.
[23] *Id*. at 572.
[24] A.G. Cardew et al, 'Report of the Indian Jails Committee, 1919-1920', (1921).
[25] G. Sahai et al, 'Report of the Criminal Tribes Enquiry Committee, United Provinces, 1947', (1947).

C. THE CONSTITUTIONAL FRAMEWORK GOVERNING THE SCHEDULED AREAS AND SCHEDULED TRIBES

From the very outset, the Constituent Assembly was preoccupied with the situation of the tribal communities and the excluded and partially excluded areas.[26] This preoccupation with the tribal communities however did not extend to the criminal tribes. The Advisory Committee on Fundamental Rights and Minorities, tasked with representing the interests of all minorities was tasked with preparing a scheme for the administration of the tribal and excluded areas. At its meeting on February 27, 1947, this Committee set up three sub-committees: one to consider the areas in Assam, one the areas in the Provinces other than Assam, and one the tribal areas in the North-West Frontier and Baluchistan.[27] Of these, only the first two reported, since, following Partition the tribal areas in the North-West Frontier became part of the Dominion of Pakistan.[28]

Both these sub committees recognised that the ultimate solution to the problem of the excluded areas was development, not isolation. They recommended that the development of these areas should not be left to the responsibility of the provincial governments with their limited financial resources and competing claims, but rather that the Centre should play an active role in drawing up schemes for these areas and ensure that they were implemented by the Provinces. [29]

The non-Assam sub-committee submitted its final report in September 1947. It noted that the excluded and partially excluded areas, which it stated should be known as 'Scheduled Areas', did not cover the entire tribal population, so recommended that tribes, whether they lived inside or outside, should be treated "as one whole" as a minority, and given special representation in Legislatures.[30] It recommended that the Provincial ministers, rather than the Governors in their discretion, should have responsibility for these tribal groups, but that responsibility should ultimately be that of the Centre, for drawing up plans of development and providing the necessary finances.[31] It recommended that the Constitution should provide for the setting up in each Province a body which would keep the Provincial Governments (PGs) constantly in touch with the needs of the tribes – the Tribes Advisory Councils (TACs), on which the tribes should be strongly represented. The TACs would primarily 'advise' the government in regard to application of laws in the Scheduled Areas; no law affecting (1) social matters, (2) occupation, allotment and use of land (3) village administration would apply if a TAC considered it unsuitable; on other matters, the PG could make special laws after 'consulting' the TACs. These recommendations were embodied in the Fifth Schedule to the Draft Constitution of February 1948.[32]

When the Drafting Committee considered these recommendations, it found that the recommended draft of the Fifth Schedule conferred too much legislative and executive power on the TACs, which it feared would do the opposite of safeguard tribal welfare since tribal representation was bound to be weak for a long time and they would have difficulty understanding complicated matters of law. Therefore, the role of the TACs was made a purely consultative one.[33] The Drafting Committee favoured the vesting of powers not in the TACs but the President and the Governors.

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[26] The Cabinet Mission Statement of May 16, 1946 mentioned these areas as requiring the special attention of the Constituent Assembly. See, *supra* note 18, at 572.
[27] *Id*. at 573.
[28] Id. at 573.
[29] Id. at 574.
[30] *Id*.
[31] *Id*. at 575.
[32] *Id*.
[33] Constituent Assembly Debates, Book 4, vol.9, 967-1008.

In particular, it was left to the President to decide whether to create Tribes Advisory Councils in states that had ST population but did not have Scheduled Areas. Secondly, the Schedule vested the Governor with the discretion to apply central or provincial laws in SAs and did not bind him to the advice of the Tribal Advisory Councils. Finally, it prescribed that amendments to the Fifth Schedule should be made by an ordinary Act of Parliament rather than the more difficult procedure to make constitutional amendments.

Within the Constituent Assembly Debates, the discussions are characterised broadly by the narratives of both identity and development, with a greater emphasis on the "tribes being backward communities that should be integrated in the mainstream of Indian society" than that the "tribes are a community with a distinct way of life that should be protected and preserved as such". The narrative of integration encapsulates a narrative of political representation and affirmative action for tribal communities in the form of reservations in government and educational institutions. To reiterate these provisions.

First, the STs have both individual and group representation within the Indian federal constitutional framework. Article 330 of the Constitution read with the Representation of People's Act, 1951, provides for separately reserved electoral constituencies in majority ST districts for both the state assembly and parliamentary constituencies. The only other group to have this privilege of special representation within the constitutional framework are the Scheduled Castes, who are historically disadvantaged communities within the mainstream of the dominant Hindu society.

Second, the Constitution stipulates affirmative action provisions that reserve 7% seats in government funded educational institutions and government jobs for the STs[34], which is in accordance with their proportional percentage in the population at the time of independence. The Scheduled Castes also enjoy this privilege of proportionate population reservations in educational institutions and government jobs.

On the other hand, the narrative of identity intertwined with geographic location leads to the creation of relative autonomy of tribal peoples in the Fifth and Sixth Scheduled areas. Nowhere is the contrast between the identity and development narratives stronger than in the views of Jaipal Singh on the one hand, and those of Shibban Lal Saksena, Brajeshwar Prasad and K.M. Munshi on the other. Jaipal Singh, a member of the Munda tribe from the forested plateau of South Bihar peopled by numerous tribes, was the only tribal representative in the Constituent Assembly who speaks on the debates on the Fifth Schedule. Describing the tribals as "adivasi", or "original inhabitants" of the subcontinent[35], Singh argued broadly in favour of the schedules as well as for reservations of seats in the legislature and government jobs for the tribals. He saw the previous '6000 years' of tribal history as the history of persecution (continuous exploitation and dispossession by the non-aboriginals of India) by the 'newcomers' – non-tribals –and saw the proposed constitutional provisions as a means to make amends.[36]

In contrast to Jaipal Singh's views, Shibban Lal Saksena regarded the existence of the Scheduled Tribes and the Scheduled Areas as a "stigma" and hoped "that the STs and SA would be developed quickly so that they became "indistinguishable" from the rest of the population.[37] Thus, while Jaipal Singh highlights the "tribal problem" as one involving the development of the tribal peoples' according to their own genius in accordance with their distinctive culture and way of life", for Shibban Lal Saksena, the problem of the tribals is no different from that of the Dalits who

[34] Articles 15(4) and 16(4).
[35] Constituent Assembly Debates, Book 4, vol.9, 994.
[36] Constituent Assembly Debates, Book 4, vol.9, 992-996.
[37] Constituent Assembly Debates, Book 4, vol.9, 992-996.

have been systematically discriminated in Indian society. This is however not true because the Dalit narrative is that of systematic historical discrimination within the mainstream of the caste Hindu society, the tribal narrative is that all these heterogeneous tribes have a distinct culture and way of life that is outside the mainstream of Indian society. In other words, the Dalits are seeking integration and respect within mainstream Hindu society which has been denied to them for centuries. But the tribals are seeking development on their own terms outside the mainstream of Indian society. However, the trouble with this tribal narrative espoused by Jaipal Singh is highlighted by K M Munshi. Munshi notes that the tribal community is not one "conscious corporate collective whole in this country so that someone can speak in its name or can lead a movement combining them into a single unit."[38] And this problem of disunity between the tribes has been a significant problem in articulation of their interests in the national discourse.

Haunting the Constituent Assembly debates on the Fifth and Sixth Schedules is the spectre of political disintegration given that the debates took place during the bloodbath of partition. The fear of political disintegration is articulated by several members in the Constituent Assembly particularly with respect to the debates in the Sixth Schedule, which provided for a significant measure of political and administrative autonomy to the indigenous tribal populations than the Fifth Schedule.[39]

Article 244(1) of the finally adopted Constitution read with the Fifth Schedule provided for the administration of variously described "tribal majority" and "backward" areas in nine states within peninsular India that have tribal minority populations, that is the population of STs is in a minority compared to the population of the remainder of the state. The President of India can by order declare any area to be a Scheduled Area. The currently designated Scheduled Areas are in the states of Andhra Pradesh, Telangana and Gujarat that we are studying as part of this project, and also Jharkhand, Chhattisgarh, Himachal Pradesh, Madhya Pradesh, Maharashtra, Orissa, Rajasthan. According to the Fifth Schedule, these areas are to be administered by the Governor of the State, in consultation with the Tribes Advisory Councils to be appointed by the Governor. The Governor has powers to regulate the application of laws of the State and the Acts of Parliament to the Scheduled Areas. He or she can make any regulations for the good governance of any or all Scheduled Areas in a State.

Now, India is often described as a union of states. What that means is that we have a federal system of government with a unitary bias. We have a parliamentary system of government where the President and the Governors make decisions mostly on the basis of the recommendations of their Council of Ministers. The implication of that for how Fifth Schedule areas are governed is that there is considerable centralisation of power in the tribal areas with Parliament and state legislatures. What this also means is that legally speaking, there was simply no recognition of tribal sovereignty over the land and natural resources in the Fifth Scheduled areas. The Indian State has sovereignty over these areas. There is only recognition of the special status of the tribals and state directed laws for their protection.

Article 244(2) read with the Sixth Schedule provides the broad framework for the administration of tribal areas in the north eastern states of Assam, Meghalaya, Tripura and Mizoram. It provides for a system of scheduled areas called Autonomous Districts and Autonomous Regions (within the districts) to be administered democratically by the indigenous tribal population of such scheduled areas. Article 244(2) mandates that there shall be a district council for each autonomous district consisting of not more than thirty members, of whom not more than four members will be nominated by the Governor and the rest shall be elected on the basis of adult suffrage. The Governor shall make rules for the first constitution of the District Councils and Regional Councils in consultation

[38] Constituent Assembly Debates, Book 4, vol.9, 992-996.
[39] Constituent Assembly Debates, Book 4, vol.9, 967-1008.

with the existing tribal councils or other representative tribal organisations within the autonomous districts or regions concerned. The elected members of the district council hold office for a period of five years.

The Regional Councils have enormous legislative, financial and administrative powers with respect to allotment, occupation and use of land, the management of any forest not being a reserved forest, the use of canals and watercourses, the regulation of shifting cultivation, inheritance of property, the establishment of village and town committees and their powers, marriage and divorce and other social customs.

The Regional Councils for an autonomous region and District Councils within the Autonomous Districts have the powers to assess and collect land revenue, levy taxes on lands and buildings in accordance with the principles of the state of which such councils and districts are a part. But the federal and state governments retain powers to acquire land in exercise of the power of eminent domain. In addition, they have the powers to grant licenses for prospecting for mining in the Autonomous Regions and Districts, except that the state has to share royalties with the District Councils as agreed to upon by the state governments. The President may by notification apply or restrict the application of central acts, and the Governor my do so with respect to state Acts in the autonomous districts or regions of any of these states.

D. THE POST-COLONIAL DEVELOPMENT STATE'S TREATMENT OF THE SCHEDULED TRIBES AND SCHEDULED AREAS: THE DOMINANCE OF THE "BACKWARDNESS" NARRATIVE FROM 1950 TO 2000

Although both the backwardness/development narrative and the identity narratives directed the formulation of the constitutional provisions for safeguarding the rights of the STs in the Constituent Assembly, post-independence, we find that the backwardness narrative dominates policy making with respect to the tribal population. The Report of the Backward Classes (Kalelkar) Commission, 1955 classified the Scheduled Tribes and Denotified tribes along with Scheduled Castes, women, and other socially, economically and educationally backward classes as backward classes[40]. It adopted the following criteria for the identification of backward communities: (a) low social position in the traditional caste hierarchy of Hindu society; (b) lack of general educational advancement among the major sections of a caste or community; (c) inadequate or no representation in government service and (d) inadequate representation in the field of trade, commerce or industry. The denotified tribes (ex-criminal tribes) were classified as backward along with the Scheduled Castes and Scheduled Tribes. It also identified certain "backward" districts and recommended their classification as Scheduled Areas. The Committee recommended various measures for the removal of social, educational, and economic backwardness, all of which were aimed at the integration of all the backward classes, including the Scheduled Tribes and denotified tribes in society.

A few years later, the Renuka Ray Committee on Social Welfare and Welfare of Backward Classes, 1959 defined "backward classes" to mean the "Scheduled Castes, Scheduled Tribes, Denotified Communities, and other backward classes"[41]. Again, the Commission expressly recommended that the major objective of all social programmes that were targeted to benefit the "backward classes" including the STs and denotified communities was their eventual integration into a "normal community". The broad priorities for the STs included their "economic development and communications, education, and public health". The principles guiding the welfare services included not

[40] Kalelkar et al, 'Report of the Backward Classes Commission', Journal of Indian School of Political Economy, (1955).
[41] R. Ray et al, Committee on Plan Projects, 'Report of the Study Team on Social Welfare and Welfare of Backward Classes', Volume 1, (1959).

"overadministering these areas" and "imposing things on tribals" but rather helping them evolve in accordance with their own genius and through their own social and cultural institutions.

Following a directive in the Constitution, a decade after its adoption, a committee was constituted to report on the administration of Fifth Schedule areas, in particular the functioning of the Tribes advisory councils, the application of laws to Fifth Schedule areas and the exercise of the Governor's powers in these areas. This Commission known as the Dhebar Commission[42], after the name of its chairman, recommended consideration of the following factors in the declaration of any area as a scheduled area: (a) preponderance of tribals in the population; (b) the compactness and reasonable size of the area; (c) the underdeveloped nature of the area; and (d) marked disparity in the economic standard of the people.

The Commission recommended that the benefit of the Fifth Schedule should also be extended to the Union territories. It recommended the inclusion of additional areas of 58,897 sq Km along with a tribal population of approximately 45, 00,000 to the Fifth Scheduled areas. The Commission noted its disappointment with the functioning of the Tribes Advisory Councils and in line with Jaipal Singh's recommendation in the Constituent Assembly, recommended the creation of TACs in all states and UTs with powers to advise on and review all matters pertaining to tribal areas. This was more so in relation to legislation for protection of rights of tribals to land and against exploitation by moneylenders. Finally, the Commission recommended special financial allocations by the state governments to the scheduled areas.

The 1969 Report of the Advisory Committee on the Revision of the List of SCs and STs, popularly known as the Lokur Committee Report, noted that while the Constitution has not expressly prescribed any principles or policy for drawing up lists of STs, "primitiveness" and "backwardness" were the tests applied in preparing the lists in 1950 and 1956 that were notified by the President pursuant to Article 342[43]. In submitting their revisions to those lists, the Lokur Committee noted that they had adopted the following five criteria: (a) indications of primitive traits, (b) distinctive culture, (c) geographical isolation, (d) shyness of contact with the community at large and (e) backwardness. Correspondingly, they had excluded from the lists those tribes whose members had largely integrated with the mainstream population.

Thus, despite reference to the "identity" narrative in the identification criteria of the STs, integration remains the goal of the government's policy objective regarding the tribal communities. Moreover, the "backwardness" narrative dominates the Committee's recommendations, because they note that the more advanced communities in the ST list should be gradually descheduled, because only then could "complete integration" be achieved.

In line with the backwardness narrative, in 1978, the Government of India created a multi member Commission for Scheduled Castes and Scheduled Tribes, to conduct studies on the social and economic conditions of both backward communities. Following a constitutional Amendment in 1990, the first National Commission for Scheduled Castes and Scheduled Tribes was set up in 1992 under the chairmanship of Ram Dhan. The NCSC&ST was charged with investigating and monitoring all constitutional and legal safeguards for Scheduled Tribes, and to enquire into specific complaints regarding the violation of these safeguards and rights, to participate and advise on the planning process

[42] U.N. Dhebar et al, 'Scheduled Areas and Scheduled Tribes Commission', (1961).
[43] B.N. Lokur et al, 'The Report of the Advisory Committee on the Revision of the Lists of Scheduled Castes and Scheduled Tribes', Department of Social Security, (1965).

regarding the socio- economic development of Scheduled Tribes, and evaluate their progress to discharge any other functions related to the protection, welfare and development of Scheduled Tribes.[44]

However, following this, there was a growing realization of attending separately to the needs of the Scheduled Tribes. This manifested first in the creation of a separate department for tribal affairs within the Home Ministry followed by the creation of a separate Ministry of Tribal Affairs in 1999. This shift in the treatment of the Scheduled Tribes can be seen most clearly in the Bhuria Committee Report, 2002[45], which for the first time in the post-independence era questioned the dominance of the backwardness narrative with respect to the Scheduled Tribes. It noted that the tribal people rejected the oft reiterated "dictum" in previous government reports that "objective of tribal policy should be that the tribal people join the mainstream". Finding this approach "not only paternalistic but patronising", the Bhuria Committee noted that the tribal people were "averse to attempts, overt or covert that aim at their assimilation. They wish to preserve the integrity of their culture, and personality."

The Report stresses the importance of "land and forests" as the two basic resources of the tribal life support system, which had been "assaulted" by the processes of "accelerated urbanisation and industrialisation". The Commission made a series of recommendations, including maintaining the sanctity of the Scheduled areas, introduction of prohibition of ST land alienation prohibition laws in urban areas, as well as their application to non-agricultural land in rural areas.

E. THE TRANSLATION OF POLICY INTO ACTION BY THE POST COLONIAL STATE THROUGH LEGISLATIVE, FINANCIAL AND ADMINISTRATIVE REFORMS:

LAND ALIENATION PROHIBITION LAWS, THE TRIBAL SUB PLAN, PESA, THE MINISTRY OF TRIBAL AFFAIRS AND THE FOREST RIGHTS ACT

E1. Land Alienation Prohibition laws

Post the adoption of the Constitution, the first major legislative reform introduced sought to safeguard tribal rights to land. Noting the centrality of land to tribal identity, economy and culture, and the need to protect the Scheduled Tribes from exploitation and displacement, during the 1950-1970s, Parliament and legislatures of all states with Fifth and Sixth Schedule areas enacted legislation to safeguard tribal rights to land[46] by prohibiting transfer of land in the Scheduled Areas from tribals to non tribals. States like Sikkim, West Bengal, and Uttar Pradesh that do not have any designated scheduled areas under the Fifth and Sixth Schedules also enacted legislation prohibiting transfer of land belonging to tribals, to non tribals.[47]

E2.The Tribal Sub Plan

[44] "Report on the National Commission for Scheduled Tribes" file:///C:/Users/namita%20wahi/Downloads/NCST%20CPR%20(2).pdf (accessed on January 31, 2018).
[45] Dileep Singh Bhuria et al, 'Report of the Scheduled Areas and the Scheduled Tribes Commission Government of India', Volume 1, 2002-2004, Scheduled Areas and Scheduled Tribes Commission, (2004).
[46] Andhra Pradesh Scheduled Areas Land Transfer Regulation, 1959 and Andhra Pradesh Scheduled Areas Land Transfer Rules, 1969; Madhya Pradesh Land Revenue Code, 1959; Maharashtra Land Revenue Code, 1966 and the Maharashtra Land Revenue Code and Tenancy (Amendment) Laws, 1970 as well as Maharashtra Restoration of Land to the Scheduled Tribes Act, 1975; Himachal Pradesh Transfer of Land (Regulation) Act, 1968; Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of transfer of certain lands) Act, 1978; Manipur Land Revenue and Land Reforms Act, 1960; Orissa Scheduled Area Transfer of Immoveable Property (by Scheduled Tribes) Regulation, 1956 and (Amendment), 2002, and Orissa Land Reforms Act, 1960. *Supra note 7*
[47] The Uttar Pradesh Land Laws (Amendment) Act, 1982; West Bengal Land Reforms Act, 1955; Sikkim Agricultural Land Ceiling and Reforms Act, 1977; *Supra note 8*

Within India's planned economy, pursuant to the recommendations of the Dhebar Commission, the second major institutional reform was the creation of a targeted plan of financial allocations and expenditures for the benefit of the tribals. This manifested in the Fifth Five Year Plan (1974) into the creation of a tribal sub plan which provide a platform for targeted funding to be channelised appropriately for tribal welfare all the way to the village level. Continued in successive Five Year Plans since the Fifth FYP, the tribal sub plan sought to supplement the financial allocations by the state governments with respect to tribals and provide an additional targeted grant that was in proportional terms equivalent to the percentage of the ST population according the to the latest Census figures.

The Tribal Sub Plan has the following four components: allocations made under the central TSP, allocations made under the state TSP, allocations made by the Ministry of Tribal Affairs and institutional finance. Institutional finance includes funds received under a number of different heads, including, Corporate Social Responsibility funds, and funds from various marketing and financial institutions set up by the state governments to provide institutional support for marketing and development of tribal products. For the year, 2015-2016, these components added upto 1, 15,996 crores.

We analysed the average relative share of TSP components for a period of five years from 2011 to 2015 based on reports from the Ministry of Tribal Affairs for the years 2012 to 2016 respectively. See Figure 1. We find that the state TSP contributes the bulk of the funds for the TSP (84% of funds on average), while the central TSP (8%), funds from the Ministry of Tribal Affairs (6%), and institutional finance (2%) constitute a very small percentage of funds under the TSP.

Therefore, it becomes abundantly clear that even though the Constitution envisages a centralised framework for the administration of tribal areas under the aegis of the President and the Governors of all the states, the responsibility of financing the costs of progressive changes for the tribals vests almost completely with the state governments. Thus, we see the fragmented nature of the constitutional protections for the STs are also replicated in the administrative and financial apparatuses designed to effectuate these protections, thereby reducing the efficacy of provisions designed to safeguard the rights of the tribal peoples.

We further analysed the discrepancy between the TSP allocations made under the central and state TSP for the years 2011 to 2015 with the recommended allocations under the central and state TSP as per the Planning Commission's Guidelines, 2006. We found that the total TSP allocations made to 23 states over the five year period (2011 to 2015) is 12 billion USD. However, if we compute the recommended allocations under both the central and state TSP as per the Planning Commission Guidelines, we find that there is a shortfall of 15.2 billion USD in the central TSP and 6.7 billion USD in the state TSP. See Figure 2.

From the above analysis, it could not be clearer that the governments are shortchanging the tribal peoples with respect to the recommended financial allocations for the promotion of tribal welfare, which is a constitutional responsibility on part of both the central and state governments.

Figure 1: Relative share of TSP components from 2011 to 2015

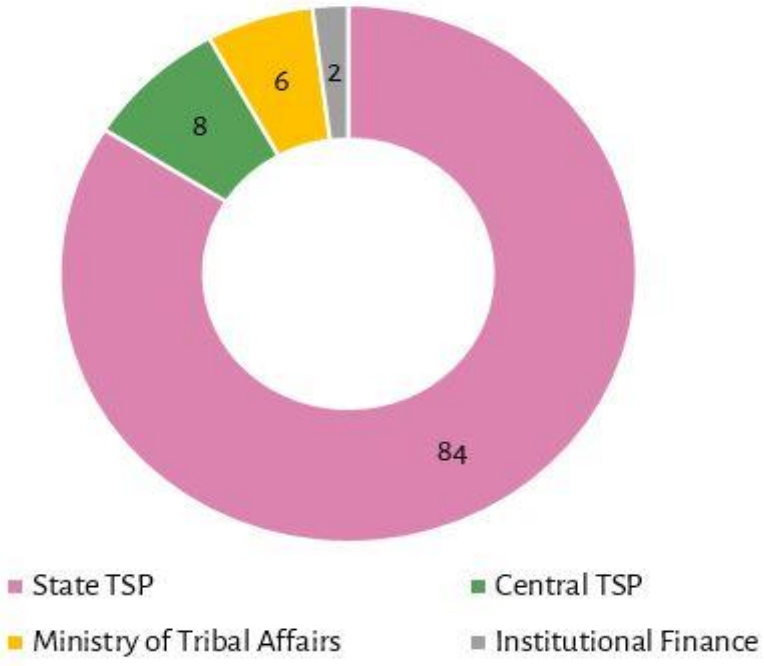
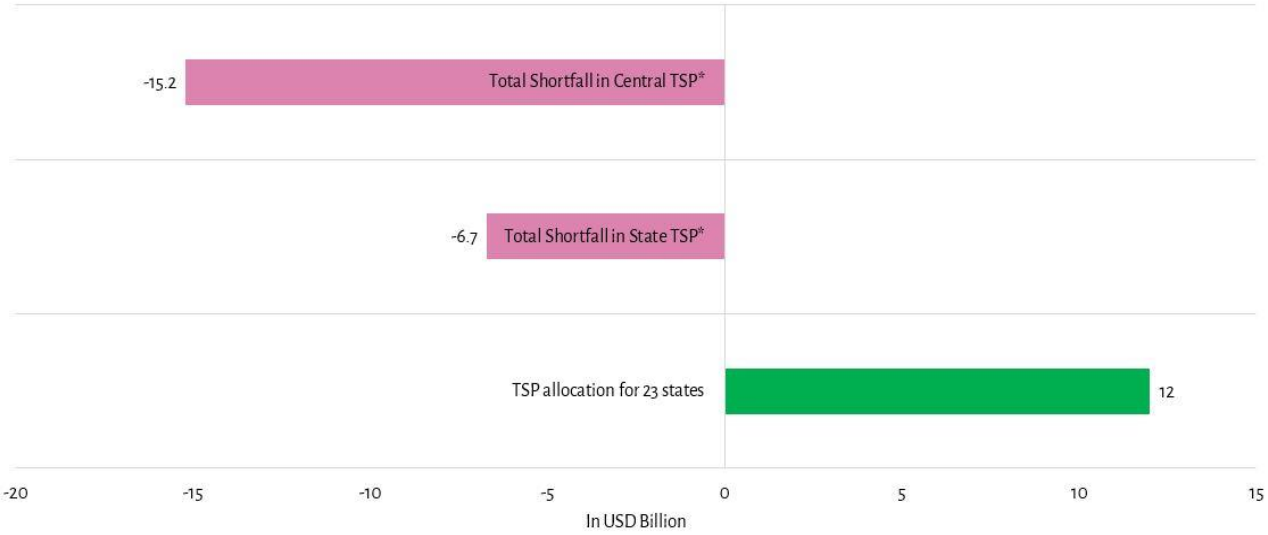


Figure 2: TSP Allocation and Shortfall in Central & State TSPs from 2011 to 2015 (in billion USD)



E3. The Panchayat Extension to Scheduled Areas Act, 1996

Parliament enacted PESA in 1996 with a view to devolve greater autonomy and local self government to tribal communities in the Fifth Scheduled Areas. This law was enacted in response to a long standing demand by tribal communities and activists in the Fifth Schedule areas that they be granted the same autonomy and self government enjoyed by the Sixth Schedule areas. The PESA attempts to vest statutory powers to Gram Sabha specifically in areas relating to development planning, management of natural resources and adjudication of disputes in accordance with prevalent traditions and customs. In pursuance of PESA the state legislature are required to ensure that the Panchayats at the appropriate level and/or the Gram Sabha are endowed specifically with powers for management of land resources among other things. However, PESA was intended only as an umbrella framework under which

respective state panchayat Acts have to be amended to incorporate the letter and spirit of PESA. A number of states which have adapted PESA under a statutory time line of one year as mandated in PESA have left a lot of operational issues subject to rule making powers and state prescriptions under their respective amendments.

E4. The Ministry of Tribal Welfare

For more than fifty years since independence, the Central Home Ministry was charged with the responsibility of tribal welfare. Though some states had independent tribal welfare departments, a separate Ministry of Tribal Affairs was not created at the level of the central government until 1999. This inspite of the fact that the debates in the Constituent Assembly had highlighted the role of the central government in the protection and uplift of the tribal communities. The MoTA sought to assume responsibility of the NCST, even though the latter was envisaged to be an independent body which would advise the government on matters of tribal policy. Since its creation, the MoTA has been the nodal agency for the creation of central tribal policy in consultation with the NCST and the national commissions created for tribal welfare, including the Bhuria Committee, 2002 and Xaxa Committee, 2014.

E5. The Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

In 2006, Parliament enacted the Forest Rights Act to reverse more than a century of injustice against forest dwelling communities, particularly the STs since the enactment of the draconian forest laws of the 19th century. The British colonial state's Forest Rights Policy, 1854 conferred limited rights on tribals, before they were outlawed by the subsequent forest laws. The 1894 Forest Rights Policy diluted tribal "rights" into "rights and privileges". Though expected to undo the injustice to tribals, the independent Indian state's National Forest policy, 1952[48], further diluted these "rights and privileges" to "rights and concessions". It stated that tribal communities should not be allowed the use of forest produce at the "cost of national interest." When Parliament enacted the Forest Conservation Act, 1980, the Forest Department was further empowered to deprive tribals of their rights to collect minor forest produce and cultivate forest lands.

It was not until the National Forest Policy, 1988[49], that a reversal of this position was attempted. Noting the uniquely symbiotic relationship between tribal people and forest land, the NFP, 1988, stressed that the primary task of all agencies responsible for forest management, should be to associate the tribal people closely with the protection, regeneration and development of forests, as well as to provide gainful employment to people living in and around the forest. Pursuant to this policy, in the 1990s, the Ministry of Environment and Forests introduced guidelines for the "Joint Forest Management" policy introduced in several states, which envisaged joint management of forests between tribal communities and Forest Department officials.

The efforts to secure the tribal people's forest rights culminated in the enactment by Parliament of the historic Forest Rights Act, 2006. This Act granted statutory recognition to individual and community rights of Scheduled Tribes and other traditional forest dwelling communities and gave them a participatory voice in forest management and conservation. The Act recognized rights of tribal communities to cultivate land in the forests, and also rights to use grazing lands, collect minor forest produce, and to protect and conserve forests.

[48] National Forest Policy, 1952, Ministry of Environment and Forests, http://www.latestlaws.in/?page_id=52960 (accessed on January 31, 2018).
[49] National Forest Policy, 1988, Ministry of Environment and Forests, http://envfor.nic.in/legis/forest/forest1.html (accessed on January 31, 2018).

F. THE SOVEREIGN STATE AND ITS POWER OF EMINENT DOMAIN

As the British colonial state asserted sovereignty over Indian territory, it also claimed "universal ownership" over all land within British territory. In doing so, they claimed to have succeeded to the "claim" and "title" of the "native rulers" who had preceded them.[50] In pursuance of this claim, the British state enacted a number of laws that gave it enormous powers to reshape and redistribute property rights in India.[51] Chief amongst these laws were a series of land acquisition laws enacted in exercise of the state's power of eminent domain, which authorised the compulsory taking of property belonging to private individuals by the state,[52] forest laws that asserted state ownership of forests and derecognised the rights of forest dwelling communities[53], and mining laws which asserted the right of the state to all resources in the subsoil. Since we have already described the Forest laws and the correction of the historic injustice perpetrated by them by the Forest Rights Act, 2006, in this section, we will devote our discussion to the land acquisition and mining laws.

F1. Land Acquisition laws

The power of "eminent domain", inherent in the exercise of the state's sovereignty allows the state to compulsorily acquire property belonging to private persons for a public purpose and upon payment of just compensation, following procedure established by law. Starting with the Bengal Regulation I of 1824[54] and culminating in the Land Acquisition Act, 1894, the British experimented with a variety of procedures for acquisition of land. The Land Acquisition Act, 1894, originally enacted for the territory of British India was, following independence, extended to cover the entire territory of India except for the state of Jammu and Kashmir. The princely states had their own land acquisition laws.[55]

This Act remained in force for a period of 119 years although it was amended frequently during this time.[56] The last amendment to this law was made in 1984. The Land Acquisition Act, 1894, applied originally only to British India. Like other colonial laws, the application of the Land Acquisition Act, 1894 was grandfathered by Article 13(2) of the Constitution insofar as it was not in conflict with the fundamental rights of the people.

Moreover, apart from the laws that dealt directly with land acquisition, a number of other colonial and post-colonial central and state laws contained provisions for acquisition of land. A study by the CPR Land Rights Initiative of all Supreme Court disputes on land acquisition has estimated that there are at least 15 central and 87 state laws of land acquisition.

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[50] Baden Henry Baden-Powell, *The Land Systems of British India: Being a Manual of the Land Tenures and of the Systems of Land Revenue Administration Prevalent in the Several Provinces, vol.* 1 (London: 1892), 216.
[51] Namita Wahi, doctoral dissertation; Namita Wahi, "Property and Sovereignty: Creating, destroying and resurrecting property rights in British India" (2018); Namita Wahi, Ankit Bhatia et al., Land Acquisition in India: A Review of Supreme Court cases from 1950 to 2016.
[52] Atul M. Setalvad, *A Study into Certain Aspects of the Land Acquisition Act, 1894 JILI* (January-March 1971): 1, at 2.
[53] See section "E".
[54] H.M. Jain, *Right to Property under the Indian Constitution* (Allahabad: Chaitanya Publishing House, 1968), 12.
[55] The princely states passed their own Acts, for example, the Mysore Land Acquisition Act, 1894, the Hyderabad Land Acquisition Act, 1899, and the Travancore Land Acquisition Act, 1914.[55]
[56] The Land Acquisition Act, 1894 was amended by Acts 4 and 10 of 1914, 17 of 1919, 38 of 1920, 19 of 1921, 38 of 23, 16 of 1933 and 1 of 1938. The Amending Act of 1923, for the first time, gave an opportunity to the persons interested in the lands proposed to be acquired to state their objections to the acquisition and to be heard by the authority concerned in support of their objections. *Law Commission of India, Tenth Report,* 3.

In 2013, the 1894 Act was repealed and replaced by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.[57] This Act has from its inception been subject to intense political and legal contestation and has now been amended by several states, including those of Tamil Nadu[58], Telangana[59], Gujarat[60], Rajasthan[61], Maharashtra[62] and Jharkhand.[63]

The special constitutional provisions safeguarding tribal rights to land in the Fifth Schedule areas do not recognise the sovereignty of the tribals with respect to these areas. Although in the debates on the Sixth Schedule, Dr. Ambedkar, the President of the Drafting Committee on the Constitution acknowledged that the political and administrative autonomy guaranteed for the tribal areas under the Sixth Schedule was 'somewhat analogous to the position of the Red Indians in the United States as against the white emigrants'[64], thereby signifying some sort of limited sovereignty over the land as "peoples", the text of the Constitution makes these areas expressly subject to the land acquisition laws enacted by the federal and state legislatures of the respective states. Therefore, the Indian state retains its eminent domain powers over these areas.

F2. Mining laws

Just like with the Forests laws, the British colonial state retained all subsidiary rights to the land, including the rights to minerals under the soil, or the right to the water in the lakes or streams.[65]The Indian state claimed succession to the same rights to the subsoil. Within India's federal constitutional structure, the power to make laws with respect to "regulation of mines and oilfields and mineral development" vests with the federal government.[66] But the state governments are empowered to frame rules and regulations in respect of mining activities and mineral development, subject to the provisions of List I.[67] This was in accordance with the structure of the colonial government under the Government of India Acts, 1919, and 1935.

Following the Mineral Policy Conference, 1947, Parliament enacted the Mines and Minerals (Development and Regulation) Act, 1957, to regulate the mining sector in India, which specifies requirements for obtaining and granting mining leases for mining operations. Under the MMDR Act, Mineral Concession Rules, 1960, and the Mineral Concession and Development Rules, 1988, outline the relevant procedures and conditions for obtaining a Prospecting License or Mining Lease.

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[57] For the evolution and details of the changes made by this law to the 1894 Act see Namita Wahi, "Equity of Land Acquisition," *The New Indian Express*, November 29, 201, available at http://www.newindianexpress.com/opinion/article250235.ece?service=print (Visited on March 17, 2014); Namita Wahi, "Land Acquisition, Development and the Constitution" 642 *Seminar Magazine* February, 2012, available at http://india-seminar.com/2013/642/642_namita_wahi.htm (Visited on March 17, 2014); Namita Wahi, "Compromise over land takeover", available at http://www.newindianexpress.com/opinion/Compromise-over-land-takeover/2013/09/11/article1778031.ece?service=print (Visited on March 17, 2014).

[58] Tamil Nadu Government Gazette, Chennai, Monday, January 5, 2015.

[59] K.V. Kurmanath, Telangana gets new land acquisition Act, January 16, 2018, *Hindu Business Line*, http://www.thehindubusinessline.com/news/national/telangana-gets-new-land-acquisition-act/article9447900.ece (accessed on January 31, 2018).

[60] A. Bhardawaj, "Did you know Gujarat and Rajasthan passed Land Acquisition Bills?", July 19, 2016, *Newslaundry* Retrieved from http://www.newslaundry.com/2016/04/29/did-you-know-gujarat-rajasthan-passed-land-acquisition-bills/ (accessed on January 31, 2018).

[61] *Id.*

[62] Manju Menon et al., "In state-level changes to land laws, a return to land grabbing in development's name", 28 September, 2017, *The Wire*, https://thewire.in/181933/state-level-changes-land-laws-return-land-grabbing-developments-name/, (accessed on January 31, 2018).

[63] *Id.*

[64] Constituent Assembly Debates, Book 4, vol.9, 1027.

[65] M. Hidayatullah, *Right to Property under the Indian Constitution* (Calcutta: Calcutta University, 1983), 114; Namita Wahi, Doctoral dissertation.

[66] Entry 54, List I of the Seventh Schedule.

[67] Entry 23 "Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union" as mentioned in List II (State List) in Seventh schedule of Indian Constitution. List II or State List is a list of 61 subjects (initially there were 66) on which state legislatures have exclusive power to legislate.

Read in conjunction with the land acquisition laws, the mining laws applicable both to Fifth and Sixth Schedule areas, empowered the state to displace the Scheduled Tribes from their lands. In 1997, following the historic *Samata* judgment[68], the NGO *Samata*, one of our project partners for this research, challenged the grant of mining leases to non-tribal people in the Scheduled Areas of the state of Andhra Pradesh as being violative of the Andhra Pradesh Scheduled Areas Land Transfer Regulation, of 1959 and Forest (Conservation) Act of 1980. The Supreme Court held these leases to be null and void, declaring that "government lands, tribal lands, and forestlands in the scheduled Areas cannot be leased out to non-tribals or to private companies for mining or industrial operations". The Court advocated that mining activity should be taken up only by the State Mineral Development Corporation or a tribal co-operative if they are in compliance with the Forest Conservation Act and the Environment Protection Act. It also directed that at least 20% of the net profits should be set aside as a permanent fund for basic amenities like health, education and roads. In the absence of total prohibition, the court laid down certain duties and obligations to the lessee, as part of the project expenditure. The court also held that, as per the 73rd Amendment Act, 1992, "...every Gram Sabha shall be competent to safeguard...Under clause (m) (ii) the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawful alienation of land of a scheduled tribe"

In 2015, the MMDR Act was significantly amended by the Mines and Minerals (Development and Regulation) Amendment Act, 2015, which stipulated certain rules and conditions for issuance of mining and prospecting licenses. In line with the recommendations of the Supreme Court in the *Samata* judgment, this amendment also mandated the creation of District Mineral Foundations in all districts affected by mining operations. By a notification dated 16 September 2015, the central government directed states to set up a DMF. As of 10 October 2016, DMF has been set up in 263 districts across 12 mineral rich states and an amount of Rs. 3589 crores has been collected.[69]

G. EVALUATING THE CONSTITUTIONAL, LEGAL, FINANCIAL AND ADMINISTRATIVE MEASURES FOR PROTECTION OF RIGHTS OF STS

The previous section delineated the various constitutional, legal, financial, and administrative measures taken by the independent Indian state for protection of the rights of STs to reverse the centuries of injustice against these communities and for their protection and uplift pursuant primarily to the "backwardness narrative", and secondarily to the "identity narrative". In this section, we will present findings from the work done by us to evaluate the success and failures of some of these measures.

However, when we began this task, we realized the primary data on various aspects of the situation of the Scheduled Tribes and Scheduled Areas didn't exist. Therefore, we first worked on creating this primary data to answer the following five aspects pertaining to the relationship of the STs and Scheduled Areas and explaining in part the reasons for their displacement and deprivation relative to the rest of the population, despite the plethora of policy, legislative, constitutional, administrative, and financial measures for their protection.

1. How much geographical area within India's land mass falls within the Scheduled areas and what is the percentage of tribal population living within the Scheduled areas?
2. What is the overlap of forested land with the Scheduled Areas relative to other areas?
3. What is the overlap of dams with Scheduled areas as compared to other areas in the country?

[68] *Samata v. State of A.P. and Others*, AIR 1997 SC 3297.
[69] http://arthapedia.in/index.php?title=District_Mineral_Foundation_(DMF)

4. What is the intensity of mining activity in the Scheduled areas? And are the Scheduled Tribes the beneficiaries of this activity?

G1. Geographical area within the Scheduled Areas and Percentage of tribal population living in the Scheduled areas

The Ministry of Tribal Affairs ("MoTA") or any other department of the Government of India had simply no estimate on the extent of geographical area within the Scheduled Areas or the percentage of tribal population living in the Scheduled areas. The Annual Report of the MoTA has a state wise list of the Scheduled areas, as provided in the Scheduled Areas (Part A) and (Part B States) Orders, and modified subsequently by other presidential orders.[70] But MoTA does not have a current mapping of the Scheduled Area districts as of the present date. The only attempt to map the Scheduled Area districts in India has been made by a civil society group called Mines, Minerals and People. In a complete data void on this subject, this map is a good attempt at giving some idea of the Scheduled areas in India. However, the map is incomplete because it only lists the Fifth Schedule areas, and inaccurate because the areas represented do not necessarily correspond with the Scheduled area districts listed in the presidential orders on the MoTA website.

In order to assess the problems of poverty and vulnerability of scheduled tribes in the scheduled areas of India, to conduct any comparative assessment of the varying Scheduled Areas across different states, the logical first step was to create an accurate geospatial representation of the Scheduled areas.

We chose to map all the demarcated Scheduled Areas listed in the MoTA Annual Report to the administrative codes of districts, sub districts and villages as per the latest Census of India, i.e. the 2011 Census. The Census of India is the most comprehensive data gathering exercise conducted by the government of India. Pursuant to this exercise, the government collects information on thirty one metrics, including area, population, literacy, work force, access to banking and physical assets, etc. for the entire Indian population.

The mapping of Scheduled Areas to the "location" or "administrative" codes in Census 2011 was a complicated exercise for multiple reasons. *First*, because the demarcated Scheduled areas were not always demarcated in the same administrative units as recorded in the Census 2011. Moreover, the terms used to identify scheduled areas, for instance, *patwari* circle numbers, *panchayats*, *mahals*, Agency area, Autonomous Areas etc. are peculiar to each individual state, which adds layers of complexity to the problem of correspondence of the demarcated scheduled areas with the Census codes. [71] *Second*, on multiple occasions, the demarcated regions have undergone alterations in name, boundary limits, and categorisation.

Despite prodigious efforts to establish correspondence between all the demarcated Scheduled areas and the Census codes, we were unable to complete this exercise for all the villages of Maharashtra and Andhra Pradesh because of non-availability of updated information with respect to those villages, with neither the MoTA nor the tribal welfare

[70] Madras Scheduled Areas (Cesser) Order 1951 (C.O. 50); Andhra Scheduled Areas (Cesser) Order, 1955 (C.O.30); Scheduled Areas (Himachal Pradesh) Order, 1975 (C.O. 102); Scheduled Areas (States of Bihar Gujarat, Madhya Pradesh and Orissa) Order, 1977, (C.O., 109); Scheduled Areas (State of Rajasthan) Order, 1981 (C.O. 114); Scheduled Areas (Maharashtra) Order, 1985 (C.O. 123); Scheduled Areas (States of Chhattisgarh, Jharkhand and Madhya Pradesh) Order , 2003 (C.O., 192); Scheduled Areas (State of Jharkhand) Order, 2007 (C.O. 229).

[71] For instance, in states like Himachal Pradesh, Jharkhand, and Chhattisgarh, the demarcation of Scheduled Areas is at the level of district or sub-district, which is simpler to map successively over decades, because it corresponds with the administrative codes outlined in the Census. But in states like Maharashtra, Madhya Pradesh, and Andhra Pradesh, where demarcation of Scheduled areas has been done at sub-tehsil levels, like villages, *panchayats* or *patwari* circles, it is difficult to establish the correspondence of these areas with the Census 2011 administrative codes because the states have continuously reshaped the boundaries of these villages, *panchayats* and *patwari* circles through numerous executive orders over time.

departments of both the states. Subject to these caveats for missing information in case of Maharashtra and Andhra Pradesh, the analysis presented below must be seen as the best available estimate.

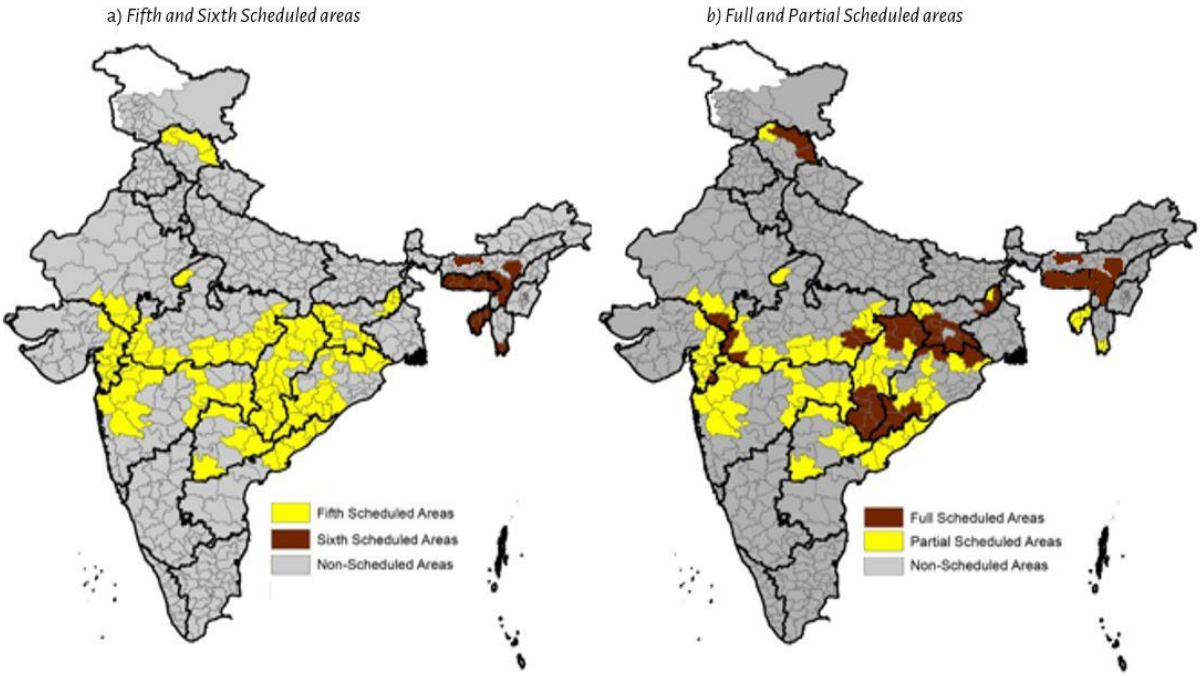
Upon completing this mammoth exercise, we have established that out of a total of 640 administrative districts in India, a total of 125 districts have listed Scheduled Areas. Of these districts, 105 districts have Fifth Schedule and 20 districts have Sixth Schedule areas. See **Figure 3**. Of these 125 districts, 51 districts are those where the entire district has been declared as a Scheduled Area while the remaining 74 districts have partial Scheduled Areas in varying proportions. In case of the 51 districts that have been declared entirely as Scheduled areas, 37 are Fifth Schedule Area districts while 15 are Sixth Schedule area districts. See **Figure 4.**

Once we identified all these districts, we used Quantum Geographic Information Systems software ("**QGIS**") to represent the fully and partially Scheduled area districts geospatially. **Map 1a** highlights the Fifth and Sixth Scheduled area districts in India. **Map 1b** represents the partial and fully scheduled area districts in India.

Figure 3: Number of Fifth and Sixth Scheduled Area districts

Figure 4: Number of Full and Partial Scheduled Area districts

Map 1 (a &b): Geo spatial representation of the Scheduled areas



Once we had sorted the sub-district level list of SAs as per the latest administrative setup, the next step was to assess the geographical area under the Scheduled Areas, its relative proportion to total Geographic area of India and the respective states and even to understand the urban-rural distribution of SAs. Moreover, we wanted to assess the proportional distribution of Scheduled Tribe and non-Scheduled Tribe population residing in the SAs.

In order to conduct this exercise, we relied upon the Primary Census Abstract (PCA) of Census 2011, to extract information with respect to the metrics mentioned above and to facilitate a better visual representation, we created graphs using this information and plotted maps using GIS software.

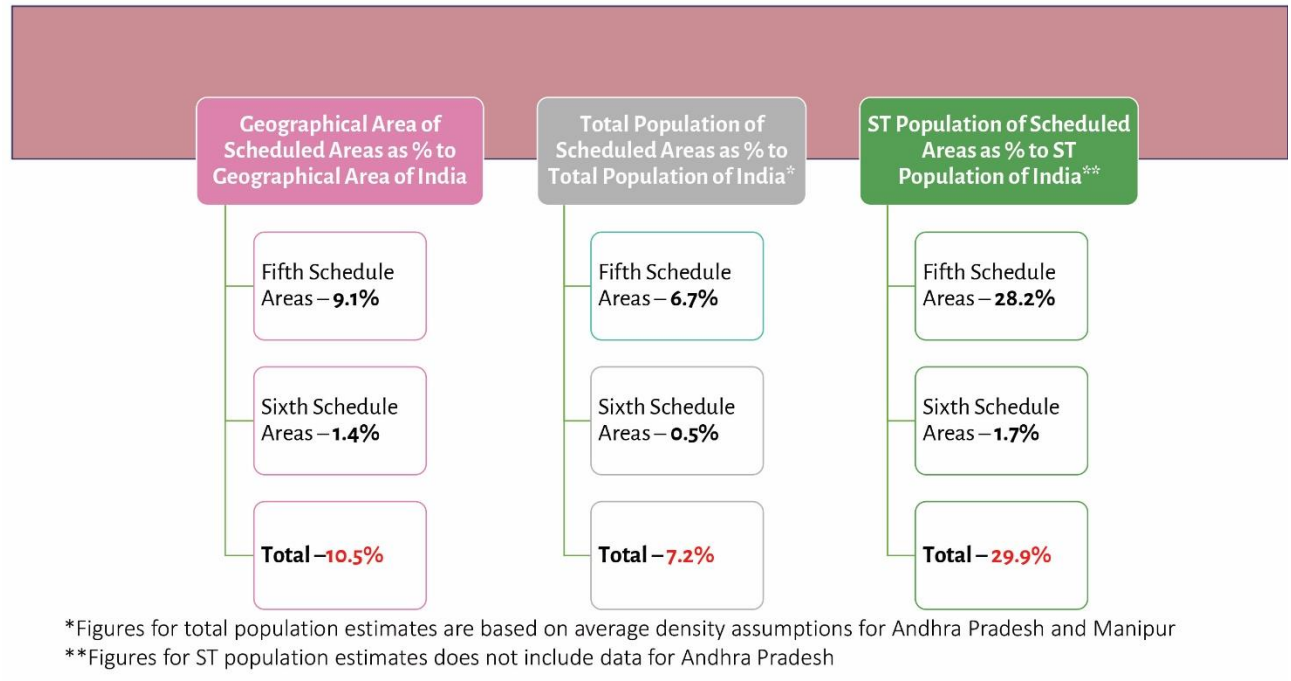
From the same dataset, we further sought to inquire the proportion of total and ST population residing in the SAs. However, for the purpose of this report, we are presenting this information at the level of states. It is to be noted that in those cases where point level information is not available (Andhra and Maharashtra), we relied on the rural component of the respective sub-districts to make computations. So, in that sense, the estimates are slight overestimates but it does not affect the trend of the analysis.

Based on this, we concluded that the percentage of Scheduled area vis-à-vis total geographical area in the country is 10.5%. 9.1% of this falls under the Fifth Schedule while 1.4% falls under the Sixth Schedule. Based on this, we calculated the state wise distribution of Scheduled areas. Map 3 shows the percentage of scheduled area as percentage of the total geographical area of each of the fourteen states that have demarcated scheduled areas. Other than the Shillong Township, the entire state of Meghalaya is designated as having Scheduled areas under the Sixth Schedule. The states of Jharkhand and Tripura have more than a majority of the land area as Scheduled area under the Fifth and Sixth Schedules respectively, whereas almost a majority of the area of the state of Chhatisgarh is also designated as a Scheduled area. On the other end of the spectrum, less than 10% of the area in the states of Gujarat, Maharashtra and Mizoram is designated as Scheduled area. Rajasthan has the least amount of scheduled area amongst the 14 states with designated scheduled areas.

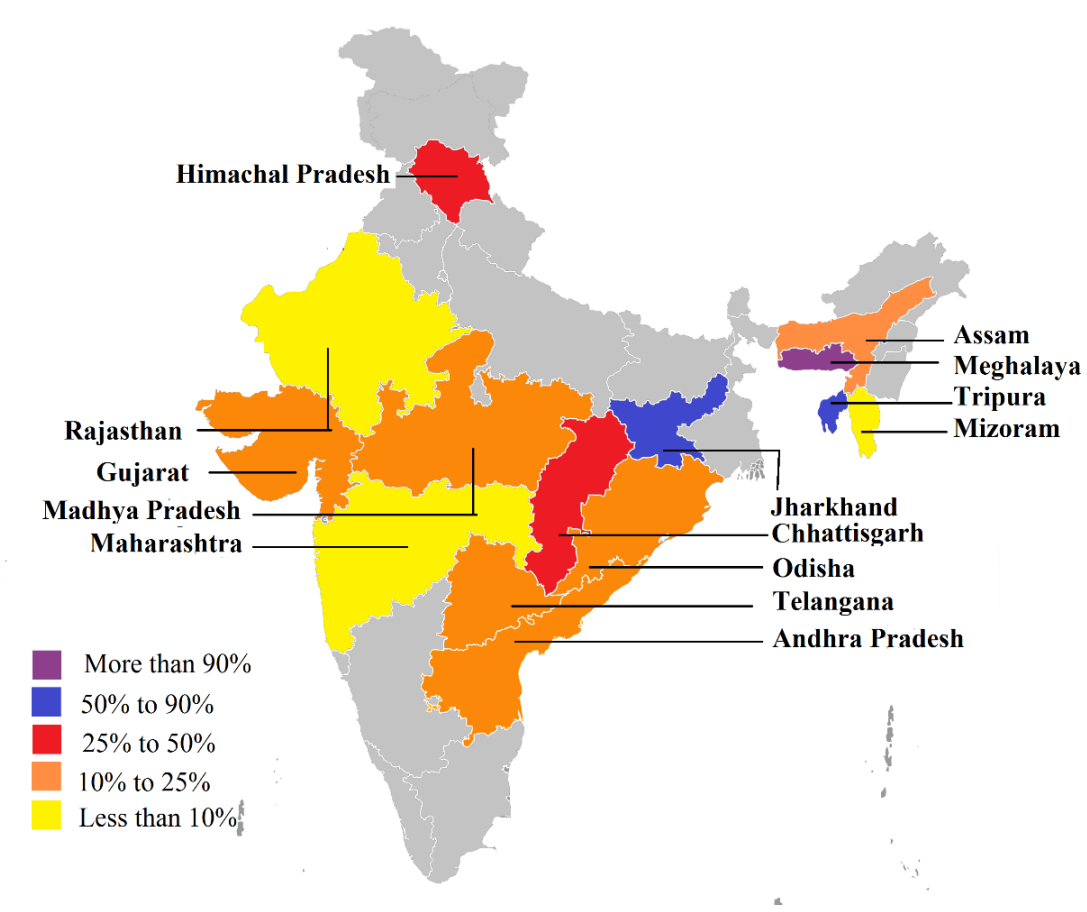
Further, we computed that 7.2% of India's population is residing in the Scheduled Areas. This includes both the Scheduled Tribe and non-Scheduled Tribe population. In fact, we have computed that on average, only about 30% of the total ST population of India is residing in the Scheduled Areas. Putting these figures together, we can conclude that on average, 35.6% of Scheduled area population is ST population, whereas 64.4% of the population is non ST.

The Constituent Assembly demarcated Scheduled areas as tribal majority districts in India. But, based on our data, it is abundantly clear that most of the designated tribal majority districts in India are in actual fact tribal minority districts, which seems to confirm the widespread belief that the Scheduled Tribes have been either voluntarily or involuntarily displaced from the Scheduled Areas.

Figure 5: Summary findings on Geographical Area, Total Population and ST population with respect to the Scheduled Areas



Map 2: State wise geo spatial representation of percentage distribution of geographic area in the Scheduled areas.



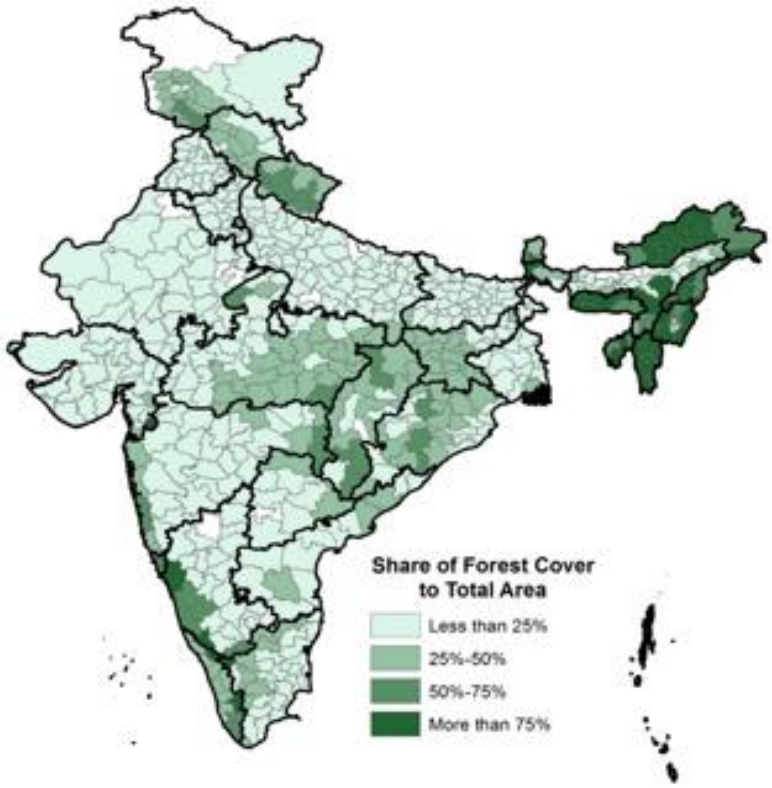
G2. Overlap of forested areas with Scheduled Areas.

Given the nature of the special relationship between tribals and forests, we wanted to establish the extent of overlap between forested areas and Scheduled area district wise total forest cover for all States in India from the Forest Survey of India, 2013 available at www.data.gov.in.

It is important to note that the figure for the percentage of forest cover[72] lying in Scheduled Area districts, although the best possible estimate, is an overestimation. This is because forest cover has been calculated at a district level, not a sub-district/*taluk* level or villages in terms of which Scheduled Areas are demarcated. This is because the lowest level at which forest cover data is available, is the district level. Data on forest cover for 51 newly formed districts is not available. It has been assumed that the Forest Survey of India has calculated the forest cover of newly formed districts under old district boundaries. So, in this data we have adjusted for such reorganisation of districts.

Based on this analysis, we have computed that the total forest cover in India is 32, 87,268 km square, which is **21.2%** of its total geographical area. **Map 3** represents the state wise percentage of forest cover in India. We have now estimated that **38.8%** of the Forest Cover in India lies in Scheduled Areas districts (125 districts of 640), which means that the intensity of forest cover is almost **twice** in Scheduled Areas. Given the special nature of the STs to forestland, it is unsurprising that the **concentration of forest cover in the Scheduled Areas is almost twice that compared to the rest of the country**. However, since there were no existing estimates of the exact percentage of forest cover in the Scheduled areas, our study goes a long way in shedding light on the geography and topography of the Scheduled areas.

Map 3: Districtwise geo special representation of forest cover



[72] Forest Cover under this analysis does not include Tree Cover and Scrubs.

G3. Overlap of dams in the Scheduled Areas

Dams are widely believed to be one of the biggest causes of displacement of the Scheduled Tribes. We decided to establish the veracity of this claim by identifying the distribution of dams in the Scheduled Areas vis-à-vis the distribution of such dams in non-Scheduled areas. In order to create the dataset on the spatial and temporal distribution of dams in India, we relied on two sources, 1) Water Resource Information Systems (WRIS) and 2) National Register for Large Dams (NRLD). For us to understand the intensity of dams in SAs and to assess their impact on the socio-economic development of the local people, we needed to establish data on the following characteristics of dams such as their geographical location, reservoir area, storage capacity, purpose of the dam etc. But neither dataset contained complete information on either variable. Therefore, we needed to collate this information from the two datasets to create a consolidated dataset on dams in India.

Extracting information from two different datasets and reducing it into a singular form for the purposes of analysis was the biggest challenge. The WRIS dataset contains information on 4657 dams, whereas the NRLD dataset contains information on 5190 dams. In the WRIS dataset, information was available separately for each state on their respective websites, in HTML version. In the NRLD dataset, on the other hand, the information was available in multiple PDF files. To collate and analyse this raw data, we consolidated the separate state-specific files and converted them into excel sheets. We did a similar treatment for the PDF files from NRLD dataset. We used a matching algorithm to collate the two datasets, but also had to manually collate the data on location for around 700 dams. Based on this exercise, we created a consolidated database of 3,771 Large Dams[73] and 59 Dams of National Importance[74] in India. It is to be noted that this dataset does not contain data on dams which are under construction, reservoirs, tanks, barrages and weirs.

Map 4 shows the numeric distribution of dams across various states in India. This include both large dams and dams of national importance. Figures 6 and 7 show the distribution of dams of national importance and large dams in the Fifth and Sixth Scheduled area districts. Figure 8 shows the state wise distribution of dams in the Scheduled area districts.

From the above analysis, we can conclude that 38% of all dams lie within the Scheduled areas, which implies that the intensity of dams is almost twice in the Scheduled Areas.

[73] In NRLD the definition of "Large Dams" has been adopted as per the norms of International Commission on Large Dams (ICOLD). A large dam is classified as

I. a one with a maximum height of more than 15 metres from its deepest foundation to the crest, or
II. a dam between 10 and 15 metres in height from its deepest foundation is also included in the classification of a large dam provided it complies with one of the following conditions:
   a. length of crest of the dam is not less than 500 metres or
   b. capacity of the reservoir formed by the dam is not less than one million cubic metres or
   c. the maximum flood discharge dealt with by the dam is not less than 2000 cubic metres per second or
   d. the dam has especially difficult foundation problems, or
   e. the dam is of unusual design

[74] In NRLD, "Dams of National Importance" have been defined as,

I. "such dams with height 100 metre and above or gross storage capacity of 1 billion cubic metre and above."

Figure 6: Distribution of 'Dams of National Importance' in the Scheduled Areas districts

Figure 7: Distribution of 'Large Dams' in the Scheduled Area districts

Map4: Districtwise geo special representation of distribution of dams

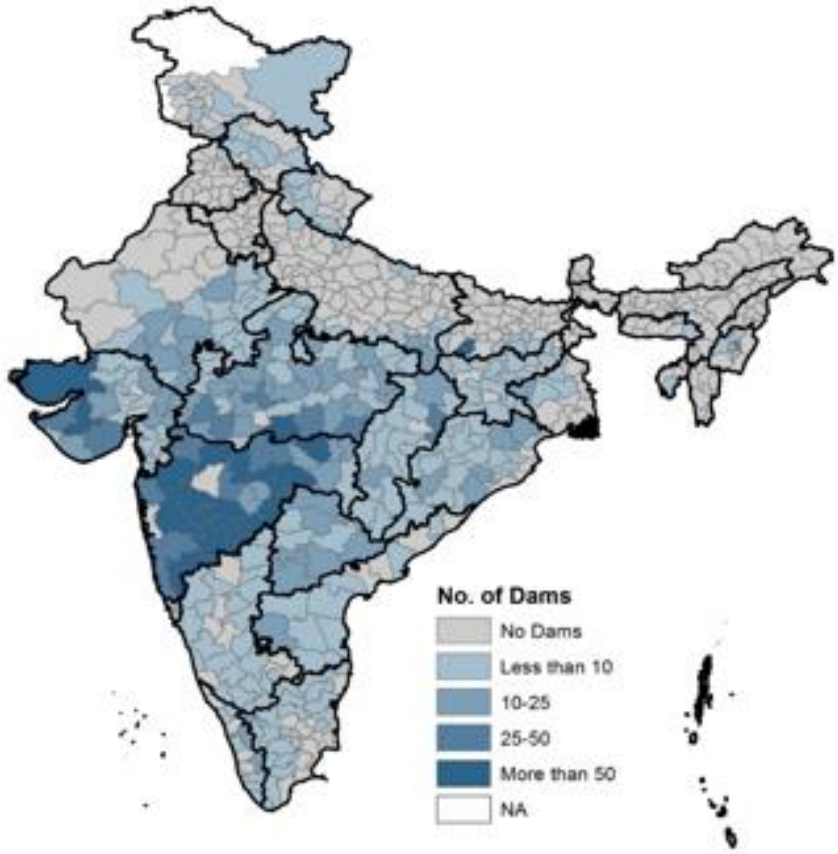
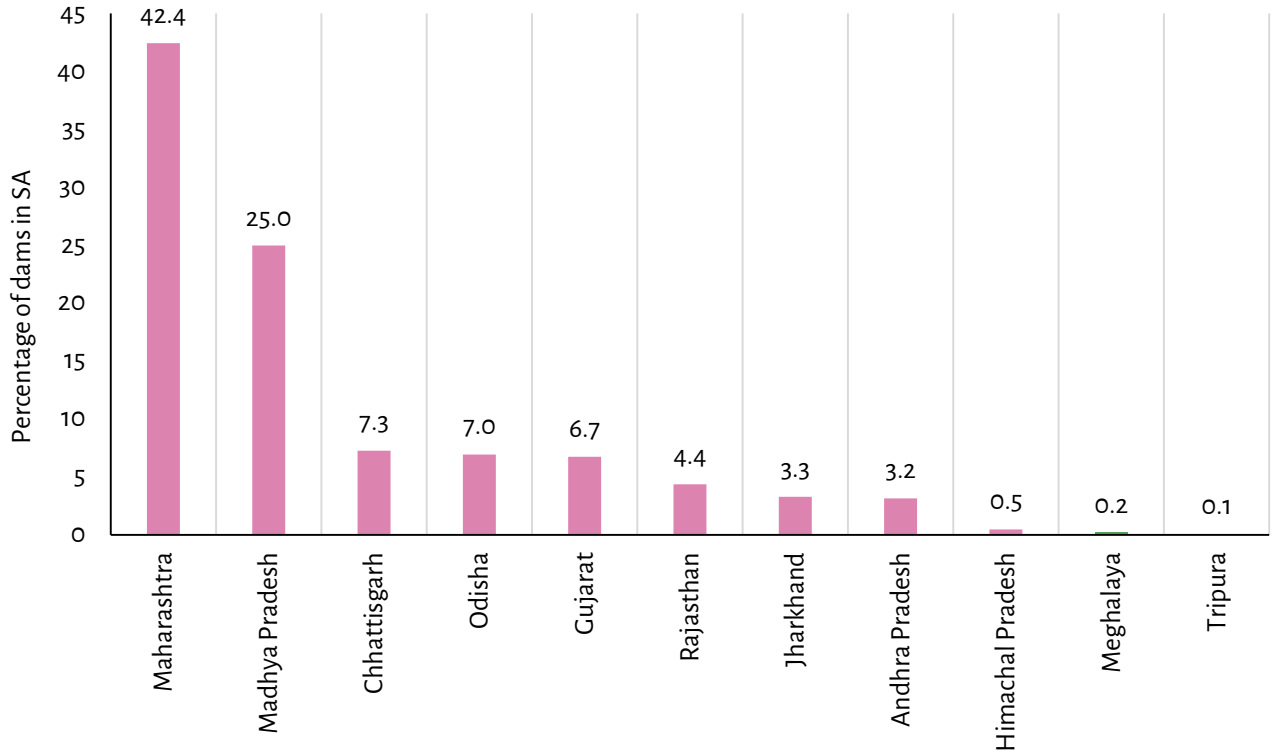


Figure 8: State-wise distribution of Dams in the Scheduled Area districts



G4. Intensity of mining in Scheduled Areas

There is a widespread belief that along with dams, mining is the biggest cause of displacement of tribals. But systematic data on the extent of mining activity in the Scheduled areas and the distribution of revenue generated from such mining activity amongst different beneficiaries, namely, the government, the mining companies, and the tribal population is conspicuous by its absence. Therefore, we made a first attempt at creating data on the intensity of mining in the Scheduled Areas.

At the outset, we identified three sources of data on mining with the government of India. The first two sources were government ministries, the first being the Central Ministry of Mines, and the Department of Mines of States. The third was the Indian Bureau of Mines, a government organisation under the Ministry of Mines engaged in promotion of conservation and scientific development of mineral resources and protection of environment in mines. After reviewing these three data sources, we proceeded to use data from the Ministry of Mines because the Ministry records data 'year-wise' and 'state-wise' and also the most recent data was available with them, thereby enabling inter-state and temporal comparison. We extracted latest data on mineral production, number of reporting mines and royalty accruals from the Annual Report of Ministry of Mines 2016-17.

The MMDR Act 2015, classifies the mineral wealth of India to "major" and "minor" minerals. The Act defines "minor minerals" as "building stones, gravel, ordinary clay, and ordinary sand, other than sand used for prescribed purposes, and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be a minor mineral". The Act makes clear that all other minerals not regarded as minor will be considered as major.[75]

Based on the data collected from the Annual Report of Ministry of Mines 2016-17, for the year 2015-2016, the total number of major mineral reporting mines were 2100. Out of this, 1463 mines i.e. roughly 70% of mines were in Fifth Scheduled Area states. See Figure 9. This estimate is excluding the share of Himachal Pradesh, Meghalaya, Mizoram and Tripura since information for these states was not available.

Further, we deciphered from the information contained in the Annual Report that the total value of mineral production for the year 2015-2016 was INR 276,638 crores.[76] The Report specified the value of "minor minerals" produced during this period, but did not contain information on the value of "major minerals". This was computed by deducting the figures for value of "minor minerals" from the "total value of mineral production" mentioned in the Report.

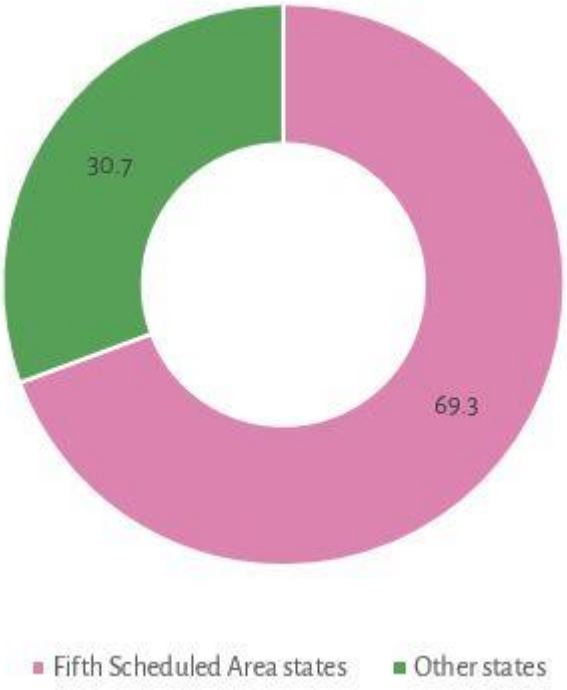
Our analysis of these mineral production values reveals that 70% of mines and almost 70% of mineral production is concentrated in the states that have Fifth Scheduled Areas. See Figure 10. Royalty accruals from these states are as high as 88.5% of the total royalty accruals in India. See Figure 11. The disaggregated mining data for Sixth Schedule area states was not available. Moreover, it must be noted, that state wise comparative mining data was available only at the state level, but as described earlier, except for the state of Meghalaya, Scheduled areas in the remaining thirteen states are at the level of districts or sub districts. Therefore, any attempt to correlate the mining data with the Scheduled area districts and sub districts must necessarily be somewhat of an overestimation. Nevertheless, the trend of the data is loud and clear.

[75] Section 3(e) of the MMDR Act.

[76] The total value of mineral production for the year 2015-2016 was not directly available and therefore it was calculated based on the production assessment for the year 2016-17. The value of total mineral production for the year 2015-16 was 6.78% more than the estimated value of mineral production for the year 2016-17, which was INR 257,882 crores. Thus, the value of mineral production for the year 2015-16 was calculated at INR 276,638 crores.

From the above analysis, it is clear that the Scheduled area states are bearing the costs of most of the mining activity in the country and contributing to almost 90% of the royalty accruals to the central and state governments. Though we do not have district level mining data, a Report by the Centre on Science and Environment based on information obtained through filing RTI requests with central and state governments, has identified 50 major mining districts in India.[77] By comparing these districts with the district wise Scheduled area list in our database, we can conclude that 27 out of the 50 major mining districts in India are Scheduled area districts. That the STs remain the most vulnerable and impoverished people in the country shows that they are not beneficiaries of the mineral wealth being generated from areas with respect to which they have specialised constitutional protections. Clearly, the legal and administrative frameworks relating to mining in India, have facilitated the displacement and impoverishment of the STs and form a contrary legal framework to the protective provisions contained in the Constitution.

Figure 9: Distribution of reporting mines (major mineral) in Fifth Scheduled Area states



[77] http://www.cseindia.org/userfiles/District-Mineral-Foundation-DMF-Report.pdf pg.14-15

Figure 10: Proportionate distribution of mineral wealth in the Fifth Scheduled Area states vis-à-vis other states

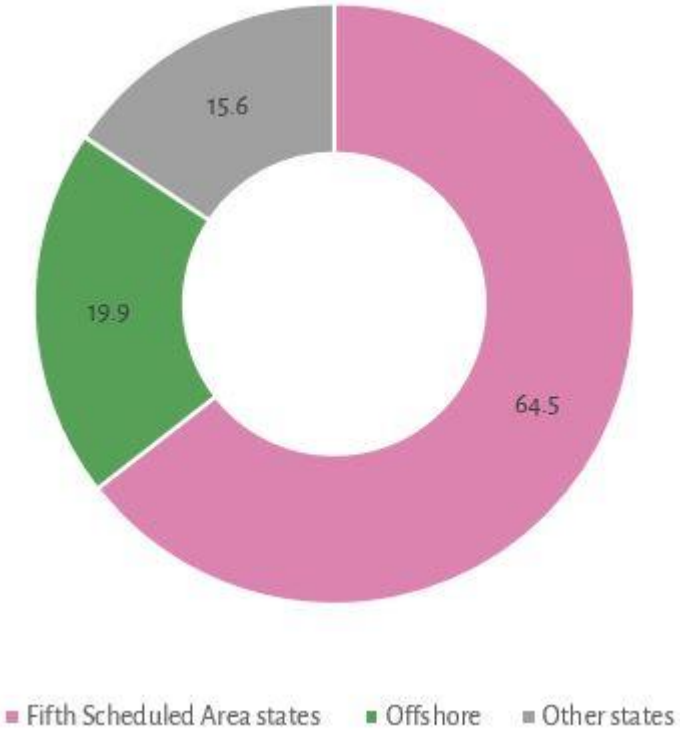
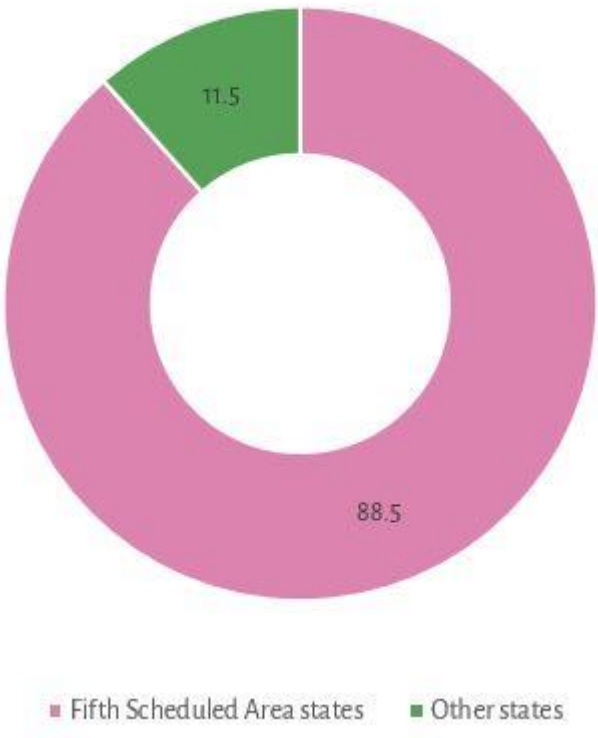


Figure 11: Distribution of royalties' accrual in the Fifth Scheduled Area States



H. CONCLUSIONS

India was a pioneer in recognising special protections for her tribal or indigenous peoples in the Constitution, recognising their distinctive cultural, social, and economic identity from that of the mainstream Indian society and that they needed some protection from exploitation by the mainstream. However, inspite of these special provisions, the Scheduled Tribes continue to be the most vulnerable and impoverished sections of the Indian population. Through a review of the historical and contemporary policy frameworks that have defined both the "Scheduled Tribes" and the "Scheduled Areas", and primary archival data documenting the causes of the displacement of the tribes through contradictory policy discourses, displacing legislative and administrative frameworks, and the displacing and alienating processes of economic development initiated and facilitated by the colonial and post-colonial Indian state, we have attempted to shed some light on why the STs continue to be the most vulnerable and impoverished groups in the country.

We conclude that despite the centrality of land to the identity, economy, and culture of the Scheduled Tribes, the protections for the Scheduled Tribes and Scheduled Areas in the Constitution were fragmented and somewhat contradictory in conception and execution from the time of drafting of the Constitution. The creation of these fragmented protections was in turn a product of two factors. *First*, it arose partly from the reality of the tribal situation, in that even at the time of drafting of the Constitution, many tribal communities were no longer located within the geographically isolated scheduled areas, while many non-tribal communities were resident there, some for several generations. The Constitution makers had to create safeguards both for the tribal people resident in the Scheduled areas and those that were residing outside the Scheduled Areas. *Second*, it arose from the inherent contradiction in creating geographically protected areas for the Scheduled Tribes, while at the same time imposing no limitations on the movement of tribals outside those areas, and no restrictions on the movement of non tribals to those areas. Indeed, given that the Constitution guaranteed to all citizens the fundamental right to move freely throughout the territory of India, it is not clear how such a limitation could have been imposed by law.

Thus, even though the Indian Constitution was progressive for its time, both generally in its recognition of rights for all its citizens, but also in terms of its recognition of protections for minority rights, including those of the Scheduled Tribes, the incoherence and contradictory nature of the provisions diluted their effectiveness in safeguarding the rights of the STs.

The Report also finds a fundamental contradiction between two narratives that have characterised the policies of the British colonial state and the independent Indian state. The first narrative, that we call the "identity" narrative, identifies the tribals as a "distinctive group outside the mainstream Hindu society both in terms of their cultural traits and geographical isolation", who are keen to preserve their distinctiveness and their isolation. The second narrative called the "backwardness/development" narrative identifies the tribal way of life, as backward compared to the mainstream Indian population and seeks to improve their economic and social indicators to "integrate" or "assimilate" them within the mainstream population. The Report notes that both the "identity" and "backwardness" narratives characterised the drafting of the constitutional protections for the STs, post-independence policy making was guided primarily by the "backwardness" narrative. However, the Scheduled Tribes have regarded the "backwardness" narrative as both paternalistic and patronising and alleged that this narrative does not seem to capture the aspirations of the tribal people to "develop according to their own genius". In order to have a coherent strategy for the uplift and protection of the tribal people, we therefore need clarity on how the "backwardness" and "identity" narratives can be integrated in policy discourse and lawmaking, so as to facilitate the design of laws and policies that

can safeguard the rights of tribals and help them develop according to their genius. Needless to state, the processes of law making must happen in consultation with the tribal communities and not be a paternalistic imposition on them by the state, where they are not only a minority, but a very special minority at that.

The protections offered by the Constitution have been further diluted by a contrary legal framework comprising of colonial and post-colonial forest, mining, and land acquisition laws. The land alienation prohibition laws only prohibit the transfer of tribal land to non tribals. Nothing prevents the state from acquiring land in the Scheduled areas for its own purposes in the exercise of its power of eminent domain or assertion of its rights over forestland. The *Samata* judgment which has been observed more in the breach prohibited the grant of mining leases in the Scheduled areas by private companies, but not by state mining corporations. Land acquired in the Scheduled areas for the purposes of construction of dams and mining have displaced and impoverished millions of Scheduled Tribes.

Our research has revealed that while almost 89% off all mineral wealth generated in India comes from the Schedule area states, this wealth is not channelised appropriately for the benefit of the tribal peoples. This is especially worrying when we find that there are huge shortfalls in expenditure in the special financial allocations made for the welfare of the Scheduled Tribes. Moreover, the intensity of dams is twice in the Scheduled area districts compared to other districts in India, which also concretely signifies their role in displacing the Scheduled Tribes.

Our research has also revealed huge gaps in the study of the Scheduled areas and Scheduled Tribes. By establishing that 10.5% of all geographical area of India is in the Scheduled areas, and mapping these areas according to the latest Census data, we have created scope for further explorations of correlations with respect to representation of STs, and their impoverishment and landlessness. This is work we and others can do in the future.

All of the above is not to say that the struggle for safeguarding the rights of tribal peoples has been a failure. The decriminalization of criminal tribes; the special constitutional provisions for representation, affirmative action, and recognising the land rights of tribals in the Scheduled areas; the creation of the tribal sub plan for special financial allocations for tribal population; the creation of the National Commission for Scheduled Tribes, and the Ministry of Tribal Affairs; the enactment of the Panchayat Extension to Scheduled Areas Act, 1996 and the Forest Rights Act, and the creation of the District Mineral Foundation under the MMDR Act, 2015; are important constitutional, legislative and administrative steps that have the potential of going a long way to redress the historic injustices against the tribal communities in India. But only the effective and coordinated functioning of all these mechanisms can truly safeguard the rights of tribals in India. And ultimately they may not be enough to protect the tribal communities' distinct way of life against the hegemonic mainstream which seeks to integrate and assimilate them.