

Strengthening Democracy in India through Participation Rights

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Abstract: This paper is contextualised around the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 in India, which recognises both individual and community rights of the Scheduled Tribes and other traditional forest dwellers relating to forest land and forest produce. The Forest Rights Act, along with the Panchayats (Extension to the Scheduled Areas) Act 1996, also recognises decision-making power of the Scheduled Tribes to make decisions regarding claims on forest land.

The paper argues that the recognition of such participation rights, broadly understood as the right to participate in specific decisions that impact our other rights, can be an important means for strengthening democracy in India. This creates space for oppressed communities who may face exclusion in other institutions, to directly participate in decisions involving their substantive rights. It holds the potential to deepen a deliberative version of democracy, creating space for discussion and deliberation within communities while deciding questions regarding their rights, rather than a version of democracy based on interest-bargaining and power-play. Participation rights may also serve as an important tool for oppressed people to secure their substantive rights, such as the right to forest land.

The paper therefore contributes to wider debates around democracy and rights. It explores what we understand by ‘democracy’, advocating for a deliberative view of democracy. It explores how democracy relates to rights, both participation rights and substantive rights. Lastly, it evaluates the design of existing participation rights – the Forest Rights Act and the Panchayats (Extension to the Scheduled Areas) Act 1996 – to examine whether these are designed to deepen deliberative democracy and secure substantive rights. It concludes that existing participation rights are flawed, but there is potential to interpret these in a manner that strengthens deliberative democracy, and the ability of participation right to secure substantive rights to forests, by relying on the Indian Supreme Court’s jurisprudence in *Orissa Mining Corporation*.

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A. Introduction

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 ('FRA') recognises both individual and community rights of the Scheduled Tribes and other traditional forest dwellers relating to forest land and forest produce. The framework of the FRA provides decision-making power to the gram sabha, consisting of all adult members of a village¹ to decide claims on forest land. This right to participation has sometimes been successfully used by adivasi communities (indigenous tribes of central India, officially recognised by the State as the Scheduled Tribes) to secure their forest land. For instance, in *Orissa Mining Corporation*² the Indian Supreme Court enforced provisions of the FRA and Panchayats (Extension to the Scheduled Areas) Act 1996 ('PESA').³ The Dongaria Kondh tribe, living around the Niyamgiri hills in Orissa, who used the forests to meet their subsistence needs and worshipped the hills as 'Niyamraja', successfully prevented mining on their mountain and forest land through the exercise of their decision-making powers.

This paper argues that the recognition of such participation rights, broadly understood as the right to participate in specific decisions that impact our other rights, can be an important means for strengthening democracy in India. This creates space for oppressed communities who may face exclusion in other institutions, to directly participate in decisions involving their rights. It holds the potential to deepen a deliberative version of democracy, creating space for discussion and deliberation within communities while deciding questions regarding their rights, rather than a version of democracy based on interest-bargaining and power-play.⁴ Participation rights may also serve as an important tool for oppressed people to secure their other rights, such as their rights to forest land.

I develop these arguments in the following sections – in part B of this paper, I argue that participation rights strengthen a deliberative version of democracy. I briefly explain why I take a deliberative view of democracy and what this entails, and thereafter explain how participation rights strengthen deliberative democracy. In part C, I examine concerns around the institutional design of participation rights, to flag important issues that must be taken into account if participation rights are to strengthen a deliberative version of democracy. In part D, I examine the FRA and PESA to critique the design of participation rights under these statutes. Different levels of participation rights have been recognised, and the

1 Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, s 2(g).

2 *Orissa Mining Corporation v Ministry of Environment and Forest* (2013) 6 SCC 476 (Supreme Court of India).

3 Panchayats (Extension to the Scheduled Areas) Act 1996, s 4(d); Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, s 6; *ibid* [64] - [68].

4 *Joshua Cohen*, Deliberation and Democratic Legitimacy, in: James Bohman / William Rehg (eds.), *Deliberative Democracy*, Cambridge, Mass. 1997; *Jürgen Habermas*, *Between Facts and Norms*, Oxford 1997.

most robust participation rights have been recognised over a very narrow range of decisions. The flaws in design enable government officials to take advantage of this state of affairs to maintain hegemony over important decisions, and through that process, privilege the interests of big businesses. I end by drawing on the jurisprudence of the Indian Supreme Court to explore how participation rights under FRA and PESA may be strengthened, to deepen deliberative democracy in India.

B. Participation rights strengthen deliberative democracy

Before arguing that participation rights strengthen democracy in India, I must first explain what I understand by democracy, and thereafter argue why democracy is strengthened through participation rights. I adopt a deliberative view of democracy⁵ and argue that participation rights strengthen a deliberative version of democracy.

I. A deliberative view of democracy

I understand democracy to be based on the principle that all individuals matter equally, and hence should have an equal share in collective decision-making.⁶ In other words, because all individuals matter equally, everyone impacted by a decision should have an equal share in making it. This begs the question, how should collective decision-making take place to ensure that all individuals impacted by a decision have an equal share in it? The question becomes even more complex given the fact that democracies like India involve peoples with a diversity of needs, wants, interests, values and preferences living under conditions of structural inequality. In the following paragraphs, I argue that a deliberative version of democracy is best suited, normatively, to address these concerns – ensuring an equal share in collective decision-making under conditions of pluralism (of values, interests, etc.) and structural inequality.

By structural inequality I mean inequality due to structural reasons – where society is designed in a manner that causes some to be oppressed (to lack the freedom to do and be what they value) and dominated (to be denied the ability to determine the course of their lives). The material, social, cultural inequalities faced by groups such as women and dalit and adivasi communities are caused by structures of oppression and domination, such as patriarchy, the caste system and capitalism.⁷

Collective decision-making should not take place through bargaining between peoples with diverse preferences and interests living under structural inequality. This is because un-

5 The discussion on deliberative democracy in section A.I. is necessarily brief, because my paper is not limited to a justification of the deliberative democratic ideal, rather it argues for participation rights to strengthen deliberative democracy.

6 See, for instance, *Seyla Benhabib*, Towards a Deliberative Model of Democratic Legitimacy, in: Seyla Benhabib (ed.), *Democracy and Difference*, Princeton, NJ 1996.

7 See *Iris Marion Young*, *Justice and the Politics of Difference*, Princeton, NJ 1990.

der such a system, those most powerful (materially, socially, politically) would bargain with those oppressed (materially, socially, politically) to push in favour of their needs, wants, preferences. Such a version of democracy is designed in favour of those already privileged under systems of oppression and domination, and to the detriment of the oppressed, and fails to realise the need to ensure that all peoples have an equal share in decisions that impact them. It gives those already privileged under systems of domination and oppression a greater share in collective decision-making.⁸

Collective decision-making should also not take place through an aggregation of the diverse preferences of peoples (i.e. 'majority wins'). An aggregation model of democracy takes preferences and interests as fixed, without interrogating how they come about. People's preferences are often adapted to their circumstances, so that what they prefer is impacted by their socialisation and their political, social and economic circumstances.⁹ Women can show a preference for housework and care-work, but they are often socialised into preferring these types of work under patriarchy, which requires women to bear a disproportionate responsibility for such work. An aggregation model does not interrogate the formation of preferences under conditions of structural inequality, and can, therefore, reproduce structural inequality. The reproduction of structural inequality in turn threatens an equal share in collective decision-making for everyone, giving those already privileged under systems of domination and oppression a greater share in collective decision-making.

The aggregation model also does not account for the change of people's preferences. Peoples' preferences can change when they speak to one another and are convinced of the rightness of different views, or are manipulated through the use of material, social and cultural capital. In this manner, the aggregation model suffers from a different problem to that of the bargaining model – it does not account for bargaining, let alone deliberation between people and their preferences as they interact with one another.¹⁰

Moreover, for the aggregation model, the substantive outcome of the decision-making process does not matter, as long as it is what the maximum number of people prefer (i.e. 'majority wins'). It does not matter if the decision re-enforces existing structural inequality. It does not care about the substantive justness of a decision. Like many others, I believe that

8 See, Cohen, note 4, p. 67. See also, Jürgen Habermas, Three Normative Models of Democracy, in: Seyla Benhabib (ed.), Democracy and Difference, Princeton, NJ 1996. Habermas argues that there are three normative models of democracy, the first being a liberal model, which envisages democracy to function like a market, involving bargaining between people with different interests. Young calls this an 'interest based democracy'. See Iris Marion Young, Communication and the Other: Beyond Deliberative Democracy, in: Seyla Benhabib (ed.), Democracy and Difference, Princeton, NJ 1996.

9 See, for instance, Martha Nussbaum, Women and Development, Cambridge 2008; Sandra Fredman, Human Rights Transformed, Oxford 2008; Amia Srinivasan, Does anyone have the right to sex?, London Review of Books 40 (6) (2018).

10 Iris Marion Young, Inclusion and Democracy, Oxford 2000, p. 20-21. See also Joshua Cohen, Deliberation and Democratic Legitimacy, in: James Bohman / William Rehg (eds.), Deliberative Democracy, Cambridge, Mass. 1997, p. 77-78; Fredman, note 9, p. 36.

the outcome of the decision ought to matter, that there is a connection between justice and democracy, that we value democracy for reasons that include that we believe it to promote greater justice.¹¹

For reasons outlined above, democracy ought not to be about interest bargaining or aggregation of preferences. Instead, it ought to be deliberative, where collective decisions are made through a process of deliberation where everyone puts forth their reasons publicly to convince others on the strength of their reasoning.¹² This idea can be traced back to Habermas, who argued in favour of ‘value-oriented’ rather than ‘interest governed’ coordination, where people justify their positions by appeal to reasons that all people can accept, and are willing to be persuaded by reasons advanced by other people, with the aim of arriving at consensus through the process of reasoned deliberation, rather than through power-play.¹³

Deliberative democracy therefore consists of at least the following elements – inclusion, political equality, reasonableness and publicity.¹⁴ Firstly, ‘a democratic decision is normatively legitimate only if all those affected by it are included in the process of discussion and decision-making’.¹⁵ Secondly, everyone affected must be included in the process on equal terms. These two elements are obvious from the understanding of democracy I adopt at the very outset – it is based on the idea that all individuals matter equally, and hence should have an equal share in collective decision-making. Of course, ‘any definition of essentially contested concepts like democracy, freedom, and justice is never a mere definition; the definition itself already articulates the normative theory that justifies the term’.¹⁶

Thirdly, everyone must be willing to listen to each other in recognition of everyone’s equal standing, and be willing to explain their reasons for why they prefer (or don’t) any course of action, or why they think a course of action is more just. They must be willing to be persuaded by the force of people’s reasoning. Fourthly, the process must be public – people must state their reasons publicly, to have their reasons accessible to all others who may then decide whether to be persuaded by these reasons, or to challenge them.¹⁷ The third and fourth elements combined make this version of democracy ‘deliberative’. It is the giving of

11 It is beyond the scope of this piece to develop the relationship between justice and democracy in any detail. For such a discussion, see, for instance, *Young*, note 10, p. 27-36. It is also beyond the scope to delve upon what justice might require. Of course, I take justice to be more substantive than requiring giving each person one vote in an aggregative model, because this can entrench structural inequality. The limited point being made here is that justice, whatever it may be beyond an aggregation of preferences, matters when we’re thinking about democracy. Nor is it argued that justice is the only thing that matters – other things might also matter, including efficiency.

12 *Cohen*, note 4; *Benhabib*, note 6; *Fredman*, note 9.

13 *Habermas*, note 4, p. 139-140; *Fredman*, note 9, p. 35.

14 *Young*, note 10, p. 20.

15 *Ibid.*

16 *Benhabib*, note 6, p. 68.

17 *Young*, note 10, p. 21-25. See also, *Amy Gutmann / Dennis Thompson*, Democracy and Disagreement, Cambridge, Mass. 1996; *Amy Gutmann / Dennis F. Thompson*, Why Deliberative Democracy?, Oxford 2004.

reasons publicly that is the essence of deliberation, and decision-making through the process of giving reasons publicly, lies at the heart of a deliberative democracy.

This deliberative version of democracy enables everyone to have an equal share in collective decision-making by centring the principles of inclusion and political equality, and requiring decision-making through deliberation. In such a version of democracy, materially, socially, or culturally powerful people and groups cannot determine collective decisions merely using their advantages under systems of oppression and domination. Instead, they are compelled to share reasons for their preferred course of action, such that these reasons must be compelling for others. This version is therefore structured in a manner that enables all people to take part in collective decision-making, and not for the powerful to have a greater role in collective decision-making than the less powerful. In this manner, it addresses the shortcomings of a 'bargaining' model of democracy.

As opposed to an aggregate model of democracy, where people's interest, preferences, etc. are aggregated to determine collecting decisions ('majority wins'), this deliberative version of democracy requires the articulation of reasons for one's interests, preferences, etc., and thereby enables interrogation of how these were formed, and enables the changing of interests and preferences based on more convincing reasons. Lastly, it can promote just outcomes by requiring the need to publicly give reasons for one's preferences, including why we think our preferred course of action is more just, and allowing for these to be challenged by others.

There are several versions of the deliberative democracy ideal, and therefore it is worth making some clarifications. The version I adopt addresses important critiques made against the deliberative democratic ideal.

1. Compatibility with representative institutions

The deliberative democratic ideal does not require only face to face deliberation. Such a requirement would make the idea irrelevant for today's democracies like India, involving 1.3 billion people relating to one another through democratic institutions.¹⁸ It allows for reasoned deliberation in a multitude of democratic fora, some of which may involve face to face deliberation (such as in the local *gram sabha* meetings under FRA and PESA), but allows for deliberation that is not face to face. Representative institutions are compatible with the deliberative ideal, although it is beyond the scope of this paper to develop this argument at length. Thus, this paper does not seek to deny the importance of democratic representative institutions, or to argue for only a de-centralised version of democracy, but rather to argue in favour of an additional democratic forum through participation rights.

18 Young, note 10, p. 44. See also, Benhabib, note 6. Benhabib argues that a plurality of modes of association in which all affected persons have the right to articulate their points of view is compatible with the deliberative democratic idea.

2. Democratic procedure and substantive rights

Deliberative democracy can account for substantive pre-commitments, for instance through the recognition of rights, through the idea of ‘bounded deliberation’.¹⁹ It is compatible with the deliberative ideal to have pre-commitments that set some boundaries for deliberation, because these are necessary to enable the deliberative ideal. The deliberative democratic ideal can only be advanced when people are formally and substantively equal,²⁰ so that each can advance reasons and expect others to be open to being influenced by those reasons, and structural inequalities do not hamper the process of deliberation. Given the reality of structural inequality, it becomes important to recognise political, as well as and social and economic rights to enable reasoned deliberation to take place. Moreover, these rights may have already been the product of an earlier broadly deliberative process, such as during the framing of the Indian constitution;²¹ and future deliberations can be viewed as a further elaboration of that process, building on the pre-existing decisions.²²

3. Addressing feminist critiques

The deliberative democratic ideal has sometimes been critiqued for constructing the idea of deliberation very narrowly, restricted to modes of critical argument and an emphasis on rationality.²³ However, the idea of ‘reasonable deliberation’ does not require only ‘rationality’, but can include emotions and imagination to convince others regarding the justness and aptness of one’s proposed course of action. An emphasis on ‘rationality’ tends to be exclusionary – associated with the elite.²⁴ Moreover, deliberation need not involve ‘polite, orderly, dispassionate, gentlemanly, well-structured arguments’. It can be disorderly and disruptive. Lalu Prasad Yadav’s witty and humorous speeches,²⁵ protests with their banners, marches, songs and slogans, street plays – all the messiness of flesh and blood practices of democracy count within a wide view of deliberation. What matters is that people publicly put forth their reasons and be willing to be persuaded by the strength of others’ reasons.²⁶ This ver-

19 *Fredman*, note 9, ch. 4; *Sandra Fredman*, Comparative Human Rights, Oxford 2018, ch. 4.

20 *Cohen*, note 4.

21 The framing of the Indian Constitution did not involve *everyone*, only 15 women were part of the Constituent Assembly, and representation from other oppressed groups – dalit and adivasi – was also inadequate. At the same time, the chairperson of the drafting committee was the dalit leader, Dr. Ambedkar, and the debates of the assembly and the drafting committee indicate the richness of deliberation that did take place.

22 *Fredman*, note 9, p. 106; *Seyla Benhabib*, Democracy and Difference, Princeton, NJ 1996.

23 *Iris Marion Young*, Communication and the Other: Beyond Deliberative Democracy, in: *Seyla Benhabib* (ed.), Democracy and Difference, Princeton, NJ 1996; *Young*, note 10.

24 *Young*, note 10, p. 36-40.

25 President of the Rashtriya Janata Dal, former Chief Minister of Bihar and former Railways Minister of India.

26 *Young*, note 10, p. 47-51.

sion of deliberative democracy may thereby meet feminist and other concerns around the over-emphasis of 'rationality', and the marginalisation of other means of deliberation in political philosophy.

Moreover, it is not argued that only arguments for the 'common good' can be raised in a deliberative democracy, or that interests of particular groups have no place in a deliberative democracy. The argument is more nuanced than that. Pluralism/difference and structural inequality characterize our world. In this context, the very idea of the 'common good' tends to be the good of those privileged within structures of oppression and domination. When a particular course of action is proposed in a deliberative democracy, it is perfectly alright to argue that it is more just because it takes into account the experience of structural inequality of the oppressed, and that it serves their needs, wants and interests, but not everyone's interests or the common good. While doing so, reasons must be given as to why this is a preferred course of action, and/or a more just one, and the reasons must be open to the scrutiny of others, who can raise counter views.²⁷

II. *Participation rights strengthen deliberative democracy*

Participation rights strengthen this value-oriented, deliberative democracy by firstly, creating an additional deliberative forum; secondly, furthering the ideals of inclusion and political equality that are essential to deliberative democracy; and thirdly, by creating the possibility of securing other rights, such as the right to forest land, through the exercise of participation rights.

I use an example, inspired by the *Orissa Mining Corporation* case. Say an industrialist wants to use some forest land for mining, and argues that this will create livelihood opportunities for people in the area, and be useful for allied industries, and thereby 'the economy'. An adivasi community has used that piece of forest land to meet their subsistence needs for generations, the community's way of life is closely tied to the forest, and they are wary of the benefits that mining or such 'developmental activities' might bring them. They can see how the industrialist may profit from the extraction of minerals, but are worried that they would face impoverishment under an economic system where profit is not distributed to them, and in a caste-based society in which they face discrimination. People in other parts of the country hold a variety of views about this situation. Some want mining to support 'developmental activities' that would be beneficial for what they argue is the 'common good', while others can see a direct benefit for themselves. Still others support the adivasi community because they feel they have the first claim on the forests, they see how extractive and development activities would impoverish the adivasi while others profit, and therefore think that access to forest land for the adivasi community is the most just outcome. Different groups have different views about how the forest land must be used, and about the

27 Young, note 10, ch. 3; Benhabib, note 6.

justness of different courses of action, and one group (the adivasi community) faces structural inequality, due to the caste system and capitalism.

Deliberative democracy requires that all those impacted by a decision have an equal say in it, and that the decision be made through reasoned deliberation. Recognising the participation rights of the adivasi community in making this decision strengthens deliberative democracy in many ways. Of course, the design of participation rights matters for how these strengthen deliberative democracy, and I engage with questions around design in part C of this paper.

Firstly, it creates a forum for the deliberation to take place. While the deliberation can take place in other democratic fora, including in legislative assemblies, and in the wider public arena through media, social media, in plays, films and protests, this creates an additional deliberative forum. Moreover, participation rights enable deliberations about specific decisions that impact our other rights, and thereby create a forum for deliberations of a kind that might be different from those in other democratic fora such as in legislative assemblies. This is not to say that legislative assemblies cannot engage in discussions about specific decisions such as this, they often do, but that they aren't designed primarily to engage in these sorts of discussions.

Secondly, this deliberative forum furthers the ideals of inclusion and political equality that are essential to deliberative democracy. The adivasi community faces structural inequality due to capitalism and the caste system (by being outside of it and facing deep marginalisation in society), including in other democratic fora. These democratic institutions can be critiqued for failing to ensure inclusion and political equality for the most oppressed group, and I offer a brief critique here.

Casting a vote in periodic elections often does not offer real participatory power to the people,²⁸ and hence something more than a voice through the vote may be necessary. The Parliament of India often is dominated by social and economic elites.²⁹ Although reservations in parliament ensure the presence of dalit and adivasi people, political parties dominated by upper caste and capitalist interests co-opt dalit and adivasi leaders into their fold, and the most radical voices within these groups seldom make it to parliament.³⁰ Courts, too, can be a deliberative democratic fora,³¹ but may be inaccessible and oppressive because of

28 *Fredman*, note 9, p. 34.

29 See *M Manisha*, How Democratic is Our Parliament: Elite Representation and Functional Efficiency of Lok Sabha, in: Sharmila Mitra Deb / M Manisha (eds.), *Indian Democracy: Problems and Prospects*, Delhi 2009, p. 66.

30 See *Christoffe Jafferlot*, *India's Silent Revolution – The Rise of the Lower Castes in Northern India*, London 2003, ch. 3 for a detailed discussion on how dalit leaders were co-opted by the Congress party through the policy of reservations. The chapter discusses politics in India until the 1970s.

31 See *Fredman*, note 9, ch. 4 for a discussion on how judicial review strengthens deliberative democracy.

location and language,³² and lack of representation of oppressed groups such as the adivasi among judges and lawyers.³³ The wider public arena is also stacked heavily against the most oppressed. Mainstream media hardly pays attention to the concerns of the most oppressed,³⁴ and social media, too, has proved to be most useful to those wielding the greatest economic, social and political capital.³⁵ Civil society, is dominated by the elite (middle class, upper caste), and does not offer sufficient space to the most oppressed.

While all these institutions must be strengthened to ensure greater fidelity to the deliberative democratic ideal, and especially through ensuring inclusion and political equality for the most oppressed, the recognition of participation rights for the oppressed is another path available for strengthening deliberative democracy. Recognising participation rights of the adivasi community furthers the ideals of inclusion and political equality by giving them space to deliberate about the use of forest land.

Lastly, participation rights offer the possibility of securing other substantive rights, such as the rights to forest land in the example above. The Indian Constitution recognises a range of substantive political as well as social and economic rights, through the constitutional text, judicial interpretation and statutes to operationalise rights. Creating a space through participation rights for the most oppressed groups to deliberate on decisions that directly impact their other rights, gives them the means to secure their other rights. This may be particularly important where the right to forest land is concerned, given the political economy around the use of forest land for extraction of minerals or development activities under structural inequality – the intersecting structures of capitalism and the caste system. Whether or not participation rights succeed in securing substantive rights to forest land may

32 During an internship with the Jagdalpur Legal Aid Group in Bastar, Chhattisgarh, I saw first-hand how difficult it was for adivasi communities to access district courts in far off district capitals poorly connected to their villages, let alone the High Court and Supreme Court. The lawyers were overwhelmingly upper caste, and arguments in the court were in Hindi rather than in Halbi or Gondi spoken by the adivasi. The very architecture of the court was alien and oppressive to the adivasi people accustomed to open fields and forests, and the demeanor of judges and lawyers dressed in black and white was alienating and condescending.

33 National Commission for Scheduled Castes, A Report on Reservation in Judiciary, <http://ncsc.nic.in/files/Reservation%20in%20Judiciary.pdf> (last accessed on 30 November 2020); Tarika Jain / Shreya Tripathi, 70 Years of Indian Judiciary: Composition Terribly Skewed, Higher Levels Bastion Of Upper Caste Males, Outlook, 3 February 2020, <https://magazine.outlookindia.com/story/india-news-70-years-of-indian-judiciary-opinion-composition-terribly-skewed-higher-levels-bastion-of-upper-caste-males/302658> (last accessed on 30 November 2020).

34 For example, see this piece on the coverage of a farmers' protest in 2018 involving over 30,000 largely landless adivasi farmers from Maharashtra: <https://www.altnews.in/thousands-of-farmers-protest-in-mumbai-how-did-mainstream-media-report-the-news/> (last accessed on 10 May 2019). P Sainath has been a consistent critic of the denial of space to the concerns of rural India in mainstream media. See, for example, *Palagummi Sainath*, *Everybody Loves a Good Drought: Stories from India's Poorest Districts*, New Delhi 1996.

35 See, for instance, the Cambridge Analytica controversy: The Guardian, The Cambridge Analytica Files, <https://www.theguardian.com/news/series/cambridge-analytica-files> (last accessed on 10 May 2019).

be an empirical question. The limited argument being advanced here is that creating a deliberative institution through the recognition of participation rights, creates the means for the adivasi community, which faces exclusion in other democratic institutions, to secure their substantive rights over forest land.³⁶

While the FRA is one example of participation rights for oppressed groups such as the adivasi to protect their right to forest land, we can think of similar participation rights in other contexts – for instance, giving rights to people living in informal settlements to participate in decisions regarding the use of the land on which their settlements are built, especially in instances where eviction or demolition of their settlements is being contemplated. The design of participation rights need not be the same for all contexts, and the limited argument being made here is that participation rights can create space for oppressed communities who may face exclusion in other democratic institutions to secure their substantive rights through the exercise of participation rights.

The securing of these substantive rights may also be an important means to ensure deliberative democracy. As discussed in section B.I, substantive pre-commitments through the recognition of substantive rights, can help secure equality during the process of a ‘bounded deliberation’. It is compatible with the deliberative ideal to have pre-commitments that set some boundaries for deliberation, because these are necessary to enable the deliberative ideal. The deliberative democratic ideal can only be advanced when people are formally and substantively equal,³⁷ so that each can advance reasons and expect others to be open to being influenced by those reasons. Structural inequalities threaten the process of deliberation, because even when people are formally equal, and formally included in the process of deliberation, structural inequality can threaten the ability of the reasoning of oppressed and dominated groups to be heard, and for others to be influenced by that reasoning. The recognition of substantive rights can help counter that structural inequality, because some questions are taken off the table. In the example I use to begin this section, the question of whether the adivasi community has any rights over the forest land has been taken off the table for deliberation. Taking this question off the table gives the adivasi community some substance to hold on to as they enter any deliberation regarding the use of forest land. Otherwise, the danger is that power and interest under structural inequality may ensure that the adivasi community isn’t heard at all regarding how forest land ought to be used. Under a bounded deliberation, however, the adivasi community enters any deliberation with pre-recognised forest rights, and thereafter can use the process of deliberation to secure their access to forest land.

The charge of circularity can be raised against such an argument. You need equality for deliberative democracy, yet you need deliberative democracy precisely because of, inter

36 See also *Nandini Sundar*, The rule of law and the rule of property: Law-struggles and the neo-liberal state in India, in: Akhil Gupta and Kalyanakrishnan Sivaramakrishnan (eds.), *The State in India after Liberalization: Interdisciplinary Perspectives*, London 2010.

37 Cohen, note 4.

alia, structural inequality. Similarly, you need to recognise substantive rights, such as rights over forest land, to ensure deliberative democracy, yet you need deliberative democracy to secure access to substantive rights. To get around this charge of circularity, it becomes important to understand deliberation as an iterative process, rather than a circular one. The recognition of substantive rights can help ensure that the reasoning of oppressed and dominated groups may have some influence in the process of collective decision-making through bounded deliberation. Also, emphasis on deliberation over bargaining gives these groups space to take part in collective decision-making. The process of deliberation may, in turn, help secure those substantive rights. The recognition of participation rights can help accelerate this iterative process in favour of oppressed and dominated groups. When these oppressed and dominated groups are unable to be included in the process of decision-making at par with other groups in democratic institutions, and when decision-making is not taking place through deliberation in these other institutions, we may need to create additional deliberative fora, including through the recognition of participation rights.

C. Designing participation rights to strengthen deliberative democracy

Participation rights can strengthen deliberative democracy if they are designed to do so. Attention must therefore be paid to the concerns that participation rights are expected to meet, while determining how these may be designed. This requires us to keep in mind the different aspects of the deliberative democracy ideal while thinking about the design of participation rights. Paucity of space prevents me from a detailed exploration of all issues, but I nonetheless flag the concerns.

I. Ensuring inclusion and political equality

Participation rights are meant to help fill a perceived gap in other democratic institutions by ensuring the inclusion and political equality of those otherwise facing domination in other democratic institutions. This would require attention to be paid to who participates, the language of participation, the space and architecture in which participation takes place, the physical accessibility of the space, the timing of participation, etc. Positive measures may be necessary to ensure inclusion. Attention must be paid to the intersectional concerns of all those oppressed along intersecting axes of caste, class, gender, disability, age, sexuality, etc.

II. Enabling reasoned and public deliberation

Participation rights, in order to strengthen deliberative democracy, must create a forum for public and reasoned deliberation. The forum must enable discussions between those whose rights are impacted by decisions, in a manner that enables others to access and respond to the discussions. This would also require sharing of all relevant information with those deliberating on different courses of action, to enable a meaningful deliberation. This would

enable those deliberating to understand the implications of the various options open to them, especially the impact on their rights, and enable them to come up with solutions that advance their rights while engaging with possible objections. Participation without access to detailed information, would be reduced to an exercise in tokenism.

III. Determining the strength of participation

The strength of participation rights, or the degree to which the deliberations must influence the final determination of issues, should be calibrated to take into account the substantive rights that may be impacted by the decision, and the oppression faced by rights holders. For instance, in the context of the FRA, a decision with respect to the use of forest land impacts the rights of adivasi communities dependent on the forest land for their livelihood, subsistence and way of life. It has an impact on their already recognised rights over forest land. Hence, the degree to which their deliberations must influence the final decision regarding the forest land must reflect this. Others who face a more diffused impact of these decisions, such as people in other parts of the country who may only face a diffused impact of how the forest land is used, should have less of an impact on the final decision. This is in conformity with the principle underlying democracy – those impacted by a decision should have a say in it, and therefore it should follow that those most impacted by a decision have the greatest say in it. When already recognised rights, such as those of forest dwelling adivasi communities, are to be impacted by a decision regarding the use of forest land, the adivasi community should have the greatest say in the decision. Moreover, because the adivasi community faces exclusion in other democratic institutions, to ensure their rights are not ignored by more powerful groups, the strength of participation rights should be calibrated to take this into account.

We can take a contrasting example, also inspired by reality – that of an informal settlement. Say the settlement is in a city, on public land. The state government decides to use that land for another purpose – building a school, a hospital, or perhaps a commercial establishment. A multitude of rights may therefore be at play – the rights to access education and healthcare, as well as the right to housing and livelihood (which is constitutionally recognised³⁸ to be closely tied to housing because people reside close to where they work). Those impacted by the decision include people residing in the settlement, but also those who would access the school and hospital. Hence, although it can be argued that the people residing in the informal settlement, who may otherwise face exclusion in other democratic fora, must have participation rights in deliberating over whether an eviction or demolition of their settlement can take place, the strength of their participation rights may not be to the same degree as those of the adivasi community having recognised rights to forest land.

The purpose of this brief discussion and the examples is to flag the concern that the strength of participation rights may differ depending on the degree to which other rights are

38 For instance, *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545.

impacted by the decision being deliberated through participation rights, and the marginalisation faced by rights holders. This is in conformity with the purpose of participation rights – to strengthen a deliberative democracy by offering space to oppressed people to secure their other substantive rights.

D. Participation rights under PESA and FRA

Do the participation rights recognised under PESA and FRA³⁹ meet the concerns flagged in part C? In other words, are the participation rights designed to strengthen deliberative democracy in India? I argue here that the participation rights recognised under PESA and FRA are flawed,⁴⁰ and that in their current form, they are not properly designed to strengthen deliberative democracy in India. To advance the argument, I examine the design of participation rights under PESA and FRA.

Some caveats are relevant at this point. Firstly, it should be noted that this is not meant to be an empirical evaluation of how participation rights are exercised on the ground. Rather, this section seeks to examine whether participation rights under FRA and PESA can theoretically strengthen deliberative democracy in India, based on their design. Secondly, the paper does not examine the different ways in which participation rights may be recognised, for instance through a right to self-determination or other political rights. The paper accepts that participation rights have been recognised under FRA and PESA, and seeks to examine whether the design of these participation rights enables the strengthening of deliberative democracy in India.

I. Inclusion and political equality

To strengthen deliberative democracy, participation rights under PESA and FRA must be designed to include those otherwise facing domination in different democratic institutions. In this context, these must be designed to ensure the participation of the adivasi people in determining questions around their right to forests and forest land. In this section, I evaluate whether these do so, by examining questions around who can participate, how intersectional concerns are met, whether positive measures are taken to ensure inclusion of the adivasi, and how the process of participation is designed to ensure inclusion.

39 It must be noted that the constitutionality of FRA is currently under challenge in *Wildlife First and others v Ministry of Forest and Environment and others* (Supreme Court of India, Writ Petition Civil No.109/2008), and that in February 2019, the Supreme Court ordered the eviction of over a million adivasi and forest-dwelling communities whose claims under the FRA had been rejected. This order was subsequently stayed. Any argument made regarding the potential of the FRA to strengthen deliberative democracy must recognize the current precariousness of rights recognized under the legislation, and consequently the lives of adivasi and other forest-dwelling people claiming rights under the legislation.

40 I examine the statutes as well as the rules framed thereunder.

1. Who participates

Under PESA and the FRA, every adult member of a village in the Scheduled Areas in India, through the gram sabha, has the right to participate in decisions over issues specified under these legislations.⁴¹ Hence, each adult member is a bearer of the right to participation under these statutes. The states in India to which PESA applies,⁴² have specified, through rules, how the gram sabha is to take decisions under the PESA. Several states require decisions to be taken through consensus (Rajasthan,⁴³ Maharashtra⁴⁴), although other states allow decisions to be taken through voting (Gujarat, although it is not specified whether a simple majority is required, or some other voting threshold).⁴⁵ States have also specified quorum requirements for meetings of the gram sabha, ranging from as little as 1/10th of all members (Rajasthan,⁴⁶ Gujarat,⁴⁷), to 1/4th (Maharashtra) or 1/3rd of all members (Andhra Pradesh).⁴⁸ Under the FRA, the gram sabha is required to take decisions through simple majority of those present and voting, and the quorum requirements are much higher – requiring half of the total strength of the gram sabha to be present for its meetings. It must be noted that decisions may be taken without the involvement of all members of a village in the Scheduled Areas, as no state requires all villagers to be present to make quorum, and several states do not require decision-making through consensus. Nonetheless, every individual has the right to participate in the decision-making process directly by attending meetings of the gram sabha.

41 To be more specific, under the PESA, the gram sabha is defined to consist of all persons in the village whose names have been included in the electoral rolls for the village panchayat. PESA, s 4(c). However, under the FRA, the gram sabha consists of all adult members of the village. FRA, s 2(g). This inconsistency causes confusion, and hence should be rectified through a suitable amendment or judicial interpretation. The wider definition of a gram sabha under the FRA should be consistently adopted.

42 Currently, parts of Andhra Pradesh, Telangana, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Madhya Pradesh, Maharashtra, Odisha and Rajasthan have been declared to be Scheduled Areas under Schedule V of the Constitution. The Panchayats (Extension to the Scheduled Areas) Act 1996 ('PESA') enabled states to extend local self-governance to these areas through state-level legislation. See <http://pesadarpan.gov.in/> (last accessed on 10 May 2019).

43 Rajasthan Panchayati Raj (Modification of Provisions in their Application to the Scheduled Areas) Rules 2011, rule 5.

44 Maharashtra Village Panchayats Extension to Scheduled Areas (PESA) Rules 2014, rule 9. The Rules require decisions to be taken by consensus as far as possible, and in the absence of consensus, through majority voting.

45 Gujarat Provisions of the Panchayats (Extension to the Scheduled Areas) Rules 2017, rule 64.

46 Rajasthan Rules 2011, note 43, rule 6.

47 Gujarat Rules 2017, note 45, rule 58.

48 Andhra Pradesh Panchayats Extension to Scheduled Areas (PESA) Rules 2011, Rule 4(iv).

2. Intersectional concerns

Attention has been paid to the intersectional marginalisation faced by women adivasi. Under the FRA, the gram sabha is defined to include the ‘full and unrestricted participation of women’. Moreover, the rules framed under PESA and the FRA require women to be present during meetings of the gram sabha. For instance, rules under the FRA provide that the quorum for meetings of the gram sabha can be met only if at least 1/3rd of those present are women.⁴⁹ This seems to be in recognition of the marginalisation of adivasi women, and to ensure their participation in the decision-making process of the gram sabha.

However, other axes of marginalisation, including disability, age, sexuality, etc. are not recognised. Moreover, the adivasi or Scheduled Tribes are not a homogeneous entity even along the axis of being adivasi, and different adivasi groups wield different power among the adivasi. For instance, a study carried out by researchers from the Centre for Social Justice, Ahmedabad in Dang, Maharashtra argues that it is insufficient to design affirmative action policies for adivasi women, without acknowledging the differences among adivasi women belonging to three different adivasi groups in Dang, with one group wielding greater power than the other two.⁵⁰

3. Positive Measures

The lack of awareness among the adivasi of their rights under PESA and FRA has been cited as a reason for the insufficient implementation of these legislations,⁵¹ as the Supreme Court itself acknowledged in *Niyamgiri*.⁵² To rectify this situation, the Ministry of Tribal Affairs, Government of India has issued guidelines for the implementation of the FRA, requiring states to develop awareness building and training mechanisms. The guidelines require state governments to hold public meetings on market days in villages to build awareness around the FRA in the Scheduled Areas, and to involve the gram sabha in the task of awareness building.⁵³ Directions have been issued to translate the legislation and rules into

49 Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules 2007, Rule 4(2).

50 *Nikita Sonavane, Purnima Subramani / Tanay Gandhi, Affirmative Action Among Adivasi Women in Dang, The International Conference on Affirmative Action and the Sustainable Development Goal of Gender Equality, Tamil Nadu National Law University and Oxford Human Rights Hub, 22-23 September 2018. See also, Ursula Munster / Suma Vishnudas, In the Jungle of Law: Adivasi Rights and Implementation of Forest Rights Act in Kerala, Economic and Political Weekly 47 (19) (2012), p. 38.*

51 Munster / Vishnudas, note 50, p. 42; Sanjay Upadhyay, Scheduled Areas Need a Fresh Legal Perspective, Economic and Political Weekly 45 (41) (2010), p. 25.

52 *Orissa Mining Corporation*, note 2, [39]. The Supreme Court was explicit in recognising that ‘many of the STs and other TFDs are totally unaware of their rights.’

53 Ministry of Tribal Affairs, Government of India, Letter dated 12 July 2012, in *Orissa Mining Corporation*, note 2, [49].

local tribal languages, and to disseminate the same, with funds being allocated by the Government of India to enable this.⁵⁴

The pathalgadi movement, an adivasi-led movement, seems to have had better success in achieving the purpose of awareness building. The movement was started by formally educated, middle class adivasi, and took inspiration from the adivasi custom of placing stone slabs on the tomb of the dead.⁵⁵ It sought to raise awareness about constitutional and statutory rights enjoyed by the adivasi through writing down provisions of the Constitution of India, statutes such as the PESA and FRA, and rules framed thereunder, on large stone slabs/plaques (called pathalgadi) placed in adivasi villages.⁵⁶ During pathalgadi meetings, the adivasi engage in conversations around their rights, discussing the interpretation of legal texts.⁵⁷ The discussions take place in the languages of the adivasi, most of which do not have a written script, and in terms easily understood by the adivasi, who may not have had a formal education. Moreover, reports on the pathalgadi movement indicate the richness of deliberations that are possible.

The movement has gone much beyond awareness-building, and the stone slabs now serve as a symbolic assertion of rights by the adivasi. The decision by a village to erect a pathalgadi is hence a solemn one, imbued with a resolve to protect their rights.⁵⁸ The sense of ownership and assertion of rights that is reflected within the pathalgadi movement would be difficult to replicate in a top-down model of awareness building, and the pathalgadi movement therefore serves to remind us of the need to ensure that positive measures integral to a meaningful right to participation, including awareness building measures, are led by rights holders, using methods that speak closely to them, while facilitated through provision of resources and support.

54 Ministry of Tribal Affairs, Government of India, Training and use of technology for proper implementation of Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, Letter dated 28 April 2015, <https://www.tribal.nic.in/FRA/declarationsClarifications/5Training%20and%20use%20of%20technology.pdf>, (last accessed on 30 July 2018); Ministry of Tribal Affairs, Government of India, Letter dated 10 June 2015, <https://www.tribal.nic.in/FRA/declarationsClarifications/4RoadmapofFRAimplementationinstates10Jun2015.pdf> (last accessed on 30 July 2018).

55 *Santosh K. Kiro*, The State's Violent Response to Tribal Discontent Is Fuelling the Pathalgadi Movement, The Wire, 29 June 2018, <https://thewire.in/rights/jharkhand-pathalgadi-movement-abd> ution-violence (last accessed on 30 July 2018).

56 *Nandini Sundar*, Pathalgadi is Nothing But Constitutional Messianism So Why is the BJP Afraid of It?, The Wire, 16 May 2018, <https://thewire.in/rights/pathalgadi-is-nothing-but-constitutional-messianism-so-why-is-the-bjp-afraid-of-it> (last accessed on 30 July 2018).

57 Ibid.

58 Ibid.

4. Process of participation

Several Indian states have framed detailed rules governing the meetings of gram sabhas. For instance, the rules framed by the state of Gujarat require gram sabha meetings to take place at least once every three months, in the office of the gram panchayat (village council) or in the *chora* (gathering space in the village), for a notice in writing mentioning the time, place and agenda of the meeting to be given at least seven days before the meeting, and for the meeting to be announced via loud speakers and drums in all the residential parts of the village a day before the meeting.⁵⁹ Rules provide for the order of business of meetings, including the different items of agenda to be ordinarily discussed during meetings.⁶⁰

It is a matter of concern that these rules read like those governing the procedure of meetings of any government department, and it is evident that the rules are the product of the state executive, with no indication of the involvement of the gram sabha in developing the rules. While some rules are praiseworthy, such as the requirement of oral announcement of meetings, and inviting of oral questions during meetings with priority given to women, they are largely open to criticism for failing to be developed in a bottom-up manner to incorporate the customs and traditions of discussions among the adivasi in their villages. To enable the inclusion and political equality of the adivasi, it is important that the form or method of participation be developed by them. Otherwise, the deliberations may not be meaningful, and thereby participations rights would fail to strengthen deliberative democracy.

A doctrinal analysis of the FRA and PESA to examine the design of participation rights within these statutes therefore suggests that inclusion and political equality for the adivasi are ensured to a limited degree. While all adivasi bear participation rights under the statutes, decisions may be made without their presence, or without taking their views into account even when they are present. Intersectional concerns are incorporated into the design to a limited degree, recognising the intersectional discrimination faced by women adivasi, but not on the basis of other axes. Positive measures required to be taken prior to participation, and the process of participation, can similarly be criticised for ensuring inclusion and political equality for the adivasi to a limited degree.

II. Reasoned and public deliberation

Participation rights under the FRA and PESA are designed to enable public deliberations. The meetings of the gram sabha are required to take place in a public place in the village.⁶¹ Several states require decisions of the gram sabha to be taken through consensus (Ra-

59 Gujarat Rules 2017, note 45, rules 45-52.

60 Ibid.

61 Ibid.

jasthan,⁶² Maharashtra⁶³), although other states allow decisions to be taken through voting (Gujarat, although it is not specified whether a simple majority is required, or some other voting threshold).⁶⁴ Under the deliberative democracy model propounded by Habermas, the purpose of deliberations is to achieve consensus, although he recognised that consensus was not always possible, and voting may be necessary to overcome deadlock and make final decisions in case consensus is not achieved. Hence, even when voting is recognised to be necessary to overcome deadlock, the purpose in the main remains to convince others through one's reasoning, rather than to bargain amongst each other to arrive at a decision. The participation rights recognised under PESA and the FRA largely enable fidelity to this ideal.

III. The strength of participation rights

In section C.III, I argued that the strength of participation rights, or the degree to which deliberations amongst those holding the right to participation must influence the final determination of issues, should be calibrated to take into account the rights that may be impacted by the decision, and the marginalisation faced by the holders of participation rights. The FRA recognises both individual and community rights of the Scheduled Tribes and other traditional forest dwellers relating to forest land and forest produce. This is because decisions with respect to forest land and forest produce impacts the subsistence, livelihood and way of life of the adivasi people. It should therefore follow that the deliberations among the adivasi determine to a great degree the final decision with respect to forest land and forest produce. This is in conformity with the principle underlying democracy – those impacted by a decision should have a say in it, and therefore it should follow that those most impacted by a decision have the greatest say in it. Further, because the adivasi face oppression and domination in society, it is a real concern that their deliberations may be ignored, and the interests of dominant social groups and big business will trump any attempts at reasoned deliberations. To avoid participation rights being reduced to a mere procedural box to tick, questions around strength of participation rights under PESA and FRA become significant.

Under PESA, the gram sabha is empowered to play an important role in taking decisions at the village level. However, different levels of participatory rights of the gram sabha have been recognised. The most robust participation rights have been recognised over a narrow range of decisions, including the power to 'safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary

62 Rajasthan Rules 2011, note 43, rule 5.

63 Maharashtra Village Panchayats Extension to Scheduled Areas (PESA) Rules 2014, rule 9. The Rules require decisions to be taken by consensus as far as possible, and in the absence of consensus, through majority voting.

64 Gujarat Rules 2017, note 45, rule 64.

mode of dispute resolution'.⁶⁵ The gram sabha is also empowered to take decisions such as the approval of plans for social and economic development at the village level, the recognition of beneficiaries for poverty alleviation schemes,⁶⁶ the prevention of alienation of land in the Scheduled Areas and restoration of any unlawfully alienated land of a Scheduled Tribe, and ownership of minor forest produce.⁶⁷

The gram sabha has more diluted power with respect to the use of minor minerals in the Scheduled Areas, where obtaining the 'recommendation' of the gram sabha is mandatory before these minerals can be mined.⁶⁸ The weakest participatory rights, however, are recognised over decisions that can enormously impact the rights of adivasi living in Scheduled Areas – the gram sabha needs to merely be 'consulted' before the acquisition of land in the Scheduled Areas for development projects, and before the rehabilitation of persons affected by such projects.⁶⁹ Lastly, the gram sabha need not play any role in decisions on issues not specified under PESA.

While recognising three levels of participatory rights of the gram sabha, and implying the fourth (no participation), the PESA, at several places, is ambivalent as to whether the gram sabha or the gram panchayat (a local governance body consisting of elected representatives) may exercise the decision-making power.⁷⁰ As a result, several states have chosen to grant greater powers to the elected gram panchayat, rather than allowing participation of all members of the village through the gram sabha.⁷¹ Thus, the structure of PESA must be criticised for offering a very weak possibility of participation rights to the adivasi.

Under the FRA, the gram sabha has been empowered to initiate the process of determining the nature and extent of individual and community forest rights recognised under

65 PESA, s 4(d).

66 Ibid, s 4(e), (f).

67 Ibid, s 4(m).

68 Ibid, s 4(k), (l).

69 Ibid, s 4(i). Yet, under s 41(3) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013, the 'prior consent' of the concerned gram sabha is required to be obtained in case of acquisition of land in Scheduled Areas. A harmonious reading of the two statutes should require that the higher threshold under the subsequent legislation must prevail over the lower threshold of 'consultation' contained in PESA.

70 In s 4(i) of PESA, either the gram sabha or the gram panchayat may be consulted when land is acquired for development projects, or for resettling and rehabilitating persons impacted by such projects. In ss 4(k) and 4(l), either the gram sabha or the gram panchayat may be required to recommend mining of minor minerals. For a detailed discussion of the Panchayat Raj Acts, which provide for the establishment of elected panchayats and gram sabhas within the states in Scheduled Areas, see *Mahi Pal*, Panchayats in Fifth Scheduled Areas, *Economic & Political Weekly* 35 (19) (2000), p. 1602. Pal compares each of the state legislation to PESA to show how the powers of the gram sabha have been whittled down in several states, and how the decision-making powers over several issues have been granted to gram panchayats rather than gram sabhas.

71 *Pal*, note 70.

the Act.⁷² Claims under the FRA need to be made to the gram sabha, and it has the power to verify claims and pass resolutions regarding those claims.⁷³ No evictions or removals from forest land can take place until individual and community rights have been determined under the FRA.⁷⁴ Moreover, no resettlements from forests declared national parks or sanctuaries can take place without ‘free informed consent’ of gram sabhas.⁷⁵

While there is potential for robust participation under the FRA, other provisions of the legislation, and the rules framed thereunder, dilute the same. For instance, the gram sabha only initiates the process of determining claims, and resolutions passed by the gram sabha are examined by sub-divisional committees, consisting of state officials, and the sub-divisional officer takes the ultimate decision on claims made under the FRA.⁷⁶ Like PESA, while glimpses of the possibility of a robust right to participation can be seen under the FRA, the participation framework has been diluted through the design of the legislation and rules framed under it.⁷⁷

IV. Opening-up of possibilities

Despite the many flaws in both the PESA and the FRA, the Supreme Court of India creatively interpreted constitutional provisions, and these legislations, to ensure a robust right to participation for the adivasi in the case of *Orissa Mining Corporation v Union of India*.⁷⁸ The case involved bauxite mining in the forest covered Niyamgiri hills in Orissa. The Dongaria Kondh tribe lived around the hills, used the forests to meet their subsistence needs, and worshipped the hills as ‘Niyam Raja’. Through a protracted process, the Orissa Mining Corporation, a public-sector entity, along with Vedanta and Sterlite, a multinational mining conglomerate and its subsidiary, sought permission to mine the Niyamgiri hills for bauxite.

72 The gram sabha is defined more widely under the FRA than under PESA. FRA, s 2(g) defines the gram sabha as ‘a village assembly which shall consist of all adult members of a village...’.

73 FRA, s 6.

74 FRA, s 4(5).

75 FRA, s 4(2)(e).

76 Ibid, s 6. See also *Lovleen Bhullar*, The Indian Forest Rights Act 2006: A Critical Appraisal, Law, Environment and Development Journal 4 (1) (2008), p. 20. See also *Chitrangada Choudhury / Aniket Aga*, Manufacturing Consent: Mining, Bureaucratic Sabotage and the Forest Rights Act in India, Capitalism Nature Socialism 31 (2) (2020). In this paper, the authors argue that the participation provisions of the FRA are ‘derailed by “bureaucratic sabotage,” i.e. the power of corporations and state officials to control and manipulate the movement and circulation of documents through different tiers of government.’

77 For more details, see *Ursula Munster / Suma Vishnudas*, In the Jungle of Law: Adivasi Rights and Implementation of Forest Rights Act in Kerala, Economic & Political Weekly 47 (19) (2012), p. 38; *Sourish Jha*, Process Betrays the Spirit: Forest Rights Act in Bengal, Economic & Political Weekly 45 (33) (2010), p. 24; Mocking Adivasi Concerns: There is a new ‘plan’ for the scheduled tribes, but the adivasis themselves will have no say, Economic & Political Weekly 46 (2) (2011), p. 7.

78 *Orissa Mining Corporation*, note 2.

The Supreme Court initially granted permission, subject to the fulfilment of a list of conditions, including rehabilitation of the affected adivasi, contribution towards development of the Scheduled Areas, and subject to approval by the central government's Ministry of Environment and Forest ('MoEF').⁷⁹ However, the MoEF denied permission once it was apprised that provisions of legislation including the FRA had not been complied with. The MoEF considered that the adivasi community rights over the Niyamgiri hills had not been ascertained under the FRA, and moreover, the adivasi were not *consulted* during the process of seeking forest clearance.⁸⁰ Orissa Mining Corporation and the conglomerates once again approached the Supreme Court to seek clearance for the mining project, giving the Court an opportunity to interpret the FRA and PESA to affirm the right to participation, as well as cultural rights and rights to the forest of the adivasi under these legislations.

The Supreme Court read Articles 25 and 26 of the Constitution of India (the right to freedom of religion), along with s 4(d) of the PESA (the power of the gram sabha to safeguard and preserve the traditions and customs of the people, their cultural identity and community resources) to recognise that the belief of the Dongaria Kondh regarding the divine character of the Niyamgiri hills could fall within the protection of these provisions.⁸¹ Of the four kinds of participation rights recognised under PESA, the Supreme Court therefore chose to include this sort of decision-making within the strongest form of participation rights recognised under PESA. The Court held that under the PESA and FRA, the gram sabha was empowered to *decide* this issue, rather than to make *recommendations* regarding this issue, or be *consulted* regarding this issue, or not have any participation rights at all regarding this issue. The manner in which the Court framed the issue, in terms of the traditions and customs of the adivasi people, their cultural identity and community resources, enabled it to recognise this issue as falling within the strongest possible participatory rights of the Dongaria Kondh within the framework of PESA and FRA. The Court thereby enabled the adivasi people to *decide* whether their community rights over the Niyamgiri hills would be impacted by the mining project.⁸²

The Court also put in place a safeguard mechanism to prevent the mining companies as well as the state and central governments from influencing the deliberations of the gram sabha, by requiring a district judge nominated by the Chief Justice of the Orissa High Court to be present during the proceedings and to certify that they took place independently.⁸³ The Court thereby recognised the conditions of structural inequality under which the decision-making process was taking place, and the need to put in place safeguards to enable a deliberative outcome, rather than one influenced by the power of big capital, given the size and nature of companies involved in the case. Eventually, all twelve gram sabhas deliberating

79 Ibid [7] - [9].

80 Ibid [15].

81 Ibid [55] - [57].

82 Ibid [58] - [59].

83 Ibid [62].

on the community rights of the Dongaria Kondh recognised their religious and cultural rights over the hills, and refused to permit mining on their 'Niyam Raja'.⁸⁴

Other adivasi communities have similarly sought to secure their substantive forest rights through the exercise of their participation rights under the PESA and FRA. For example, in January 2019, the Forest Advisory Committee of the Ministry of Environment, Forest and Climate Change granted 'in principle approval' for coal mining to take place in the Hasdeo Arand forest in Chhattisgarh.⁸⁵ While a state owned entity⁸⁶ was permitted to mine the area, it further appointed Adani Enterprises Limited, a multinational conglomerate, to carry out the mining operations.⁸⁷ In this context of structural inequality, the adivasi communities dependent on the Hasdeo Arand forest for their subsistence and livelihood oppose mining in the forest, because they argue that this will deprive them of access to forest produce and forest land for agriculture.⁸⁸ The gram sabhas of 20 villages had previously passed unanimous resolutions opposing coal mining in the area.⁸⁹ They continue to assert their substantive rights to forest land under the FRA, and seek to use their participation rights under PESA and FRA to secure the same. They argue that no acquisition of land for the purpose of mining can take place without their consent under the PESA and FRA.

E. Conclusion

To strengthen deliberative democracy in India, groups such as the adivasi, who are otherwise oppressed and dominated in the political as well as social and economic spheres, must be given the right to participate in decisions about their other rights. Participation rights enable the strengthening of a deliberative democracy in India by ensuring inclusion and political equality for the adivasi, and other oppressed groups in the process of collective decision-making. While these groups may go unheard in other democratic institutions, by creating a forum for them to deliberate about their rights, a deliberative democracy can be

84 *Sayantan Bera*, Niyamgiri answers, DownToEarth, 11 June 2015, <https://www.downtoearth.org.in/coverage/niyamgiri-answers-41914> (last accessed on 30 August 2018). Despite the decision of the gram sabhas, which was re-affirmed by the central government, Vedanta and the state government continues to seek permission to mine the area, Aruna Chandrasekhar, The Anatomy of a Fake Surrender: A Movement Against Bauxite Mining in Odisha's Niyamgiri Hills and the State's Efforts to Circumvent It, Caravan, 4 August 2017, <http://www.caravanmagazine.in/vantage/odisha-bauxite-mining-fake-surrender-niyamgiri> (last accessed on 30 August 2018).

85 Minutes of the meeting of forest advisory committee held on 15th January, 2019, http://forestsclearance.nic.in/writereaddata/FAC_Minutes/111211217121911_20190121192001153.PDF (last accessed on 30 November 2020).

86 The Rajasthan Rajya Vidyut Utpadan Nigam Limited, a power corporation owned by the government of the Indian state of Rajasthan.

87 *Nileena MS*, The long battle of Hasdeo Arand residents against the Parsa coal project in Chhattisgarh, Caravan, 24 June 2020, <https://caravanmagazine.in/communities/long-battle-of-hasdeo-arand-residents-against-parsa-coal-project-chhattisgarh> (last accessed on 30 November 2020).

88 *Ibid.*

89 *Ibid.*

strengthened. Moreover, participation rights offer the possibility to secure other recognised rights, such as the rights to forest land and forest produce recognised under the FRA. Although powerful interests under the structural inequality of capitalism and the caste system pose a constant challenge to these substantive rights, robust participation rights, when properly designed, offer the possibility for securing these rights.