

Deliberating Development in India's Forests

Consent, Mining and the Making of the Deliberative State

Arpitha Kodiveri

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 08 July 2021

European University Institute
Department of Law

Deliberating Development in India's Forests
Consent, Mining and the Making of the Deliberative State

Arpitha Kodiveri

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Examining Board

Prof. Peter Drahos, EUI

Prof. Joanne Scott, EUI

Prof. B.S Chimni, Jindal Global Law School

Prof. César Rodríguez-Garavito, NYU School of Law

© Arpitha Kodiveri, 2021

No part of this thesis may be copied, reproduced or transmitted without prior
permission of the author

**Researcher declaration to accompany the submission of written work
Department of Law – LL.M. and Ph.D. Programmes**

I Arpitha Kodiveri certify that I am the author of the work Deliberating Development in India's Forests I have presented for examination for the Ph.D. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

I warrant that I have obtained all the permissions required for using any material from other copyrighted publications.

I certify that this work complies with the Code of Ethics in Academic Research issued by the European University Institute (IUE 332/2/10 (CA 297)).

The copyright of this work rests with its author. Quotation from this thesis is permitted, provided that full acknowledgement is made. This work may not be reproduced without my prior written consent. This authorisation does not, to the best of my knowledge, infringe the rights of any third party.

I declare that this work consists of 1,13,635 words.

Signature and date:



14/06/2021

CONTENTS

Thesis Summary	5
List of Abbreviations.....	6
Glossary of Hindi Terms and Phrases.....	7
Acknowledgements.....	8
1. Deliberating Development an Introduction.....	11
Introduction	11
Methodology	14
Relationship between the state and forest-dwelling community: Is there possibility for repair?.....	27
Argument and Outline of the Thesis	33
2. Regimes of dispossession, Self-determination and the Emergence of the Consent	
Provision in India's Forest Laws.....	40
Introduction.....	40
Forest Laws in the Colonial Period.....	42
Making of Forest Laws and Scheduled Areas in Independent India.....	51
Glimmer of Hope: The Recognition of the Rights of Forest-Dwelling communities.....	57
The Regime of Dispossession in Forest Areas and the recognition of the Right to Self-Determination.....	60
The Forest Rights Act,2006 (FRA).....	65
The Emergence of the Consent Provision.....	70
Consent, The Right to Self-determination and Shared Sovereignty	83
Deliberative reconciliation of laws.....	88
3. Deliberative Democracy and Citizenship in India.....	94
Introduction.....	94
Deliberative Democracy in India.....	96
Deliberative Democracy and the State in India's Forests.....	100
Citizenship and It's Practices in India's Forests.....	103

Jurisprudence and legal approaches to repair the relationship between forest-dwelling communities and the state in India's Forests.....	109
Theories of Deliberative Democracy, Governance, and Systems as the Normative Ideal: Its contours and applicability to forest governance in India.....	115
4. Multiple Modalities of the State.....	124
Introduction.....	124
The State as Operating in Modalities.....	125
Brief Description of the Modalities of the State.....	129
5. The Mechanics Of The Non-Deliberative State: Pro-Business Bureaucracy, Discretionary Power, And The Deliberative Reimagination Of The Consent Provision.....	139
Introduction.....	139
Mechanics of the Consent Provision.....	140
Discretionary Power.....	150
Paper State and Exercise of Discretionary Power in the Three Mining Sites.....	152
Discretionary power in the eventual decision arrived at, the Gram Sabha resolution and the non-deliberative state.....	161
Exercise of Discretionary Power in restricting the applicability of the FRA.....	163
Deliberative Governance and The Reimagination Of the Consent Provision.....	168
6. Recognition, Redistribution and the Selectively Deliberative State.....	176
Introduction.....	176
Recognition, Redistribution, and the Forest Rights Act,2006.....	178
Divide by Legal Design.....	183
Divide between the understanding of justice.....	190
Recognition, Redistribution and Legal Mobilization.....	196
Discursive Pluralism, Networks of Participation, and Inclusion.....	202
Deliberative Loop of the Regulatory Convening or Bhaitak.....	207
7. Constraining The Capacity To Aspire And Capability Deprivation In India's Forests...211	211
Introduction.....	211
Development, Capabilities and the Capacity to Aspire.....	213
The Development Predicament in India's Forests.....	216
Constraining the Capacity to Aspire and Capability Deprivation in India's Forests.....	219

The Deliberative State.....	227
8. Negotiating Compensation in the Informal: Dalal’s and the Social License to Operate (SLO).....	236
Introduction.....	236
Consent and the Social License to Operate.....	237
The Dalal.....	240
The Playbook of Strategies to Obtain an SLO: How Dalal’s Operate.....	248
Bargaining, Negotiations and the SLO.....	258
9. Complicated Dance with the Law: Strategies of Legal Mobilisation and the Selectively Deliberative State in the Three Mining Sites.....	257
Introduction.....	257
Legal Mobilisation in the three contested sites: Repertoires of Legal resistance.....	259
Legal Strategies in Withholding Consent.....	260
Redistributive Claims and Legal Mobilisation in Coal Mining Areas and Other Mining Sites.....	282
Legal Forums and Deliberative Decision-making.....	287
10. Jurisdictional Leapfrogging	294
Introduction.....	294
Jurisdictional Leapfrogging and the Non-deliberative state.....	296
International legal instruments Involved.....	299
The Boomerang Effect	305
The Risk of Disinvestment.....	322
11. The Making Of A Deliberative State In India's Forests.....	326
Introduction.....	326
Reimagining the Relationship Between the State and Forest-Dwelling Communities:	
Listening to The Jurisprudence From Below.....	328
The Building Blocks of the Deliberative State	332
The Working Agreement	340
References.....	343
List of Tables and Figures.....	355

THESIS SUMMARY

Deliberating Development in India's Forests is a thesis that examines how India's forest laws and the right to free, prior, and informed consent or consent provision of forest-dwelling communities has shaped the relationship between the state and forest-dwelling communities in extractive frontiers. The relationship between the state and forest-dwelling communities is tenuous as land in forest areas is acquired based on the Doctrine of Eminent Domain for extractive industries. Through extensive fieldwork in three mining sites in the eastern state of Odisha, this thesis offers an analysis of how the consent provision is implemented and how the relationship between the state and the forest-dwelling citizen is mediated by the pro-business bureaucracy as one of competing sovereignties.

The forest-dwelling communities describe that the state operates in multiple modalities in India's forests to enable extraction and realize its pro-business ambitions. Drawing from interviews with forest-dwelling communities and their aspirational legal interpretation of the consent provision the thesis makes an argument for the state to operate in a deliberative mode in India's forests supported by a shared sovereignty framework and theories of deliberative and nodal governance. The thesis charts out an institutional pathway to overcome the structural imbalance experienced by forest-dwelling communities in their negotiations and dialogue with the state. This pathway can pave the way to repair the ruptured relationship between forest-dwelling communities and the Indian state and entrench the state in its deliberative modality.

LIST OF ABBREVIATIONS

Abbreviation	Expansion
CBA	Coal Bearing Areas Act,1957
CEC	Central Empowered Committee
CFR	Community Forest Rights
CIL	Coal India Limited
CoE	Council on Ethics
CSESMP	Coal Sector Environmental Social Mitigation Project
CSRP	Coal Sector Rehabilitation Project
DC	District Collector
DFO	District Forest Officer
FAC	Forest Advisory Committee
FCA	Forest Conservation Act,1980
FPIC	Free, Prior, and Informed Consent
FRA	Forest Rights Act,2006
GS	Gram Sabha
IDCO	Industrial and Infrastructure Development Corporation
IFA	Indian Forest Act,1927
IFR	Individual Forest Rights
IP	Inspection Panel
MCL	Mahanadi Coalfields
MoEF	Ministry of Environment and Forests
MoEF and CC	Ministry of Environment, Forests and Climate Change
MoPR	Ministry of Panchayat Raj
MoTA	Ministry of Tribal Affairs
MoU	Memorandum of Understanding
NCPs	National Contact Points
NSS	Niyamgiri Suraksha Samiti
OECD	Organization for Economic Cooperation and Development
OMC	Odisha Mining Corporation
OTFDs	Other Traditional Forest Dwellers
PESA	Panchayat Extension of Scheduled Areas Act,1996
PILs	Public Interest Litigations
Posco	Pohang Steel Company
PPSS	Posco Pratirodh Sangram Samiti
PTGs	Primitive Tribal Groups
SC	Supreme Court
SLO	Social License to Operate
ST	Scheduled Tribe
SWF	Sovereign Wealth Fund
TAC	Tribes Advisory Council
TANs	Transnational Advocacy Networks
UNDRIP	United Nations Declaration on the Rights of Indigenous People
WLPA	Wildlife Protection Act,1972

GLOSSARY OF HINDI TERMS AND PHRASES

HINDI TERM OR PHRASE	EXPLANATION
Hemgiri Adivasi Ekta Manch	association for the unity of forest-dwellers in Hemgiri
Niyamgiri Suraksha Samiti	the committee to protect Niyamgiri
Bhaitak	A sitting with the village assembly to discuss regulatory issues
Sunvayi	A hearing with the state and local bureaucracy
Sahamati	The consent or permission of the forest-dwelling community
Baat cheeth se samjauta	An agreement after discussion and consensus building process
Bal se var karenge	Operating from a position of strength

ACKNOWLEDGEMENTS

Writing this acknowledgment was hard as there are so many people to thank and scholars whose work has inspired me to undertake this inquiry. I want to begin by thanking my supervisor Prof. Peter Drahos who encouraged me to infuse my thesis with hope and possibility, as I looked at my interview data, I started to see it everywhere; this thesis would not have been possible without his constant support and guidance. This thesis owes its existence to the kindness and generosity of those I interviewed in Odisha, New Delhi, Norway and others remotely. They took time away from their busy schedules and sat with me, patiently addressing the questions I inundated them with. I especially would like to thank Sandeep Pattnaik, Swathi Mishra, Prashant Paikaray, Sharanya Nayak, Ranjana Padhi, Sudhir Pattnaik, Jitu Jakesika, and Lado Sikaka.

Odisha was a part of India that I had visited often and had worked in for a few years, but as I began my fieldwork, many friends made it home. Thank you to Meera Mohanty for her immense support, hospitality, and long conversations about India's mining policy, which sharpened my understanding of the political economy of Odisha. Thank you to Sanjog Sahu, Ambika Satpathy and Sadanand Satpathy who gave me a glimpse into the political reality and social relations that helped me navigate life in Odisha, and their kind hospitality ensured that I always had someone to meet and discuss my field visits.

No thesis is possible without the love, encouragement, and unconditional support of family and friends. This thesis is dedicated to my parents, who have been the rock that I lean on every time I am doubtful about my work. Writing a thesis during a pandemic is particularly difficult, and I was able to do it because of my mother's unyielding support and my father's not so great jokes that made these heavy moments a lot lighter. This thesis is for both of you. I would like to thank my best friend, chief recipient of my complaints about the writing process, and proof-reader Shibumi Raje. Thank you for listening and being there always. Thank you to Sandhya Ramaswamy for your joyful presence and our Saturday board game evenings are what energized me to get to the finish line. Thank you, Meghana Srinivas, for being my cheerleader. Thank you to the girls (you know who you are). Thank you to my cousin Deepta Sateesh for being there on the Ph.D. journey with me as she was working on her own

doctoral thesis. Our writing sessions at the coffee shop were crucial to cope with the mammoth task of writing the thesis. Thank you to Danish Sheikh for long conversations about legal theory, doctoral writing and life that happens somewhere in the middle, these conversations centred me as I was writing.

Thank you to my friends at the European University Institute who made my time there so enriching and fulfilling in no particular order. Thank you to Mike Videler, Smita Shah, Bastiaan Nutgeren, Giovanna Gilleri, Fiona Barsouhm, Sophie Alex Du Roy, Julie Wetterslev, Marie Petersmann, Rebecca Williams, and Rebecca Munro. Last but not least, thank you to my professors and mentors who supported me in different parts of this journey- Prof. Amita Baviskar, Prof. Vivek Bhandari, Dr. Pramath Raj Sinha, Prof. Robert Infelise, Prof. Claudia Polsky, Prof. Jolene Lin, Prof. Tarun Khaitan, Prof. Cesar Rodriguez Gravito, Prof. Surya Deva and Prof. Joanne Scott.

1. DELIBERATING DEVELOPMENT IN INDIA'S FORESTS: AN INTRODUCTION

1. Introduction

It was a gloomy monsoon morning in the coal-rich district of Sundergarh in Odisha. I had journeyed there to meet with the activists of the Hemgiri Adivasi Ekta Sangathan or the Hemgiri Association for the Unity of Adivasis in early August 2018 to understand their ongoing struggle against an expanding coal mine.¹ I was greeted by Sunil Nayak an Adivasi, who was an activist and community leader in the area. He brought with him a large file containing an archive of his struggles against the coal mining operations. I asked him to describe the story of struggle of the Adivasi community in Sundergarh, he stated:

The story is one of protest and resistance against the loss of land. It all began when the state declared these forest areas as coal-bearing areas. This was done without informing us. Our land was then compulsorily acquired in 1987, and ever since, we have been categorized as encroachers on our own land. Coal mining operations began soon after, and we decided to resist as this is a scheduled area that enjoys special constitutional protection. The scheduled area provisions were not implemented as this is a coal bearing area. We continued to resist as that gives us a way to engage the state in dialogue about our other issues of compensation and rehabilitation.²

In this brief encounter, what emerges is the complexity of land conflicts in India's forests. The intricacies of legal categorization of land, the political economy of extraction, the pro-business Indian state, and resistance by forest-dwelling communities frame the dynamics of land conflicts in the forested stretches of Odisha.³ The Indian state, as this thesis will argue, operates in modalities that prioritize extraction and exclusionary conservation, marginalizing the claims to social and economic justice made by forest-dwelling communities.⁴

¹ Adivasi is the term used by forest-dwelling communities to identify as the original inhabitants of the area.

² Interview with Sunil Nayak in Tumulia in Sundergarh on August 2018.

³ Ranjana Padhi and Nigamananda Sarangi, *Resisting Dispossession: The Odisha Story* (Palgrave Macmillan, 2020)

⁴ Exclusionary conservation refers to the conservation practice where forested areas are categorized into zones such that no human interference is permitted like the creation of tiger reserves or national parks. Chapter two will delve into greater detail on the laws and policies that entrench exclusionary conservation practice in India.

Forest-dwelling communities are communities that have been living and are dependent on forest areas for many years. It is a heterogeneous community consisting of communities who self-identify as Adivasis or the original inhabitant, those legally categorized as Scheduled Tribe and lower caste communities.⁵ These communities have been historically excluded from accessing forest resources and land due to exclusionary conservation practices aimed at creating zones within forest areas devoid of interference by humans.⁶

The forest law framework consists of the constitutional protection provided for scheduled areas and laws like the Panchayat Extension of Scheduled Areas Act,1996 (PESA) and the Forest Rights Act,2006 (FRA), which recognize the rights of forest-dwelling communities to participate in decision-making.⁷ The laws, however, are implemented in such a way, as chapter 5 will argue, that reasserts state control. Given this legal context, the state enjoys a great deal of control to exclude the interests of forest-dwelling communities within the existing forest governance architecture.

I began my fieldwork in the extractive zones of Odisha by trying to understand the legal recognition and enforcement of the consent provision. This is a legal provision that requires that consent of the Gram Sabha or village assembly be obtained before forest land is acquired.⁸ During my nine months of fieldwork in the three mining sites of Niyamgiri, Sundergarh, and Jagatsingpur I deeply engaged with the social movements led by forest-dwelling communities against the mining companies. I also spent time in Bhubaneswar- the capital city of Odisha and New Delhi interviewing bureaucrats and policymakers along with officials in the mining sector. The interviews alerted me to the fractured relationship between the Indian state and the forest-dwelling community which was at the heart of these land conflicts.

The forest-dwelling communities interviewed for this thesis spoke of the possibility of repairing this ruptured relationship with the state through a reimagined governance architecture that enabled deliberation. I describe this rewired governance architecture by

⁵ Article 366 (25) of the Indian Constitution defines Scheduled Tribe as communities inhabiting Scheduled Areas as per Article 342 of the Indian Constitution.

⁶ Ramchandra Guha and Madhav Gadgil, *This Fissured Land- An Ecological History of India*, (University of California Press,1992).

⁷ Article 366 (25) of the Indian Constitution and Article 342 of the Indian Constitution.

⁸ Section 2(e) of the Rules to the Forest Conservation Act,1980.

drawing on the theory of nodal and deliberative governance and the interviews. The Indian state, forest-dwelling communities argued operates in modalities in the forest areas where it is pro-business or extractive, and thus non-deliberative. A deliberative state the forest-dwelling community members articulated is where the state listens to their aspirations and governance strategies to address the issues of development and conservation of forests.

Forest-dwelling community members described the consent provision as an opportunity or avenue to deliberate. During my fieldwork I discovered a traditional and indigenous form of deliberation built on an ethos of constant engagement and dialogue with the state as a way reconfigure their relationship. The reimagined governance structure suggested by the forest-dwelling communities provides a pathway to entrench the state in its deliberative modality.⁹

My micro fieldwork data spoke to the macro problem of the contestations over land sovereignty between the state and indigenous communities.¹⁰ While scholarly work on land sovereignty by Arjun Appadurai, Dolly Kikkon and Helen Stacy has addressed the failures of the state to accept and recognize indigenous sovereignty claims, what my fieldwork data suggests is a way to address this contestation through the framework of shared sovereignty and deliberative democracy that can guide engagement between the forest-dwelling community and the Indian state.¹¹ In a shared sovereignty framework, the emphasis is laid more on how these two claims of sovereignty interact and co-exist. As Lado Sikaka, a Dongria Kondh activist from Niyamgiri, stated:

Claims of sovereignty over forest land cannot be one of constant conflict between the state and Adivasi communities. We need to come to a consensus on how we are going to govern the forests, conserve the forests, and share authority in making decisions.¹²

The thesis now addresses the question: Can indigenous-inspired deliberation create new relationships between the state and forest-dwelling communities on aspects of development and conservation? I argue that the possibility for repair exists if the deliberative reimagination

⁹ Fieldnotes from July 2019 and February 2020.

¹⁰ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000).

¹¹ Appadurai, Arjun, 'Sovereignty Without Territoriality: Notes for a Postnational Geography' in P. Yaeger (Ed) *The Geography of Identity* (University of Michigan Press, 1996); Helen Stacy, 'Relational Sovereignty' (2003) *Stanford Law Review* 55; Dolly Kikkon, *Living with Oil and Coal: Resource Politics and Militarisation in Northeastern India* (University of Washington Press, 2019).

¹² Interview with Lado Sikaka in Niyamgiri on February 2020.

of forest law and governance derived from my interviews with forest-dwelling communities to form the building blocks of the deliberative state in India's forests.

I will begin the chapter with a brief section on the methodology I used for my fieldwork and details of the three case studies. In the next section, I highlight the possibility and pathway to establish a deliberative relationship between the state and the forest-dwelling community. I conclude with an overview of the thesis argument and outline.

2. Methodology

The principal question guiding my initial research design was to document the legal recognition of the consent provision and unpack its enforcement. The consent provision, which was recognized in law with the amendment to the Rules of the Forest Conservation Act, 1980 in 2016 is a product of legal mobilization by forest-dwelling communities who were caught in land conflicts and were struggling against the extractive state and mining companies. To understand its enforcement required me to conduct fieldwork in sites of conflict where the consent provision was being contested and mobilized by forest-dwelling communities.

My fieldwork was located in the state of Odisha. Odisha is an eastern Indian state or sub-national unit characterized by a political economy shaped by extraction. Odisha is home to rich reserves of iron, coal, bauxite, and manganese, among others. These mineral-rich areas overlap with the forests where a diverse community of forest-dwellers live. This overlap is the site of land conflicts as forest-dwelling communities are forced to relocate because of the opening up of mines. Odisha has a vibrant environmental movement against extraction, which has actively used the tools of democratic protests and legal mobilization to hold the state and mining companies accountable.¹³

I chose to locate my fieldwork in the state of Odisha as I wanted to understand the enforcement of the consent provision in the context of extraction, and Odisha provided a fertile ground with the coming together of extraction and vibrant indigenous resistance movements. Having worked as an environmental lawyer with Natural Justice between 2012

¹³ Sunila S. Kale, 'Business and State in India's Extractive Economy' in Atul Kohli, Christophe Jeffrelot and Kanta Murali (Eds) *Business and Politics in India* (Oxford University Press, 2019); Ranjana Padhi and Nigamananda Sarangi, *Resisting Dispossession: The Odisha Story* (Palgrave Macmillan, 2020)

to 2016, in Odisha supporting forest-dwelling communities in their efforts to implement the Forest Rights Act, 2006 I had access to these areas of conflict based on my previous relationship with social movements on the ground, particularly the forest rights movement and an important NGO in Odisha called Vasundhara who assisted me in accessing these areas.¹⁴

As I delved into the laws that regulate land acquisition in forest areas, I was alerted to how the differences in the legal categorization of land, forest-dwelling communities, and the metal being mined contextualized the legal opportunities for forest-dwelling communities to counter extraction. These legal categorizations determined the access of forest-dwelling communities to protective legislation. For instance, a forest-dwelling community categorized as a Scheduled Tribe (ST) and occupying land in a scheduled area was better placed in law to assert their right to self-determination and the consent provision as opposed to forest-dwelling communities who are non-ST and inhabiting other categories of forest land.¹⁵

Keeping these aspects in mind, I decided to conduct multi-sited fieldwork in three mining sites where the nature of legal categorization of land, the forest-dwelling community, and the metal involved differed. I did brief visits to a few other mining sites where protests were underway to investigate the manner in which the company was responding. They were visits to the Tata Steel Plant in Kalinganagar and the Adani coal mine in Talabira, Odisha. These visits were planned organically as the social movements I associated with took part in these protests during my visit.

I chose to use a multi-sited fieldwork approach to examine how the different actors, interests, and discourses were used in the interpretation and implementation of the consent provision.¹⁶ These three mining sites were also chosen because of the presence of strong social movements led by forest-dwelling communities either to reject the mining operation entirely or to claim better terms of compensation and rehabilitation. The cases were carefully selected in light of their contribution to the emergence of the consent provision in law as well.

¹⁴ Natural Justice is an international collective of environmental lawyers based in South Africa and operating in Kenya and India.

¹⁵ Akhileshwar Pathak, *Laws, Strategies and Ideologies-Legislating Forests in Colonial India*, (Oxford University Press, 2002)

¹⁶ Kathryn Henne, 'Multisited fieldwork in regulatory studies' in Peter Drahos (Ed) *Regulatory Theory: Foundations and Applications* (ANU Press, 2017)

2.1 The Cases

- a. *Mahanadi Coalfields*: Established in 1989 in Sundergarh, Odisha. The state acquired 8000 hectares of land for coal extraction. However, despite this acquisition by the state, forest-dwelling communities continue to inhabit the land without being appropriately compensated and rehabilitated. It presently seeks to expand its capacity from 2.8 million tons per annum to 8 million tons per annum. This has posed a unique challenge for the administration as communities are claiming their rights under the FRA and asserting the due process requirements of the consent provision in coal-bearing areas where land is acquired compulsorily. The forest-dwelling community under an organization called Hemgiri Adivasi Ekta Manch, or association for the unity of forest-dwellers in Hemgiri coal block, is now mobilizing against the expansion of the coal mine as it contributes to climate change and localized pollution.
- b. *Vedanta Mining Company and Odisha Mining Corporation*: Vedanta Resources, a company listed on the London stock exchange, began mining operations in the eastern Indian state of Odisha on the sacred mountains of Niyamgiri in Kalahandi district. What ensued was a series of protests by the forest-dwelling community, Dongria Kondh, on preventing Vedanta from operating on their sacred mountains. Survival International filed a claim against Vedanta resources in the UK National Contact Point, where it was ruled that Vedanta resources did not consult with the community in an adequate and timely manner¹⁷. This was followed by a decision in the Supreme Court in India in 2013¹⁸ where it stated that the consent of the impacted village assemblies was to be taken based on the national legal requirement of the Forest Rights Act, 2006. Presently the state government, through the Odisha Mining Corporation, is beginning to mine the Kodingamali plateau to provide bauxite for the Vedanta alumina refinery where the Lok Sakti Abhiyan, a people's movement on environmental issues, claims that procedurally forest-dwelling communities were not consulted nor had their consent had been obtained. I visited

¹⁷ United Kingdom National Contact Point, *Final Statement in the Vedanta case*.

<<https://www.oecd.org/corporate/mne/43884129.pdf>> accessed on November 15, 2020.

¹⁸ Orissa Mining Corporation Ltd V Ministry Of Environment And Forests (Writ Petition (CIVIL) NO. 180 OF 2011)

Kodingamali, too, as it forms a part of the cluster of land conflicts that emerged from the Vedanta project.

- c. *POSCO and Jindal Steel Works*: POSCO, a South Korean based natural resource company, sought to mine iron ore in the sacred hills of Sundergarh, Odisha, in 2005 and establish an integrated steel plant in Jagatsingpur. The indigenous community resisted the beginning of the mining operations and setting up of the steel plant in their area on the grounds that their livelihood was adversely impacted and that their forest rights under the FRA were not recognized. Despite efforts in bringing this issue to the environmental court in India, the Ministry of Environment, Forests and Climate Change granted the environmental clearance to undertake the mining project¹⁹. The complaint that was filed before the OECD NCP in South Korea by a local community group Lok Sakti Abhiyan among others, did not yield any outcome as it was decided that the aspect of consultation with the affected community was a matter to be dealt with by the government of India and the state machinery but not the responsibility of the MNE. POSCO, stating regulatory failure and problems with land acquisition, chose to withdraw its project of an integrated steel plant in 2017. The land acquired for the project was returned to the Odisha state government. The Adivasi communities now are struggling to reclaim this land, which the state government has now banked in what they describe as their land bank. The intention of the Odisha state is to make this land available to the private Indian company Jindal Steel Works. This poses an interesting scenario where land which was acquired without complying with the consent provision is now being reallocated to a private company.

In the table below, I highlight the diversity in the categorization of forest land, forest-dwelling community, and the metal being mined. I list the key social movements on the ground where I conducted fieldwork. I further describe the contribution that the social movements have made to the emergence of the consent provision, which shaped my choice of the case studies.

¹⁹ Samantha Balaton-Chrimes, 'POSCO's Odisha project: OECD National Contact Point complaints and a decade of resistance' <<https://www.deakin.edu.au/alfred-deakin-institute/news/news-archive/2015-archive/oecd-national-contact-point-complaints>> accessed on November 15, 2020.

Case Study	Nature of mining operation	Legal categorization of land, forest-dwelling community, and metal	Social movements on the ground	Contribution to the emergence of the consent provision.
Vedanta and OMC mining company	Strip-mining of bauxite	Particularly Vulnerable Tribal Group inhabiting a scheduled area which is rich in bauxite.	Niyamgiri Suraksha Samiti or the committee to protect Niyamgiri which were assisted by other environmental movements within Odisha like Green Kalahandi and Transnational Advocacy organizations like Survival international	The Supreme court judgement from 2013 in this case recognized the Gram Sabha as a regulatory authority in decision-making on forest land acquisition and used the mechanism of a referendum to operationalize the consent provision.
Posco and Jindal Steel Works	Setting up of an integrated steel plant (downstream industry)	Other Traditional Forest-dwellers inhabiting forest land whose categorization is contested	Posco Pratirodh Sangram Samiti (PPSS) or the committee against Posco who worked with social movements in Odisha and Transnational Advocacy network called ESCR-Net. The United Action Committee which was advocating for the entrance of Posco into the area	The social movement was effective in clarifying the bureaucratic process in the implementation of the consent provision before amendments were made to the law in 2016 with the nature of quorum, documentation of the resolution and submission before the district collector.
Mahanadi Coalfields	Open-cast mining of coal	Scheduled Tribes inhabiting area categorized as scheduled area which is rich in coal	Hemgiri Adivasi Ekta Sangathan an organization of forest-dwelling communities leading a movement to protest the expansion of the coal mine and negotiate better compensation for land lost.	The consent provision is being used to push back against the compulsory acquisition of land for coal.

Table 1: Details of the Case Studies

2.2 Processual Mapping and Following Social Movement Networks of Resistance at multiple scales.

Before I began my fieldwork, I documented the paper trail of key decisions by the administrative bodies involved in the conflicts, court judgments, and press reports, as well as research reports which had been put out by the social movements in each site. In doing so, I arrived at a list of key interviewees for each land conflict who played an important role in the decision-making around the consent provision.

I arrived at a map of the process involved in the enforcement of the consent provision in each case and the social movement actor who mobilized this provision. I wanted to follow the trajectory of the consent provision in these three mining sites across three levels of decision-making, namely at the sub-national level, the national level, and the international level. The sites were thus varied. It ranged from bureaucratic offices within the state of Odisha, at the national level to international financial institutions.²⁰

²⁰ M. Candea 'Arbitrary locations: In defence of the bounded field-site', (2007) Journal of the Royal Anthropological Institute 13(1) pp 167–84.

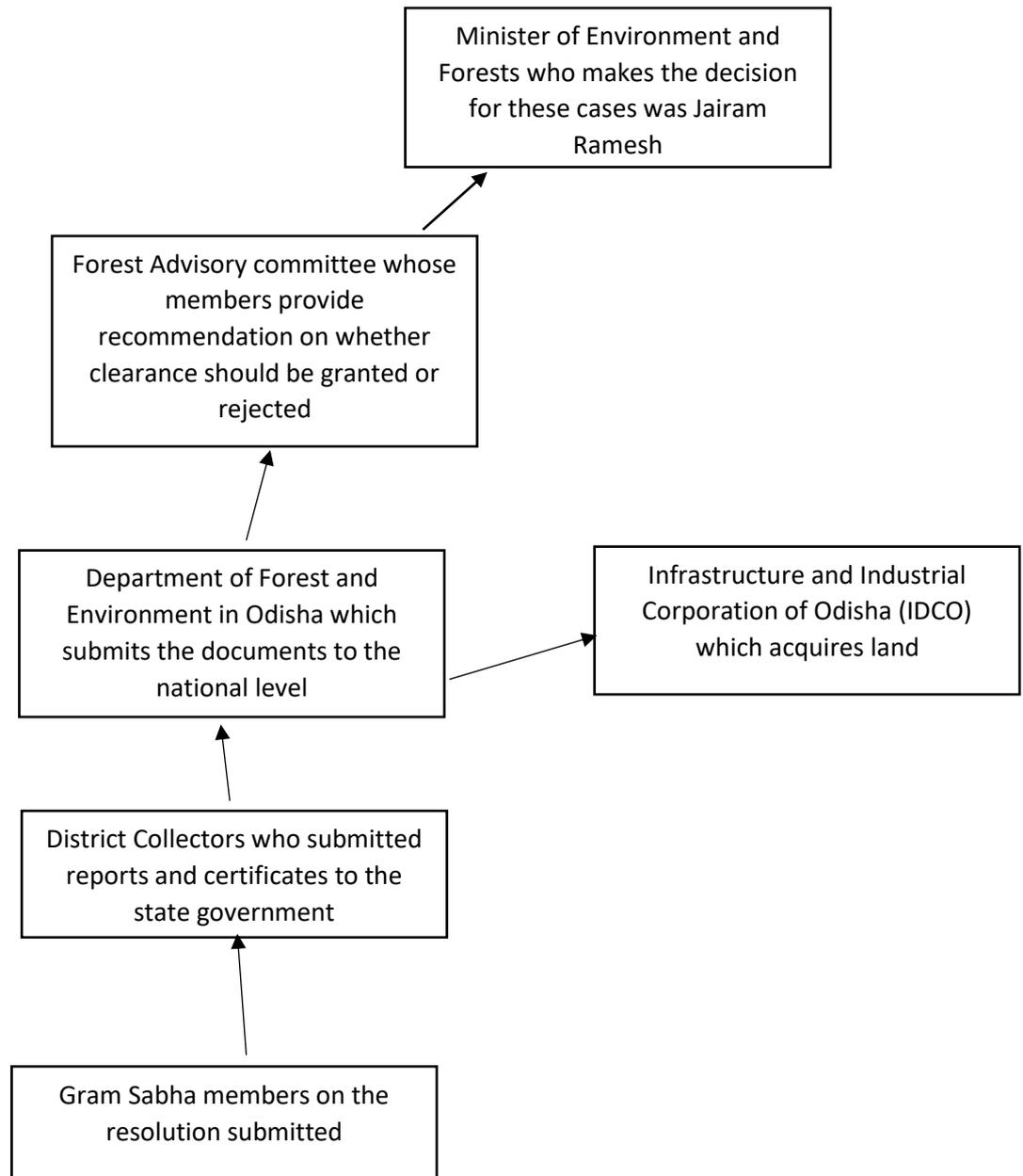


Figure 1: Processual Mapping and Associated Interviews

As seen in the diagram above, based on the legal process of the consent provision, I crafted a list of interviews that I would conduct during my fieldwork. I then developed the strategy of following the network of social movements that were in some way resisting the mine. Following the social movement network of resistance referred to the social movement actors and activists who assisted in the legal mobilization of the consent provision in the three cases. Tracing this network was an organic process. I met the key activists of the social movements in each of these three mining sites listed above and then relied on snowball sampling as the

activists directed me to others within the community and across the network at the national and international level to interview. This included organizations who were part of a larger transnational advocacy network like Survival International an international network of activists working on indigenous rights.²¹ An example of this can be seen in the figure below of the social movement networks across a coordinated enforcement pyramid.²² I will examine this in more detail in chapter 9 of this thesis.

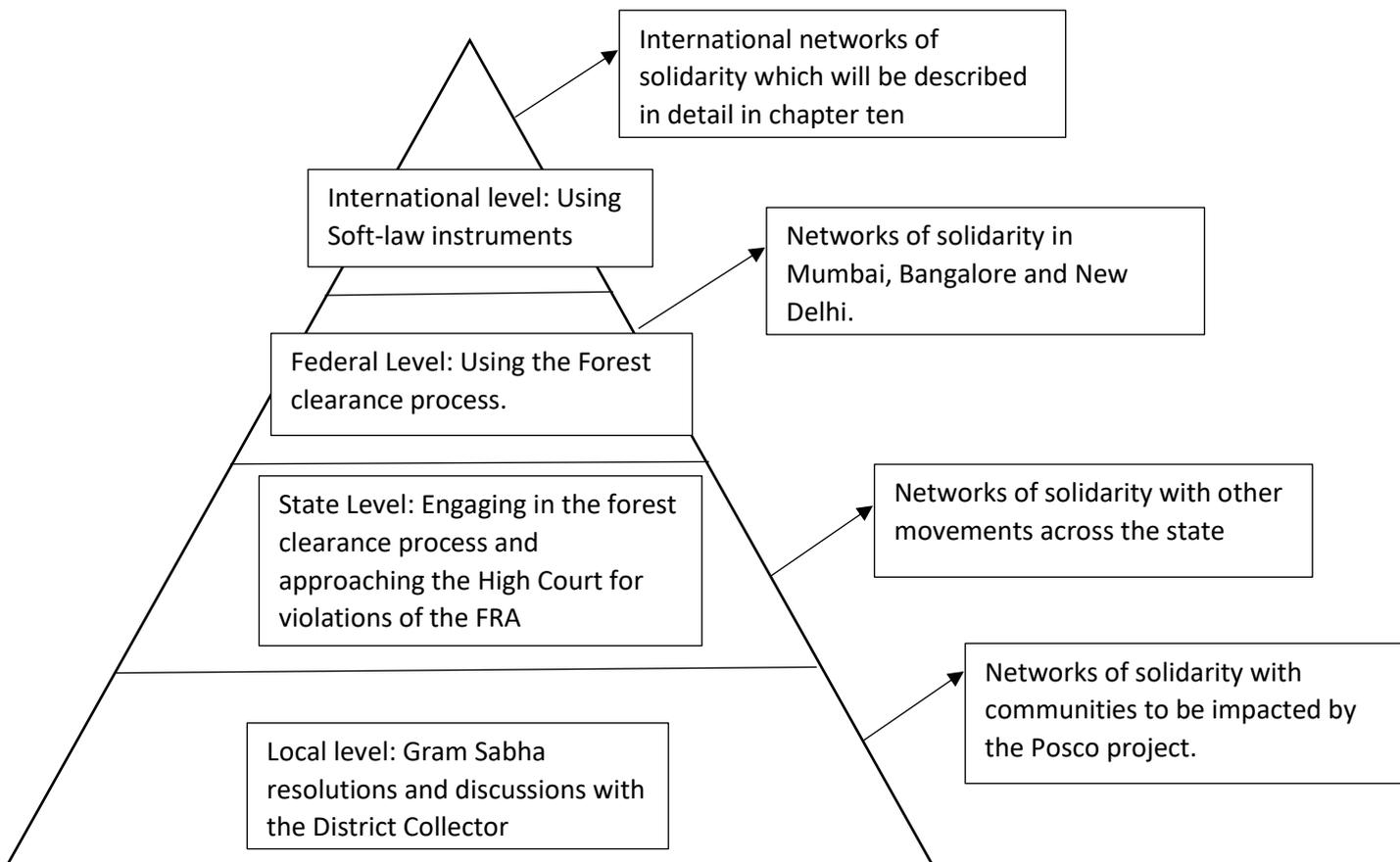


Figure 2: Example of the social movement network of resistance across the different levels in the Posco case

²¹ Margaret.S.Keck and Kathryn Sikkink, *Activist Beyond Borders: Advocacy Networks in International Politics*,(Cornell University Press, 1998).

²² John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press,2000).

The goal that guided my initial bout of fieldwork in the three mining sites in July 2018 was to interview these key actors to unpack the legal process within the state's administrative machinery and legal mobilization strategies deployed by the social movements to resist the mining operations. As I interviewed the senior bureaucrats and policymakers in New Delhi and Odisha, what became amply clear was the complexity of the conflicts and legal mobilization strategies that were used. The initial phase of fieldwork served as a scoping visit to understand the actors involved on the ground and the nuances of the land conflict.

Access to these areas of conflict was not easy. It was after I spent considerable time with activists in Bhubaneswar in Odisha and gained their trust that I was given access to the forest-dwelling communities on the ground. Sandeep Pattnaik and Prashant Paikaray, both of whom were part of PPSS, were instrumental in assisting me to gain access to the three mining sites. This initial bout of fieldwork played a pivotal role as I was able to establish a rapport with Sandeep Pattnaik and Prashant Paikaray, as well as get a sense of the bureaucratic authorities involved in decision-making.

Gaining access to the three mining sites was only one part of the process as staying in these areas for long durations of time was difficult. They were under constant surveillance by the paramilitary forces and law enforcement of the government of Odisha. To overcome this challenge, I designed my visits in short bursts of two to three days and invited forest-dwellers to Bhubaneswar in the event I was unable to interview them in these remote areas.

The other challenge was to be able to interview different actors in the conflict based on their divergent interests during the same stretch of my fieldwork. The problem was that my interviewing the bureaucrats or company officials was seen by the social movements on the ground as me picking a side. To avoid this, I undertook separate field trips to interview actors in clusters of their interests.

I conducted my second phase of fieldwork in July 2019. It was in this phase that I was able to conduct interviews with the important bureaucratic authorities within Odisha, namely the Department of Mines, the district collectors in the three mining sites, and I revisited the forest-dwelling communities in the three mining sites. It was during this visit with forest-dwelling communities that I was exposed to the desire of communities for dialogue and deliberation with the state. During this stretch of fieldwork, I went back to some of the key

interviewees to ask how they understood the relationship with the state and the desire for deliberation expressed by forest-dwelling communities. The importance of a deliberative relationship with the state was a key finding in this phase of fieldwork and it guided how I conducted my last stretch of fieldwork.

In my last stretch of fieldwork, I chose to focus on interviewing the company officials and their local teams on the ground who were in charge of land acquisition to understand the nature of the state-business nexus. A major hurdle that forest-dwelling communities described in establishing a relationship of dialogue with the state was the state's pro-business leanings. In some ways, this stretch of fieldwork was to document the non-deliberative ways in which the state functioned. I revisited the forest-dwelling communities in these areas to gather more details of the governance arrangements they would propose for realizing the deliberative relationship with the state. Both processual mapping and tracing the social movement networks of resistance enabled me to investigate multiple sites where the conflict was decided. Drawing from interviews with the forest-dwelling community I was able to construct an alternative nodal arrangement for decision-making which had the promise of repairing the relationship with the state.

I primarily conducted semi-structured interviews with different actors across scales and spaces. I conducted a total of one hundred and fifty-three interviews with bureaucrats, activists, forest-dwellers, international advocacy organizations, and company officials across the processual mapping exercise and tracing the network of resistance. I combined these interviews with participant observation during my short stays in these sites of conflict.²³

A limitation of my method has been the inability to stay for long stretches in these areas of conflict; thus, I was unable to interview forest-dwellers who were not part of the social movement network of resistance locally.

Using the grounded theory method, I coded my interviews and derived themes from them.²⁴ Borrowing from Braithwaite and Drahos's observation of the micro-macro approach to the anthropology of global cultures where they study a macro phenomenon at a micro-scale of individuals, my interaction with individual interviewees across the different scales led

²³ Kathryn Henne, 'Multisited fieldwork in regulatory studies' in Peter Drahos (Ed) *Regulatory Theory: Foundations and Applications* (ANU Press, 2017)

²⁴ Kathy Charmaz, *Constructing grounded theory: A practical guide through qualitative analysis* (Sage, 2006)

me to gather data that would help me to develop an account of the macro relationship between indigenous communities and the state.²⁵

What began as a study of the consent provision through interviews and multiple stretches of fieldwork evolved into understanding of what the terms or basis are for establishing a deliberative relationship with the state. This was possible through using data from my interviews to reveal a larger picture of contestations over sovereignty, citizenship, and power in how decisions are made about what happens in India's forests. It was through the ground-up or from the micro to the macro from my interviews that I propose an alternative understanding of the relationship between the forest-dwelling communities and the state, which is one mediated by deliberation and dialogue.

²⁵ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000)

2.3 List of Key Interviewees

S. No	Name and Description
1	Abhay Sahoo, member of Communist Party of India Marxist and leader of Posco Pratirodh Sangram Samiti (PPSS).
2	Adam Matthew, Member of the Church of England Fund and who advised on the delisting of Vedanta
3	Amita Baviskar, Ex-Member of the Forest Advisory Committee when these cases were being deliberated.
4	Ashish Kothari, Activist who was involved in the drafting of the FRA and the 2009 notification.
5	Brahmahar Das, Dalit forest-dweller and activist with Posco Pratirodh Sangram Samiti (PPSS)
6	District collectors in the districts of Sundergarh, Rayagada, Koraput, and Jagatsingpur
7	Gram Sabha representatives of the villages who drafted the three-Gram Sabha resolutions in these cases
8	Hilde Jervan, on the staff at the Council on Ethics in Norway which disinvested from Vedanta Resources Pvt Ltd on the grounds of violation of Indigenous rights.
9	Jairam Ramesh, former Minister of Environment and Forests.
10	Jitu Jakesika, Dongria Kondh activist in the Niyamgiri area
11	Lado Sikaka leader of the Niyamgiri Suraksha Samiti
12	Land acquisition teams of Jindal Steel Works in Jagatsingpur and Coal India in Talcher
13	Madhu Sarin, Activist, and Researcher involved in the drafting of the FRA.
14	Mahesh Rangarajan, Ex-member of the Forest Advisory Committee when these cases were being deliberated.
15	Manorama Katua, Adivasi leader in the PPSS.
16	N.C Saxena, Member of committees set up to examine the decisions in the Vedanta and Posco case

2.3 List of Key Interviewees Continued

Serial No	Name and Description
17	Nitin Sethi, Environmental Journalist
18	Officials at Industrial and Infrastructure Development Corporation of Odisha in Bhubaneswar
19	Prakash Jena, forest-dweller, and activist with PPSS
20	Prashant Paikaray, spokesperson for PPSS
21	R.B Mathur, Former employee of Coal India and Mahanadi Coalfields
22	R.K Sharma, Secretary-General of the Federation of Indian Mineral Industries.
23	Rajendra Nayak, leader of the CPI(M) and people's movement against Coal India in Sundergarh.
24	Rinjo Sikaka, Member of the Niyamgiri Suraksha Samiti
25	Sandeep Pattnaik, independent activist working on business and human rights issues in Odisha.
26	Sanghamitra Dubey, Activist, and Researcher working in Odisha on Forest Rights
27	Sanjay Chowdhury, Former head of corporate affairs at Vedanta
28	Shankar Gopalakrishnan, Activist, and Researcher involved in the drafting of the FRA and the Campaign for Survival and Dignity.
29	Sophie Grig, Member of Survival International which campaigned against Vedanta internationally.
30	Subodh (name changed) member of the local land acquisition team of Jindal Steel Works.
31	Sunil Nayak, activist with the Hemgiri Adivasi Ekta Manch
32	Tony Henshaw who was appointed as the chief sustainability officer at Vedanta Resources Pvt. Ltd to address the Niyamgiri conflict
33	Tushar Dash, Activist, and Researcher involved in the drafting of the FRA
34	Usha Ramanathan, Legal researcher, and member of the committee that examined legal violations by Vedanta.

Table 2: List of Key Interviews

3. The Relationship Between the State and The Forest-Dwelling Community: Is There a Possibility for Repair?

The forest-dwelling community members interviewed across the three mining sites and in other parts of mineral-rich Odisha spoke of a relationship with the state based on dialogue and engagement. Lado Sikaka, a Dongria Kondh leader and member of the Niyamgiri Suraksha Samiti, elaborated on this ethos:

Dialogue is when we get the opportunity to speak, we are heard in a way that the state engages with our views, aspirations, and thoughts while making decisions. The state in these forests operates by force without any dialogue or discussion which is why this relationship is broken.²⁶

Forest laws in India, as chapter 2 of this thesis will show, are in conflict with each other on aspects of conservation and administrative control of forests. The forest law framework consists of laws like the Indian Forest Act, 1927 and the Wildlife Protection Act, 1972, which recognize absolute control of the state in decision-making on conservation and development.

Despite this difficult legal context, the empirical findings of my thesis highlight how there exists a possibility of repairing the relationship with the state. This possibility is grounded in the reimagination of concepts that shape the relationship between the state and forest-dwelling communities, namely sovereignty, self-determination, and governance.

Forest-dwelling community members in the three mining sites described in detail the building blocks for establishing a deliberative relationship with the Indian state. In doing so, they argued for a rearrangement of institutional nodes and networks where the voice of the forest-dwelling community can decisively influence governance outcomes.²⁷ In this section, I will provide a glimpse into the reimagination of concepts and nodal arrangements in forest governance to entrench a deliberative relationship with the state. These concepts and nodal arrangements will be discussed in greater detail in the forthcoming chapters of this thesis.

²⁶ Interview with Lado Sikaka in Niyamgiri on February 2020

²⁷ Peter Drahos, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) Temple Law Review, 77 pp. 401

3.1 From the Regime of Dispossession to the Principle of Shared Sovereignty

The thesis begins by exploring the regime of dispossession in India's forests in chapter 2. The regime of dispossession refers to a forest law regime that has made dispossession of forest-dwellers easy by recognizing state control over decision-making which is guided by certain economic interests like extraction. The regime of dispossession is characterized by a governance structure where the state unilaterally makes decisions on conserving and acquiring forest areas for mining without consulting the forest-dwelling communities.²⁸

The regime of dispossession is challenged by laws that recognize the right to self-determination of forest-dwelling communities, mainly the constitutional protection to scheduled areas, the Panchayat Extension of Scheduled Areas Act, 1997 and the Forest Rights Act, 2006. The consent provision made its way into the forest law framework in 2009 through a government notification and an eventual statutory amendment to the Rules of the Forest Conservation Act, 1980 in 2016. The laws which recognized the right to self-determination were not implemented appropriately and conflicted with the existing forest law regime of dispossession.

This conflict was termed by Rinjo Sikaka, a Dongria Kondh activist with the Niyamgiri Suraksha Samiti and someone who has been strongly associated with forest rights movement as one of the competing sovereignties. He described it as follows:

One set of laws recognize the state's absolute sovereignty and control over forest areas. Other sets of laws recognize our right to self-determination without emphasizing how to relate to the formal state. The way the right to self-determination is viewed by the Indian state is through the lens of competition and not cooperation. We are competing for control when, ideally, we need to find a way to share it.²⁹

Forest-dwelling communities who were interviewed in the three mining sites spoke of a shared sovereignty framework. The principle of shared sovereignty was understood as a framework to share the power of decision-making in India's forests with forest-dwelling communities through continuous dialogue.

²⁸ Micheal Levein, 'From Primitive Accumulation to Regime of Dispossession' (2015) EPW Vol. 50 Issue 22.

²⁹ Interview with Rinjo Sikaka in Niyamgiri on February 2020.

The right to self-determination and sovereignty as articulated by the forest-dwelling community is relational to the formal Indian state. This is similar to the concept of relational sovereignty, where sovereignty is theorized in relation to the multiple social relations and political forces struggling over resources and territory. In this instance, sovereignty is theorized in relation to the formal Indian state, customary institutions of forest-dwellers, and shaped by the interests of mining companies that intend to acquire forest land.³⁰

The principle of shared sovereignty is defined by Manorama Kathua who is an activist with Posco Pratirodh Sangram Samiti (PPSS) the social movement in the Posco case, as "The Indian state and the forest-dwelling community need to arrive at decisions together, problem-solve together and find ways to conserve these areas together."³¹ The sharing of power is accompanied by the implementation of forest laws in a manner that gives forest-dwelling communities legitimate space within governance to make decisions.

The consent provision is reimagined here as the consent principle, where the forest-dwelling community are part of a deliberative circuit of engagement with the Indian state and bureaucracy on aspects of conservation, development, and acquisition of forest land. The consent principle, when read with the shared sovereignty approach, is where obtaining consent from the forest-dwelling community is not a one-time event but a process that reconfigures the governance architecture to establish a deliberative relationship with the state.

3.2 The non-deliberative and deliberative modality of the state

The modalities of the state in India's forests were derived inductively from my fieldwork and consisted of primarily non-deliberative modes of operating. The state was present as the pro-business or extractive state, the police state, and the paper state and absent in its deliberative form. The non-deliberative modalities of the Indian state as the pro-business state is where the bureaucratic arrangements are such that the state serves the interest of capital while marginalizing the voice of the forest-dwelling community. The police state is where law enforcement is present in these land conflicts to discipline protests, and forest-dwelling communities have been falsely charged for committing crimes that cause a public

³⁰ Micheal Levein, 'From Primitive Accumulation to Regime of Dispossession' (2015) EPW Vol. 50 Issue 22.

³¹ Interview with Manorama Kathua in Jagatsinghpur in July 2018.

disturbance. The paper state is that modality of the state where it uses paperwork and discretionary power of the bureaucracy to silence the evidence of dissent put forth by forest-dwelling communities.³² The modalities of the state are elaborated upon in chapter 4 and chapter 5 of the thesis.

The forest-dwelling communities described that the state operates in these non-deliberative modalities in the enforcement of the consent provision, thus preventing the voice of the forest-dwelling community to influence state decision-making. The state is seen shifting from one non-deliberative modality to another with ease as it works to make land accessible to the mining company in the three cases.

The consent provision is viewed by the forest-dwelling community as a legal avenue to switch the state into a deliberative mode where there is porosity between the Gram Sabha and the Indian state. Legal mobilization efforts by the forest-dwelling communities across several legal fora are directed to shift the state into a deliberative modality as described in chapter 9 and 10 of the theses. These efforts are sometimes successful if the court offers remedies that require engagement as it did in the Niyamgiri case.³³

3.3 Nodal arrangements for engagement and deliberation: The building blocks of the deliberative state

The empirical finding of the desire for a deliberative relationship with the state by forest-dwelling communities was accompanied by detailing of a governance architecture for India's forests, which can make this a reality. Forest-dwelling communities interviewed for the thesis relied on the existing institutional arrangement of scheduled areas and suggested that it be revitalized in its implementation by describing an ethos of engagement.

The scheduled areas governance structure is where the Gram Sabha along with the Tribes Advisory Council (TAC) and the governor become part of the regulatory circuit of decision-making. Here the Gram Sabha, the TAC and the governor have decision-making authority on what laws are to be made applicable and need to be consulted when land is to be acquired.

³² Nayanika Mathur, *Paper Tiger: Law, Bureaucracy and the Developmental State in Himalayan India* (Cambridge University Press, 2015).

³³ *Odisha Mining Corporation V Ministry of Environment and Forests and Others (Writ Petition (CIVIL) NO. 180 OF 2011)*

The hurdles in the realization of the deliberative relationship are the political economy of extraction, exclusionary conservation, and forest laws being in conflict. To overcome these hurdles and entrench a deliberative circuit of decision-making, forest-dwelling communities have over time evolved ideas for a new governance process and arrangement.

Theories of deliberative governance and nodal governance support the description of the rearrangement of nodes and provide a normative benchmark to ensure inclusion, authenticity, reciprocity, and discursive diversity of the governance structure. These theoretical foundations are dealt with in chapter 3 of the thesis.³⁴

The nodal rearrangement to make way for a deliberative circuit places the Gram Sabha at the heart of decision-making. The Gram Sabha, as the thesis will elucidate in chapter 6, struggles to include all members of the forest-dwelling community; it excludes Dalit forest-dwellers and women. To address this, there exist counter-publics within the village with sub-committees for women, Dalits, and forest-dwellers who are in discursive conflict with the Gram Sabha. This intricate architecture within the village of nodes and networks forms part of a deliberative system that can be brought into these reimagined governance arrangements.

The nodal arrangements suggested by the forest-dwelling community address the hurdles as follows:

- a. **Laws in Conflict:** To address the forest laws which conflict with each other, forest-dwelling communities spoke of shifting the site of reconciliation of laws from the District Collector (who is the head of the local bureaucracy and administration of the district) to the Gram Sabha and the TAC. Presently the district collector has vast discretionary power to interpret how these conflicting laws can be reconciled, as will be explained in chapter 2 of the thesis.
- b. **Extractive circuit:** To break the extractive circuit, forest-dwelling communities place the Gram Sabha and the TAC as the key unit of governance for deciding the terms and

³⁴ Peter Drahos, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) Temple Law Review 77 and John Dryzek with Simon Niemeyer, *Foundations and Frontiers of Deliberative Governance* (Oxford University Press, 2010)

conditions on which the mining company can enter the area when the Memorandum of Understanding is being drafted. This is described in detail in chapter 7 of the thesis.

- c. **Exclusionary Conservation:** Similar to the deliberative circuit for the reconciliation of laws, the forest-dwelling community suggests that the Gram Sabha and the community-based conservation committee be made a legitimate authority to conserve forest areas alongside the forest department. This deliberative circuit is addressed in chapter 7 of the thesis.

Each of these deliberative circuits is guided by the ethos of engagement, which consists of three phases and an outcome. The three phases are:

- a. **Bhaitak** (literally translates to a sit down): A sitting down or regulatory convening and weighing in of options within the Gram Sabha; a micro public of deliberation which includes different counter-publics without intervention from any state authority. It was viewed as an internal deliberation within the village.³⁵
- b. **Sunvayi** (Literally translates to be heard): This is where the deliberated decision is shared with the state authorities. They are demanding that the state authorities hear them and genuinely engage with their decision.
- c. **Sahamati** (consent/permission): This is where the state arrives at a decision considering the Gram Sabha's deliberations and presents it before them for their consent or permission. If the state fails to obtain the consent of the Gram Sabha, it will undergo these three stages of deliberations until an agreement is forged with the state on any intervention.

This process of engagement is directed towards an eventual outcome described by forest-dwelling communities as *baat-cheeth se samjautha* or a working agreement, which is incompletely theorized and arrived at after a consensus-building process. The working agreement is a framework agreement that operationalizes the principle of shared sovereignty by deciding on how the forest-dwelling community and the state work together. The working agreement was not seen as the document which had finality but was a work in progress with changes incorporated to the emerging problems of forest governance. These elements form

³⁵ Peter Drahos, *Intellectual Property, Indigenous People and Their Knowledge* (Cambridge University Press,2014)

the building blocks of the deliberative state, which functions on the basis of the working agreement and by outcomes of the deliberative circuits.

4. Argument and Outline of the Thesis

This thesis argues that the Indian state mostly operates in a non-deliberative modality in India's forests unless social movements through legal mobilization force it to shift to a deliberative mode. Harnessing the theory of deliberative democracy and interviews with forest-dwelling community members, I articulate a deliberative reimagination of the consent process, law, and relationship with the state. Located in this deliberative reimagination, the difficult argument that this thesis will seek to make is the need for the state to operate in a deliberative mode. Drawing on in-depth fieldwork data the thesis shows a feasible architecture for this deliberative governance based on nodes and forums. A deliberative modality does lie within the grasp of the Indian state. It can operate otherwise than it does.

I begin with a chapter on tracing the regime of dispossession of forest laws and the nature of the conflict between the laws. Micheal Levein's theory of regimes of dispossession argues that dispossession is an institutionalized way of expropriating land from its current owners or users. It has two essential components: a state willing to dispossess for a particular set of economic purposes tied to particular class interests; and a way of generating compliance to this dispossession. These two aspects are intrinsically linked.³⁶ In this chapter, I unpack the legal regime of dispossession in India's forest areas by analyzing forest laws and the emergence of the legal standard of consent.

In this part of the thesis, I argue that the law does not provide opportunities for deliberation as forest laws that recognize state control continue to operate alongside the Forest Rights Act, 2006. In implementing the consent provision, the state is selectively deliberative as an outcome of prolonged legal challenges by the forest-dwelling community. While the chapter already lays out the legal conflicts at play, I will introduce a short section here about a need for deliberative reconciliation of laws.

In chapter three I then explore the theoretical contours of deliberative democracy and its presence in India's polity and the forests in particular. I will draw on the works of Joshua

³⁶ Micheal Levein, 'From Primitive Accumulation to Regime of Dispossession' (2015) EPW Vol. 50 Issue 22.

Cohen on democratic legitimacy, John Dryzek on deliberative governance, as well as Seyla Benhabib and Arjun Appadurai's work on Deliberative chains in decision-making to formulate a textured understanding of deliberative democracy.³⁷ Deliberations, I argue as Amartya Sen does in *The Argumentative Indian*, is a very natural corollary to the Indian experience of democracy.³⁸ Deliberative democracy, as understood in this thesis, is both procedural and substantial. In the context of the scheduled area, I will articulate how the shared sovereignty framing governs the relationship between the Gram Sabha (the primary deliberative node in the deliberative system) and how the state's absences are negotiated.

In chapter four, I sketch the multiple modalities that the state operates in India's forests. These are derived inductively from my fieldwork. The modalities of the state are extractive, paper, developmental, and deliberative. Extractive, paper, and developmental states tend to be non-deliberative in their decision-making. In this chapter, I address the making of a deliberative state.

Chapter five explores the administrative practice and legal interpretation of the consent standard across the three essential decision-making layers at the district, state, and central levels. I demonstrate how the district collector and the district forest department harness their discretionary power in a manner that restricts the FRA's applicability and channels its provisions into the operational construction of paper truths around the consent provision. Using the theoretical framework of nodal governance, I offer an insight into the circuits of the different modes and priorities of the state; the developmental circuit, the conservation circuit, and the extractive circuit. The nodes that shape decision-making events in the consent process are concentrated with the district collector and the Ministry of Environment and Forests. Using Deliberative governance, I offer an alternative retelling of these mechanics with a hopeful reimagination of an ideal circuit based on my field interviews.³⁹

Chapter six highlights that Forest-dwelling communities are heterogeneous groups composed of different castes, occupations, and indigenous heritage. This heterogeneity is flattened

³⁷ John Dryzek with Simon Niemeyer, *Foundations and Frontiers of Deliberative Governance* (Oxford University Press, 2010); Joshua Cohen, 'Procedure and Substance in Deliberative Democracy' in Seyla Benhabib (Ed) *Democracy and Difference* (Princeton University Press, 1996); Seyla Benhabib (Ed) *Democracy and Difference* (Princeton University Press, 1996).

³⁸ Amartya Sen, *The Argumentative Indian: Writings on Indian History, Culture and Identity* (Penguin Books, 2006)

³⁹ Fieldnotes from July 2019 and February 2020.

within the Forest Rights Act,2006 by categorizing these communities into Scheduled Tribes and Other Traditional Forest Dwellers. OTFD communities have to prove that they have been living and depending on these forest areas for 75 years. This chapter will argue that in the three cases, the different modes in which the state operates in the implementation of the consent provision renders it non-deliberative. This chapter will articulate that forest rights and consent are firmly rooted in a particular Adivasi identity conception. Community members that fall outside of this conception find it harder to use these protective laws. Consent thus can cause the state to be selectively deliberative depending on the identity of the forest-dwelling community that is impacted. It privileges claim of recognition over claims of redistribution.

In chapter seven, I argue that Forest-dwelling communities are caught between conserving forest areas and the demands of a political economy of extraction. The former restricts the extent of their developmental activities and dependence in forest areas, and the latter threatens to displace them without compensation. It has put them in a situation that has restricted their capacity to aspire.⁴⁰The choices are reduced to one of two extremes- either they are asked to relocate, live in and around polluted mines, or reject any form of development.

The Forest Rights Act,2006 itself restricts the notion of development to the clearing of the forest to the extent of 75 trees for establishing a school, primary healthcare center, and a community center. Their developmental needs are often articulated by social movements who interpret it from the lens of what anthropologist Amita Baviskar describes as the knowledge bearers of alternatives to "destructive development." Through interviews in the three mining sites, I will bring to light how forest-dwelling communities are perceived either as a barrier for the expansion of the extractive economy by the extractive state, the mandated steward of forest areas, or the bearers of alternatives to destructive development practices. Consent as a legal principle operates within the boundaries of these perceptions of forest-dwelling communities. In this chapter I offer an alternative decision-making pathway of a deliberative circuit to break away from the extractive circuit of decision-making.

⁴⁰ Arjun Appadurai, 'The Capacity to Aspire: Culture and Terms of Recognition' in *Culture and Public Action* Eds by Vijayendra Rao and Micheal Walton (Stanford University Press,2004)

In chapter eight, I highlight the role of Dalals or intermediaries since dialogue between the state, the local community, and the mining company rarely occurs. Instead, brokers or Dalal's function as the messengers between the local community and the parastatal agencies charged with acquiring forest land. In this chapter, I unpack how the Dalal's operate as norm entrepreneurs and acquire forest land through informal negotiations. As the state retreats through its non-deliberative tactics, Dalal's offer an avenue to negotiate the terms and conditions on which land can be acquired.

In chapter nine, I showcase how the state is forced to reconsider its decisions on forest land acquisition when forest-dwelling communities challenge it by using different laws and forums. In such instances, the state is selectively deliberative, and it continues to be a zero-sum game. In the process of legal mobilization, forest-dwelling communities continue to be entrenched within the identity perceptions described above, i.e., the steward, the barrier to development, or the knowledge bearer of an alternative development model to extraction. In their struggle to prevent acquisition, the discussions around consent occur within the binary of whether the community should agree to the acquisition or entirely reject it. Meaningful choices that exist in between are not entirely considered.

This chapter speaks to the role of courts in the deliberative system. I reinforce the deliberative governance alternative presented this far and delve further into the relationship between the state and forest-dwelling communities, a relationship that needs to be reconfigured to enable deliberation instead of being forged in the courts' adversarial forum, a forum that only serves to simplify these complex, historical, and layered conflicts.

Chapter ten flows from chapter nine on legal mobilization. I argue that Forest-dwelling communities are likely to be more successful in changing the state's mode into a deliberative one when pressure from international institutions and legal forums are present. The presence of the international institutions acts as an additional layer of scrutiny for the due process violations committed by the state in the acquisition process.

Chapter eleven concludes with a description of the building blocks to entrench the deliberative state. Bringing together elements from the previous chapters of the deliberative reimagination of the consent process, reconciliation of laws, and nodal rewiring on decisions of acquisition and conservation, I argue that they lay the foundation for the making of a

deliberative state in India's forests and the governance architecture articulated here can lead to the outcome of an incomplete theorized working agreement on development, conservation, and other issues.

2. REGIMES OF DISPOSSESSION, SELF-DETERMINATION AND THE EMERGENCE OF THE CONSENT PROVISION IN INDIA'S FOREST LAWS.

1. Introduction

"Consent is a mere legal standard, self-determination and decentralization will ensure that consent is needed from the local community." – Shankar Gopalakrishnan⁴¹

The consent provision was recognized as a legal standard through a government notification by the Ministry of Environment, Forest and Climate Change in August 2009. This notification required that written consent⁴² be obtained from the village assembly or Gram Sabha if forest land⁴³ is being acquired. The consent provision was statutorily recognized with an amendment to the rules of the Forest Conservation Act, 1980 in 2016.

The interpretation of the consent provision is at the crux of many land conflicts in India's forests. A difference exists in how the local and national bureaucracy interpret the provision when compared to forest-dwelling communities. The difference in interpretation cannot be understood through recent legal developments alone but require an understanding of the laws that preceded it. The laws that preceded the recognition of consent focused on state control over forest areas, decentralization of powers in certain categories of forest areas, and the right to self-determination of forest-dwelling communities.

In tracing the laws that preceded the consent provision, the theory of the regime of dispossession offers an analytical frame to map these legal developments. Micheal Levein defines a regime of dispossession as follows:

the regime of dispossession is an institutionalized way of expropriating land from their current owners or users. It has two essential components: a state willing to dispossess for a particular set of economic purposes tied to particular class interests; and a way of generating compliance to this dispossession. These two aspects are intrinsically linked. ⁴⁴

⁴¹ Interview with Shankar Gopalakrishnan over email on August, 2018.

⁴² Written consent refers to a resolution drafted by the Gram Sabha or in some instances it refers to a no-objection certificate from the Gram Sabha.

⁴³ Forest land as defined under the Forest Rights Act, 2006 includes land of any description falling within a forest area. Land which has been categorized as forest land or unclassified and undemarcated forests.

⁴⁴ Micheal Levein, 'From Primitive Accumulation to Regime of Dispossession' (2015) EPW Vol. 50 Issue 22.

The state's willingness to dispossess is determined by its struggle to meet its developmental and democratic interests, which is complicated in forest areas. The state's willingness and the set of economic purposes have changed in the different phases of the development of forest laws.

The overview of the laws will show how deeply embedded the developmental interests of the state were in the exploitation of forests combined with the need to create inviolate spaces for conservation. These laws, policies and rules framed place the forest-dwelling communities in a position of great inequality, they continue to shape the way forests are governed today.

The present forest laws in India are influenced by the colonial encounter. During the colonial period European legal logic and science of forestry was based on the understanding that spaces devoid of people would ensure conservation. Exclusionary conservation practice was coupled with the management of forests as a repository of timber.⁴⁵

The independent Indian state adopted the colonial legal framework in 1947. Tracing the drafting of the forest laws in the colonial and post-colonial period I construct a historical lens that clarifies how the consent provision emerged in forest areas and how it is interpreted now.

Legal concepts like the difference between forest rights and forest privileges of forest-dwelling communities continue to govern the implementation of laws today. Forest privileges are a system where the forest bureaucracy based on the exercise of its discretionary power may recognize certain kinds of forest uses and allow them to be exercised without restriction like access to minor forest produce.⁴⁶

Adopting a historical approach highlights the evolution of power of the forest bureaucracy across different laws. The Forest Rights Act,2006 sought to rectify what it termed as historical injustice experienced by forest-dwelling communities. To make sense of the nature and contours of the historical injustice experienced, it becomes imperative to journey through the forest laws beginning with the Indian Forest Act,1865, and identify the early roots of the

⁴⁵ Chhatrapati Singh, *India's Forest Policy and Forest Laws*, (Natraj Publishers,2000).

⁴⁶ Minor forest produce refers to non-timber forest produce like honey or fruits.

regime of dispossession. This historical inquiry shows that laws supporting the right to self-determination preceded the laws relating to the consent provision.

The question this chapter asks is how have forest laws across the colonial and post-colonial period changed the nature of forest governance? And how is the regime of dispossession of forest laws counterbalanced by laws that recognize the right to self-determination and shared sovereignty?

The chapter argues that from tracing the laws across the colonial and post-colonial period what is made visible is the entrenchment of the regime of dispossession despite laws that recognize the right to self-determination of forest-dwelling communities. I argue that the passing of the Forest Rights Act, 2006 and the emergence of the consent provision provide an opportunity to reconfigure the forest governance architecture to include the voices of forest-dwelling communities in decision-making. However, these progressive laws are limited in their scope of influence as their implementation are riddled with conflicts with older forest laws. I explore the possibility of deliberative reconciliation of forest laws as forest-dwelling communities interviewed for this thesis have articulated deliberation as a way to enable the fuller realization of the progressive legal regime.

In this chapter, I examine laws from the colonial period, the period of Indian independence, the making of the FRA, and the recognition of the consent provision. The reason for dividing it into these periods is to represent significant legal changes in India's forest laws and policies which influenced forest governance.

2. Forest Laws in the Colonial Period

The Colonial period was marked by experimentation in forest governance structures and management strategies. I trace the trajectory of these experiments by examining the drafting of the Indian Forest Act, 1865, The Indian Forest Act of 1875 and the Forest Policy of 1894. Alongside the experimentation in forest governance, I map the laws that recognize the right to self-determination in areas occupied by tribal and forest-dwelling communities. The areas inhabited by tribal and forest-dwelling communities were legally categorized as excluded and partially excluded areas.

Mapping of the forest laws in this section is restricted to the forest laws applicable across colonial India, though its impact and implementation differed across the region. In this section I focus on the broader changes and shared experience of forest-dwelling communities as opposed to specific regional experiences of dispossession.

In documenting these changes, I concentrate on the role of three key architects responsible for important legislative changes. The first is Sir Dietrich Brandis who is a German botanist and spent thirty years in the British Imperial Forestry Service. Many German foresters came to occupy vital positions in the imperial forest service.⁴⁷ He was instrumental in the invention of the distinction between forest rights and forest privileges. Second, is Henry Baden-Powell who was a civil servant in Bengal and conservator of forests in Punjab and was responsible for the introduction of the concept of property and easement rights in forest areas. Lastly, I draw attention to John Lumley Dundas who was the one of the key drafters of the Government of India Act, 1935 which contains the provisions of excluded and partially excluded areas.

The conservation model during this period was designed on creating exclusive zones within forest areas where use of forest produce was heavily regulated. Forest laws were anchored in complete state control of forests to the exclusion of forest-dwelling communities except in designated areas like village forests where rights could be exercised by forest-dwellers.⁴⁸ Though this model of conservation was the norm, its implementation varied across the presidencies. The Madras Presidency was an outlier and in favor of recognizing ownership of local communities to their forests. During this period, the tussle over forest rights was whether the forest-dwelling community has legal rights of ownership in forest areas or had access to informally recognized privileges.

The Indian Forest Act, 1865, was the first attempt at drafting a law on forests in India. It dealt with the tension of rights and privileges by categorizing forests into two types-which were government forests and reserve forests. Government forests were forest areas entirely under

⁴⁷ Akhileshwar Pathak, *Laws, Strategies and Ideologies-Legislating Forests in Colonial India*, (Oxford University Press, 2002).

⁴⁸ Chhatrapati Singh, *India's Forest Policy and Forest Laws*, (Natraj Publishers, 2000).

state control, while reserve forests were areas where the forest-dwelling community's rights were recognized.⁴⁹

The priority that shaped forest governance then was the interest in extracting timber. Conservation was understood as a way to ensure that timber would be extracted at a pace that would not destroy the forest areas. The exercise of rights by local communities was seen as a barrier to conserving forest areas.⁵⁰ The exclusionary conservation model continues to guide decision making in India's forests even today.⁵¹ In an interview with a senior Indian forest officer in Bangalore, he stated:

British forest management strategies are what we continue to use. Our interpretation of the laws and policies is guided by the need to keep areas inviolate or free from exploitation of the resources by forest-dwellers.⁵²

However, the 1865 Act was seen as being insufficient by Dietrich Brandis, who went on to become the inspector general of forests. He opposed it because it allowed for the exercise of existing rights by local or forest-dwelling communities, while there was no clarity on the notion of an existing right in the law. In drafting the rules for the 1865 act, Brandis recommended that the approach be one of 'regulating, commuting and extinguishing existing rights.' He wanted to establish the state's absolute property right in forest areas and called for a fresh law to be made, which went on to become the Indian Forest Act of 1875.⁵³

To assert complete state control in forest areas, it was Brandis who suggested creating a difference between privileges and rights. Privileges, he stated, would not require to be legislated while rights would require legislative recognition. Noting that it would practically be unfeasible to eliminate all forest-dwelling communities rights to their forests, he thought privileges could provide a framework where the property right would remain with the state while allowing the exercise of a few privileges at the colonial state's discretion.⁵⁴

⁴⁹ Section 2 of the Indian Forest Act, 1865.

⁵⁰ Ramchandra Guha and Madhav Gadgil, *This Fissured Land- An Ecological History of India*, (University of California Press, 1992).

⁵¹ Arun Bandhopdhyay, 'The Colonial Legacy of Forest Policies in India' (2010), *Social Scientist* Vol.38, No1/2 pp 53-76.

⁵² Interview with Vinay Rao, Bangalore, July 2018.

⁵³ *Ibid* 51.

⁵⁴ Akhileshwar Pathak, *Laws, Strategies and Ideologies-Legislating Forests in Colonial India*, (Oxford University Press, 2002).

This legal concept of distinguishing between privileges and rights is an integral part of the discourse that guides forest governance in independent India. An example of this can be seen in protected areas, where forest rights are considered privileges whose recognition is dependent on the discretion of the local forest and wildlife bureaucracy.⁵⁵

The forests in the Indian Forest Act, 1875, were categorized into three types. First, were special forests which were conserved exclusively for the interest of the market as repositories of timber. In special forests the state had complete control. The second category of forests were ordinary forests where some rights of local communities could be exercised. The third category was of district forests which were exclusively for the use of forest-dwelling communities. This categorization of forests remained and went on to be renamed as reserved for special forests, protected for ordinary forests, and village forests to describe district forests in the later versions of this law.⁵⁶

The shift in the legal language from privileges to rights emerged as Baden-Powell, an expert in forest laws during the colonial period, adopted the European legal approach to Indian forests.⁵⁷ In doing so, he recognized customary rights of communities living in these areas similar to an easement right. Forest-dwelling communities however could not own forest areas. The rights in the form of easement rights were to be settled in the case of establishing the forest area as a special forest.⁵⁸

The legal mechanism of the settlement of rights was where existing rights were either recognized or regulated based on the discretionary power of the forest-settlement officer. A forest-settlement officer is mandated with the task of settling forest rights in an area to be categorized as a regulated forest space. The process of settlement of forest rights continues to inform the operationalization of forest laws in independent India.⁵⁹

Baden-Powell had clearly argued that the right of the user of the forest would never be a proprietary right. The Madras Presidency however was in favor of including a co-ownership

⁵⁵ Ashish Kothari, Neera Singh and Suri Saloni, *People and Protected Areas: Towards Participatory Conservation in India*, (Sage Publications, 1996).

⁵⁶ Indian Forest Act, 1875.

⁵⁷ Akhileshwar Pathak, *Laws, Strategies and Ideologies-Legislating Forests in Colonial India*, (Oxford University Press, 2002).

⁵⁸ *Ibid* 57.

⁵⁹ *Ibid* 57.

model for forest areas. While the forest laws recognized rights in certain types of forests, forest-dwelling communities could never exercise proprietary rights; this was a bone of contention among many Adivasi communities and was the cause of rebellions against the colonial state.⁶⁰

Baden-Powell in his book *A Manual of Jurisprudence for Forest Officers* elaborates on the role of forest officials which offers a glimpse into the expectations placed on them as regulators of rights and privileges during this period.

The great variety of tasks which even this brief sketch shows to be imposed by the State management of forests, obviously necessitate a special service of forest officers, who constitute at once a forest police for protection and surveillance; a managing agency to handle the estates, keep their accounts, and realize their revenues; and a professional staff to direct and carry out works of utilization, regeneration, and improvement. Such a service needs to be organized, to be vested by law with certain powers of arresting offenders, interposing to prevent offences, and demanding help in the case of fire or other danger.⁶¹

The administrative responsibility of forest officers is all encompassing with the dual role of policing the exercise of rights and privileges whilst managing the estate and resources generated from the forest.

The Forest Policy of 1894 put in place a system of regulation of rights and restriction of privileges akin to the process of settlement of rights with the objective of public interest in mind. It reinforced the importance of the forestry service as a regulator in forest areas. It further categorized the forest areas into forests which were to be preserved on climatic and physical grounds, forests for the exclusive use of timber, minor forests where forest-dwelling communities could exercise some rights and pasture lands for the purpose of grazing.⁶²

⁶⁰ Ramchandra Guha, 'The Past and the Future of Indian Forestry' in *Deeper Roots of Historical Injustice: Trends and Challenges in the Forests of India*, (Rights and Resources Initiative, 2012), <https://rightsandresources.org/wpcontent/uploads/2014/01/doc_5589.pdf> accessed on April 8th, 2019.

⁶¹ B.H Baden Powell, *A Manual Of Jurisprudence For Forest Officers: Being A Treatise On Forest Law and the Branches of General Civil And Criminal Law which are Connected with Forest Administration with a Comparative Notice of the Chief Continental Laws* (Superintendent of Government Printing in India, 1882)

⁶² Indian Forest Policy, 1894.

The impact of the 1894 policy on forest-dwelling communities is aptly captured in the Dhebar commission report which was the report by the first commission on Scheduled Areas and Scheduled Tribes in independent India, it states:

It was only in 1894 that forest officials seriously appeared on the scene and claimed authority to limit and regulate tribal rights in favour of the rights of government.⁶³

The 1894 policy was the definitive moment where the forest officials emerged as a regulator and mediated the exercise of forest rights and privileges in the areas.

The regime of dispossession can be clearly seen during this period with the willingness of the state to take control over forest areas for economic purposes like access to timber and minerals at the cost of dispossessing the forest-dwellers. The dispossession occurs through the legal mechanism of rights, privileges, and their settlement. Interestingly, the regime of dispossession in forest areas were accompanied by a legal structure that supported the right to self-determination of forest-dwelling communities, particularly scheduled tribes.⁶⁴ This can be seen in the drafting of the Government of India Act,1935.

Lawrence John Lumley Dundas, the chief architect of the Government of India Act, proposed a category of areas called excluded and partially excluded areas. These were areas where British laws or laws of the empire were not applicable, and if they were to apply, they were to be customized to the specific cultural context of forest-dwelling communities. This state of exception in the applicability of laws can be seen as a mode of recognizing indigenous communities right to self-determination with the absence of the formal law which makes way for the customary.⁶⁵

Penetration of the colonial state in these areas did occur to regulate customary practices which were seen as being against the virtues of that time. The Kondh community in Odisha, for instance were subject to the banning of their customary practice of shifting cultivation

⁶³ National Commission for Scheduled Tribes, First Report (2004-2005,2005-2006) < https://ncst.nic.in/sites/default/files/documents/ncst_reports/first_annual_report_of_ncst/PART%20I%20-%201st%20Report%20NCST%202004-20059484175791.pdf> accessed on January 14,2021.

⁶⁴ Scheduled Tribes refer to tribes which have been listed for protection under article 342 of the Indian Constitution.

⁶⁵ J.Marshall Cornwall, 'Essays, The Memoirs of Lawrence, Second Marquess of Zetland' (1957) The Geographical Journal. 123(3):409-409.

which was declared illegal. This decision of banning swidden agriculture was informed by the science of forestry too. The science of forestry then had declared that swidden agriculture would cause deforestation.⁶⁶

The British Parliament justified the decision to create excluded areas on three main grounds. The first ground was one of "culturally distinct primitive identity," the second was that of "protection from exploitation by the mainstream," and the third was "development" of the tribes, all of which supported the continuation of a policy of isolation of the "hill tribes."⁶⁷ Excluded areas were seen as difficult geographies to govern as they were mostly forested and viewed by the administration as better left untampered.

The colonial encounter saw the remaking of custom as Neeladri Bhattacharya argues in his extensive study of customary law in Punjab where the colonial government was preoccupied with the conflicting goals of improving native institutions while preserving them. In the case of excluded areas preservation was achieved by absence of the colonial state and efforts to document as well as codify custom. Improvement occurred by attempts to ban certain customary practices or attempts to understand them.⁶⁸

The banning of swidden agriculture continues in independent India as well. Customary practice at this time was regulated in a manner that it erased customary institutions that supported these practices. However, the colonial government was equally invested in understanding custom as ethnographers began to engage with village elders to document practices. The documentation and understanding of custom gave forest-dwelling communities agency in making space for their culture and practices within the administration of the colonial state, though this was not always an empowering experience as it facilitated the regulation and codification of custom.⁶⁹

⁶⁶ Felix Padel, *The Sacrifice of Human Being: British Rule and Kondhs in Odisha*, (Oxford University Press, 2001).

⁶⁷ Namita Wahi and A. Bhatia, *The Legal Regime and Political Economy of Land Rights of Scheduled Tribes in the Scheduled Areas of India*, (Centre for Policy Research, New Delhi, 2018).

⁶⁸ Neeladri Bhattacharya, 'Remaking Custom: The Discourse and Practice of Colonial Codification' in R. Champalakshmi and S. Gopal (Eds) *Dissent and Ideology: Essays in Honour of Romila Thapar* (Oxford University Press, 1996).

⁶⁹ *Ibid* 68.

In a session of the British parliament on 25th February 1936, Lawrence John Lumley is seen providing the following justification for excluding these areas, he states:

Considerable tracts of land in India are inhabited by aboriginal people who require a simpler form of government.⁷⁰

Self-determination was seen as a way to enable these communities to govern in accordance with their customary practices, which were viewed as being primitive or backward.

One dominant justification for the creation of excluded areas was the need for a simpler form of government alongside the need for recognition of customary governance systems of forest-dwelling communities enabled by the non-interference of formal law. As was observed by Lawrence Lumley Dundas:

It is inhabited by very primitive peoples, living in a heavily wooded and mountainous country. For generations past, they have been administered under their hereditary Chiefs.⁷¹

Customary institutions were present to deal with the everyday problems experienced by forest-dwelling communities. As interviews with the Dongria Kondh in Niyamgiri reveal, deliberative practices and institutions continue to thrive even today with a wide array of committees and village level units of decision-making. These customary institutions existed for centuries prior to British rule. These institutions underwent complex alterations with the desire for codification of customary practice and the ways in which the colonial state interfered in the practice of custom.⁷²

Apart from the need to preserve customary governance systems this-governance by exclusion was motivated by the colonial states aspiration to protect the communities from people of the plains, Lumley states:

⁷⁰ British Parliamentary proceedings, *HL Deb 25 February 1936 vol 99 cc734-43* <<https://api.parliament.uk/historic-hansard/lords/1936/feb/25/government-of-india-excluded-and>> accessed on April 8th, 2019.

⁷¹ British Parliamentary proceedings, *HL Deb 25 February 1936 vol 99 cc734-43* <<https://api.parliament.uk/historic-hansard/lords/1936/feb/25/government-of-india-excluded-and>> accessed on April 8th, 2019.

⁷² Patrik Oskarsson and Siddharth Sareen, 'Adivasiness as Caste Expression and Land Rights Claim-Making in Central-Eastern India', (2020) *Journal of Contemporary Asia*, 50:5, 831-847.

In their simplicity, they are very liable to suffer when they come into contact with the more sophisticated people from the plains. Measures should be taken to protect them from their sophisticated neighbors.⁷³

Lumley likened the effect of allowing exploitation by the plains people similar to putting an innocent lamb and the rapacious wolf into one cage. This approach to governing areas with Adivasi or forest-dwelling communities continues to influence policy in independent India. Within the architecture of creating zones of exception, self-determination was recognized. The British state did interfere in activities related to access to resources in forest areas or customary practices. In most cases, the forest laws did not extend to excluded areas.

The political economy of extraction with the mining of coal, iron-ore and slate beginning in colonial India brought with it enabling legislation for compulsory acquisition. Land bearing minerals was acquired under the Land Acquisition (Mines) Act, 1885 which had a separate land acquisition process without the need for compensation. It was governed by the power of the district magistrate to provide a declaration of acquisition and the mining rights vested with the government after acquisition. A pertinent provision of this Act reads as follows:

that land is needed for a public purpose or for a Company, it may, if it thinks fit, insert in the declaration a statement that the mines of coal, ironstone, slate or other minerals lying under the land or any particular portion of the land, except only such parts of the mines or minerals as it may be necessary to dig or carry away or use in the construction of the work for the purpose of which the land is being acquired.⁷⁴

The uneasy co-existence of the regime of dispossession in the form of forest laws, compulsory land acquisition for mining alongside areas designated as excluded or partially excluded areas frames the site of struggle for claims of forest rights by forest-dwelling communities in the colonial period.

This section highlights the key legal concepts that configured the regime of dispossession in the colonial period. They are the distinction of rights and privileges, the distinction between

⁷³ British Parliamentary proceedings, *HL Deb 25 February 1936 vol 99 cc734-43* <<https://api.parliament.uk/historic-hansard/lords/1936/feb/25/government-of-india-excluded-and>> accessed on April 8th, 2019.

⁷⁴ Section 3 of the Land Acquisition (Mines) Act, 1885.

rights and ownership and the putting in place of the legal process of settlement of forest rights.

The regime of dispossession functions on the categorization of forest areas where some areas are under exclusive state control and other areas where the rights of the forest-dwelling communities are recognized. I chronicled the creation of excluded areas as zones of exception from the application of laws or applied in modification to suit the customs of those communities. These legal concepts permeated and influenced the forest governance structures and the making of forest laws in independent India.⁷⁵

3. The Making of Forest Laws and Scheduled Areas in Independent India

When India became independent it was a moment engrossed in the mammoth task of nation-building. An integral part of this process was the drafting of the Indian constitution. The constituent assembly debates provide insights into how independent India dealt with what came to be labeled as the "Tribal Problem".⁷⁶

Jaipal Singh Munda who was a Munda Adivasi from Jharkhand and the head of the Adivasi Mahasabha a political organization representing Adivasi concerns was the most vocal representative in the assembly on the interests of Adivasis.⁷⁷ A resolute and sharp orator, Jaipal Singh was instrumental in designing the legal architecture to protect the land and other rights of Adivasi communities in independent India.

The arguments in the constituent assembly debates reveal that two dominant accounts dictated the approach in handling the "Tribal Problem". They are 'Identity-based Isolation' or 'Development based integration'. Both of which were the competing narratives proposed by anthropologists Verrier Elwin and G.S Ghurye whose work influenced discussions on the designing of the legal architecture.⁷⁸ Verrier Elwin's work supported the account of protection

⁷⁵ Mahesh Rangarajan, *Nature and Nation: Essays in Environmental History* (Permanent Black, 2015).

⁷⁶ The tribal problem refers to the question of whether they should be protected through isolation or integrated into the mainstream. As stated in the Constituent Assembly debates On November 4th, 1948, Volume VII. <<http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C04111948.html>> last accessed on April 8th, 2019.

⁷⁷ Pooja Parmar, 'Undoing Historical Wrongs: Law and Indigeneity in India.' (2012) *Osgoode Hall Law Journal* 49.3 pp. 491-525.

⁷⁸ Namita Wahi and A. Bhatia, *The Legal Regime and Political Economy of Land Rights of Scheduled Tribes in the Scheduled Areas of India*, (Centre for Policy Research, New Delhi, 2018).

of Adivasi communities through policies of isolation and G.S Ghurye's work pushed for the integration of Adivasis into the mainstream socially and economically.⁷⁹

The relationship between the nation-state and Adivasi communities as ideally imagined was one of negotiated sovereignty with the existence of tribal republics that enjoy the right to self-determination. Jaipal Singh Munda stated in the constituent assembly on the aspect of sovereignty:

Hereafter, there will be two Flags, one Flag which has been here for the past six thousand years, and the other will be this National Flag which is the symbol of our freedom as Pandit Jawaharlal Nehru has put it. This National Flag will give a new message to the Adivasis of India that their struggle for freedom for the last six thousand years is at last over, that they will now be as free as any other in this country. I have great pleasure, Sir, in accepting and acknowledging on behalf of the Adivasis of India the Flag that has been presented to us by Pandit Jawaharlal Nehru.⁸⁰

The co-existence of the nation state and areas where the right to self-determination of Adivasis was recognised is seen in the Nehruvian approach to tribal governance. Nehru developed five principles to guide policy in relation to Adivasis which was known as the Panchsheel Policy. In the Panchsheel Policy he referred to the need to give forest-dwelling communities the right to develop in accordance with their own genius, respect tribal rights to land and forests and stressed on the importance of preventing over-administration of tribal areas. The exercise of the right to self-determination was relational to the nation-state whose influence was restricted based on these principles. As Pooja Parmar elucidates in her paper it is where Adivasis would be part of the nation-state without letting go of their autonomy in these tribal republics.⁸¹

⁷⁹ G.S Ghurya, *The Scheduled Tribes of India* (Routledge,1980) and Verrier Elwin, *A Philosophy of NEFA* (Reprinted by Isha Books, 2009)

⁸⁰ Speech by Jaipal Singh Munda in *Debates of the Constituent Assembly of India* (vol IV ,22 July 1947) at 751

⁸¹ Pooja Parmar, 'Undoing Historical Wrongs: Law and Indigeneity in India.' (2012) *Osgoode Hall Law Journal* 49.3 pp. 491-525.

The exercise of designing the legal architecture for Adivasi areas involved considering the colonial categories of partially and fully excluded areas. This legal category was re-examined, and the identity of Adivasis was legally categorized as Scheduled Tribe.⁸²

In the summary of recommendations by the committee on excluded and partially excluded areas which was a sub-committee headed by Jaipal Singh Munda, it was stated:

It will be necessary to provide for the exclusion of unsuitable legislation in such matters as land, village management, and social customs in certain areas inhabited predominantly or to an appreciable extent by tribals. These areas will be known as scheduled areas. In their recommendation specific to the united provinces stated that there should be a provision in the constitution preventing the alienation of land to non-tribals in these areas.⁸³

Excluded and partially excluded areas went on to be recognized as Scheduled Areas in schedule five of the constitution. The recommendations by the sub-committee did not go on to shape the governance structure in scheduled areas entirely. The primary reasons for the dilution were the extension of the executive power of the state to these areas, accompanied with limited powers of the Tribes Advisory Council which was to play a vital role in ensuring autonomy in schedule areas. In the constituent assembly Jaipal Singh Munda described the shift in power:

I find that this-new proposed Fifth Schedule has, somehow or other, perhaps without meaning it, emasculated the Tribes Advisory Council. The whole pattern of the original draft was to bring the Tribes Advisory Council into action. It could initiate, originate things, but, somehow or other, the tables have now been turned. The initiative is placed in the hands of the Governor or Ruler of the State.⁸⁴

The fifth schedule in its eventual form in the constitution had safeguards in the form of protection from the alienation of land, where the Governor at the sub-national level was asked to pass laws where land cannot be sold from a tribal to a non-tribal.⁸⁵ The Governor now enjoyed several powers to oversee Scheduled areas, where the Governor had the right to amend laws specifically to suit the local context or render laws inapplicable to these areas.

⁸² Staff Writer, 'The Scheduled and Tribal Areas.' (1977) Indian Journal of Public Administration 23, no. 3: 821–36.

⁸³ Constituent Assembly debates on scheduled areas, <http://khadc.nic.in/acts_rules_regulations_bills/Constituent%20Assembly%20Debate%20relating%20to%206th%20Schedule_excerpts_.pdf> last accessed on April 8th, 2019.

⁸⁴ *Ibid* 83.

⁸⁵ Article 244 of the Indian Constitution.

The Tribes Advisory Council was to merely advise the Governor in making these decisions. The constitution now mandates that the council be consulted when land from scheduled areas was being transferred to a non-tribal.⁸⁶

Despite these constitutional safeguards the regime of dispossession in the form of forest laws, which existed under British rule were now made applicable in scheduled areas in independent India. In a report on the history of forest laws in India by C.R Bijoy an experienced forest rights activist, it states:

Vast areas under the control of the princely states (the Residency Areas) had their own forest laws, which were frequently modeled after the British, but often incorporated their own systems of rights. After independence, with the accession of the princely states to the Union and the amalgamation of the excluded and partially excluded areas, British forest laws were — often quite literally by the stroke of a pen — extended to most of these regions overnight.⁸⁷

Forest laws adopted in independent India were similar to the colonial legal framework. The colonial Indian Forest Act, 1927 was adopted in independent India. The forests were mostly under state control. They relied on the legal concept of privileges and at times recognized rights in exceptional circumstances.⁸⁸ The categories of forest land under the Act were reserved forests which were completely under state control, protected forests where some forest rights could be exercised and village forests where forest rights were recognized.⁸⁹

The exercise of customary rights like grazing were criminalized as forest offenses in reserve and protected forests.⁹⁰ The legal regime of dispossession over forests now extended to scheduled areas which were meant to be areas where the rights to self-determination of Adivasis were to be exercised. Reflecting on this decision of the sovereign Indian state, O. Springate-Baginski et al., in their paper on redressing historical injustice state:

Rather than recognizing the colonial injustice and overhauling structures, there was instead a strong re-affirmation of colonial imperatives. Post-Independence, state forestry policies and

⁸⁶ Article 244 (1) of the Indian Constitution, The TAC consists of a maximum of twenty members of which three-fourth will be Ministers in the legislative assembly belonging to a Scheduled Tribe of the state. It has the power to advise the governor on matters pertaining to the welfare and advancement of the STs in the state.

⁸⁷ C.R Bijoy, Shankar Gopalakrishnan and Shomona Khanna, 'India and the Rights of Indigenous People' (2010) Published by Asia Indigenous Peoples Pact.

⁸⁸ Chhatrapati Singh, *India's Forest Policy and Forest Laws*, (Natraj Publishers, 2000).

⁸⁹ *Ibid* 88.

⁹⁰ As per the Indian Forest Act, 1927.

land annexation processes continued little changed, illustrated in the continued use of the 1927 Indian Forest Act (to this day). The 1952 Forest Policy begins: '[T]he fundamental concepts underlying the existing forest policy still hold good ...' This reflects a high degree of continuity in the priorities of the new political and commercial power elites.⁹¹

The change from rights and privileges to rights and concessions in the 1952 forest policy resulted in heavy regulation of rights and permitted exercise of privileges with the payment of a fee.

The forest laws tilted towards concentrating power in the hands of the forest department at the cost of eroding the rights of forest-dwelling communities. The Bhuria committee report which was a report to examine the status of scheduled areas and scheduled tribes in 1995 observed that "the approach in general was towards progressive down gradation of rights".⁹²

The regime of dispossession in forest areas is deepened by the demands placed on it by the developmental Indian state. As the constitution was being drafted, there were differing ideas of development at play among the influential members of the constituent assembly and key leaders of the freedom movement. Mohandas Gandhi pushed for the idea of development, which relied on the principle of self-sufficiency and villages being the unit for making decisions on development. The socialist idea of state-led development defined Nehru and Ambedkar's approach where development had to be driven by industrialization with welfare of the citizen in mind.⁹³ The Nehruvian approach of the Panchsheel Policy conflicted with the demands of nation-building which was a land intensive process of the construction of dams and other infrastructure.⁹⁴

The formation of areas as scheduled areas was accompanied by the nationalization of natural resources as observed in the constituent assembly debates. The constituent assembly debates reflect the development of the principle of permanent sovereignty of natural resources in International Law. As decolonization was underway, post-colonial states proclaimed this principle of utmost importance to assert control over their resources to

⁹¹ O. Springate-Baginski et al, 'Redressing Historical Injustice Through the Indian Forest Rights Act, 2006', Institute for Pro-poor Growth < <http://www.ippg.org.uk/papers/dp27.pdf>> accessed on April 8th, 2019.

⁹² Scheduled Areas and Scheduled Tribes Commission, *Volume I of the Report* (2002-2004)

⁹³ Ramchandra Guha, *Makers of Modern India* (Penguin Books, 2010).

⁹⁴ Atul Kohli, *Democracy and Development in India: From Socialism to Pro-Business* (Princeton University Press, 2009)

exclude foreign interference.⁹⁵ The constituent assembly debates reveal that there was an emphasis on the nationalization of all important resources.⁹⁶

In the constituent assembly debates, statements were made to prevent the privatization of mines and recognized that the center or provincial governments or state-owned corporations could be trusted with the exploitation of resources. The Doctrine of Eminent Domain extended to the forest areas. The alienation of forest land was made possible without consulting the forest-dwelling community unless it was in a scheduled area.⁹⁷

The regime of dispossession in forest areas was reshaped by the need to conserve wildlife. In 1972, the Wildlife Protection Act (WLPA) was enacted, which further categorized forests into national parks, sanctuaries, and community conserved reserves. It put forth a gradient of restriction in the exercise of forest rights similar to the Indian Forest Act, 1927 (IFA) in each category of forest area.

In national parks, existing rights were to be settled, similar to the exercise undertaken in the colonial period so that the area could be declared as inviolate.⁹⁸ In sanctuaries, exceptions were made, and certain rights were recognized and could be exercised. In community conserved areas, the forest-dwelling community could make decisions on the question of forest rights. The WLPA became an instrument which furthered the dispossession of forest-dwelling communities.

In 1980, to reduce forest land diversion for development projects, the Forest Conservation Act (FCA) was passed. This Act required that the center's decision on forest diversion was to be made through the Ministry for Environment, Forests and Climate Change in a forest clearance process; this was seen as an effective way to manage the large-scale diversion that took place before 1980 under the sub-national governments.⁹⁹

⁹⁵ Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, (2011) Northwestern Journal of Human Rights 54.

⁹⁶ Constituent Assembly Debates, Volume IX < <https://indiankanoon.org/doc/1201813/>> accessed on January 16 2020.

⁹⁷ Chhatrapati Singh, *India's Forest Policy and Forest Laws*, (Natraj Publishers, 2000).

⁹⁸ Dilip Kumar, 'Defending the Green Realm: The Forest Conservation Act 1980 of India in Theory and Practice' (2016) Unpublished ISEC Monograph 44.

⁹⁹ *Ibid* 97.

This law was passed after the forty second constitutional amendment in 1976. In this amendment the power to legislate over forests which initially rested with the sub-national governments was shared between the sub-national government and the national government. This was made possible by placing forests as a subject in the concurrent list which contains a list of subjects where both the state and central government can legislate upon.

4. Glimmer of Hope: The recognition of the rights of forest-dwelling communities

The early phase of India's independence was marked by forest laws which enabled absolute state control of forest areas . The National Forest Policy of 1988 was a welcome departure from this approach as it for the first time recognized the role of forest-dwelling communities in the conservation of forest areas and recognized their rights to forest produce. The policy in this respect reads as follows:

The life of tribals and other poor living within and near forests revolves around forests. The rights and concessions enjoyed by them should be fully protected. Their domestic requirements of fuelwood, fodder, minor forest produce, and construction timber should be the first charge on forest produce.¹⁰⁰

The recognition of the role of forest-dwelling communities in conservation within the forest policy of 1988 ushered in changes in the forest governance architecture to involve communities in conservation. This led to the joint forest management program where committees were set up consisting of forest-dwelling communities and the forest department to conserve forest areas. However, it was implemented in a manner that reinforced control by the forest department.¹⁰¹

Article 244 of the Indian Constitution recognizes certain areas as scheduled areas based on the proportion of the ST population and backwardness. The right to self-determination was not fully recognized in these areas as land alienation was mediated through the Tribes Advisory Council and not the village assembly. The Bhuria committee was then set up to examine the question of decentralization and self-rule in scheduled areas. The 73rd

¹⁰⁰ National Forest Policy, 1988.

¹⁰¹ O. Springate-Baginski et al, 'Redressing Historical Injustice Through the Indian Forest Rights Act, 2006', Institute for Pro-poor Growth < <http://www.ippg.org.uk/papers/dp27.pdf>> accessed on April 8th, 2019.

constitutional amendment passed in 1992 was focused on decentralization of governance to the village level.¹⁰² The Bhuria committee was appointed to provide recommendations to extend this amendment to scheduled areas.¹⁰³

The Bhuria committee recommendations culminated in drafting of the Panchayat Extension to Scheduled Areas Act, 1996 (PESA). PESA ensured that the Gram Sabha was enshrined with powers to govern scheduled areas in accordance with their customs and traditions. This law aimed to enable the decentralization of decision making and self-rule. This provision in the Act highlights the extent to which power was conferred with the village assembly on questions of development and governance of natural resources.

The Village Assembly has the following powers:

- (i) To safeguard and preserve the
 - (a) traditions and customs of the people, and their cultural identity,
 - (b) community resources, and
 - (c) the customary mode of dispute resolution
- (ii) carry out executive functions to
 - (a) approve plans, programs, and projects for social and economic development.
 - (b) identify persons as beneficiaries under the poverty alleviation and other programs.
 - (c) issue a certificate of the utilization of funds by the Panchayat for the plans; programs, and projects¹⁰⁴

Self-determination within the ambit of PESA included the need for approval by the Gram Sabha on plans for social and economic development. The Gram Sabha is seen as the deliberative node where decision-making takes place within the village. PESA recognizes the role of customary law and institutions of dispute resolution.¹⁰⁵ The Gram Sabha is empowered to revive and safeguard these customary practices. This progressive law was not appropriately

¹⁰² Jaganath Pathy, 'Panchayati Raj and Decentralisation of Political Power' (1980) *Social Scientist*, Vol. 8, No. 9 pp. 36-41.

¹⁰³ Scheduled Areas and Scheduled Tribes Commission, *Volume I of the Report* (2002-2004).

¹⁰⁴ Section 4(m) of the Panchayat Extension to Scheduled Areas Act, 1996.

¹⁰⁵ Rao, Vijayendra, and Paromita Sanyal, 'Dignity through Discourse: Poverty and the Culture of Deliberation in Indian Village Democracies.' (2010) *The ANNALS of the American Academy of Political and Social Science* 629, no. 1: 146-72.

implemented in most parts of the country. Sub-national governments were asked to draft rules to implement this law, which has not been done in many states.¹⁰⁶

The overlap of scheduled areas and forest areas is considerable. Forty per cent of scheduled areas are covered with forests.¹⁰⁷ This overlap has created a conflict of decentralization and aggressive state control supported by the Indian Forest Act, 1927. Thus, the conflict of laws in these areas in terms of decentralization and state control prevented the appropriate implementation of PESA.

The legal protection against alienation of land to non-tribals in Scheduled Areas was tightened after the Samata Judgement in 1997. In the Samata Judgement, the Supreme Court ruled that land in scheduled areas could not be sold to non-tribals, including private mining companies.¹⁰⁸ This case was an instance where PESA has been used in protecting land in scheduled areas.

Independent India adopted some of the colonial legal concepts that recognized the state's rights to resources in forests, driven by the needs of a developmental state and laws that were modeled on an exclusionary model of conservation. Thus, self-determination over forest land was a tricky proposition. The historical injustice referred to by forest-dwelling communities is located in this conflict. Rinjo Sikaka, a prominent Adivasi leader and activist in Odisha in an interview stated:

Historical injustice is what was done in the colonial period of repressive forest laws where our right to forest land was eliminated. The Indian state adopted similar laws, but we have been able to engage with the state to change these laws, and the outcome was PESA, and now the Forest Rights Act, 2006.¹⁰⁹

While the Indian state adopted a repressive forest regime, it has been on an arc of progressive decisions by recognizing forest-dwelling communities rights to their lands and resources. The challenge has been the contested co-existence of progressive laws like Panchayat Extension of Scheduled Areas Act, 1996 (PESA) and the national forest policy of 1988 alongside the

¹⁰⁶ E.Venkatesu, *Democratic Decentralization in India* (Routledge, 2016).

¹⁰⁷ Ministry of Tribal Affairs, *Report of the High Level Committee on Socio-economic, Health and Educational Status of Tribal Communities in India* (2014) < <https://www.kractivist.org/wp-content/uploads/2014/12/Tribal-Committee-Report-May-June-2014.pdf>> accessed on May 28 2020

¹⁰⁸ Samatha Vs The State of Andhra Pradesh and Others Appeal ((civil) 4601-02 of 1997).

¹⁰⁹ Interview with Rinjo Sikaka in Niyamgiri on February 2020.

regime of dispossession consisting of the Indian Forest Act,1927 and Wildlife Protection Act,1972.

The forest bureaucracy and the district administration that implement these laws prioritize the repressive forest laws over progressive laws like PESA. The primary reason for such prioritization has been the states need to harness forest land for large scale development. This section has shown the complexity of multiple legal orders that frame decision making in forest areas. Competing priorities of development, conservation, and rights are negotiated continuously in land conflicts within forest areas.

4.1 The Regime of Dispossession in Forest Areas and the recognition of the Right to Self-Determination

Before I delve into the making of the Forest Rights Act,2006 which introduced a rights-based approach to forest management and governance, I would like to take stock of the nature of the regime of dispossession and recognition of the right to self-determination in India this far.

In the table below, I identify the regime of dispossession and the categorization of forest areas that determine the nature and extent of rights of forest-dwelling communities that can be recognized. I will contrast this regime of dispossession with the laws that support the right to self-determination.

FOREST LAW	REGIME OF DISPOSSESSION	CATEGORIZATION OF FOREST AREAS
Indian Forest Act,1927	It is characterized by the categorization of forest areas to restrict the exercise of rights. The legal concept of the settlement of rights was enabled. The purpose was to increase state control over forest areas so they could be harnessed for commercial interests. Customary rights of forest-dwelling communities like grazing, swidden agriculture, and others were criminalized as forest offenses. ¹¹⁰	Forest Areas were categorized into Reserved forests where there was absolute state control, Protected forests where some forest rights could be recognized, and village forests where local communities had control over forest management. This was never appropriately implemented.
Wildlife Protection Act,1972	The need to conserve areas and create zones without any human interference was seen as the priority. This increased state control over forest areas and created an additional arm to the forest bureaucracy, exclusively concerned with wildlife protection. It banned hunting, grazing, and the use of fire in protected areas. In establishing national parks, it required forest-dwelling communities to relocate from these areas and used the settlement of rights to commute or extinguish their rights in these areas. ¹¹¹	Forest Areas were further categorized as National Parks where no rights were recognized, sanctuaries where some rights of forest-dwelling communities were recognized, and community conserved areas where the forest-dwelling community had control over forest management. Similar to village forests, this provision was seldom implemented.

Table 3: Table of Forest Laws and the Regime of Dispossession.

4.1 Table on the Regime of Dispossession continued

FOREST LAW	REGIME OF DISPOSSESSION	CATEGORIZATION OF FOREST AREAS
Forest Conservation Act,1980	This Act was passed to regulate the acquisition of forest land for development projects. The decision-making process was dependent on the Ministry of Environment, Forests, and Climate Change in granting clearance for such acquisition. This centralized decision making on forest diversion and local communities were not incorporated in the decision-making process. ¹¹²	It did not categorize forest areas.

Table 3: Table of Forest Laws and the Regime of Dispossession.

The regime for dispossession in forest areas has institutionalized the non-recognition of forest rights of forest-dwelling communities. This non-recognition enables dispossession of forest land by the developmental Indian state for economic purposes. The regime of dispossession ensures compliance by force and criminalization of the exercise of forest rights. The non-recognition of rights in forest areas delegitimizes the claims of forest-dwelling communities to forest land. They were termed as encroachers in a judgment by the Supreme Court, which has ruled for the eviction of forest-dwelling communities' as recent as 2019 . The legal developments of rights deprivation have framed the regime of dispossession in forest land.¹¹³

¹¹⁰ As per the Indian Forest Act,1927.

¹¹¹ As per the Wildlife Protection Act,1972.

¹¹² As per the Forest Conservation Act,1980.

¹¹³ Ishan Kukreti, 'Does the Supreme Court Order mean eviction of Tribal's right away?' *Down to Earth*, (Delhi,22 February,2019)

These laws which enabled dispossession were contrasted by legal developments that supported the right to self-determination. The right to self-determination has been recognized in International law during the decolonization process as :

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social, and cultural development. Every state has the duty to respect this right in accordance with the provisions in the Charter.¹¹⁴

A similar argument was made in the constituent assembly debates by Jaipal Singh Munda in recognition of Adivasi's rights to decide the course of their future. For this chapter, the right to self-determination will be understood as the right to freely determine and pursue economic, social, and cultural development. The unit which could enjoy this right to self-determination was the subject of a heated debate in the constituent assembly, as the proposition of mini tribal republics was seen as an attempt to separate the Adivasis from the nation as was being imagined.

The Right to Self-Determination as forest-dwelling communities described it does not entail the rejection of the formal state but rather a well-crafted modality of engagement accompanied with the right to autonomy and self-government.¹¹⁵ The laws relating to the right to self-determination are envisioned as the right to self-government and the right to decide without external interference which was partially put in place in Scheduled Areas and PESA's provisions.

¹¹⁴ Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, (2011) *Northwestern Journal of Human Rights* 54.

¹¹⁵ *Ibid* 68.

LAWS RECOGNIZING SELF-DETERMINATION	NATURE OF SELF-DETERMINATION RECOGNIZED
Article 244 of the Indian Constitution recognizes areas as Scheduled Areas. In these areas, the Governor of the State or sub-national unit can amend laws to suit the specific local context and prevent land alienation to non-tribal communities. This is to be done in consultation with the Tribes Advisory Council.	The Right to Self-Determination is seen in the decision making around questions of applicability of laws and alienation of land. However, it does not recognize the rights of forest-dwelling communities to determine their economic, social, and cultural development freely. This limitation was present in the early state formation process, and the central Indian state did not want to encourage secession movements in Adivasi areas.
PESA,1996 recognized the Panchayat and village assembly's right to decide on issues of natural resource governance and economic development. As seen in the earlier section.	The right to self-determination was recognized to a great extent in this law. As communities in these areas had significant decision-making authority to determine their economic, social, and cultural development. This law, however, was not adequately implemented.

Table 4: Laws relating to the Right to Self-Determination.

The contrast of the right to self-determination with the regime of dispossession in forest areas contextualizes the discussions that led to the FRA's drafting. The need for the FRA was embedded in the need to recognize forest rights and extend the right to self-determination to forest areas which were non-scheduled . The FRA was an ambitious legal instrument that sought to reconfigure and democratize forest governance. In the next section, I will examine the key provisions of the Forest Rights Act,2006, to see how it tries to resolve this tension between the regime of dispossession and the right to self-determination.

5. The Forest Rights Act, 2006 (FRA)

The FRA was a critical juncture in the development of forest laws. It challenged the legal concept of rights and privileges or rights and concessions by firmly recognizing the rights of forest-dwelling communities. In its preamble, the Act states that it seeks to correct the historical injustice experienced by forest-dwelling communities whose forest rights over ancestral lands was not recognized in the process of consolidation of state forests in the colonial period as well as in independent India.¹¹⁶ This is a decisive shift from earlier laws that dealt with forests. The FRA was a product of sustained protests by forest-dwelling communities, who demanded their rights to be legally recognized.¹¹⁷

The demand for a new law came from Campaign for Survival and Dignity, a campaign which brought together forest-dwelling communities from across the nation. The campaign saw an opportune moment to make its claim for a new law when the common minimum program of the Indian National Congress the leading political party during this time, promised to settle the question of forest rights. As Congress came into power in 2004, they began to work on a law that would provide a framework for recognizing forest rights.

The law was initially drafted by the then National Advisory Council which was a group consisting of bureaucrats, activists and intellectuals who advised the government on various laws. The draft was then presented to the Ministry of Tribal Affairs and the Ministry of Environment and Forests. Multiple iterations of the law were discussed among the different ministries. It then went on to be examined by a joint parliamentary committee which recommended the contents of the Act, which was eventually passed in 2006, and its Rules were enacted in 2008.¹¹⁸ The Act has several important provisions, but I will focus on two critical aspects in this chapter. Firstly, the nature of forest rights recognized, and secondly, the governance paradigm that is used to underpin community forest rights.¹¹⁹

¹¹⁶ As per the preamble of the Forest Rights Act, 2006.

¹¹⁷ M. Rajshekhar, 'The Act that Disagreed with its Preamble: The Drafting of the Forest Rights Act' (2012) Unpublished paper. < <https://mrajshekhar.in/on-the-drafting-of-the-forest-rights-act/> > accessed on January 14, 2021.

¹¹⁸ *Ibid* 117.

¹¹⁹ *Ibid* 117.

5.1 Nature of Forest Rights Recognized

The FRA identifies two beneficiaries who can claim rights over forest areas. They are forest-dwelling communities categorized as scheduled tribes and other traditional forest dwellers. There are two types of rights recognized within the FRA. Individual forest rights and community forest rights. Individual Forest Rights (IFR) refer to the right to hold and live on forest land for habitation or self-cultivation. The forest-dwelling communities have the right to tenurial security, but this land cannot be alienated. This limited proprietary right is to prevent the alienation of forest land, which is of ecological importance. Individual forest rights are recognized over a patch of forest land that cannot exceed 4 hectares.¹²⁰

The nature of evidence required for the recognition of individual forest rights is dependent on the category of the beneficiary. The criteria of evidence differ between Scheduled Tribes and Other Traditional Forest Dwellers (OTFDs). OTFD communities are required to provide evidence of having lived and depended on forests for a period of three generations or seventy-five years whereas scheduled tribes do not have to provide such evidence as they make claims for individual forest rights. This has been a challenge for OTFD communities, as the use of forest rights have seldom been recorded. In many instances, the inability to produce concrete evidence of such dependence has caused the rejection of the claims to IFR made by OTFD communities.¹²¹

Community Forest Rights (CFR) are further divided into community forest resource rights and community forest rights. Community forest resource rights refer to the forest-dwelling community's rights to access minor forest produce, recognition of their rights of traditional knowledge, customary use and grazing, among other uses of forest resources.

Community forest resource rights is a legal mechanism to counter the forest offenses identified in the Indian Forest Act, 1927 where access to forest produce was criminalized. The recognition of community forest resource rights has enabled forest-dwelling communities to collect minor forest produce and sell it in the market like honey or medicinal herbs. According

¹²⁰ Section 3 (1) (a) of the Forest Rights Act, 2006.

¹²¹ Section 2 of the Forest Rights Act, 2006.

to Shankar Gopalakrishnan, this was incorporated to ensure the security of their livelihood, which was heavily dependent on forests.¹²²

I will now proceed to examine community forest rights separately as it is seen as one of the powerful provisions of the Act. community forest rights put in place a new governance paradigm requiring the forest bureaucracy to share decision-making power with the forest-dwelling communities on conserving the forests.

5.2 The New Governance Paradigm: Community Forest Rights and democratization of forest governance

Community forest rights are recognized under Section 3 (1) (i) of the FRA, which states as follows:

The right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use;¹²³

While it seems relatively straight-forward in interviews with the drafters of this law, particularly members of the National Advisory Council, the intention that guided this section was democratizing forest governance.¹²⁴

The right to conserve the community forest area was seen as a way for forest-dwelling communities to assert their rights to make forest management decisions in these zones. These were zones where absolute community control existed. The forest bureaucracy would not have jurisdiction or authority to operate in areas where community forest rights were recognized. This was the governance paradigm that underpinned the recognition of this right. However, the governance paradigm has not been achieved except for Mendha Lekha a village in Maharashtra where the forest-dwelling community is managing and conserving a large patch of forest.¹²⁵

¹²² Section 3 (1) of the Forest Rights Act,2006.

¹²³ Section 3 (1) (i) of the Forest Rights Act,2006.

¹²⁴ Interview with N.C Saxena member of the NAC in New Delhi on July 2018.

¹²⁵ Anusha Subramaniam, 'Fortune in the Woods' in *Business Today* (March 18 2012)

<<https://www.businesstoday.in/magazine/features/mendha-lekha-first-village-granted-community-forest-rights/story/22778.html>> accessed on January 14, 2021.

In the initial quote of Shankar Gopalakrishnan, he spoke about consent as a mere procedural requirement in the FRA.¹²⁶ It was the CFR rights which were to recognize the right to self-determination. The right to manage these areas included the right to decide the nature of development that would take place in these areas. This radical possibility was a matter of debate in the drafting of the FRA. The opposition was from the forest department, which believed that the forest-dwelling community would not manage these areas against the threat of poaching.¹²⁷

The drafters saw this governance paradigm as a way to extend the right to self-determination in forest areas which were non-scheduled. It would be more inclusive as it would include forest-dwelling community members who have not been categorized as Scheduled Tribes.

5.3 Limitations of the FRA and Challenges in its implementation

Though the FRA tries to reconcile the regime of dispossession with the right to self-determination, it has its limitations. The primary limitation of the FRA has been the evidentiary criteria for OTFD communities. This evidentiary barrier has left many forest-dwelling communities, who have legitimate rights, rightless. The evidentiary barrier was introduced because land reforms in India did not achieve equitable land redistribution thus landless communities would now claim forest land.¹²⁸

As a conservationist who has filed a case challenging the constitutionality of the FRA stated:

OTFD criteria is nebulous. It just opened the floodgates for many to claim forest land.¹²⁹

There is a struggle at the level of the local bureaucracy in deciphering who are the legitimate claimants to forest rights.

The other limitation of the FRA has been the bureaucratization of the process of recognition of forest rights. The village assembly or the Gram Sabha is mandated to decide on the nature

¹²⁶ Interview with Shankar Gopalakrishnan over email on August 2018.

¹²⁷ Interview with Praveen Bharghav, September 2015.

¹²⁸ Arpitha Kodiveri, 'Narratives of Inclusion and Exclusion: Dalit Rights and the Making of the Forest Rights Act, 2006', Published by The Hindu Center for Politics and Public Policy, <<https://www.thehinducentre.com/publications/policy-report/article8097476.ece>> accessed on January 14, 2021.

¹²⁹ Interview with Praveen Bharghav, September 2015.

and extent of the forest right under the Act. The sub-divisional level committee and the district level committee have a few representatives from the local community and decide on the claim's eventual acceptance or rejection.¹³⁰

This three-tier institutional structure for the scrutiny of the claim has caused undue delay in recognition as much paperwork has to be submitted to apply.¹³¹ Forest-dwelling communities who are unable to afford legal assistance find themselves left in the lurch having to navigate this messy process independently.

Many claims stand rejected for the lack of proper evidence or not meeting the local bureaucracy's benchmark of the right kind of paperwork.¹³² As bureaucratic discretion in forest areas is large, each district I visited in Odisha had its own set of guidelines for interpreting legal evidence and the process for claiming rights. While the FRA was aimed at changing the power asymmetry between the forest bureaucracy and the local community, the recognition of forest rights falls within a bureaucratic trap where the forest bureaucracy has the eventual decision-making power.

As the FRA was enacted, amendments were not made to other forest laws. In a bizarre situation of laws in conflict, the FRA is implemented while the forest laws that recognize state control are enforced simultaneously. In the event of such a conflict of laws, the forest bureaucracy interprets laws in an effort to reconcile them. The FRA's empowering potential is stunted by operating in a space where other laws chip away at its core. This is the unruly legal matrix of forest areas within which the principle of consent gains concrete and practical expression.

¹³⁰ Section 4 of the Forest Rights Act, 2006.

¹³¹ Community Forest Rights Learning and Advocacy Network, *Promise and Performance: Ten Years of the Forest Rights Act in India. Citizens' Report on Promise and Performance of The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, after 10 years of its Enactment* (2016) <www.cfrra.org.in> accessed on January 14, 2021.

¹³² Arpitha Kodiveri, 'Narratives of Inclusion and Exclusion: Dalit Rights and the Making of the Forest Rights Act, 2006', Published by The Hindu Center for Politics and Public Policy, <<https://www.thehinducentre.com/publications/policy-report/article8097476.ece>> accessed on January 14, 2021.

6. The Emergence of the Consent Provision

In this section of the chapter, I will trace the legal development of the consent provision in forest laws. It will bring to light the dynamics that resulted in consent being made part of a government notification which has lesser legal weight than a statute. It will address the struggle of the consent provision to undo the regime of dispossession and recognize the right to self-determination.

Through interviews and access to government documents on the making of the FRA, this section will carefully reconstruct the attempts made to incorporate the consent provision within the FRA and its eventual incorporation in a notification in 2009 by the Ministry of Environment, Forests and Climate Change. I will then unpack the interpretation of prior, informed consent as seen in the Vedanta case and subsequent amendments made to the Rules to the Forest Conservation Act, 1980 in 2014 and 2016.

6.1 The Consent Provision and the making of the Forest Rights Act, 2006

The Forest Rights Act, 2006, as seen in the previous section, was driven by the need to undo the regime of dispossession and democratize forest governance. The need to incorporate the consent provision was an integral part of the drafting process.¹³³ Before the Act was tabled in parliament, it was heavily negotiated between different ministries, In particular, the then Ministry of Environment and Forests (MoEF), the Ministry of Tribal Affairs (MoTA), and the Ministry of Panchayat Raj (MoPR). Below is an overview of the ministries' mandates and their perspective during the drafting of the FRA.

¹³³ Interview with Shankar Gopalakrishnan, August 2018.

Ministry	Mandate
MoEF	The protection of the environment and forest across India plays a crucial role in making decisions about diverting forest land for any development project or activity. ¹³⁴
MoTA	It is the nodal ministry to oversee the planning, policy, and coordination of programs specific to Scheduled Tribes. ¹³⁵
MoPR	The ministry looks into all matters related to the Panchayati Raj, which are local village level institutions that were set up after the process of decentralization in 1996. ¹³⁶

Table 5 : Mandates of the Different Ministries.

As the Ministry of Tribal Affairs was tabling this bill, in some ways, it was limited by its mandate to protect the rights of scheduled tribes alone. This was challenged by expanding the scope of the bill to include other forest-dwelling communities. What was initially termed as the Schedule Tribes bill was renamed the Forest Rights Act. Other ministries apart from these were consulted in making the law, their influence on the draft varied. These three ministries played a pivotal role in the drafting of the Act.

The Ministry of Environment and Forests had more influence in the process than the Ministry of Panchayat Raj. The MoEF's concern remained the conservation of forests as the exercise of such rights in forest areas was seen as a potential threat to the forest's biodiversity and ecology.¹³⁷ The issue of land alienation and consent appeared in a few instances in the making of the law. The Ministry of Panchayat Raj was more concerned about the issue of land alienation and consent in forest areas than the other two ministries.

¹³⁴ Mandate drawn from the Government of India (Allocation of Business) Rules,1961.

¹³⁵ *Ibid* 135.

¹³⁶ *Ibid* 135.

¹³⁷ Based on documents obtained from the government through the Right to Information Act,2005.

In their note to MoTA, MoPR mentioned that Panchayat Extension to Scheduled Areas Act, 1996 requires that the Panchayat is consulted when land is alienated in scheduled areas.¹³⁸ The emphasis was on incorporating provisions such that PESA and FRA can be read together, mainly when the diversion of forest land occurs. The question of land acquisition remained in the background, while issues of conservation were at the fore. The MoPR proposed amendments to the then Scheduled Tribes bill and pushed for the inclusion of an additional section which read as follows:

The Gram Sabha or the Panchayats at the appropriate level shall be consulted before acquiring land in the forest villages for any project and before re-settling or rehabilitating persons affected by such projects in forest villages¹³⁹

The reasoning behind the inclusion of this proposed section was based on the silence within the law on due process requirements in land acquisition as the MoPR states:

There is no covering provision for land acquisition, displacement, and rehabilitation of displaced persons¹⁴⁰

This lacuna identified by the MoPR never went on to be filled. Instead, reliance was placed on the existing legislation of PESA and Scheduled Areas to address this gap. The limitation of placing reliance on PESA is that Scheduled Areas do not include the entirety of India's forest areas, whereas the FRA applies to all forest land.

There were serious disagreements between the MoTA and MoEF on questions of conservation and forest rights. In light of this, a Joint Parliamentary Committee (JPC) was appointed to reconsider the bill and draft a final version that can be placed before each parliament house. In its version of the bill, the joint parliamentary committee included an explicit provision incorporating consent.

It was in article 5(5), as per the JPC draft of the Act which required that prior intimation and consent of the Gram Sabha be obtained before the diversion of forest land. This section elucidated procedural safeguards in the acquisition of forest land. These procedural

¹³⁸ These are areas which are declared if the scheduled tribe population is above 50%. In these areas, land cannot be sold to a non-tribal.

¹³⁹ Letter from the MoPR to the MoTA, February, 2004 from the documents accessed from the government through the Right to Information Act, 2005.

¹⁴⁰ *Ibid* 139.

requirements would have ensured more just administrative practices in the diversion of forest land.

The procedural safeguards were three-fold. Firstly, forest-dwelling communities needed to be given prior notice and sufficient information about the acquisition of forest land. Secondly, prior consent of the Gram Sabha or village assembly was to be obtained. Thirdly, a process was to be in place to ensure that the forest rights of forest-dwelling communities were not adversely impacted from such diversion. These procedural safeguards would change the process of decision-making on land acquisition in forest areas where there is no requirement of consultation or consent with forest-dwelling communities in non-scheduled areas.

In scheduled areas, this section sought to change the legal standard from consultation to one of consent. It further safeguarded the interests of forest-dwelling communities by stating that diversion of forest land would not be made possible without adequate compensation on the principle of 'cultivable land for land' and proper rehabilitation.

The Ministry of Tribal Affairs, which had the final word on this draft, eliminated this section as it stated that it did not want the law to impinge on every aspect of tribal life. It further dismissed this provision because PESA in scheduled areas and the national rehabilitation and resettlement policy would suffice.¹⁴¹ They affirmed that there was no need for an explicit provision in this Act to look into these matters.

MoTA, in its justification for this decision, stated:

Once rights are created, the holder will be entitled to the remedy as provided in the relevant Acts/regulation/policy whenever or for that matter anyone else wishes to infringe on such vested rights¹⁴²

MoTA rejected the need for an explicit consent provision in this Act by placing reliance on other laws dealing with aspects of consultation and not consent, namely PESA and schedule five areas that, which as seen earlier in this chapter, these provisions have not been appropriately implemented.

¹⁴¹ Letter from the MoPR to the MoTA, February, 2004 from the documents accessed from the government through the Right to Information Act, 2005.

¹⁴² Memorandum submitted by the Ministry of Tribal Affairs to the JPC in 2005 from the government documents accessed through the Right to Information Act, 2005.

The right to self-determination, which was incorporated in the section recognizing community forest rights, was not supported by the procedural safeguards of consent in the diversion of forest land. The recognition of forest rights checked the regime of dispossession, but diversion could take place quite easily unless the area were recognized as part of a CFR right. In an interview with Dr. N.C Saxena, who was involved in the drafting of the Act as a member of the National Advisory Council spoke to the need for procedural safeguards, he stated:

I had pushed for the need to ensure that land acquisition in forest areas had procedural safeguards. Especially the need for compensation, I recommended we use an old law that guaranteed this that can be used as a model for the Act. My suggestions were not taken seriously. We now have a situation where the state can acquire forest land without compensating forest-dwelling communities. This is the gap that the law should have addressed but did not.¹⁴³

As the spatialization of rights and procedures was crafted, I would like to take a moment to reflect on the categorization of forest land and the right to self-determination and associated procedural safeguards.

¹⁴³ Interview with N.C Saxena, August, 2018.

CATEGORIZATION OF FOREST LAND	RIGHT TO SELF-DETERMINATION AND PROCEDURAL SAFEGUARDS
Scheduled Area	Panchayat has to be consulted under PESA.
CFR area	Gram Sabha has the right to conserve and draft management plans for these areas. Including taking decisions on the nature of development that can take place in the area. They need not be consulted for the diversion of forest land.
Non-scheduled and non-CFR areas	Forest rights are recognized, and no procedural safeguards in the process of land acquisition.

Table 6: Table on the categorization of forest areas and the right to self-determination.

What emerges is a gradient of procedural safeguards and rights. The elimination of Section 5(5) has left those forest areas that are neither scheduled nor form part of the CFR claim vulnerable to easy acquisition. The reasoning provided by the MoTA that reliance would be placed on existing laws shows that it did not want to extend the need for procedural safeguards beyond scheduled areas. Procedural safeguards were to be contained in its applicability by restricting it to Scheduled Areas. Forest land being diverted for conservation and creation of national parks would require local communities' consent before relocating. The documents on the making of the FRA show that emphasis was paid to dispossession caused by conservation instead of development.¹⁴⁴

While consent as a requirement for the diversion of forest land for development projects could have brought the divergent interests of conservationists and tribal rights activists, it did not happen. Conservationists opposed the FRA as a law that would destroy the forests as forest land would be lost to subsistence agricultural practices of forest-dwelling communities. Further, it prevents forest departments from overseeing the conservation-related matters. A

¹⁴⁴ Letter from the MoPR to the MoTA, February, 2004 from the documents accessed from the government through the Right to Information Act,2005.

large amount of energy was spent on ensuring that national parks and tiger reserves remained outside the ambit of this Act and procedural safeguards were restricted in its applicability to relocation from protected areas.¹⁴⁵

The Campaign for Survival and Dignity, which had been campaigning for forest-dwelling communities' rights, was optimistic that the democratization of forest governance through CFR rights or local control based on the new governance paradigm would secure the forest-dwelling communities' right to self-determination. When I interviewed Shankar Gopalakrishnan, he articulated that consent was subsumed in the discussion on decentralized governance.¹⁴⁶

Decentralized governance within the FRA or the new forest governance paradigm in community forest areas by transferring decision-making power to the Gram Sabha would ensure that the Gram Sabha had complete control on whether land could be diverted or not. Thus, consent was a mere procedural requirement, while the substantive right was the right to self-determination within CFR areas. However, the degree of decentralization and democratization that would have given life to the principle of consent has not taken place within CFR areas. Consent that is missing from this legislation was recognized in a government notification in 2009.

6.2 Notification in August 2009

The Ministry of Environment and Forests passed a notification in August 2009. This notification recognized the right to prior, informed consent of the Gram Sabha or village assembly during forest diversion and forest clearance under the Forest Conservation Act, 1980. This notification emphasizes the need to recognize CFR rights, habitat rights and protection from eviction until the completion of the recognition of forest rights.¹⁴⁷

The title of the notification is 'Diversion of Forest Land, ensuring compliance with the FRA.' This notification sought to fill the gap of the recognition of consent when forest land is

¹⁴⁵ M.Rajshekhkar, 'The Act that Disagreed with its Preamble: The Drafting of the Forest Rights Act' (2012) Unpublished paper. < <https://mrajshekhkar.in/on-the-drafting-of-the-forest-rights-act/> > accessed on January 14, 2021.

¹⁴⁶ Interview with Shankar Gopalakrishnan over email on August 2018.

¹⁴⁷ Consent here is seen to be derived from the provisions of the law that support the right to self-determination.

acquired. The notification requires the Gram Sabha's written consent and makes the granting of forest clearance conditional on the recognition of forest rights. The state government requires letters and written resolutions from the concerned Gram Sabhas about the completion of forest rights recognition as well. It requires that the proposal for the diversion of forest land be placed before the concerned Gram Sabhas or village assemblies before any decision on acquisition is made.

An additional safeguard it includes is that consent needs to be obtained not merely for the diversion of forest land but for compensation and ameliorative measures as well. The notification recognizes the procedural safeguards that challenge the regime of dispossession in forest areas.

Ashish Kothari, who was tasked with drafting this notification in an interview where he reflected on its contents, said:

When we got involved in drafting this circular, we did not consult with other groups or networks about the procedure for the consent provision. Consent and other issues were subsumed within the larger issue of local control. It seemed at that time to be an opportune moment to get the circular through. This left little time for consultations on the more detailed operational aspects of what consent would mean. As the case of any circular, we assumed that the processes would be worked out, and operational guidelines will be drafted. Such a process was not carried out, and we have no clarity on how this will be operationalized.¹⁴⁸

This sheds light on the hasty manner in which the notification was drafted and the lack of consultation with the communities on how the consent process should be envisioned. While the notification does check the dispossession regime in forest areas, it suffers from legal ambiguity on the procedure to be followed for obtaining consent from the Gram Sabha.

The notification states that written consent needs to be obtained with a quorum of fifty percent of the Gram Sabha members present. As will be shown in the case studies in this thesis, this legal ambiguity is exploited by the bureaucratic actors involved in alienating land for specific economic purposes. Legal ambiguity creates the opportunity for bureaucratic

¹⁴⁸ Interview with Ashish Kothari, August, 2019.

actors particularly the District Collector to generate paperwork to manufacture an official narrative that shows that consent has been obtained.

In many instances, the procedure followed has been below the expectations of decentralized governance and the right to self-determination. Some view the lack of procedural clarity as a necessary aspect of the consent procedure. Kanchi Kohli, a legal researcher, and activist, who has written extensively on the consent provision and has worked with local communities in Gujarat to oppose the acquisition of land for a large port project and power plant being set up, in an interview reflected:

It is important to strike a balance. While legal ambiguity is used as a tool by the local bureaucracy to enable land acquisition, a rigid procedure might also hinder local decision-making practices. However, I think that operational guidelines are needed but with enough room for local decision-making structures to thrive.¹⁴⁹

This shows the complexity in the implementation of the consent provision. Legal ambiguity in the procedure as Kanchi Kohli argues is beneficial as it would not impose formal legal requirements where customary decision-making structures are operational and would thus encourage forest-dwelling communities to devise their own procedures in arriving at decisions. However, legal ambiguity leaves ample room for the local bureaucracy to use its discretionary power in interpreting the process in a manner that it dilutes the empowering potential of the consent provision.¹⁵⁰

Legal ambiguity in the consent process has generated many interpretations of what the process should look like on the ground. An example of this was evident in a conversation with a local activist implementing the FRA in Sundergarh, Odisha. He mentioned that it was important to first apply for community forest rights and then assert the Gram Sabha's right to either give its consent or reject a project.¹⁵¹ There is confusion among the local bureaucracy in the areas that I visited of what triggers the applicability of the consent provision. The confusion was whether a CFR right had to be recognized as a qualifying right for the consent

¹⁴⁹ Interview with Kanchi Kohli, July 2018.

¹⁵⁰ Upendra Baxi, 'Developments in Indian Administrative Law' in Abdul Gafoor Noorani (eds) *Public Law in India* (Vikas Publishers, 1982).

¹⁵¹ Interview with Rajendra Nayak, August 2018.

requirement to be made applicable or whether it would apply without a CFR right being recognised.

As Ashish Kothari has stated, consent is subsumed into the larger question of local control. It brings me back to the struggle between the regime of dispossession and the right to self-determination. If recognized, self-determination will undo the regime of dispossession by shifting the authority of decision-making from the local and forest bureaucracy to the forest-dwelling communities. Consent then would be implicit in the realization of self-determination. This assumption, though grounded in law, is a difficult proposition. The forest governance's democratization as radically imagined in the FRA would require a drastic reconfiguration of forest bureaucracy that is functioning based on the IFA and WLPA. The limitation on the forest bureaucracy's powers as proposed by the FRA is perceived as a threat by the forest department. In an interview with a senior forest bureaucrat on the impact of the FRA on the forest bureaucracy, stated:

The FRA wants us to be removed from the forests. We have had a rich history of maintaining these forests. How can we let go of our responsibility to a community that does not have the know-how or expertise?¹⁵²

This is telling of the challenges of decentralization in forest areas. The right to self-determination, as imagined within the FRA, has to overcome many obstacles in being realized. The notification on the consent provision provides a stronger legal foothold in protecting rights over forest land than CFR rights, which are seldom recognized or adequately implemented.¹⁵³ It is important to note that this notification is an administrative legal instrument meant to guide administrative decision-making on forest land diversion, its legal weight and degree of enforceability are minimal when compared to a right recognized in a statute.

In many ways, what emerges from this notification is the recognition of consent with sufficient room for the exercise of the discretionary power of the local bureaucracy and the forest-dwelling community in determining the procedure for implementation. The contours

¹⁵² Interview with a senior forest official, July 2018.

¹⁵³ Memorandum submitted by the Ministry of Tribal Affairs to the JPC in 2005 from the government documents accessed through the Right to Information Act, 2005.

of the consent provision were reshaped in the Vedanta judgment, where the Supreme Court interpreted these legal provisions and designed a procedure to be followed in obtaining consent from the Gram Sabha through the mechanism of a referendum.

6.3 Consent and The Vedanta judgment

The consent provision and the notification of 2009 was an integral part of the legal battle to protect the Niyamgiri hills by the Dongria Kondh community. Vedanta Resources Pvt Ltd was a multinational mining conglomerate who were assured bauxite from the Niyamgiri hills. Niyamgiri was to be mined by the state-owned company, Orissa Mining Corporation.¹⁵⁴ These hills are sacred to the Dongria Kondh community, and they started a movement to protect the hills from being mined. In 2013, the Supreme Court ruled on whether bauxite can be mined on the sacred hill of Niyamgiri in Odisha.¹⁵⁵ The Supreme court, in its decision, devolved powers to the Gram Sabha to decide on whether Niyamgiri should be mined. A report on the judgment by the Campaign for Survival and Dignity reads:

In that sense, the court has gone well beyond the question of "consent" and instead treated the Gram Sabha as a regulatory authority.¹⁵⁶

The Supreme Court considered the right to self-determination as being derived from CFR and habitat rights as paramount and the consent provision as the mechanism to operationalize it. Before I delve into the judgment itself, I would like to highlight the consent provision's interpretation, which was arrived at in the N.C Saxena committee report.¹⁵⁷

¹⁵⁴ Odisha Mining Corporation V Ministry of Environment and Forests and Others (WRIT PETITION (CIVIL) NO. 180 OF 2011)

¹⁵⁵ *ibid* 154.

¹⁵⁶ Document written by the Campaign for Survival and Dignity, ' Supreme Court Judgement on the Vedanta Case', < https://www.fra.org.in/ASP_Court_Cases_UploadedFile/%7B55233dc5-b38a-4c53-9228-00a2b8d19034%7D_Briefing_note_on_vedanta_judgment_April_18_2013.pdf> accessed on April 8, 2019.

¹⁵⁷ A committee that was set up by the Ministry of Environment, Forest and Climate Change to examine the implementation of the Forest Rights Act,2006.

The Supreme Court relied heavily on the report by a committee headed by N.C Saxena and appointed by the Forest Advisory Committee to investigate the implementation of the FRA in Niyamgiri. In the report they stated the following about consent:

The rights conferred under the Forest Rights Act automatically imply that free, prior, and informed consent of forest dwellers such as the Dongria and Kutia Kondh is a prerequisite for diversion/destruction of the forest habitat the communities' consent is required before any damage or destruction of their habitat and community forests is authorized. This is independent of whether the Gram Sabha submit their claims for the proposed mining lease area.¹⁵⁸

This interpretation has seeped into the judgment where the community's right to conserve and manage the forest and the right to their habitat would automatically imply that the consent provision was required. The N.C Saxena committee in its report referred to the 2009 notification that had made consent mandatory, which they observed Vedanta had not obtained. The report referred to PESA as well, where it stated that a parliamentary committee recommended the standard of consent, but eventually, the term incorporated in the legislation was that of consultation.¹⁵⁹

In a similar vein, the Supreme Court in the Vedanta case held that the Gram Sabha was the appropriate authority to decide whether the Niyamgiri hills were to be mined or not by reading PESA and FRA together. Both PESA and FRA devolve powers to the Gram Sabha on matters concerning the local community's customs and traditions.¹⁶⁰ An important aspect that influenced the Supreme Court's decision was the religious or sacred bond of the Dongria Kondh community with the Niyamgiri hills. It read the provisions of PESA, FRA, and Article 25 of the constitution, which recognizes the right to freedom of religion together.¹⁶¹

After the judgement Odisha's state government was asked to decide on the diversion of the Niyamgiri hills for bauxite mining by placing the decisions before the twelve concerned Gram Sabha, the state used the procedural method of a referendum in the presence of a district

¹⁵⁸ Report of the Four Member Committee to Investigate the Proposal Submitted by Odisha Mining Corporation to Mine Niyamgiri < http://envfor.nic.in/sites/default/files/Saxena_Vedanta-1.pdf> accessed on April 8, 2019.

¹⁵⁹ *Ibid* 158.

¹⁶⁰ Odisha Mining Corporation V Ministry of Environment and Forests and Others (WRIT PETITION (CIVIL) NO. 180 OF 2011)

¹⁶¹ *Ibid* 160.

judge.¹⁶² Dongria and Kutia Kondh members were asked to vote on whether the project should be accepted or rejected. The twelve Gram Sabha unanimously rejected the mining project. This judgment interpreted the right to the consent provision to include the right to withhold consent or veto a development project.

The procedural innovation of using a referendum set a precedent on how consent can be obtained. The use of referendums can be limiting as it becomes a game of numbers of those for and against a project. While it devolved decision-making power to the Gram Sabha, the quality of deliberation was reduced to the exercise of voting for or against the project. As this thesis will elucidate in the chapters to follow, the implementation of consent divides communities into groups of those against and those for. It seldom provides room for democratic deliberation on the more extensive development question.¹⁶³

6.4 Amendment to the Rules of the Forest Conservation Act (FCA),1980

The consent requirement was legislated upon and incorporated in the FCA through an amendment to its Rules in 2014 and 2016. This was a direct consequence of the Vedanta judgment, where the Ministry of Environment, Forests, and Climate Change realized that there were cases where forest clearance was granted, while forest rights issues remained unsettled. The consent of the Gram Sabha is now an essential part of the forest clearance process. Forest clearance can be given only after consent has been obtained. The district collector ¹⁶⁴is required to obtain the Gram Sabha's consent, which is then verified by the Conservator of Forests.¹⁶⁵ The amendment to the Rules reads as follows:

The District Collector shall:

(ii) obtain the consent of each Gram Sabha having jurisdiction over the whole or a part of the forest land indicated in the proposal for the diversion of such forest land and compensatory

¹⁶² Odisha Mining Corporation V Ministry of Environment and Forests and Others (WRIT PETITION (CIVIL) NO. 180 OF 2011)

¹⁶³ Field Notes from my visit to Odisha, August 2018.

¹⁶⁴ The district collector is the key administrative authority, in charge of all affairs in managing a particular district.

¹⁶⁵ The Conservator of Forests is an officer of the Indian Forest Service who is mandated with the administration of a particular forest range.

and ameliorative measures, if any, having understood the details of the purposes of diversion, wherever required.¹⁶⁶

The amended Rules recognize the powers of the district collector in the process of obtaining consent. Thus, the local bureaucracy retains considerable control in overseeing how consent is obtained and what form it takes. The procedure for obtaining consent remains ambiguous and the district collector can use his or her discretionary power in determining what the process should look like.

There have been many attempts to dilute the consent requirement since its passage. In 2019, a notification by the Ministry of Environment, Forest and Climate Change stated that consent would be required in the final stage of the forest clearance process and need not be obtained at the outset.¹⁶⁷ This violates the need to obtain prior informed consent as established in the Vedanta judgment.¹⁶⁸ The consent standard operating in a political economy of extraction like Odisha is viewed as a hurdle and an impediment in land acquisition. The later chapters of this thesis will demonstrate how dilution occurs on the ground and the interpretation used by the local bureaucracy to bypass this requirement.

7. Consent, the Right to Self-Determination and Shared Sovereignty

It is difficult to separate the consent requirement from the right to self-determination. Consent is derived from the right to self-determination, which scholars and indigenous rights activists view as the foundational principle for Indigenous rights in international law.¹⁶⁹ This, however, does not reduce the consent provision to a mere administrative process. The consent provision and the right to self-determination are intertwined.

The right to self-determination was a principle that emerged in international law during the process of decolonization. The principle of the permanent sovereignty of natural resources is tied to the right to self-determination of the nation state. The principle of the right to self-

¹⁶⁶ The Forest Conservation Act, 1980 rules as amended in 2016.

¹⁶⁷ Amendment introduced by the Ministry of Environment, Forests and Climate Change in February, 2019.

¹⁶⁸ Odisha Mining Corporation V Ministry of Environment and Forests and Others (WRIT PETITION (CIVIL) NO. 180 OF 2011)

¹⁶⁹ Jody Emel, Matthew T. Huber, Madoshi H. Makene, 'Extracting sovereignty: Capital, territory, and gold mining in Tanzania' (2011) Political Geography, Volume 30, Issue 2.

determination has now expanded beyond the reaches of the nation state to include peoples particularly Indigenous Peoples.¹⁷⁰

The principle is often associated with separate statehood, and in the context of Indigenous rights, this has changed. As James Anaya reflects when asked about the tension between indigenous claims to self-determination and sovereignty as follows:

A common tendency has been to understand self-determination as wedded to attributes of statehood, with "full" self-determination deemed to be in the attainment of independent statehood. An alternative understanding of self-determination ... [bases it upon] core values of freedom and equality that are relevant to all segments of humanity, including indigenous peoples, in relation to the political, economic, and social configurations with which they live. Under a human rights approach, attributes of statehood or sovereignty are at most instrumental to the realization of these values - they are not themselves the essence of self-determination.¹⁷¹

Modern conceptions of self-determination, particularly for indigenous peoples, do not necessarily include the right to separate from a State, but rather "a range of alternatives including the right to participate in the governance of the State as well as the right to various forms of autonomy and self-governance."¹⁷²

The consent provision is an essential part of facilitating the right to participate in the state's governance, including in the management of natural resources. The right to self-determination in India is understood as one of tribal self-rule with respect being given to these decisions by the Indian state. PESA has often been described as a constitution within a constitution as it empowers the Gram Sabha and gram panchayat to administer these areas. A model of self-governance that is yet to be adequately implemented. Jaipal Singh Munda as has been argued earlier in the chapter was looking forward to a new Indian state that would

¹⁷⁰ Helen Stacy, 'Relational Sovereignty' (2003) Stanford Law Review. 55.

¹⁷¹ Anaya, S. James and Puig, Sergio, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples' (2017), University of Toronto Law Journal 67.

¹⁷² International Working Group of Indigenous Affairs, 'Indigenous People's rights to autonomy and self-government' (2018) <https://www.iwgia.org/images/documents/Books/IndigenousPeoplesRightstoAutonomyandSelfgovernment_UK.pdf> accessed on January 14 2021.

respect the authority of mini tribal republics functioning in accordance with their own governance structures.¹⁷³

The right to self-determination as one of engagement with the state complements the jurisprudence from below of forest-dwelling communities and their relationship with the Indian state as one of shared sovereignty.¹⁷⁴

Lado Sikaka an activist in Niyamgiri aptly described shared sovereignty as follows:

Shared sovereignty is how the scheduled area's governance architecture is imagined. We share decision-making power on conservation, development, and other issues in forest areas. The state must treat us as an equal sovereign with legitimate power to govern our lands and waters.¹⁷⁵

Sovereignty and the right to self-determination need to be read closely with the recognition of the collective rights over resources of Indigenous peoples internationally. Sovereignty is as much territorial as it is relational to the peoples who inhabit a territory. Theories of sovereignty in extractive frontiers like Odisha see sovereignty as one that is articulated by the state and capital. Where capital desires a single sovereign entity to conduct negotiations with the gain access to land and resources. With legal structures like the consent provision, the Right to self-determination or self-rule as in India- sovereignty is splintered and fragmented. These competing claims to sovereignty make it harder for mining companies in India to acquire land.

Shared sovereignty was a term that emerged across interviews with forest-dwelling communities in the three mining sites. The legal vocabulary of protests in these sites was anchored on the desire for meaningful engagement with the state. Forest-dwelling communities through years of protest have crafted space within the formal legal system to create opportunities for engagement with the state like the consent provision and provisions of PESA. These are structures in place to facilitate respectful engagement with the state in its

¹⁷³ Pooja Parmar, 'Undoing Historical Wrongs: Law and Indigeneity in India.' (2012) *Osgoode Hall Law Journal* 49.3: 491-525.

¹⁷⁴ Helen Stacy, 'Relational Sovereignty' (2003) *Stanford Law Review*. 55.

¹⁷⁵ Interview with Lado Sikaka in Niyamgiri on February 2020.

deliberative mode.¹⁷⁶ In chapter three I will demonstrate how the concept of shared sovereignty exists in the legal framework that recognizes the right to self-determination.

Forest-dwelling communities described shared sovereignty as a chain or nodes of community-based governance structures and those within the state which are connected by webs of dialogue. They speak of a deliberative system of the Gram Sabha, district collector, and the tribe's advisory council that are the key nodes where decisions are made. These decisions were to be made binding only after scrutiny from the Gram Sabha.

Manorama Kathua describes what governance may look like in a shared sovereignty framework:

The Gram Sabha and village committees have been existing for years and have been making decisions on everyday problems. The District Collector seldom pays heed to these decisions and instead makes important pronouncements like acquisition of land. I think what we need is a porous state where our committees and the states formal governance structure are in constant interaction mediated by a node like the Tribes Advisory Council.¹⁷⁷

The Indian state has interpreted the right to self-determination as one of separate statehood as a trope to avoid the hard work of negotiation and engagement. A senior forest bureaucrat described the claims being made by forest-dwelling communities to self-rule as follows:

They want to eliminate the Indian state we need to quell such dissent lest it become violent like the armed left-wing Naxalite movement.¹⁷⁸

When I probed about the need for careful engagement and negotiations by the state with forest-dwellers he retorted that forest-dwelling communities are unaware of the modern economy and do not know what it is that they are negotiating. Several interviews with bureaucrats within the state of Odisha reveal how the state oscillates between interpreting self-determination as secession or a patronizing approach of viewing forest-dwelling communities as lacking the capacity to negotiate rendering it non-deliberative in India's forests.¹⁷⁹ This interpretation of the right to self-determination can be seen in India's reaction

¹⁷⁶ Alf Gunvald Nilsen, 'Adivasis In And Against The State', (2012) *Critical Asian Studies*, 44:2, 251-282

¹⁷⁷ Interview with Manorama Kathua in Jagatsinghpur on July, 2018.

¹⁷⁸ Interview with a senior forest bureaucrat in New Delhi on July 2018.

¹⁷⁹ Fieldnotes from August, 2019.

to the right to self-determination as part of the negotiations in the United Nations Declaration on the Rights of Indigenous People (UNDRIP) below.

As India became a signatory to the United Nations Declaration on the Rights of Indigenous People on 13 September 2007, the most contested aspect of the declaration was the right to self-determination. India, in its response to this right, stated:

Regarding references to the right to self-determination, it was his understanding that the right to self-determination applied only to peoples under foreign domination and that the concept did not apply to sovereign independent States or to a section of people.¹⁸⁰

The opposition to the extension of the right to self-determination to peoples in international law by India is argued to avoid claims of nationhood being made in different parts of the country. India has seen successful secession movements like the creation an exclusive Adivasi state or sub-national unit of Jharkhand. By identifying all Indians as indigenous it further constrains the applicability of progressive international law.

This move has been heavily debated among scholars without any consensus. While Adivasi communities claim that by being identified as indigenous, they will benefit from a progressive rights framework, sociologists warn that in a diverse country like India with a history of migration from different parts it risks further dividing communities on the basis of these new identity-based claims. In chapter six I will delve into the reasons for this complex stance on indigeneity.¹⁸¹

To reassert state control, the local bureaucracy interprets the consent provision as a mere administrative process that must be checked off the list of requirements for a forest clearance application. Activists and local communities on the ground view consent as an avenue to facilitate dialogue with the state to realize the principle of shared sovereignty and self-determination.

¹⁸⁰ India's written response to the World Bank consultation on the review of the safeguards, <https://consultations.worldbank.org/Data/hub/files/comments_of_govt_of_india_on_the_wb_consultation_of_new_ess_framework_19_01_2015.pdf> last accessed on April 8, 2019.

¹⁸¹ Alpa Shah, *In the Shadows of the State: Indigenous Politics, Environmentalism and Insurgency in Jharkhand, India* (Duke University Press, 2010)

Shared sovereignty as a legal concept has been used in the negotiations between the Indian state with the tribal-dominated sub-national unit of Nagaland. In its framework agreement, the term shared sovereignty is used to acknowledge the independence of the Naga state, but it is not a complete rejection of the Indian state.¹⁸²

The scheduled areas provisions are a way of negotiating the presence and absence of the Indian state in forest areas and deciding the terms of engagement. PESA for instance indicates that development plans and land acquisition are decisions to be taken in consultation with the Gram Panchayat or the village level executive body.

The democratic decentralization of governance in India created a mechanism for transferring power and encouraging localized control. As decentralization was experienced in India's forests, what failed to occur was the transfer of power. Shared sovereignty, as Rinjo Sikaka described, is a way to co-exist. Else this long drawn land conflict between forest-dwelling communities and the state will subsist.¹⁸³

8. Deliberative Reconciliation of Laws in Conflict

As this chapter elucidates, an essential flaw in the forest law regime is the conflict of laws between the old forest law regime and those that recognise forest rights, the right to self-determination, and shared sovereignty. These conflicting laws create ambiguity on which law applies and which law supersedes the other in implementation. The interpretive tools available within these laws do not resolve this conflict; instead, they speak of the laws uncomfortably co-existing. An example of this is the interpretive tool present in Section 13 of the Forest Rights Act, 2006 which states that provisions of the FRA are to be read in addition to and not in derogation of other laws in force.

The District Collector and the local forest department enjoy vast discretionary powers to reconcile these laws, and they do so in a manner that reasserts state control to facilitate extraction. In Scheduled areas, the TAC with its power to determine which laws apply and

¹⁸² Shimrah, Kharingyo, Shared sovereignty between India and Nagalim.(2015) <https://www.researchgate.net/publication/282317483_Shared_sovereignty_between_India_and_Nagalim/citation/download> accessed on December 25 2020.

¹⁸³ Interview with Rinjo Sikaka in Niyamgiri on February 2020.

what form they apply to schedule areas was described by forest-dwelling communities interviewed as the appropriate site for reconciling these conflicting legislations.

The Tribes Advisory Council (TAC) and the Governor in scheduled areas are meant to be in continuous dialogue about the nature of laws, delegated legislation, and notifications as well as how they can be applied in scheduled areas.

As N.C Saxena, a senior bureaucrat who was now retired and had been part of the National Advisory Council when the FRA was being drafted, described:

The FRA is a rebel law and what it needs is careful and artfully crafted framework for local implementation. The TAC must be present at the state and district level to work out how the FRA will be interpreted and how it will be reconciled with the current forest law regime that dispossesses communities.¹⁸⁴

The deliberative reconciliation of laws will require that the district collector moves away from unilaterally deciding how reconciliation occurs to a more inclusive process with the TAC providing its interpretations in furtherance of the principle of shared sovereignty. The TAC here is envisioned to operate beyond being a consultative body to one that can make recommendations to be followed by the Governor.

An example of how deliberative reconciliation and the Governor's power was harnessed is in the state or sub-national unit of Maharashtra, where village forest rules were passed that took away from the FRA's community forest rights provisions in 2012. The TAC then recommended that these village forest rules be amended. The Governor accepted this recommendation, and an amended version of the rules applied, which did not dilute the CFR provisions.¹⁸⁵

Through interviews with forest-dwelling communities, I extracted a possible deliberative process for reconciling these conflicting laws located in their understanding of shared sovereignty and the desire for deliberative negotiations with the state. These institutional nodes exist within the governance structure of scheduled areas, which forest-dwelling communities argue should be extended to all forest areas.

¹⁸⁴ Interview with N.C Saxena in New Delhi on August 2018.

¹⁸⁵ Shruti Agarwal, 'Tribal Affairs Ministry gives into pressure 'okays' village forest rules' in *Down to Earth* (New Delhi, 12 January 2016)

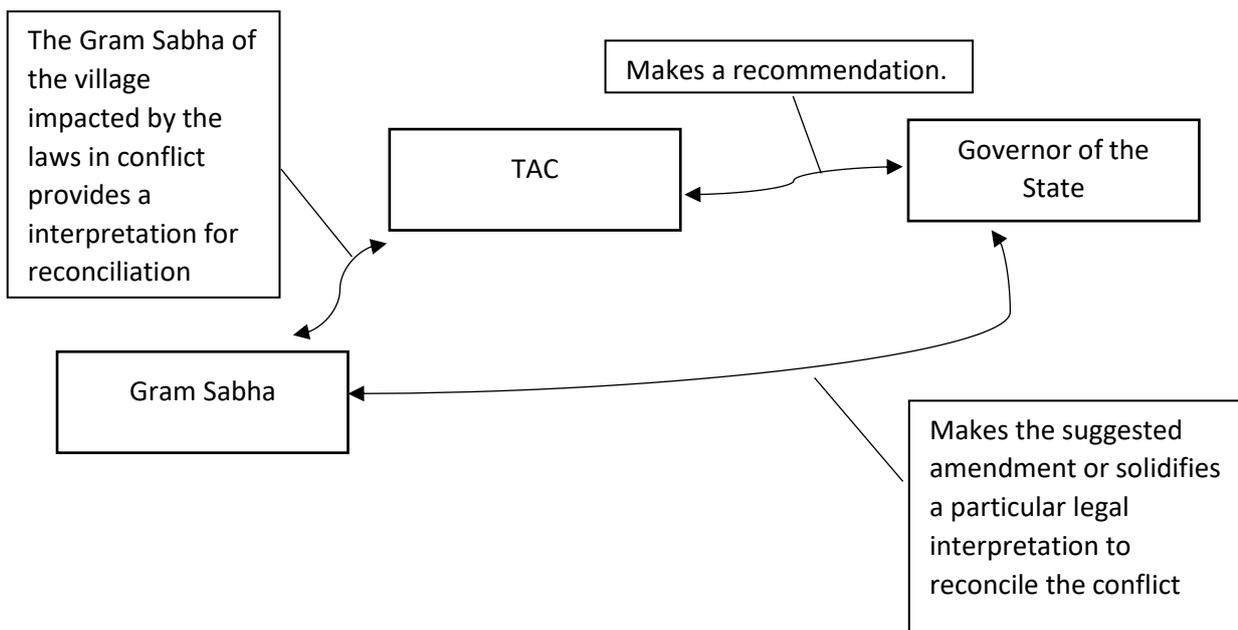


Figure 3: The Process for the Deliberative Reconciliation of Laws

Forest-dwelling communities stated that in an ideal process of deliberative reconciliation the Gram Sabha will be the governance node to interpret how conflicting forest laws should apply in the jurisdictions that map onto their forests and lives. They would then submit their interpretations to the TAC, which can then make recommendations to the Governor. The Governor who is authorised to do so in scheduled areas can amend the existing laws or provide a notification to administrative authorities on how the conflicting legislative objectives are to be reconciled.

The process of the deliberative reconciliation of laws as reimagined by the forest-dwelling communities is an aspirational legal model similar to the approach within UNDRIP of constructive arrangements that can be arrived at between Indigenous peoples and the state. The basis of these constructive arrangements are decisions that respect the rights of indigenous communities.¹⁸⁶ This legal model for deliberation is suggested instead of the one present in the law, which provides no mechanism for such deliberative reconciliation or

¹⁸⁶ Jesse McCormick, 'Strengthening partnership between state and indigenous peoples: treaties, agreements and other constructive arrangements' background note for the Office of the United Nations High Commissioner of Human Rights (July, 2012) < <https://www.ohchr.org/Documents/Issues/IPeoples/Seminars/Treaties/2012TreatySeminarNoteSecretariat.pdf> > accessed on January 22 2021.

arriving at a constructive arrangement of how laws are to be implemented. It instead leaves the power to reconcile these laws to the state, which forest-dwelling communities can challenge only in the courts.

Deliberative reconciliation of laws provides an effective way to reconcile these competing legislations. The forest-dwelling communities argued that this would provide more locally specific solutions as a huge legislative push for amendments to the IFA and WLPA will prove to be difficult as conservationists are challenging the constitutionality of FRA before the Supreme Court.¹⁸⁷

9. Conclusion

Through an overview of the forest laws and the emergence of the consent provision, this chapter provides the legal framework that governs the acquisition of forest land. Competing priorities interact in the acquisition of forest land, the state's need for control over resources, conservation of forest areas, and forest dwelling communities' rights. The interaction of these competing priorities determines land conflicts in forest areas.

By tracing the emergence of the legal standard of consent after laws that recognized the right to self-determination, this chapter showcases the arc towards democratic decision-making in forest land acquisition. But as the chapter shows, traversing this arc for forest-dwelling communities is a complicated exercise as the regime of dispossession eclipses the rights-based framework.

The regime of dispossession is shaped by forest laws that enable the assertion of state control, deliberate non-recognition of progressive laws like PESA, and the bureaucratic trap in the implementation of the consent provision. Internationally India defends the existence of this regime of dispossession with its limited acceptance of the right to self-determination and use of the term indigenous.

The potential of a deliberative governance system in correcting the regime of dispossession will be the site of inquiry in this thesis. In the dense forests of Odisha, a movement has been building since early 2018. It is called the pathalgiri movement where forest-dwelling

¹⁸⁷ Wildlife First and Others V Ministry of Environment and Forest and Others (Writ Petition(s)(Civil)No(s). 109/2008)

communities are placing a stone with the progressive laws inscribed on it. This movement is challenging the regime of dispossession by self-assertion of rights under PESA and the FRA. The stone planted at the village entrance proclaims that these rights are enshrined in law and recognized in this village.¹⁸⁸

The communities have lost faith in the state and its ability to recognize these rights. Thus, they have opted for the strategy of self-assertion. In an interview with the local community from the pathalgiri village, I asked what prior informed consent means. After a quiet moment, Brijesh, the local village leader, stated:

Consent is nothing but consensus. The village has to sit together and discuss what we want from the state, and if we are willing to give away our land to the company. As the pressure to acquire land in these areas has increased, we need to build consensus within our communities and with the state on how we intend to respond to this.¹⁸⁹

Consent sits in the crevice between the right to self-determination, shared sovereignty, and the desire for deliberative dialogue with the state. Consent is a way to challenge the state operating in its pro-business modality and force it to shift to a deliberative one where conflicting law can be reconciled through deliberative dialogue.

¹⁸⁸ Field notes from my visit to Odisha, August 2018.

¹⁸⁹ Interview with Brijesh, August 2019.

3. DELIBERATIVE DEMOCRACY AND CITIZENSHIP IN INDIA'S FORESTS

1. Introduction

“Our legal struggle is defined by our quest for respectful dialogue with the state. The state uses multiple strategies to avoid entering into a meaningful dialogue with us, and we do everything we can to be heard.” said Brahmara Das, a Dalit forest-dweller and activist opposing the acquisition of land in Jagatsingpur by Jindal Steel Works and previously by the Pohang Steel Company.¹⁹⁰ The quest for dialogue and desire for deliberation with the state frames the dominant approach of forest-dwelling communities in addressing the challenge of land acquisition.

Deliberative democracy provides a useful framework to articulate the difficulties faced by forest-dwelling communities in being heard by the state. Deliberative democracy here refers to the idea that the legitimacy of any decision to be taken on the future of India's forests needs to be based on the deliberations of those most impacted by these decisions.¹⁹¹

The question I aim to address in this chapter is what form does deliberative democracy take in India's forests? And what does deliberative governance as a theoretical framework offer to designing an alternative to the present forest governance architecture? I argue that deliberative democracy takes a particular form in India's forests with the passing of PESA and the FRA, where the state retains its discretion to either comply or reject the deliberated decisions of the Gram Sabha.

The consent provision may be viewed as a deliberative turn in the governance of forests with the creation of space within the law for forest-dwelling communities to guide state decision making on aspects of diversion. The consent provision, when viewed through the theoretical framework of deliberative governance, practices of citizenship by forest-dwelling communities, and the jurisprudence that recognises the shared sovereignty paradigm, it

¹⁹⁰ Interview with Brahmara Das in Govindpur in July 2018.

¹⁹¹ Teresa Joseph and Siby.K. Joseph Eds *Deliberative Democracy: Understanding the Indian Experience* (Routledge,2018)

offers an alternative pathway of decision-making in India's forests, which incorporates the voice and agency of forest-dwelling communities.

Deliberative governance as it exists in India in the form of a decentralized governance structure through the panchayat raj institutions with the recognition of the Gram Sabha as a deliberative forum within the constitution as part of the 73rd constitutional amendment in 1992.¹⁹²The Gram Sabha is the site of inquiry in this thesis along with the other nodes and networks that enable deliberation.

Lado Sikaka, a leading activist in Niyamgiri and member of the Niyamgiri Suraksha Samiti, described when asked what an ideal relationship with the state would be suggested the following:

The state needs to realize that we are not passive recipients of benefits but active agents in deciding how our lives are governed. I do not deny that we need the law and the state to navigate the demands of livelihood and the political economy of extraction. The law and the state have to be a space for deliberation and not an aggressive imposition. The Gram Sabha should collectively decide along with the state of how our villages are governed.¹⁹³

While Lado Sikaka was optimistic about dialogue with the state, the Dalit communities were wary of the possibility of dialogue when internal divisions within the community are not adequately addressed. As a Dalit forest-dweller described

Dialogue with the state is possible when the Gram Sabha is a space of inclusion too. Dalit forest-dwellers are marginalized in ways where engagement with their preferences is not considered as opposed to the Adivasi forest-dwellers.¹⁹⁴

Deliberative democracy in this thesis is viewed in a two-pronged manner, one which is at the level of engagement with the state and the other which is internally within forest-dwelling communities and how they arrive at decisions. The theory of deliberative democracy offers a useful lens as the thesis investigates the dynamics within communities and internal inequities that impact inclusion in deliberations as will be elaborated in chapter six. Women continue to

¹⁹² Article 243 of the Indian Constitution as amended in 1992 < <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-seventy-third-amendment-act-1992>> accessed on December 25 2020.

¹⁹³ Interview with Lado Sikaka in February 2020.

¹⁹⁴ Interview with a Dalit Forest-dweller in Niyamgiri in February 2020.

be marginalized in decision-making. While deliberative democracy and the framework that forest-dwellers have articulated provides a point to begin exploring the possibilities of repair, it is done cautiously as identity-based exclusion is prevalent in these villages.¹⁹⁵

In chapter five, I will speak to the reimagination of the consent process based on my interviews, which shares many characteristics with the theoretical framework of deliberative democracy and governance discussed later in this chapter. The use of deliberative democracy and governance as a theoretical framework is not intended to re-package the articulation of forest-dwelling communities as one of deliberative democracy but rather to complement their observations and offerings of an alternative forest governance structure.

There are three reasons for adopting a deliberative democracy lens. Firstly, it is a theoretical framework to find a pathway to repair the relationship with the state. Secondly, it offers an evaluative framework to understand the consent provision and its implementation within the bureaucracy and the village. Lastly, deliberative democracy enables me to describe the consent provision and process's future trajectory described by the forest-dwelling community. It is a thread that holds together the empirical and normative parts of this thesis.

2. Deliberative Democracy in India

Deliberative democracy in India has a rich history which challenges the perception that it is an understanding of democracy that originated only in the West.¹⁹⁶ Historically in India, as Sen documents in his work, there existed religious councils organized by Indian Buddhists, which were meant to discuss and deliberate issues of importance. Deliberative forums were not confined to Buddhism, but traditions of argumentation existed in the Hindu Nyaya or justice tradition where logic and arguments were encouraged as a means of checking power. Similarly, in Islam, too, documentation exists of how religious leaders challenged the exercise of power by the Sultan.¹⁹⁷

¹⁹⁵ In the villages I visited, Dalit forest-dwellers and women were excluded in the decision-making processes of the Gram Sabha. Documented in my fieldnotes from my visit in July 2018.

¹⁹⁶ Ramya Parthasarthy and Vijayendra Rao, 'Deliberative Democracy in India' (2017) Policy Research Working Paper; No. 7995. World Bank, Washington <<https://openknowledge.worldbank.org/handle/10986/26245>> accessed on December 25, 2020.

¹⁹⁷ Amartya Sen, *The argumentative Indian: Writings on Indian history, culture, and identity* (Macmillan, 2005).

Bayly, in his work, alerts us to the presence of sabhas, kathas, and discussions across religious groups. The term sabha (association) itself originally indicated a meeting in which different qualities of people and opinions were tested, rather than the scene of a pronouncement by caste elders. These deliberative forums brought people across class and caste barriers to discuss issues which were at times in opposition to the state.¹⁹⁸ Indian democracy, as Sen asserts, stems from the argumentative tradition where the force of a good argument has been a valuable addition to representative forms of democracy.¹⁹⁹

The tradition of deliberation is present in the customary institutions of Adivasis, too; as Jaipal Singh Munda has noted, one cannot teach democracy to the Adivasi community but must learn from them.²⁰⁰ Verrier Elwin, in his in-depth study of the Baigas, speaks to the egalitarian ethos of the community and their practice to make decisions through consensus.²⁰¹ The Dongria Kondh community, too, has a tradition of forums for deliberative decision-making on community issues.²⁰² As seen in the previous chapter, the law tried to create spaces for customary institutions to thrive, yet that has been a difficult proposition. Instead, customary deliberative institutions were subsumed into the decentralised governance architecture that was recognized. The Gram Sabha was recognised in law as a mandated deliberative forum under the 73rd constitutional amendment.²⁰³

Before I speak to the intricacies of decentralization and participatory democracy in India through the making of the constitution and the 73rd amendment, I would like to briefly mention what preceded this. Henry Maine was instrumental in putting in place a decentralized governance framework during the colonial period. The colonial encounter brought with it interaction between western concepts of participatory democracy with the existing practices in India. Henry Maine, who was advising the British government on legal issues, is said to have relied on the accounts of several British officers of thriving and

¹⁹⁸C.A. Bayly, *Origins of Nationality in South Asia: Patriotism and Ethical Government in the Making of Modern India*. (Oxford University Press, 1995)

¹⁹⁹ Amartya Sen, *The argumentative Indian: Writings on Indian history, culture, and identity* (Macmillan, 2005).

²⁰⁰ Jaipal Singh Munda speaking for the first time in the Assembly on 19 December 1946 in Eds Ashwini Kr.

Pankaj *Adivasidom: Selected Writings and Speeches of Jaipal Singh Munda* (Pyara Kerketta Foundation, 2017)

²⁰¹ Verrier Elwin, *The Baiga* (Gyan Publishing House, 2007)

²⁰² Felix Padel, *The Sacrifice of Human Being: British Rule and Kondhs in Odisha*, (Oxford University Press, 2001).

²⁰³ Nandini Sundar, 'Custom' and 'Democracy' in Jharkhand.' (2005) *Economic and Political Weekly*, vol. 40, no. 41, pp. 4430–4434.

autonomous local institutions where their structure, practice, and operation were similar to the characteristics of participatory democracy.²⁰⁴

This understanding led to the approach that village-level governance can be an alternative to the centralized governance structure that was present. It was formally acknowledged as an approach to governance in India with the local government reforms by Lord Ripon in 1882 with the intention to revive India's indigenous governance architecture.²⁰⁵ This decentralised governance structure reified the village as a unit of governance. During the making of India's constitution, Mohandas Gandhi insisted that democratic decentralization be recognised within the constitution, with the village as the unit of governance. This was vehemently opposed by Dr. Ambedkar, who saw the village as a locus of caste-based exploitation; thus, such democratisation would reinforce caste hierarchies.²⁰⁶

In Scheduled Areas, as seen in chapter two, it created a governance architecture with the Tribes Advisory Council which enjoyed a degree of self-governance.²⁰⁷ However, it was only with the 73rd amendment to the constitution in 1992 that the deliberative forum of the Gram Sabha came to be constitutionally recognised. The Gram Sabha was mandated with the role of deliberation, and the gram panchayat, which is the executive body, was accountable to the Gram Sabha. The amendment instituted a three-tier governance architecture with the panchayat at the village level, another at the block level, and one at the district level. The amendment was focused on the empowerment of the Gram Sabha. Article 243A provides that the Gram Sabha may exercise such power and perform such functions at the village level as the legislature of a State may by law provide. As the incorporation of this architecture was left to the states, it has taken on different forms.²⁰⁸

The 73rd amendment to the Indian constitution speaks to the coming together of western democratic ideas which have come to be Indianized. Parthasarthy and Rao put in the following way:

²⁰⁴ Maine, H.S, *Village-communities in the East and West*. (Henry Holt and Company, 1876)

²⁰⁵ Ramya Parthasarthy and Vijayendra Rao, 'Deliberative Democracy in India' (2017) Policy Research Working Paper; No. 7995. World Bank, Washington <<https://openknowledge.worldbank.org/handle/10986/26245>> accessed on December 25, 2020.

²⁰⁶ *Ibid* 205.

²⁰⁷ Article 244 of the Indian Constitution.

²⁰⁸ Article 243A of the Indian Constitution.

These forums have underscored the idea that deliberation is not merely a Western democratic phenomenon, but rather, an integral part of the cultures all over the world. Particularly in India, the rich interplay between Western democratic ideas and local thinkers through the late nineteenth and early twentieth centuries truly “Indianized” deliberative democracy – ultimately resulting in the 73rd amendment’s constitutional mandate to create the Gram Sabha.²⁰⁹

The Gram Sabha with such formal recognition has created a space within law for deliberation. It has been infused with customary deliberative practices by forest-dwelling communities. A forest-dweller in Sundergarh spoke to the relationship between the formal and the customary within Gram Sabhas:

The Gram Sabha is officially recognised, but at our meetings, we rely on customary practices to enhance discussions. For instance, in our community, we have a certain order in which people speak to ensure everybody is heard. We begin with the elders and then to the youngest members of our community.²¹⁰

The co-existence of the formality of the Gram Sabha and the customary practices is visible in the meetings that I attended in Odisha, where the legal requirements of quorum and agenda were combined with customary practices of order and speech acts. An example of this was in the Gram Sabha meeting in Jagatsingpur where women within the community were asked to present their discussions from their sub-committee, and a dedicated amount of time was spent to engage with their concerns. This creative fusion of the formal and the customary has created a fertile ground for forest-dwelling communities to innovate on the ground of how the Gram Sabha functions and responds to their needs.²¹¹

The deliberative turn in India’s democracy can be located in the process of democratic decentralization. Decentralization occurred with the intention of devolution of power to local bodies. However, in chapter two on the regime of dispossession, I have shown that such devolution did not occur in India’s forests.

²⁰⁹ Ramya Parthasarthy and Vijayendra Rao, ‘Deliberative Democracy in India’ (2017) Policy Research Working Paper; No. 7995. World Bank, Washington <<https://openknowledge.worldbank.org/handle/10986/26245>> accessed on December 25 2020.

²¹⁰ Interview with an Adivasi forest-dweller in Sundergarh in August, 2018.

²¹¹ Nandini Sundar, ‘Custom’ and ‘Democracy’ in Jharkhand.’ (2005) *Economic and Political Weekly*, vol. 40, no. 41, pp. 4430–4434.

The Gram Sabha under PESA and FRA have been authorized with decision-making powers on development, conservation, and management of forest areas. the potential for the Gram Sabha to influence the assertion of absolute sovereignty by the state has been limited due to forest laws being in conflict.

While the constitution recognised the role of the Gram Sabha in deliberation, the reality on the ground is far from the deliberative ideal. ²¹²In the study done by Rao and Sanyal where they reviewed 290 resolutions by Gram Sabhas in Southern India, what they found was:

Public deliberation in the Gram Sabha is rather a competition between groups and individuals who want a piece of the public pie and employ a wide repertoire of discursive techniques to make their voices heard. Participants are not interested in reaching a consensus but rather seek to stake their particular claims to the “gifts” of the state.²¹³

Discursive competition, as opposed to discussion, remains a key limitation in Gram Sabhas. I will highlight this in chapter six of this thesis. Exclusion of communities on the basis of caste and gender has been observed in these studies. In Odisha, exclusion of Dalit forest-dwelling communities and exclusion on the basis of land ownership occurred where landlessness was present. Despite these challenges, the Gram Sabhas have provided an avenue for deliberation, and as Sen and Dreze argue, it is through the practice of democracy and deliberation that these vectors of exclusion can be addressed. ²¹⁴

3. Deliberative democracy and the state in India's forests: The Absence of a Deliberative Relationship with the State

In chapter two I have demonstrated that, the state in India's forests has a normative monopoly over decisions of conservation and development. The deliberative turn in forest laws with the introduction of scheduled areas, PESA, and FRA has created pathways for deliberation over these decisions. I will elaborate in chapter five that the deliberative

²¹² Teresa Joseph and Siby.K.Joseph Eds *Deliberative Democracy: Understanding the Indian Experience* (Routledge,2018)

²¹³ Vijayendra Rao and Paromita Sanyal, 'Dignity through Discourse: Poverty and the Culture of Deliberation in Indian Village Democracies.' (2010) *The ANNALS of the American Academy of Political and Social Science* 629, no. 1 pp. 146–72.

²¹⁴ Jean Dreze and Amartya Sen, *India: Development and Participation* (Oxford University Press,2002)

potential of these laws is curtailed by the pro-business bureaucracy which interprets these laws in a non-deliberative manner.

Forest-dwelling communities described that the state was present as the police, the forest department, or surveys for land acquisition, and seldom was it present with obligations of care. Dolly Kikkon, in her book *Living with Oil and Coal*, describes how the language of love was used to analyse the relationship between the state and the citizen.²¹⁵ In Odisha, it was the language of care and neglect. Manorama Katua, a senior activist with the Committee fighting against Posco, described:

The state is present in its enabling and caring form for capital but is absent when it came to the forest-dwellers' livelihood and rights.²¹⁶

The state's neglect here was captured by its absence in its caring and deliberative avatar, but its presence in its paper and extractive mode as chapter four will highlight. The conflicting forest laws, described in chapter two, enable the state to assert absolute control. Though the FRA provided a legal framework to break away from the older and oppressive forest governance structure, it has faced many obstacles in its implementation by the forest bureaucracy.

Deliberative experiments in forest areas have occurred periodically in post-independent India. It began with the national forest policy of 1988, which recognized the importance of the forest-dwelling community's participation in conservation. More radical deliberative experiments coincided with the 73rd and 74th Amendments to the constitution, which decentralized the governance structure in rural and urban areas with the three-tier panchayat system. Decentralization was a successful experience in India's Democracy. Despite its kinks it facilitated the quasi-welfare state's desire to reach remote corners.²¹⁷

Prior to the passing of the FRA and PESA, experiments in participatory conservation were attempted to share decision-making power with the forest department. Joint Forest Management was one such model where a committee consisting of members of the forest-

²¹⁵ Dolly Kikkon, *Living with Oil and Coal: Resource Politics and Militarisation in Northeastern India* (University of Washington Press, 2019)

²¹⁶ Interview with Manorama Kathua in Jagatsinghpur in July 2018.

²¹⁷ Teresa Joseph and Siby.K.Joseph Eds *Deliberative Democracy: Understanding the Indian Experience* (Routledge, 2018)

dwelling community along with the forest department was to make decisions jointly on forest management. It was, however, implemented in a manner that the forest department retained control over decision-making.²¹⁸

Decentralization and participatory forms of democracy have entrenched a governance system deeply rooted in villages. Decentralization has been mired with reinforcing existing inequities of caste, gender, and religion. I have argued in the earlier section of this chapter on deliberative democracy in India, Gram Sabhas have failed to meet the deliberative ideal of inclusion in a heterogeneous society like those in the forest areas such that the voices of women, Dalits, lower-caste communities, and others are incorporated in the discussions. Despite these limitations, the Gram Sabha has emerged as a site where these aspects are discussed and worked out.²¹⁹ Brahmaro Das explains:

It is true that our Gram Sabha meetings do exclude members of the community. I will not deny that, but we discuss the nature of this exclusion, and we attempt to find ways to move beyond it. It is a work in progress with the ideal of inclusion in mind.²²⁰

In forest areas, the panchayat system is present. Yet, the panchayat system is limited by the conservation laws and the Doctrine of eminent domain in their ability to realize the Gram Sabha's deliberated outcomes. Exclusionary conservation laws recognise state control over forest areas and heavily regulate the use of forest resources. In such a heavily regulated zone to enforce the Gram Sabha's deliberated decisions on development or conservation is difficult as the state swoops in with its own management plan for the forest.²²¹ A young Adivasi in Karlapat Wildlife Sanctuary adjacent to Kodingamali hills where bauxite is now being mined for Vedanta's aluminium refinery, explains:

Our Gram Sabha decided we wanted a community activity area where we can have our meetings. The resolution was passed and submitted to the gram panchayat, which approved it. The forest department discovered about our plans and said that it would not be possible as

²¹⁸ Nandini Sundar, Niel Thin and Roger Jeffery, *Branching Out: Joint Forest Management in India* (Oxford University Press, 2002)

²¹⁹ Vijayendra Rao and Paromita Sanyal, 'Dignity through Discourse: Poverty and the Culture of Deliberation in Indian Village Democracies.' (2010) *The ANNALS of the American Academy of Political and Social Science* 629, no. 1 pp. 146–72.

²²⁰ Interview with Brahmaro Das in Jagatsinghpur in July 2018.

²²¹ Shankar Gopalakrishnan, 'The Forests Rights Act: Political Economy of "Environmental" Questions' *Economic and Political Weekly* VOL LII NO 31 (2017)

it is a sanctuary and felling of those many trees is not allowed. This despite the fact that the FRA gives us rights to fell trees for such purposes.²²²

The failure of these deliberative experiments and the inability of forest-dwelling communities to influence states' decision-making has fuelled sustained protests by the forest-dwelling community.

The modern developmental state has to shift from its original ideal of a well-structured bureaucracy solving problems to a more deliberative process with a sophisticated network of nodes and forums as development and conservation are a complex problem when viewed holistically.²²³ The difficulty for states to embrace deliberation is the perception that it does away with the well-structured bureaucracy instead of complementing and providing legitimacy to bureaucratic functioning.²²⁴

The state is an important actor in the deliberative system as it is the arbiter of decisions between citizens and the market on conservation and development in forest areas. The challenge for those seeking to implement the deliberative democracy has been the Indian state's pro-business avatar, where the influence of the capitalists has been significant in informing decisions. Creating a deliberative system where forest-dwelling communities share an equal influence is a challenge as it decentres the pro-business modality of the state.²²⁵

4. Citizenship and it's Practices in India's Forests

In order to understand the possibility of a deliberative relationship with the state, it becomes essential to unpack the notion of citizenship in India's forests, to understand who can make claims upon the state and how forest-dwellers articulate citizenship and belonging.

Citizenship here is understood as a set of entitlements and responsibilities being part of the nation-state's arrangement.²²⁶ This understanding of citizenship serves as a good starting point to unpack its presence in India's forests. Forest-dwellers are a heterogeneous group

²²² Interview with the young Adivasi in Karlapat in July 2019.

²²³ Evans, Peter B. 'Predatory, Developmental, and Other Apparatuses: A Comparative Political Economy Perspective on the Third World State.' (1989) *Sociological Forum*, vol. 4, no. 4, pp. 561–587

²²⁴ *Ibid* 223

²²⁵ Atul Kohli, *Democracy and Development in India* (Oxford University Press, 2010)

²²⁶ Niraja Gopal Jayal, *Citizenship and its Discontents: An Indian History* (Harvard University Press, 2013)

composed of the Scheduled Tribe (ST), other traditional forest dwellers, and Dalits, the claims of citizenship may differ based on rights and entitlements they have access to within the law.

The law has used the model of group differentiated citizenship to identify special categories of people deserving of social and economic benefits because of the discrimination they endure.²²⁷ The challenge in forest areas is the group differentiated citizenship benefits of scheduled tribes and Dalits differ substantially when it comes to recognizing the right to self-determination and protection of land rights. The STs are prioritized by the state in relation to these aspects.²²⁸

While the law groups these communities to distribute entitlements and welfare schemes, the interaction with the state in forest areas produces a different understanding of citizenship. Alf Gunvald Nilsen uses James Holston's framework of insurgent citizenship to describe how Adivasis and other forest dwellers produce citizenship as they place demands before the state through the use of law to hold the state accountable in meeting their demands. The FRA is an exciting example to examine insurgent citizenship practice as the demand for new legislation was accommodated, negotiated, and made possible in 2006.²²⁹

Notions or repertoires of citizenship are produced in interaction with the state in its insurgent form. However, the state placed demands on forest-dwellers to fulfill responsibilities, particularly conservation in forest areas. Citizenship in forest areas is also produced through the extractive regime in which it is articulated.²³⁰

In recent times, the notion of citizenship has become contested with the Modi governments introduction of the India Citizen Amendment Act, 2019 (CAA).²³¹ The Modi government brought with it what sociologist Shiv Vishwanathan has argued a fragility to the concept of citizenship and belonging brought forth by majoritarianism which demands a sense of uniformity of who an Indian citizen is. The passing of the Act was met with stiff protests by

²²⁷ Niraja Gopal Jayal, *Citizenship and its Discontents: An Indian History* (Harvard University Press, 2013).

²²⁸ Arpitha Kodiveri, 'Narratives of Inclusion and Exclusion: Dalit Rights and the Making of the Forest Rights Act, 2006', Published by The Hindu Center for Politics and Public Policy, <<https://www.thehinducentre.com/publications/policy-report/article8097476.ece>>.

²²⁹ Alf Gunvald Nilsen, *Adivasis and the State: Subalternity and Citizenship in India's Bhil Heartland* (Cambridge University Press, 2018)

²³⁰ *Ibid* 227.

²³¹ Bharat Bhushan, 'Citizens, Infiltrators, and Others: The Nature of Protests against the Citizenship Amendment Act'. *South Atlantic Quarterly* 1 January 2021 Volume 120 (1) pp 201–208

Indian citizens reclaiming the constitutional notion of citizenship.²³² This Act and the contestations over notions of citizenship were experienced differently in India's forests. Adivasi communities began to fear that they will have to prove their citizenship with the burden placed on the citizen to furnish relevant evidence. In Odisha, Jitu Jakesika described the situation as follows:

The CAA is making us feel more vulnerable as we now must justify our citizenship to the state. The forest laws already demand that we prove our relationship to the land we now must prove our citizenship too. Many are working towards gathering evidence. ²³³

This fragility of the notion of citizenship and belonging in forest areas with the introduction of the CAA has reinforced the need for forest-dwelling communities to make claims before the state in their insurgent form to withdraw this Act.

Through interviews, what emerged is three forms in which forest-dwellers understand citizenship. Firstly, is insurgent citizenship as claims being made with and against the state. Secondly, citizenship as compliance with the surveillance of dissent in the extractive regime. The third form is a legal understanding of citizenship as group differentiated citizenship grounded in rights and entitlements. When viewed in processual terms, citizenship makes room for examining the practices of claims-making between forest-dwelling communities and the state and the demands placed on these communities' state in extractive economies.²³⁴

4.1 Citizenship as claims-making

"The state is accountable to the citizenry. We need to hold the state accountable and ensure that they respect our rights," said a young Adivasi in Sundergarh where a stone had been placed with provisions from PESA and FRA enlisted.²³⁵ The notion of citizenship as the ability to make claims before the state and have them fulfilled is visible in many parts of Odisha, where I conducted my fieldwork.

The understanding of citizenship was not restricted to the existing legally enshrined rights but included the ability to push for new laws like the FRA, progressive legal interpretations, and

²³² Shiv Vishwanathan, 'Reflections on the Future of Violence' in *Rethinking Law and Violence* Eds. Latika Vashisht and Jyothi Dogra Sood (Oxford University Press, 2020)

²³³ Interview with Jitu Jakesika in Niyamgiri on February, 2020.

²³⁴ Niraja Gopal Jayal, *Citizenship and its Discontents: An Indian History* (Harvard University Press, 2013)

²³⁵ Interview with a young Adivasi in Tumulia village Sundergarh in July 2018.

benefits. The social movements against extractive industries are rooted in the understanding of shared sovereignty and the working relationship with the state where the forest-dwelling communities have a right to participate in the state's decision-making.²³⁶

The act of citizenship here is located in claiming rights against the state and demands that these rights be respected when forest land is diverted. The dialogue or interaction between the state and the citizen is based on rights, particularly forest rights. When citizenship is looked at in processual terms, it is seen as a way to accept specific state modalities and reject others.

The act of claims-making is found in different forms, Sunil from Tumulia village is about to be evicted for the expanding MCL coal mine. He narrates his acts of citizenship and the relationship he shares with the state as follows:

I have petitioned the state time and again to recognize my forest rights. I had filed my application about eight years ago and still have not heard about the outcome. It was rejected once, and I have since filed for an appeal. It is difficult to plead for the recognition of my rights constantly. However, it becomes a reason for me to have continuous engagement with the state on our community's issues. We have taken the state to court too on the grounds of not being paid appropriate compensation.²³⁷

To Sunil, the act and practice of citizenship were one of the constant claims-making before the local bureaucracy and before the courts. Citizenship as claims-making and away from the restricted sense of law and political status is how forest-dwelling communities negotiate the everyday tyranny of the state in India's forests.

4.2 Citizenship as Compliance

Dolly Kikkon, in her work *Living with Oil and Coal*, speaks of the nature of citizenship in the extractive frontiers of Assam in the north-eastern state of India as carbon citizenship. Citizenship, she argues, is produced through the political economy of extraction accompanied by state surveillance of forest-dwelling communities on these lands.²³⁸The regime of

²³⁶ Kundan Kumar and John Kerr, 'Democratic Assertions: The Making Of India's Recognition of Forest Rights Act' *Development and Change* 43(3): 751–771

²³⁷ Interview with Sunil in Tumulia village in July 2018.

²³⁸ Dolly Kikkon, *Living with Oil and Coal: Resource Politics and Militarisation in Northeastern India* (University of Washington Press, 2019)

citizenship as compliance is present in Odisha's extractive state, too, in the form of labelling forest-dwelling communities as anti-national or anti-development if they resist acquisition and are charged with false criminal offences.

Manorama Kathua, who has been leading the protest against forest land acquisition in Jagatsingpur, has been charged with twenty-three criminal cases.²³⁹ In the villages surrounding Govindpur, many forest-dwellers have been charged with provisions under the Indian Penal Code by the state machinery for participating in protests or resisting land acquisition.²⁴⁰ This tactic used by the state to discipline protests has placed demands on these communities to comply with the state's decision to acquire land.

Manorama describes this as she speaks about the criminal charges that she faces "I am required to travel to the courts often to be there for my hearings. All I did was articulate dissent against the development plans of the state, they have the power to place these charges on me, but I do not think I am guilty of merely disagreeing with the state. The state expects us to go along with their plans without any questions being asked."²⁴¹

The idea of surrendering to the state's will on its goals of extraction is seen as an essential element of the compliant citizen in forest areas. While surrendering in the process of land acquisition was initially understood by forest-dwellers after independence as an act of sacrifice and contributing to nation-building, repeated displacement and lack of compensation have transformed this understanding to one of exploitation by the state of the marginalized in the national interest or for the greater common good as Arundhati Roy argued in her famous essay critiquing the construction of the Narmada Dam.²⁴²

In conservation practice, the forest-dwelling community must either steward the forests or be displaced for the conservation of the area.²⁴³ This notion of citizenship as compliance is contrasted by the articulation of dissent and use of law by forest-dwelling communities for claims-making. The diversity in the practice of citizenship in forest areas is best captured as the relationship between the state and forest-dwellers oscillating between citizenship being

²³⁹ Alf Gunvald Nilsen, *Adivasis and the State: Subalternity and Citizenship in India's Bhil Heartland* (Cambridge University Press, 2018)

²⁴⁰ *Ibid* 236

²⁴¹ Interview with Manorama Kathua in Jagatsinghpur in July 2018.

²⁴² Arundhati Roy, 'The Greater Common Good' in *Outlook* (May 24 1999)

²⁴³ Amita Baviskar, *In the Belly of the River* (Oxford University Press, 1995)

viewed as compliance by forest-dwelling communities and the practice of citizenship as claims-making.

4.3 Citizenship as Legal Categories

The third form of citizenship articulated by forest-dwelling communities in their interviews is the understanding of group differentiated citizenship as a legal category enabling access to welfare schemes and rights. The law differentiates citizenship categories in forests based on forest-dwellers' backwardness and vulnerability. The categories which forest-dwellers have come to be identified as are Scheduled Tribe, Other Traditional Forest Dweller, Scheduled Caste, Other Backward Caste, and Particularly Vulnerable Tribal Groups.²⁴⁴

These categories present in the law today can be historically located in the categorization schema that the colonial administration assigned to these groups. The Indian state has identified target groups as recipients of state support in the form of access to food, education, and development facilities. The table below provides a schematic overview of the categories, descriptions, and nature of rights and entitlements it attracts.

²⁴⁴ Article 342 of the Indian Constitution and Section 2 of the Forest Rights Act, 2006.

CATEGORY	DESCRIPTION	RIGHTS AND ENTITLEMENTS
Scheduled Tribe	Scheduled Tribe refers to the Adivasi or tribal communities listed in the scheduled under Article 342 of the Indian constitution. The criteria for recognition are backwardness, geographical isolation, and shyness. ²⁴⁵	Entitled to a reservation in the employment in public sector jobs, forest rights, and protective rights to land.
Particularly Vulnerable Tribal Groups	Groups who are considered primitive and thus requiring additional protection from the state ²⁴⁶	Right to welfare schemes, development aid, and rights over land and forests.
Scheduled Caste	Lower caste or Dalit communities so listed under Article 342 of the Indian constitution. They face discrimination in the form of the practice of untouchability, among others.	Right to a reservation in employment and education in public institutions. Right to land under the land reforms efforts. Access to development aid and protection from discrimination based on caste.
Other Traditional Forest Dwellers	Forest-dwellers who are not categorized as a scheduled tribe but have been dependent and residing in forest areas for three generations or seventy-five years. ²⁴⁷	Forest rights and right to forest land.
Other Backward Caste	Communities that have been historically marginalized in India and continue to face oppression and social, economic, and educational isolation but do not fall into the Scheduled Castes or Scheduled Tribes list fall into the Other Backward Classes category under Article 340 of the constitution	Forest rights if they come under the other traditional forest-dwellers category and other protective measures.

Table 7: Legal categorization of communities and their associated rights and entitlements.

²⁴⁵ Article 342 and 340 of the Indian Constitution and Report of the Scheduled Tribes and Scheduled Areas Commission of the Government of India, 2002. Available at < <https://tribal.nic.in/writereaddata/AnnualReport/BhuriaReportFinal.pdf>> last accessed on December 25 2020.

²⁴⁶ Primitive Tribal Group was re-classified as Particularly Vulnerable Tribal Groups in 2006 available at < <https://tribal.gov.in/writereaddata/Schemes/4-5NGORevisedScheme.pdf>> last accessed on December 25 2020.

²⁴⁷ Section 2 of the Forest Rights Act,2006.

This schematic overview provides a glimpse into the legal categories that define citizenship in forest areas and their relationship with the state mediated through rights and entitlements. These existing categories within the law continue to inform how the state interacts and engages with the demands placed before it by different communities.

This form of variegated or differentiated citizenship creates divisions within communities in forest areas. It affects who has the right to participate and whose deliberative speech acts are given more room in the Gram Sabha. I will elaborate on these aspects in chapter six. However, this schema of citizenship within the law is a foundational lens for how the state frames who are entitled to rights and protection. The relationship between the state and the citizens in forest areas is navigated through these categories, and communities use these categories to make themselves legible to the state and participate in deliberative opportunities.

5. Jurisprudence and legal approaches to repair the relationship between forest-dwelling communities and the state in India's Forests.

While one reading of forest laws is the regime of dispossession, another reading of forest laws informed by the theory of deliberative democracy is that of establishing a deliberative relationship between the state and forest-dwelling communities. The failure of the deliberative experiments is rooted in the interpretation of forest laws that reinforce state authority.

Deliberation and deliberative opportunities within existing jurisprudence are seen as a meeting place, an encounter, or a convening of competing normative orders, discourses, and sources of authority on conservation and development in the forest areas. A deliberative democracy reading of forest laws reveals an existing environmental jurisprudence, particularly by the Supreme Court and statutory mechanisms of scheduled areas in India of sharing authority and sovereignty between the state and the forest-dwelling community with potential avenues for continuous dialogue.

It is the public trust doctrine and the governance structure in scheduled areas from the existing environmental jurisprudence and law which limit the state's exercise of absolute sovereignty. These legal principles and approaches to governance challenge the exercise of

The Doctrine of Eminent Domain and state control in decision-making.²⁴⁸ This deliberative democratic reading of forest laws and jurisprudence is supported by interviews with forest-dwellers that pushed the envelope on the implementation of these legal principles' scope and their future trajectory.²⁴⁹ A sort of living jurisprudence and re-interpretation from below on how these existing legal principles can be interpreted in the direction of healing and repairing the relationship with the state.²⁵⁰

I will briefly provide an overview of the legal principles and their presence in the Indian context and expand its understanding with interviews from forest-dwellers. I conclude with how these legal principles create deliberative possibilities to heal and repair the relationship with the state.

5.1 Shared and negotiated Sovereignty and Deliberative Reconciliation of Laws in Scheduled Areas

Scheduled Areas are areas where the state's authority is limited with restrictions on the sale of land to non-tribals and where changes to laws are to be made in consultation with the Tribes Advisory Council. The origin of scheduled areas is framed by the right of scheduled tribes to self-determination and self-governance which was explained in chapter two. The governance of scheduled areas has been conducted to violate these limitations and reinforce the state's authority. Jaipal Singh had argued that there is a need for the Tribes Advisory Council to have more teeth in shaping decision-making and moving beyond a merely consultative role. For the meaningful implementation of scheduled areas governance, the Indian state needs to share authority with forest-dwelling communities.²⁵¹

²⁴⁸ Roger Cotterrell, *Living Law: Studies in Legal and Social Theory*. (Ashgate,2008).

²⁴⁹ Forest-dwelling communities use the scheduled areas governance framework and the public trust doctrine to push back against the Doctrine of Eminent Domain to be able to influence state decision-making.

²⁵⁰ Roger Cotterrell, *Living Law: Studies in Legal and Social Theory*. (Ashgate,2008).

²⁵¹ Parmar, Pooja. 'Undoing Historical Wrongs: Law and Indigeneity in India.' (2012) *Osgoode Hall Law Journal* 49.3 pp.491-525.

It would be deceiving to claim that the Indian state in forest areas has exercised absolute sovereignty, as Odisha sovereignty is negotiated and shared with forest-dwelling communities. Sovereignty as Thomas Blom Hansen and Dolly Kikkon describes as:

Everyday sovereignty is produced through resource extraction regimes. Sovereignty creates itself during a fragmentary, uneven distribution of power and configurations of authority, exercising a form of violence that is more or less legitimate in that particular territory.²⁵²

In Odisha's forests, extractive regimes create a fragmented configuration of authority. The governor and the tribal advisory council have not been effective in deciding on laws that apply in scheduled areas. The deliberative possibilities that the shared and negotiated sovereignty framework provides are the ability for forest-dwelling to influence the state's decision-making.²⁵³

Sovereignty is layered as it percolates from the nation-state's idea to the bounds of the federal system and is further chipped away, particularly with the ability to make laws and administer with the creation of scheduled areas. The governance framework in scheduled areas provides a forum for deliberation through the Tribes Advisory Council where laws can be changed, keeping in mind the priorities of the scheduled area, and recognised through the exercise of the governor's executive power.

The regime of dispossession ruptures the relationship between forest dwellers and the state in India's forests. The presence of a forum similar to the Tribes Advisory Council should be the appropriate forum to reconcile the conflicting forest laws instead of the district collector. The assortment of normative orders that operate in India's forests has already been described in chapter two. In a space where legal pluralism is prevalent, there is a need for deliberative reconciliation of laws, norms, and interpretations, in Maharashtra in scheduled areas where new village forest rules chose to do away with the progressive provisions of the Forest Rights

²⁵² Thomas Blom Hansen, 'Sovereigns Beyond the State' in Thomas Blom Hansen and Finn Stepputat (Eds) *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* (Princeton University Press, 2005)

²⁵³ Alf Gunvald Nilsen, *Adivasis and the State: Subalternity and Citizenship in India's Bhil Heartland* (Cambridge University Press, 2018)

Act,2006. The governor amended these rules in consultation with the tribal advisory council to be rendered applicable to the scheduled area.²⁵⁴

Scheduled area governance as it exists now is a weak framework to forge pathways for a deliberative relationship with the state. Forest-dwelling communities in Odisha describe a need for flexibility in administrative structures and strengthening forest-dwelling communities' role in shaping the administrative structure. Many forest-dwelling communities referred to arriving at a meta-consensus with the state in the form of a working agreement that defined how the authority will be shared and deliberative pathways that can be forged for decision-making on development, conservation, and land acquisition.²⁵⁵

Rajendra in Sundergarh described the meaning of state authority and sovereignty in the coal frontiers of Odisha:

It is simple, the state has the authority to decide, and we do not feature in decision-making. How is that a self-governance model? Ideally, these decisions need to be made together. We have to come to an agreement that works for all. The state, as I said, decides, and we have to abide. It is like being in a relationship with a bossy friend. Sometimes it is better to move away and forge new connections by rejecting them like we do the state unless the friend reforms, learn to listen, and is willing to share power.²⁵⁶

Political, Legal, and Administrative sovereignty is to be shared in India's forests as forest-dwellers are keen to be active citizens with certain rights to forest land and resources. Shared sovereignty complements the right to self-determination, as understood through interviews. The possibility of deliberation, encounter, or convening between the forest-dwelling community and the state is conducive to such a negotiation.²⁵⁷

The Naga Peace Accord is an exciting example where shared sovereignty has been elaborated between the Indian state and the Naga community. While the history of state formation and the struggle for self-determination in Nagaland is quite different from Odisha, what can be

²⁵⁴ Alok Deshpande, 'Maharashtra Governor modifies law on forest rights' *The Hindu* (May 28 2020) <<https://www.thehindu.com/news/national/other-states/maharashtra-governor-modifies-law-on-forest-rights/article31690811.ece>> accessed on December 25 2020

²⁵⁵ Field notes after interviews with forest-dwelling communities from July 2018 and February 2020.

²⁵⁶ Interview with Rajendra in Sundergarh on July 2018.

²⁵⁷ Shimrah, Kharingyo, Shared sovereignty between India and Nagalim.(2015) <https://www.researchgate.net/publication/282317483_Shared_sovereignty_between_India_and_Nagalim/citation/download> accessed on December 25 2020.

extrapolated from this agreement is how shared sovereignty is envisioned and how the right to self-determination has been articulated. This can provide an alternative approach to repair the relationship between the state and forest-dwellers.²⁵⁸

5.2 The Public Trust Doctrine

The Supreme Court (SC) in India has been an activist court when it comes to environmental jurisprudence. In a case filed by M.C Mehta where a motel was being constructed blocking the flow of River Beas, the Supreme Court prevented its construction based on the Public Trust Doctrine. The SC emphasized that the state was merely a trustee of natural resources, specifically water, forests, and seas. The sovereignty of the state in deciding how public resources are used is contingent on using them prudently, and it remains accountable to citizens on these decisions. The citizens retain the right to challenge the use of these resources.²⁵⁹

However, to trigger citizen scrutiny is dependent on approaching the courts. The ability of citizens to question state power in decision making has to be funnelled through the courts. Thus, deliberative forums like the Gram Sabhas are important as cooperative forums before recourse is made to the courts and their adversarial forms of operation, forms that leave minimal room for discussion and negotiation on forest land diversion.

This Doctrine went on to be applied in another case where an underground market was being built under a heritage area in Lucknow. Beyond these interventions in court, this Doctrine's ability to reshape the relationship between the state and the citizens have been unexplored. The state's idea of merely holding the resources in trust with a duty of accountability to citizens requires a form of permission or approval from citizens before decisions are made.²⁶⁰

The National Mineral Policy, 2019 has acknowledged the state's understanding as merely a trustee of natural resources. It states:

²⁵⁸ *Ibid* 254.

²⁵⁹ M.C Mehta Vs Kamal Nath and Others (1 SCC 388 1997)

²⁶⁰ M.I. Builders v Radhey Shyam Sahu (AIR 1999 SC 2468)

There is a need to understand that natural resources, including minerals, are a shared inheritance where the state is the trustee on behalf of the people to ensure that future generations receive the benefit of inheritance.²⁶¹

Lado Sikaka in Niyamgiri elaborates on this role of the state and the understanding of property to expand the existing jurisprudence of the public trust doctrine. When asked who owned the forests, he said:

Nobody can own the forest, not the state or us. We all are merely stewarding it. The state has to work with us in making decisions on how we can best use these forests while making sure that it can be conserved for future generations. The idea of the property that makes sense to me is to think of it as a relationship between us, our environment, and generations. It is a connection of respect and not one of control.²⁶²

As Lado Sikaka puts it, the public trust doctrine is where the state is stewarding the forests with the forest-dwelling community. Decisions are to be deliberated upon as opposed to being decided upon unilaterally by the state. The public trust doctrine has not been reconciled with the Doctrine of eminent domain in India.

The notion of property rights proposed by Lado Sikaka resonates with the understanding of property rights put forth by anthropologists as well as property rights in the context of indigenous knowledge.²⁶³ It transforms from an understanding of ownership of people over things to relationships that people have with things. The idea of property rights in forest areas as relationships is visible as forest-dwelling community members who wanted to sell their land described it as a connection being broken with the land.

These connections and relationships with the land are transforming as Jitu Jakesika articulates:

²⁶¹ National Mineral Policy , 2019 <
<https://www.mines.ap.gov.in/miningportal/Downloads/NewDocs/National%20Mineral%20Policy.pdf>>
accessed on December 25 2020.

²⁶² Interview with Lado Sikaka in Niyamgiri on February 2020.

²⁶³ Hann, Chris 'Introduction. The embeddedness of property' in Chris Hann (Ed) *Property relations: renewing the anthropological tradition*. (Cambridge University Press, 1998)

Our relationship with the forest is transforming as the extractive economy makes its inroads. What we historically described as a sacred connection with the land, which is to be stewarded, is transforming into one of seeing land as assets that can be sold. ²⁶⁴

Despite this transformation, forest-dwelling communities underscore that property rights are relational to the environment and cannot be described as ownership though the extractive economy forces them to view it in that manner. This legal principle provides a jurisprudential basis to reimagine the relationship between forest-dwellers and the state as co-stewards sharing a diverse set of relationships over forest land where decisions of use and diversion are made together as opposed to unilaterally. The access to property rights and decisions of alienation is contingent on fulfilling the duty of care and care as an improvement instead of the Lockean idea of improvement requiring economic value addition.

6. Theories of Deliberative Democracy, Governance, and Systems as the Normative Ideal: Its contours and applicability to forest governance in India

Deliberative democracy, unlike representative democracy, speaks of a form of democracy that goes beyond the aggregation of preferences. It is an understanding of democracy grounded in the idea of a public space where preferences can be shared, negotiated, and changed based on an argument's strength. This model of democracy was brought to the fore by Jurgen Habermas's work on communication theory.²⁶⁵

The deliberative ideal is where preferences can be presented and debated upon and public opinion accordingly formed. Looking closer one sees that deliberative democracy is plagued by its limitations too. I will begin with an overview of dominant theories of deliberative democracy and then proceed to narrate its presence and limitations in the context of development and decision making in India's forests. I will conclude by arguing for deliberative governance and deliberative systems as a normative ideal to articulate the reimagination of the pathways of decision-making in India's forests.

Joshua Cohen, an influential theorist of deliberative democracy, provides a legitimacy account of the same. He argues that for any decision to be legitimate, there is a need for those affected

²⁶⁴ Interview with Jitu Jakesika in Niyamgiri on February 2020.

²⁶⁵ John Dryzek with Simon Niemeyer, *Foundations and Frontiers of Deliberative Governance* (Oxford University Press, 2010)

by it to accept it. This idea of legitimacy is vital as deliberative democracy demands that the eventual decisions made are a product of a deliberated outcome, which is accepted by the public as a product of public deliberation on matters of common concern.²⁶⁶

In this thesis, the legitimacy of the state's decision to divert forest land is grounded in the Gram Sabha's deliberated outcome—the legitimacy is drawn from the fairness in decision-making, inclusion, and participation within the Gram Sabha. This is the normative ideal as Lado Sikaka explains, “The state has to be receptive to our decisions, but the community as a whole should agree to the decision as well which needs to be arrived at through a fair and inclusive process.”²⁶⁷ The reality on the ground in forest areas is far from this ideal as forest-dwelling communities, highlighted in chapter six, are divided by legal design on the nature of their legal categories and in their approaches to development.

Like Joshua Cohen, Seyla Benhabib provides a democratic legitimacy reading of deliberative democracy. She examines the procedural and substantive part of deliberation. She argues that procedurally public deliberation should be enabled with the need for inclusion. Below she lays down the procedural aspects of public deliberation:²⁶⁸

if such agreement were reached as a consequence of a process of deliberation that had the following features: 1) participation in such deliberation is governed by the norms of equality and symmetry; all have the same chances to initiate speech acts, to question, to interrogate, and to open debate; 2) all have the right to question the assigned topics of conversation, and 3) all have the right to initiate reflexive arguments about the very rules of the discourse procedure and how they are applied or carried out.²⁶⁹

Participation is essential for public deliberation to be inclusive, yet theorists like Iris Marion Young alert us to the existing inequities in understanding participation. She speaks of those who can articulate and register their speech acts in the deliberative process and be heard, and others who are excluded, particularly women. She dislodges deliberative democracy and introduces communicative democracy where the understanding of speech acts is expanded

²⁶⁶ Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *The Good Polity: Normative Analysis of the State*, Alan Hamlin and Phillip Petit, editors, New York: Blackwell, 1989

²⁶⁷ Interview with Lado Sikaka in Niyamgiri in February 2020.

²⁶⁸ Seyla Benhabib, ‘Toward a Deliberative Model of Democratic Legitimacy.’ In Seyla Benhabib (Ed) *Democracy and Difference*. (Princeton University Press, 1996)

²⁶⁹ Ibid 265.

to include stories.²⁷⁰ I rely on this broader understanding of speech acts as I trace the practice of deliberative Democracy in India's forests.

Participation within the Gram Sabha occurs on vectors of exclusion based on caste and gender. Forest-dwelling communities, as the section on citizenship in the earlier part of this chapter, demonstrated is variegated by legal design with access to certain privileges and rights of Scheduled Tribes in comparison to Dalit forest-dwelling community members. Participation within the Gram Sabha has to be located in the local political dynamics of the communities. For instance, in Jagatsingpur, the forest-dwelling community has acknowledged that participation within the Gram Sabha has excluded the landless who were interested in engaging with the mining company.²⁷¹ In chapter six, I explore the divisions within these communities and how it informs the processes of arriving at a collective deliberated outcome.

While deliberative democracy in this thesis is understood in light of these theories, I situate my inquiry of deliberative democracy in India's forests in John Dryzek's work on deliberative governance and John Parkinson's and Jane Mansbridge's work on deliberative systems.²⁷² John Dryzek, in his work on deliberative governance, speaks of an institutional turn in the scholarship that emphasizes the importance of particular forums or a more systemic turn that examines all deliberations as part of a more extensive system. I adopt this systemic view of deliberative democracy rather than an institutional one to describe deliberative democracy in India's forests.

A deliberative system is understood as:

the systemic aspect is sharpened in the introduction by Mansbridge of the idea of a "deliberative system" reaching from everyday talk among friends and associates to formal debate in the legislature. The aspects of a deliberative system are elaborated by Parkinson. For Parkinson, social movement activism, expert testimony, bureaucracy, and administrative consultation, public hearings, designed forums, media, legislature, and referenda or petitions

²⁷⁰ Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, 2000)

²⁷¹ Fieldnotes from July 2020.

²⁷² John Parkinson and Jane Mansbridge, *Deliberative Systems: Deliberative Democracy in the large scale* (Harvard University Press, 2012)

can each contribute in their own particular and different ways to the achievement of deliberatively fair public policy.²⁷³

Deliberative systems provide a more inclusive understanding of how and where deliberation takes place. In this thesis, I will be examining the deliberative system surrounding the consent provision with its different parts. The deliberative system ensures that deliberations outside of the Gram Sabha taking place in mini publics are included within the understanding of the consent provision. While the Gram Sabha may not meet the ideal of equality of speech act, the deliberative system ensures the inclusion of voices. In this thesis, the systemic approach serves as a framework to describe the presence of nodes and networks that enable deliberation and inclusion whilst being measured against the normative ideal of inclusion, authenticity, and bindingness.²⁷⁴

With the systemic approach to deliberative democracy, what then are the conditions to ensure authenticity, inclusion, and impact of the deliberated decision in the eventual outcome. John Dryzek states that for deliberation to be authentic, it should induce reflection in a non-coercive manner. For inclusion, the system has to involve all those who are likely to be affected by an outcome, and arguments should be made so that others can understand it. Lastly, for it to be consequential, the deliberation should impact or influence the decision that is eventually made.²⁷⁵ A procedural map accompanies this normative framework that Dryzek lays out, illustrated in the diagram below:²⁷⁶

²⁷³ John Parkinson and Jane Mansbridge, *Deliberative Systems: Deliberative Democracy in the large scale* (Harvard University Press, 2012)

²⁷⁴ John Parkinson and Jane Mansbridge, *Deliberative Systems: Deliberative Democracy in the large scale* (Harvard University Press, 2012)

²⁷⁵ John Dryzek with Simon Niemeyer, *Foundations and Frontiers of Deliberative Governance* (Oxford University Press, 2010)

²⁷⁶ *Ibid* 272

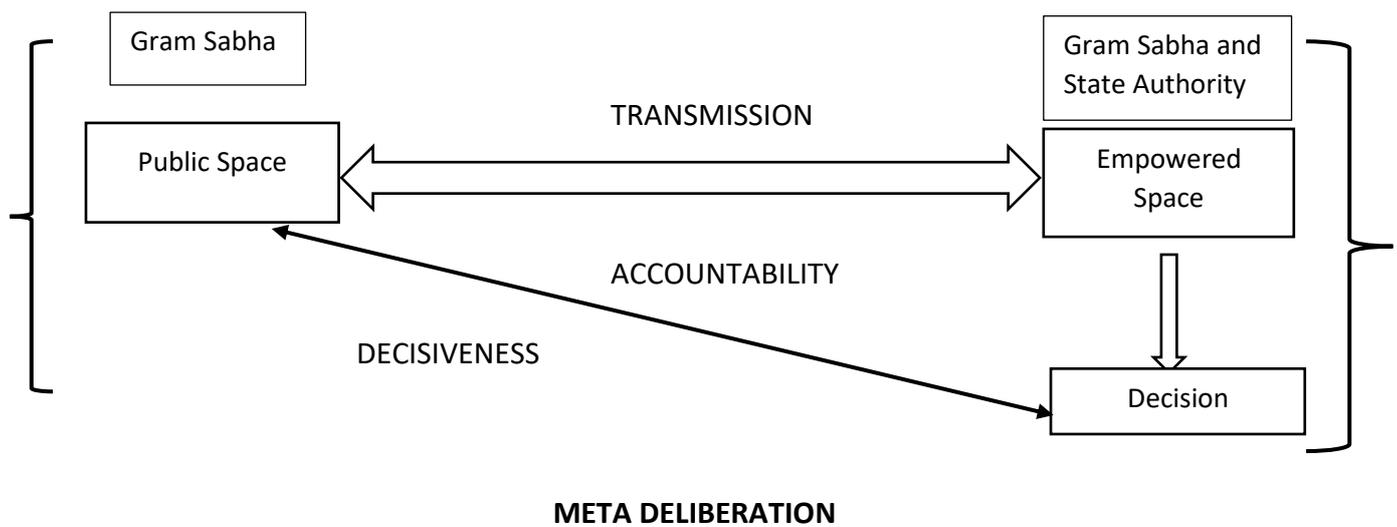


Figure 4: The Procedural Map of Deliberative Decision-making

Dryzek lays out that the public space is where deliberation occurs, and the empowered space is where decisions are legitimized. There is a need for public deliberation to inform or a channel for transmission to exist based on which a legitimated decision is made in the empowered space. The empowered space remains accountable to the public space.²⁷⁷ The eventual decision that is arrived at is evaluated against how much it resonates with the deliberations in the public space.²⁷⁸

When applied to the consent provision and India's forests, this shows that the public space includes the forest-dwelling community, which overlaps with the empowered space of decision-making- the Gram Sabha where a deliberated outcome is placed before the state. This decision's bindingness does not stick, which I show in chapter five, where the bureaucracy finds ways to bypass these deliberated outcomes. Meta deliberation is an incomplete theorized working agreement that is continually being negotiated between the

²⁷⁷ John Dryzek with Simon Niemeyer, *Foundations and Frontiers of Deliberative Governance* (Oxford University Press, 2010) and Archon Fung and Erik Olin Wright, *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (Verso, 2003)

²⁷⁸ *Ibid*

state and forest-dwelling communities in India's forests. Some form of consensus exists while other aspects are in constant tussle.

In this thesis, the deliberative governance structure is explored through the nodes and networks that connect the Gram Sabha to the bureaucracy and the ministry of environment, forests, and climate change. The exploration of the deliberative governance architecture begins with the consent provision and extends to development and conservation governance too.

Nodal governance theorists like Scott Burris and Peter Drahos describe the need for nodes which are sites where governance occurs in the context of forest governance this would require the participation of nodes like the Gram Sabha in the broader network of decision-making.²⁷⁹ Nodal governance enhances democratic governance outcomes where access to nodes and participation of nodes in a network influence the eventual outcome. They state:

the theory of nodal governance problematizes these nodal characteristics, and both demands (normatively) and allows (through explanation) that means be devised to enhance the potency of weaker nodes to promote greater participation and equality in decision-making.²⁸⁰

Deliberative governance when seen through the lens of nodes and networks speaks to the need to enhance the potency of the forgotten governing nodes of the Gram Sabha, the Tribes Advisory Council, and their influence within the network. Deliberative governance offers a way to revitalise these governing nodes and rendering them potent in the decision-making process of acquisition of forest land and beyond.

Deliberative governance provides a granular description of the abstraction of how collective decisions are deliberated and legitimated. Dryzek's work informs my approach and narration of deliberative democracy in India's forests. The deliberative system's idea is conducive to describing how forest-dwelling community members interact with the forest governance architecture to be heard and attempt to establish a working relationship with the state. Dryzek, in his writing on legitimacy, inclusion, and participation, relies on discursive

²⁷⁹ Scott C. Burris, Peter Drahos, and Clifford D Shearing, 'Nodal Governance' (2005) *Australian Journal of Legal Philosophy*, Vol. 30.

²⁸⁰ Scott C. Burris, Peter Drahos, and Clifford D Shearing, 'Nodal Governance' (2005) *Australian Journal of Legal Philosophy*, Vol. 30.

democracy. The barometer for the criteria of authenticity, inclusion, and participation is embedded in this understanding of discursive democracy.²⁸¹

Dryzek describes the authenticity of the public space as space where a constellation of discourses is present and discussed without coercion or a chamber of discourses. Inclusion and participation are when all discourses present in the public space's constellation are heard and can present their argument. A discursive approach to deliberative democracy provides a more practical way of evaluating a deliberative system with this as the ideal. In this thesis, the Gram Sabha is viewed as the chamber of discourses, from which the initial deliberated outcome is derived.²⁸²

Deliberative democracy should not be seen as erasing the need for representative democracy. Representative institutions and forums like the Gram Sabha are compatible with the needs of discursive representation, deliberation, and crafting of outcomes.²⁸³ We will see in chapter six that discursive inclusion provides a broader mechanism to ensure inclusion beyond the divisions of caste, gender, and citizenship.

Some community-based views of deliberation rely on customary practices that exclude women and members of the lower caste.²⁸⁴ It is keeping this in mind that the normative ideal is drawn from these western theories of deliberative democracy. As Rao states, deliberative democracy in India is a product of a rich interplay with western theories and Indianized versions of such theories. Forest-dwelling communities in interviews have articulated a reimagination of the consent provision and pathways of decision-making. Many of these re-interpretations and imaginations of law resonate with the normative ideal present in these theories.²⁸⁵ Thus, this normative ideal in some ways speaks to the vision that forest-dwelling communities aspire towards whilst also pushing against visions of deliberation that may exclude certain members of the community.

²⁸¹ *Ibid* 277.

²⁸² *Ibid* 277.

²⁸³ Seyla Benhabib, 'Toward a Deliberative Model of Democratic Legitimacy.' In Seyla Benhabib (Ed), *Democracy and Difference*. (Princeton University Press, 1996)

²⁸⁴ S. Ahlawat, 'Caste and Dynamics of Inclusion and Exclusion in Local Governance'. In P. Judge (Ed.), *Mapping Social Exclusion in India: Caste, Religion and Borderlands* (pp. 192-214). (Cambridge University Press, 2014).

²⁸⁵ Ramya Parthasarthy and Vijayendra Rao, 'Deliberative Democracy in India'. Policy Research Working Paper; No. 7995. World Bank, Washington (2017) available at <<https://openknowledge.worldbank.org/handle/10986/26245>> last accessed on December 25 2020.

7. Conclusion

In this chapter, I introduced the contours of deliberative democracy in India and harnessed theories of deliberative democracy, governance and systems that support the normative ideal of engagement with the state and within forest-dwelling communities. I described legal principles and the jurisprudence of healing that will be further developed throughout the thesis. This chapter lays the foundation for the use of the concept of deliberative democracy and citizenship in this thesis which will be further developed through the thesis.

I begin to sketch a possible reimagination of the state's role in India's forests to enable deliberative dialogue. As I will argue in the next chapter, the state operates in multiple modalities in India's forests from extractive, pro-business, paper, and discretionary to violent. The relationship between the state and forest-dwellers is fractured due to absolute sovereignty and the regime of dispossession.

This fractured relationship, I argue, can be repaired with the state operating in a deliberative mode. Deliberative democracy and its tenets are grounded in this jurisprudence anchored on the possibility for dialogue. The consent provision is an opportunity to repair this relationship. However, as the thesis will demonstrate, the consent provision is implemented in a manner that reinforces the non-deliberative modality of the state.

As a trustee whose sovereign power is shared with the forest-dwelling community and limited by the need to comply with intergenerational equity, the state will address the demands of the forest-dwelling communities interviewed for this thesis to be heard and seen by the state. As Rinjo Sikaka argues, "The state needs to think about us, our lives, our aspirations, and our futures. We need a state that cares and not one that perpetually extracts."²⁸⁶

²⁸⁶ Interview with Rinjo Sikaka in Niyamgiri on February, 2020.

4. MULTIPLE MODALITIES OF THE STATE

1. Introduction

The state occupies an important place in this thesis. The state's focus and its presence in the deliberative system are vital as the forest-dwelling community looked to the state as a space where companies can be held accountable and democratic rights can be protected. While describing the state, the forest-dwelling community narrated its multiple avatars. Through interviews, I inductively identify the multiple modalities in which the state operates in India's forests. This exploration of the multiple modalities of the state is deepened in the chapters that follow.

The state operates in non-deliberative and deliberative modalities. The consent principle is an opportunity for the state to switch governance circuits from the non-deliberative to the deliberative form. The chapter will identify the multiple modalities in the non-deliberative and deliberative clusters and describe how they operate. The state is understood as the nation-state along with the sub-national units asserting authority over the territory of India. However, its presence in the forests is to be limited and negotiated. The state is seen as being indistinguishable from the government by forest-dwelling communities.

As Pavitro, a young Adivasi living in the city and pursuing his studies in political science, described:

The Sarkar (the government) and the Rajya (the state) are nothing but the soul and the body. The body is the state organizational apparatus, and the Sarkar being the soul that guides actions. They function together. In forest areas, the state and the government are the same. No independence in the thought of the government can change the body and shape of the state. Yet, our protests work towards changing the soul and intent of the government and law.²⁸⁷

²⁸⁷ Interview with Pavitro in Kalahandi on July 2019.

The government informs the state, yet it is not static but malleable and can be changed. The state's modalities described below are where the government and the state operate in specific ways towards specific ends. The state is a product of the government's accumulated practices overtime to solidify these modes and influenced by the demands of the economy and civil society. The law shapes the state and government in ways that allow it to function in non-deliberative modalities. Legal mobilization by forest-dwelling communities pressures the state to switch to a deliberative mode.

This short chapter is descriptive in introducing the state's modalities as described by the forest-dwelling communities and bureaucracy interviewed for this thesis. The glossary of these modalities will describe how the state is present and operates in India's forests. While these modalities are not exhaustive, they apply to Odisha's extractive frontiers where fieldwork was conducted. These modalities offer an analytical framework for making sense of the state, seen from the perspective of forest-dwelling communities.

2. The State as Operating in Modalities

The state is continuously shapeshifting from non-deliberative to deliberative modalities. These shapeshifts mediate the relationship between the state and forest-dwelling communities. The modalities are not seen as operating in singular modes but co-existing in a graded manner, where one modality is prioritized over the other.

Theories of the state describe it as a vast institutional fabric on which competing interests are expressed with a well-worked out bureaucracy that operationalizes the state's functions. The state's operating modalities constitute the pieces that form the mosaic of the state in forest areas.²⁸⁸

The state's modalities or characterizations are not new, but are familiar labels such as developmental, neoliberal, welfare, or nation-state.²⁸⁹ Like these characterizations, the state is seen as operating in the following modes in India's forests: pro-business or extractive, developmental, welfare, paper or discretionary which form its non-deliberative avatars. The deliberative modality of the state is characterised by its porosity to decisions of the forest-

²⁸⁸ Brendan O'Leary and Patrick Dunleavy, *Theories of the State: The Politics of Liberal Democracy* (Macmillan, 1987)

²⁸⁹ *Ibid* 285.

dwelling community. The forest-dwelling community uses legal mobilization efforts to pressure the state to operate in a deliberative modality.

The narrative of state formation in India can be seen through multiple lenses. I will describe this journey in India's forests, keeping in mind the economy's transitions and the demand for environmental conservation. Seen in chapter two on the regime of dispossession, I have articulated how the state's control in forest areas remains. The state's presence in forest areas has been seen in these shifting modalities of being extractive, developmental, welfare, and largely non-deliberative.

The Indian state, Atul Kohli demonstrates, has transitioned from its socialist leanings to being predominantly pro-business. Kohli defines a pro-business state as a highly interventionist state whose decisions are tilted towards business interests. These decisions are made by a narrow alliance between the state and capitalists.²⁹⁰ This pro-business nature of the state was built during the 1980s under the leadership of Indira Gandhi and has continued since. This pro-business leaning of the state has been challenged by social movements and opposition political parties to appease the rural poor. The policies in 1991 made a decisive transition in India to open the economy, which affected the state's priorities in particular ways.²⁹¹

About land, this meant quicker acquisition processes and lesser attention to redistributive questions of resettlement, rehabilitation, and compensation. The colonial legal framework which the Indian independent state chose to adopt continued to govern these decisions, as shown in chapter two. The land acquired was swiftly provided for industrialization to build the indigenous Indian economy. Land reforms that the Indira Gandhi government ambitiously took on were not implemented. The politics of redistribution remained unaddressed by subsequent governments too. This pro-business state laid the foundation for a path that defines India's growth story of a high Gross Domestic Product accompanied by high rates of inequality.²⁹²

²⁹⁰ Atul Kohli, *Democracy and Development in India* (Oxford University Press,2010)

²⁹¹ Atul Kohli, Christophe Jeffrelot and Kanta Murali Eds *Business and Politics in India* (Oxford University Press,2019)

²⁹² Jean Dreze and Amartya Sen, *India: Development and Participation* (Oxford University Press,2002)

The pro-business state saw a turn towards the adoption of rights-based legislation in 2005. This, Kohli states, is a milder version of the socialist foundation of the Congress party. He describes this turn as follows:

While fully committed to economic growth and Indian capitalism, Congress leaders now also sought to create more equal opportunities for India's poor by focusing on education and health to help India's rural poor directly via public works programs. Resources generated via higher economic growth rates made these programs a real possibility, but local administration's low quality made their implementation difficult.²⁹³

This rights-based turn in the configuration of the Indian state saw the passing of the Forest Rights Act, 2006, and the challenge to the Doctrine of Eminent Domain. However, this rights-based turn failed to successfully penetrate the local bureaucracy to destabilize the pro-business priorities. This rights-based turn came under attack as the Modi regime came into power.²⁹⁴

The Modi regime is partly defined by its aggressive neoliberal development reforms accompanied by doing away with the rights-based safeguards.²⁹⁵ This was visible when the Modi government reduced the due process standards in land acquisition under the new law. They had to roll back these efforts as they faced stiff opposition from other political parties and the farming community.²⁹⁶ In its second term, the Modi government has seen increased communal tensions and a slowing economy with high unemployment rates. The promise of development that the Modi government was elected for is yet to bear fruition.²⁹⁷

The Modi regime, in both its terms, has followed through with reforms in the mining sector. The first among these reforms was the overhaul of the Mines and Mineral Development Act

²⁹³ Atul Kohli, *Democracy and Development in India* (Oxford University Press, 2010)

²⁹⁴ Arpitha Kodiveri, 'Changing Terrain of Environmental Citizenship in India's Forests' *Socio-Legal Review* (2016)

²⁹⁵ Jagganath Panda, 'Narendra Modi and his Mode of Governance' (2016) *Journal of Asian Public Policy* Vol.9 No.2.

²⁹⁶ Elizabeth Roche and Anuja, 'Land Acquisition Ordinance will not be reissued' *Live Mint* (August 2015) < <https://www.livemint.com/Politics/noHEydhRIEppdkn0fAqjRN/Govt-not-to-repromulgate-land-ordinance-Narendra-Modi.html>> accessed on May 2020

²⁹⁷ Shruti Rajagopalan, 'India's assault on Muslims is rooted in economic incompetence' *The Diplomat* (March 2020) available at < <https://thediplomat.com/2020/03/indias-assault-on-muslims-is-rooted-in-economic-incompetence/>> last accessed on May 2020.

to introduce an auctioning system to allocate mineral blocks.²⁹⁸ This was done to introduce a mechanism of transparency and keep the state-business alliance in check by ensuring that the highest bidder is allocated the mine instead of the system of granting leases that functioned on entrenched networks of mining companies and the state apparatus. The other significant change that followed was the coal mining sector's opening to private companies and foreign direct investment. These changes have reconfigured the political economy of extraction in Odisha and other extractive states.²⁹⁹

2.1 The Extractive State of Odisha and its Pro-business Leanings

Odisha has historically laid its pro-business foundations with a close network of high caste industrialists, the bureaucracy, and the state. The discovery of essential metals in Southern and Western Odisha has propelled the state to explore a development model embedded in extraction. Sunila Kale categorizes Odisha as a neo-patrimonial state with pro-business leanings. She argues that Odisha has seen its key politicians also being active in the extractive industry. An example of this is Biju Patnaik, whose legacy remains alive in Odisha, a noted statesman, leader, and former chief minister of Odisha who established a sponge iron plant in Barbil in western Odisha.³⁰⁰

This intricate web of industrialists, influential bureaucrats, and the state's decision-making bodies is visible even today. The opening of the mineral sector in 1993 saw the entrance of private companies into the mix of state-owned mining companies. Odisha was a premier destination for private investment in the extractive sector. In its efforts to attract investment, Odisha provided concessions in the land, water, and electricity access. These concessions were its efforts to court capital but without its ability to discipline it.

²⁹⁸ Meera Mohanty ' MoEF grants forest clearance for Kodingamali Bauxite mine' The Economic Times (October,2017) < <https://economictimes.indiatimes.com/industry/indl-goods/svs/metals-mining/moef-grants-forest-clearance-for-kodingamali-bauxite-mine/articleshow/61109551.cms?from=mdr>> accessed on May 2020.

²⁹⁹ Sunila S. Kale, 'Business and State in India's Extractive Economy' in Atul Kohli, Christophe Jeffrelot and Kanta Murali Eds *Business and Politics in India* (Oxford University Press,2019)

³⁰⁰ Meera Mohanty ' MoEF grants forest clearance for Kodingamali Bauxite mine' The Economic Times (October,2017) < <https://economictimes.indiatimes.com/industry/indl-goods/svs/metals-mining/moef-grants-forest-clearance-for-kodingamali-bauxite-mine/articleshow/61109551.cms?from=mdr>> accessed on May 2020.

Sunila Kale harnessing the literature of developmental states makes a poignant observation of statecraft in Odisha, which can attract capital and is unable to curtail its excesses.³⁰¹ This is visible in its efforts to attract Foreign Direct Investment (FDI), as seen in the Posco project. Odisha went the extra mile in ensuring that clearances were obtained, and the land was acquired. It could not resolve the ongoing land conflict and changes in the MMDR Act in 2015 that caused Posco to withdraw its project. The question of redistributive justice remained unaddressed until the massacre in Kalinganagar. In 2005 after a violent conflict occurred between the Adivasis protesting the acquisition of land in Jajpur and the police, shots were fired, and thirteen Adivasis lost their lives. With the World Bank's assistance, this forced the government to adopt new resettlement and rehabilitation in 2006 with higher standards of compensation.³⁰²

While social movements against extraction are active, they have failed to influence a change in the electoral choices that Adivasis and Dalits make. Odisha has a high population of Scheduled Tribes and Scheduled Caste population whom Kale shows have not gained a strong political voice yet. This, I argue, is also due to the limited politics of recognition that Adivasi communities pursue, one that excludes the Dalit communities.³⁰³ An Ambedkarite movement led by Adivasi communities is brewing in Western Odisha, which seeks to expand the politics of recognition by bringing divergent interests of Adivasi and Dalit communities under one umbrella.³⁰⁴

3. Brief Description of Modalities of the State

The state's modalities are characterizations inductively derived from my fieldwork, and how these modalities are operationalized will be elaborated on in the next chapter. The modalities are as follows:

3.1 Pro-Business, Extractive

As the previous section described, the pro-business and extractive state is an integral part of India's state formation. Peter Evans describes the developmental state as not entirely non-

³⁰¹ *Ibid* 296.

³⁰² Purnabasa R and R newsletter, UNDP
<http://www.undp.org/content/dam/india/docs/purnabasa_mar.pdf> accessed in May 2020.

³⁰³ As argued in chapter two of this thesis.

³⁰⁴ Fieldnotes from February 2020

deliberative. Deliberative pathways were restricted to the capitalist class and, in the Indian context, the higher caste.

Peter Evans describes, the developmental state is pro-business or extractive as the deliberative platforms are restricted to the industries and, in the case of Odisha, the mining companies. He states:

The result was not just the reinforcement of networks connecting the state and capital; deliberative interactions also contributed to the emergence of a more cohesive capitalist class with a sense of a shared national project.³⁰⁵

The pro-business state is supported by a bureaucracy that responds to the demands of the political economy. The forest-dwelling community categorizes this modality of the state as non-deliberative as there are no networks of participation that they can use to articulate their interests and priorities. The vignette from Kodingamali demonstrates this characterization of the state in India's forests.

In Kodingamali, in February 2018, when protests were underway, the forest-dwelling community had arrived at a set of conditions upon which they were willing to leave their lands and allow for the mining to continue. The conditions were accepted by the then district collector Poornima Thodu, an Adivasi who understood the plight of the forest-dwellers. The forest-dwellers were not being offered appropriate compensation or jobs for the loss of land experienced. She was transferred to another district within a week of her accepting the demands of the forest-dwelling community. Purna recalls this and articulates why he thinks the state is non-deliberative.

We felt heard and accepted when the district collector accepted the demands that we had collectively arrived at. We had protested during the floods and were excited to have this room for dialogue with the state, which was normally not listening to our needs. In the end, she was transferred, and our demands were not accepted. The state had to remain subservient to the demands of capital and the market.³⁰⁶

³⁰⁵ Peter Evans, 'Bringing Deliberation into the Developmental State' in Patrick Heller and Vijayendra Rao (Eds) *Deliberation and Development : Rethinking the Role of Voice and Collective Action in Unequal Societies. Equity and Development* (World Bank, 2015).

³⁰⁶ Interview with Purna in Bhawanipatna in July 2018.

Across the three mining sites, the forest-dwelling community described the state operating in an extractive mode based on promises that it had made to the mining companies in obtaining land and other clearances. In the next chapter, I will describe the mechanics of the state's non-deliberative modalities in greater detail.

The consent provision, which is seen as a potential for creating a deliberative node where the interests of forest-dwelling communities can be considered, is opposed to by the industrial class as a cause for undue delays in land acquisition. The requirement of the consultation was preferred as a land acquisition officer at a mining company stated:

Consent places us at the community's mercy, whereas consultation becomes a way for us to negotiate. The right to veto a proposal can be a barrier in our business. We will have to expend energy on strategizing how to overcome that in collaboration with the state who is a signatory to the Memorandum of Understanding.³⁰⁷

In conclusion, the pro-business state is where opportunities and the capacity to influence state decision-making are restricted to the mining companies and limited for forest-dwelling communities.

3.2 Discretionary state or paper state

The paper state is a term used by anthropologist Nayanika Mathur to describe the use of letters, circulars, and notifications as an essential part of the bureaucratic life of law and its implementation. In the context of the consent provision, paperwork is at the core of expanding the forest department's discretionary power and reconciling the conflicting laws in a manner that enables extraction and dispossession of the forest-dwelling community.³⁰⁸

In the Posco case, as chapter five will demonstrate, paperwork generated through administrative reports in 1960 were used to prove that the residents were not forest-dwellers rendering the FRA inapplicable to the area. The paper truth and evidence generated within the bureaucratic maze is salient in how the consent provision is implemented and the scope available for deliberative dialogue.

³⁰⁷ Interview with the land acquisition officer in Talcher in July 2019.

³⁰⁸ Nayanika Mathur, *Paper Tiger: Law, Bureaucracy and the Developmental State in Himalayan India* (Cambridge University Press, 2016)

The state's vast discretionary power is exercised in interpreting laws, putting in place procedures, and generating evidence of legal relevance. A forest-dweller best describes the discretionary state and the paper trail in the coal mining regions of Sundergarh, showing why this modality reduces the scope for deliberative dialogue with the state.

Our Gram Sabha drafted a resolution preventing the acquisition of our lands for the expanding coal mine. We submitted this resolution to the district collector, who must draft the report to be then sent to the Ministry of Environment, Forest, and Climate Change in the centre. We will never know what the content of his report will be, and further in our conversations, he has already stated that the land was acquired in 1987 and that it belongs to the coal mining company. Will our resolution be heard, or will it merely be discarded as they make their decision?³⁰⁹

The district collector's discretionary power is exercised to interpret laws and operationalize them to resolve these conflicts. The paper truth in the form of the district collector's report will be the basis on which the Forest Advisory Committee arrives at its decision of forest diversion.

3.3 The Absentee state

The extractive modality of the Indian state is accompanied by it being non-developmental in these remote areas. In an interview with R.K Sharma, the chairman of the Federation of Indian Mineral Industries, explained the role of mining and associated companies in filling the development gap, he said:

The state is an absentee state. In these remote areas, we can fill this gap. We establish schools, build roads and health care centers. Corporate Social Responsibility steps in and provides essential facilities to the forest-dwelling community.³¹⁰

The absentee or missing developmental Indian state has created a gap. According to many industry members interviewed, it is the filling of this gap that legitimized their entrance and acquisition of land. Establishing schools, hospitals and providing jobs were seen as trust-building exercises by the company.

³⁰⁹ Interview with the forest-dwellers in Tumulia village in July 2018.

³¹⁰ Interview with R.K Sharma in July 2018.

In the Posco case, the company had offered compensation to forest dwellers along with jobs in the steel plant. This was done in addition to promises of providing developmental facilities like schools in the rehabilitation colony. Though convincing, the promise of filling the development gap did not build trust between Posco- and affected villages. The neighboring villages whose land had been acquired by the Indian Oil Corporation were not adequately compensated. Their rehabilitation colony, which included a school and hospital, was left in a dilapidated condition.³¹¹ Brahmaro Das, when asked about the role of Posco in filling the development gap, stated:

Indian Oil Corporation would be a public sector corporation if they could not deliver the promise of development. How can we trust that a foreign company will deliver?³¹²

This background of failed promises of compensation has made it difficult for the affected villages to trust Posco or any other company. Similarly, In Niyamgiri, the forest-dwelling community whose land was acquired for setting up the refinery is yet to be adequately compensated. While the absentee state creates a gap that needs to be filled, the company's role in filling this gap is viewed with suspicion by forest-dwelling communities interviewed for this thesis.

Many forest-dwellers interviewed in Odisha said that they would rather pressure the state in fulfilling its developmental functions than rely on extractive companies. However, the strategy of filling the development gap continues to be used by companies, and some have been successful. In Jharkhand, Tata Steel, while building their first-ever steel plant in Jamshedpur in Jharkhand, a state in northern India, had created a township surrounding the plant. Within it, they established schools, hospitals, and colleges. Tata's effort in setting up this township is viewed as the mining sector model for ensuring that the forest-dwelling community affected is promised and given what the state has failed to deliver.³¹³

In 2015 an amendment was made to the Mines and Minerals Development Act where it provided for the setting up of a district mineral foundation where revenues from mining were

³¹¹ Dilip Satapathy, 'Posco's Odisha Journey: Travails of a big-ticket project' *Business Standard* (New Delhi, May 19th 2015)

³¹² Interview with Brahmar Das in August 2018.

³¹³ Subbiah Kannapan.'The Tata Steel Strike: Some Dilemmas of Industrial Relations in a Developing Economy' (1959)*Journal of Political Economy* Vol. 67, No. 5

to be used to meet the development goals of the local community affected by mining. This amendment was seen as a welcome step in ensuring the redistribution of benefits from mining³¹⁴. Yet in an incisive interview with journalist Meera Mohanty who has been covering mining issues in Odisha for over ten years, she describes it as a grave form of injustice as communities are required to let go of their lands to be able to obtain funds for the development of the area. She speaks:

It is like the state is saying that we will develop this area only if you trade your land and allow for mining. Is it not the duty of the state to ensure that development reaches these areas despite mining?³¹⁵

Meera's response is critical to the discussion on consent and mining. In other words, consenting to the extractive industry's entrance is incentivized by funds for developing the area which will be deposited in the district mineral foundation. The district mineral foundation is the source of funds for the state to deliver welfare facilities to the forest-dwelling community. Thus, the entrance of the mining company is the route for ensuring that these remote areas experience the developmental state.

3.4 The Police state

Forest-dwelling communities describe the police state as being characterized by its ability to arrest forest-dwelling community members for partaking in protests, on the grounds of forest offenses or as a threat to national security.

Rinjo Sikaka describes this quite eloquently as he was arrested on the false charge of being part of the armed left-wing movement in Niyamgiri.

They knew that we were not going to give up the fight for our sacred land. This meant that the state had to find ways to discipline the protests. Many were arrested on false charges as I was. The state has the power to arrest us for merely living in the forest areas, so the demands placed on us is to be complaint citizens invested in the state's project of development³¹⁶

³¹⁴ Chinmayi Shalya and Siva Karthik Valaparla, 'Long Road Ahead: Odisha's DMF funds to improve livelihood' in *Down To Earth* (April 2019)

³¹⁵ Interview with Meera Mohanty in August 2019

³¹⁶ Interview with Rinjo Sikaka in Niyamgiri on February 2020.

The police state is the state's power to arrest, backed by laws like the Indian forest act, 1927, Unlawful Activities Prevention Act, 1967 where the state can arrest without a warrant based on serious offenses like posing a threat to national security. The police state operates not merely in its ability to arrest, but it offers security services to the industry with the Odisha Industrial Security Force formation. Lalit Das, a senior police official, described what its function was:

The local community and protests require a security force to protect the industrial facility from damage. It is an additional fee for the service that the police provide for mining companies. This security force is part of the police force. It has the power to arrest without a warrant or search without a warrant. The industrial security force will follow up the arrest with legal requirements.³¹⁷

The Odisha Industrial Security Force, the Forest Department, and the local police department enjoy immense power to arrest forest-dwelling community members in these areas. These sweeping powers quell the protests and demands for dialogue with the state by the threat of arrests. In such a setting as Lado Sikaka describes, it is challenging to have a non-coercive space where deliberations can occur within these communities and with the state or company.

The police state operates on its ability to deploy violence to discipline the protesting forest-dwelling communities. The violence exists in its experiential and discursive form. The experiential form is seen in the physical harm faced by communities like in Jagatsinghpur where many were arrested and assaulted during protests in 2011 and many continue to face criminal charges. The other form of violence that frames the way the state engages with forest-dwelling communities is discursive as forest-dwelling communities are reduced to being defined as anti-national or anti-development. The impact of this violence is articulated well by Prakash Jena where he states “ It is easy to not engage in dialogue with us because we are seen as a hurdle towards India’s development”³¹⁸ this discursive disenfranchisement creates a sense of slow violence of exclusion that forest-dwelling communities face.³¹⁹

³¹⁷ Interview with Lalit Das in Bhubaneswar in July 2019.

³¹⁸ Interview with Prakash Jena in Jagatsinghpur on July 2018.

³¹⁹ Amita Baviskar, *Uncivil City: Ecology, Equity and the Commons in Delhi* (Sage Publishers, 2020).

3.5 The Deliberative State

In India's forests, the Deliberative state is an aspirational and normative goal. Forest-dwelling communities describe it as a state that listens and is willing to negotiate and listen. The deliberative state is aptly described by Rinjo Sikaka when asked what the ideal modality state would be in India's forests. Using the language of care, he said:

We desire a state that listens and is accountable for its decision. More importantly, we want the state to care about our priorities, ideas, and work with us on aspects we require state support. The state's presence in these forests should be on mutually agreed terms.³²⁰

The desire for the deliberative state requires that the state become an active part of the deliberative system, as Peter Evans states

the state must inevitably be part of any "deliberative system," states need to develop a special subset of the "nodes, forums, and processes" that constitute a deliberative system if they are to be effective.³²¹

The consent provision is an avenue or circuit to cultivate the creation of these nodes, forums, and processes. As described by forest-dwelling communities, the deliberative state is a way to break the state's modality of merely serving the interests of capital and expand its scope to include interests of forest-dwelling communities. It is a process Peter Evans describes as bringing deliberation into the state.

The normative ideal of the deliberative state is bound to face resistance. Resistance, particularly from capitalist elites and state-owned corporations, who have benefited from their ability to influence the state, who now would have to share this power and space with forest-dwelling communities. The resistance can be overcome by the demands placed on the workings of electoral democracy, as Sunita Kale describes in her work on Odisha.³²²

The other fundamental challenge posed by Tanya Li towards the possibilities of changing the experiences of marginalization through deliberation is rooted in the inability of deliberation

³²⁰ Interview with Rinjo Sikaka in Niyamgiri on February 2020.

³²¹ Peter Evans, 'Bringing Deliberation into the Developmental State' in Patrick Heller and Vijayendra Rao (Eds) *Deliberation and Development : Rethinking the Role of Voice and Collective Action in Unequal Societies. Equity and Development* (World Bank, 2015).

³²² Sunila S. Kale, 'Business and State in India's Extractive Economy' in Atul Kohli, Christophe Jeffrelot and Kanta Murali Eds *Business and Politics in India* (Oxford University Press, 2019)

to challenge dogged and polarising issues like land redistribution.³²³In response to this, the forest-dwelling communities have stated that there is a need for a jurisprudence of repair and healing to reformulate the state's relationship, which entails reconsidering some of these dogged issues like land redistribution, eminent domain, ownership, and conservation. In the previous chapter, I had sketched the contours of such a jurisprudence based on the legal construct of shared sovereignty and consent as the avenue to reformulate this relationship and, in turn, re-make the formation of the state in India's forests.

4. Conclusion

In conclusion, these modalities of the state derived from descriptions from forest-dwelling communities is an analytical framework that sits at the heart of this thesis where the state is present in non-deliberative modes and absent in its deliberative form. The modalities co-exist to varying degrees framed by the political economy of extraction. The deliberative state engrained in the jurisprudence of repair and healing breathes new possibilities. One can begin envisioning the state's role in India's forests beyond one of dispossession and extraction.

The shifting of modalities mediated by successful resistance on the ground or in courts to operate in its deliberative avatar can systematically reshape the state from within and recraft power dynamics in forest areas. The working relationship between the state and forest-dwelling communities requires constant deliberation for solving the challenges of conservation and development in these remote areas. The deliberative state and ways to construct it are themes that run throughout this thesis to offer an alternative.

³²³ Tania Li Murray, 'Articulating Indigenous Identity in Indonesia: Resource Politics and the Tribal Slot.' (2000) *Comparative Studies in Society and History*, vol. 42, no. 1, pp. 149–179.

5. THE MECHANICS OF THE NON-DELIBERATIVE STATE: PRO-BUSINESS BUREAUCRACY, DISCRETIONARY POWER, AND THE DELIBERATIVE REIMAGINATION OF THE CONSENT PROVISION

1. Introduction

As seen in chapter 4, the Indian state and the state of Odisha operates in multiple modes from pro-business, extractive to the paper state. In this chapter, I will highlight how the consent provision's operationalization is situated in these multiple modalities of the state. Odisha's extractive state is required to balance the competing priorities of extraction, forest rights, and conservation. The state machinery and bureaucracy are designed to amplify its pro-business interests. They are armed with a particular set of bureaucratic practices, a repertoire of legal interpretations of the consent provision, and paperwork that retain the material basis of expanding state authority in the forest areas.³²⁴

In chapter 2 on the dispossession regime, it shows that the pockets for deliberation available within the forest law framework are mediated by laws that recognize state control over resources. The consent provision is an opportunity to switch from the pro-business, paper, and extractive mode of the state to a deliberative one. The pro-business bureaucratic practices in this chapter are located at the sub-national and national level. Federalism in the implementation of the consent provision operates in a manner that is at times cooperative as seen in the Posco case to facilitate extraction and at times conflicting as the central Ministry of Environment, Forests and Climate Change (MoEF and CC) challenges the decision of extraction made by the bureaucracy at the sub-national level as seen in the Niyamgiri case.

In this chapter, I seek to address two questions. How does the state operationalize the consent provision in its pro-business and non-deliberative modality? What might be the pathways to shift it to a deliberative mode? Based on interviews with forest-dwelling

³²⁴ Mayur Suresh 'Accountability, Authority and Documentary Fragility: Shadow files and Trial in India'. In Susan M. Sterett, and Lee Demetrius Walker, (Eds.), *Research Handbook on Law and Courts* (Edward Elgar Publishing Ltd, 2019)

communities across the three mining sites, I present an alternative retelling of the procedure, a form of deliberative proceduralism that involves the forest-dwelling community in different decision-making stages.³²⁵

I argue that the bureaucratic actors involved in the implementation of the consent provision, particularly the District Collector and the district level forest department, exercise discretionary power in a way that restricts the applicability of the FRA. They change the procedure for implementing the consent provision in a manner that constrains the influence of the Gram Sabha resolution in arriving at the eventual decision. Discretionary power is exercised here by generating paperwork or paper truth that highlights the evidence of the project's acceptance and seldom is evidence of dissent incorporated for consideration by the vital decision-making bodies.

2. The Mechanics of the Consent Provision

Described in the earlier chapters, the consent provision is an opportunity for the state in India's forests to transfer decision-making power to the Gram Sabha on the diversion of forest land. The process as it is present within the law and how the pro-business bureaucracy has reinvented it provides an understanding of how the consent provision's deliberative potential is diluted to make way for quick and easy acquisition of forest land.

The procedure as provided for in the law shows that the Ministry of Environment, Forest, and Climate Change retains discretionary power to arrive at the final decision on acquisition. In its pro-business modality, the state creates additional layers of governance that facilitate business while silencing the principle of consent when it comes to the operational power of capital.

³²⁵ Rocheleau J. Proceduralism. In: Chatterjee D.K. (eds) *Encyclopedia of Global Justice*. (Springer, Dordrecht, 2011)

2.1 The Procedure Present in the Law

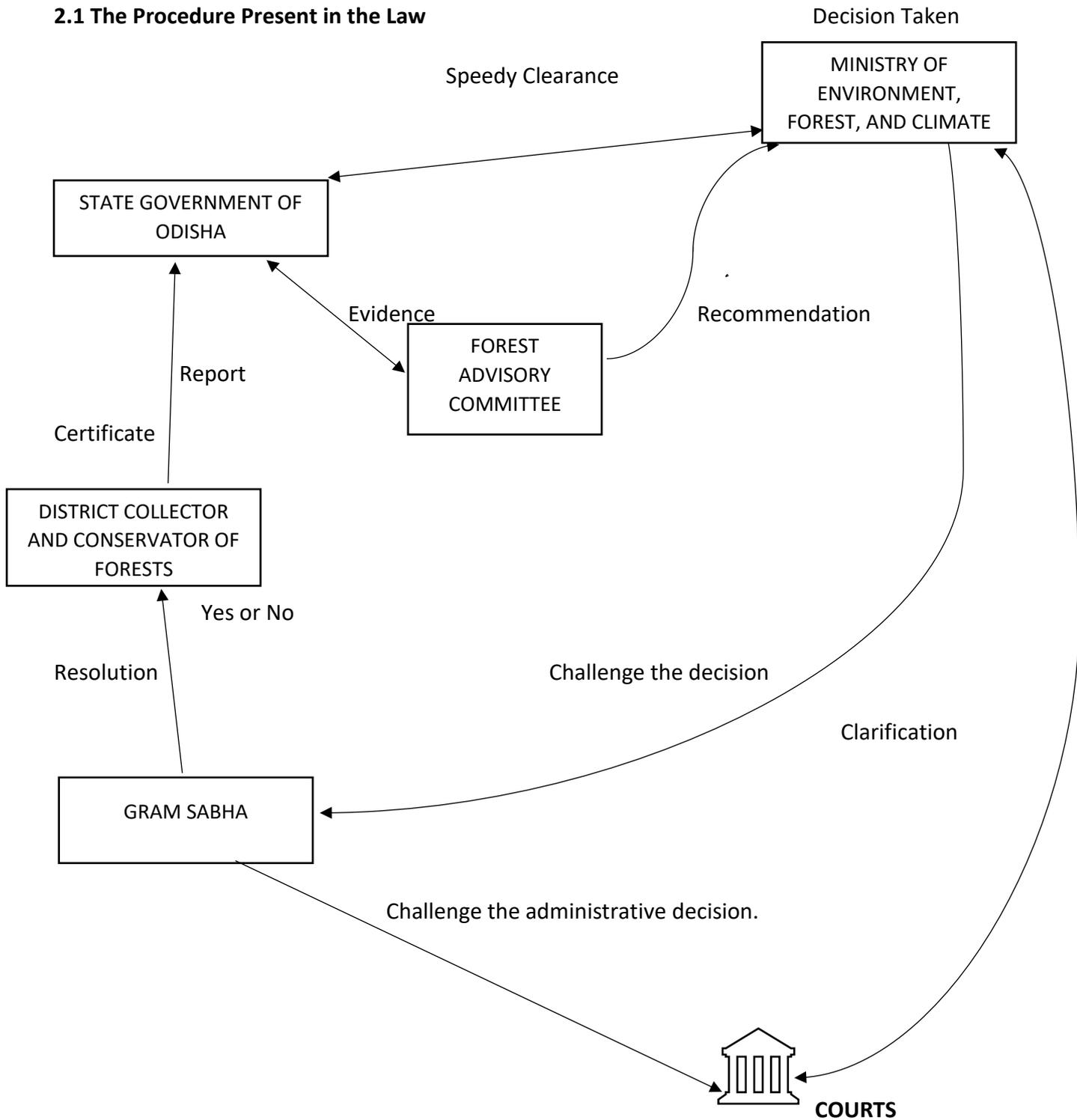


Figure 5: Procedure as is present in the Forest Conservation Rules,2016.

The diagram above illustrates how the procedure for enforcement of the consent provision is supposed to operate based on the law, namely the Forest Conservation Rules, 2016. The authorities involved are the Gram Sabha, the District Collector (DC), the conservator of forests, the state government of Odisha, the Forest Advisory Committee, and the Ministry of Environment and Forests.³²⁶

As seen in the diagram, the nodes and networks of decision-making begins with the submission of a resolution to the District Collector by the Gram Sabha, where they may either reject or accept the proposal of diversion. This resolution is submitted to the DC without having the opportunity to discuss with the DC about the decision taken by the Gram Sabha. The procedure for the fulfillment of the consent provision remains ambiguous. While the District Collector is required to provide a certificate that consent has been obtained, the process for arriving at the Gram Sabha resolution is informed by the Forest Rights Rules, 2012, and the Odisha Gram Panchayat Rules, 1968 on aspects concerning quorum. The forest-dwelling communities themselves determine the guidelines for how deliberation takes place.

The DC vets the resolution submitted by the Gram Sabha to examine if it complies with the rules of a quorum, entrance into the minutes of the Gram Sabha register and if the community members have signed it. Once the resolution is assessed as complying with these requirements, it is then subject to a site-inspection by the conservator of forests on the proposal's feasibility. A report is prepared.

The Gram Sabha resolution, the District Collector's certificate assuring compliance accompanied by the conservator of forests' report, is then submitted to the state government to be sent across to the Forest Advisory Committee (FAC).

The FAC then submits its recommendation as to whether forest clearance is to be granted or rejected. The interests of the forest-dwelling communities remain under-represented in the FAC. The MoEF and CC have the power to make the eventual decision on the granting of forest clearance based on the evidence before it. The state's non-porosity and non-deliberative nature are embedded in this exercise of discretionary power at these multiple levels.

³²⁶ The Process is derived from Rule 4 of the Forest Conservation Rules as amended in 2016.

As present in the law, the procedure shows that there is no room to appeal the decision taken by the MoEF and CC within the bureaucratic structure. What ends up happening is that a public interest litigation or writ petition is filed before the High Court to challenge the MoEF and CC's decision if it violates the decision taken by the Gram Sabha. There is no requirement within the law that the decision taken by the MoEF and CC has to be in alignment with the decision taken by the Gram Sabha. The state retains the power of decision-making. As seen in the three cases, the courts become arbiters for pushing the MoEF and CC to revisit and re-evaluate its decision.

2.2 The Procedure Reinvented by The Pro-Business State

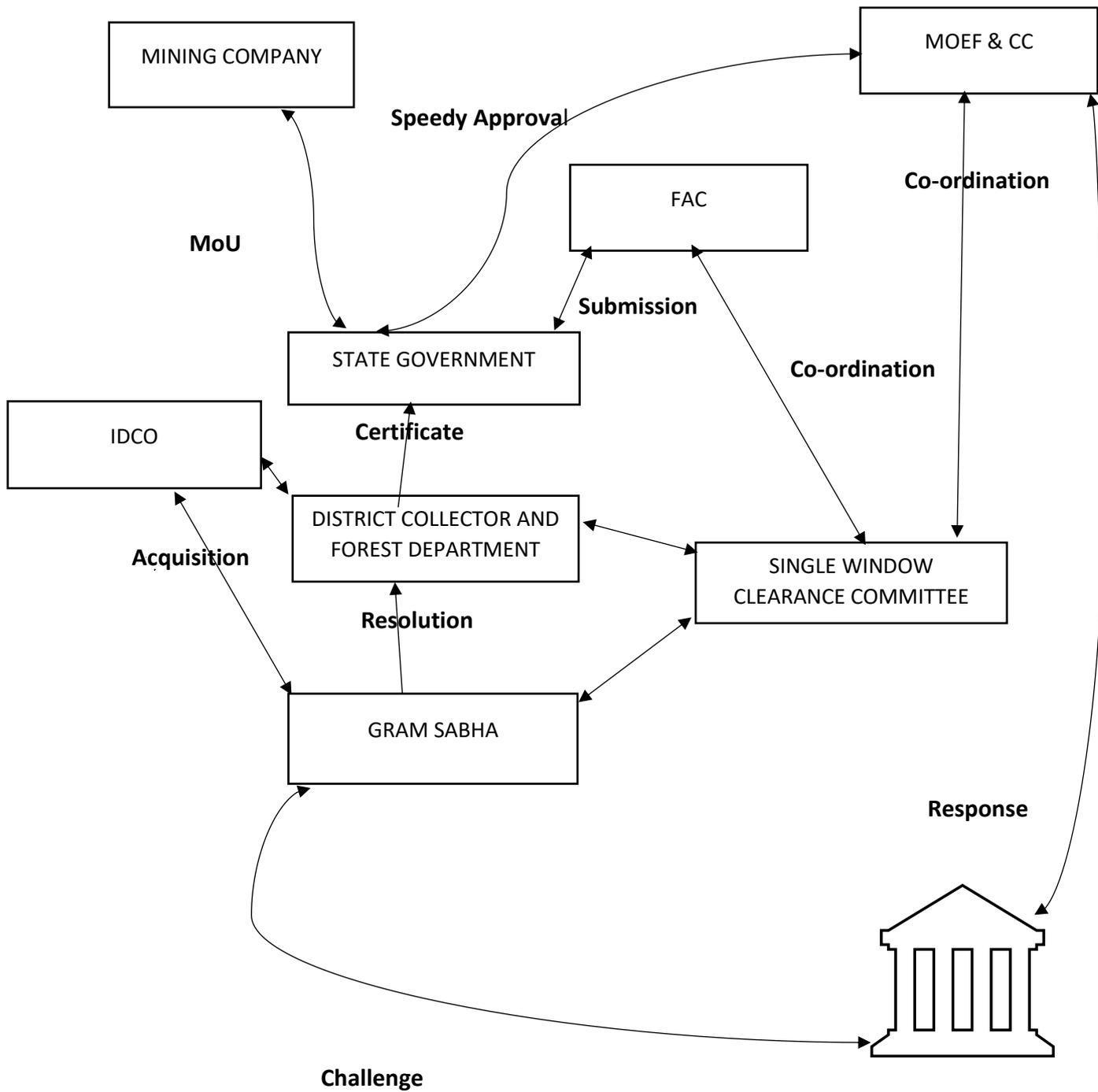


Figure 6: Procedure as is reinvented by the pro-business state.

The pro-business state reinvents the procedure for the consent provision by creating additional layers of governance to facilitate capital. The three additional layers which are not present in the procedure established by law but are present in the enforcement of the consent provision are:

- a. the role of the Industrial and Infrastructure Development Corporation (a parastatal agency vested with the responsibility of acquisition, IDCO),
- b. the single window clearance committee at the district level; and
- c. The single window clearance committee at the state level working in tandem to provide speedy clearances.

The Mining company remains in direct contact with the state government based on the MoU signed between them, which assures that land will be acquired by IDCO and provided to them within a specific time frame.

The Gram Sabha resolution makes its way similarly but is subject to the pressures of the pro-business bureaucracy demanding speedy approvals. Under pressure to provide clearances quickly discretionary power gets used to bypass the genuine implementation of the consent provision, as will be seen in the next section.

The pro-business state of Odisha functions with a bureaucratic architecture with the nodal mentality to serve the interests of capital.³²⁷ The bureaucratic architecture is built on the premise of providing efficient and speedy approvals to reduce the regulatory burden for corporations and investors. The clearance, like the forest clearance of which the consent provision is an integral part, is described as hurdles needing to be overcome with speed and efficiency.

Keeping the ease of doing business criteria in mind, Odisha, through its industrial facilitation act, 2004 adopted a single-window clearance system.³²⁸ It was one of the few states in India to bring about this mechanism of dealing with clearances. The single-window clearance creates a three-tier system for obtaining clearances for industrial and investment projects.

³²⁷ Scott C. Burris, Peter Drahos, and Clifford D Shearing, Nodal Governance (2005) Australian Journal of Legal Philosophy, Vol. 30.

³²⁸ Odisha Industrial Facilitation Act, 2004 < http://lawodisha.gov.in/files/acts/act_243007332_1436591831.pdf > accessed on May 2020.

While this does not deal with the forest clearance process, it indicates the streamlining of regulatory oversight by the state to keeping oversight at the bare minimum.

The streamlining of regulatory oversight has taken a step further as Odisha has in place committees that work on specific projects. When the Posco project was being pursued, a Posco committee was composed of important decision-makers, including the District Collector, to ensure that it was executed smoothly. A committee is now in place to work exclusively on the Jindal Steel Works projects in Jagatsingpur, Odisha. A project management group has been set up in Odisha to follow up on stalled investment projects between fifty crores or fifty million dollars to a thousand crores or one hundred and forty-two million dollars. This group is meant to address clearances and land acquisition, which may have stalled these investments.³²⁹

The District Collector in some ways is the superstructural node with excessive power and authority to make decisions in this context.³³⁰ The District Collector chairs the district level single-window clearance committee and is also required to provide the certificate that the Gram Sabha consent has been obtained. The District Collector is a crucial node at the district level in following through with different clearances needed for a project to begin. They play an essential role in the land acquisition process, too, as they have administrative control over the entire district. The District Collector in forest areas must work collaboratively with the forest department, which enjoys the power of regulating and controlling the area.³³¹ The FRA was a legislative attempt to curb the District Collectors' discretionary power. However, the due process safeguards put in place in it come within the District Collector's power and responsibility to implement.

Evidence from my fieldwork shows that the District Collector is caught between the pressures of delivering speedy clearances to handling land conflict at the local level. In an interview with a retired District Collector of Jagatsingpur district, he candidly alerted me to this tension.

³²⁹ Function of the project management group < <https://esuvidha.gov.in/odisha/> > accessed on May 2020.

³³⁰ Scott C. Burris, Peter Drahos, and Clifford D Shearing, Nodal Governance (2005) Australian Journal of Legal Philosophy, Vol. 30.

³³¹ An example of this is seen in the detailed list of powers and areas of governance that the DC is involved in Odisha available at < <https://boudh.nic.in/collectrate/> > last accessed on May 2020.

The District Collector is trapped between serving the interests of business and the citizens. The land conflicts in Odisha are a product of this trap. The District Collector is required to prioritize business interests based on the broader demands of the state. This comes at the cost of letting go of the rights of citizens to land. If I can be honest, land conflict is managed and is never earnestly addressed and resolved.³³²

The state's management of land conflict has caused the state to provide de jure transfer of land to industries without addressing the conflict on the ground actively. The principle of consent and its enforcement is reduced to an act of textual ritualism. The consent provision is implemented merely to legitimize acquisition and not to deliberate with the Gram Sabha about the acquisition of forest land.

The bureaucratic apparatus involved in land acquisition is guided by the need to make large parcels of conflict-free land available for industries. Infrastructure and Industrial Development Corporation of Odisha (IDCO) is a parastatal agency mandated with the responsibility to acquire land. IDCO, through its land acquisition officers, is active in the process of acquiring- as it works on identifying the area to be acquired, conducting surveys, and negotiating compensation.

IDCO charges for its services of acquiring land from the industries and makes a profit based on the costs associated with acquiring land and the cost at which it is transferred to the industries. Thus, its incentive structure for operating is aligned with the interests of capital. Levein characterizes this function as a land broker state.³³³

IDCO, to improve the regulatory environment for business, has created a land bank. In these banks, land belonging to the government and acquired earlier but has remained unused is transferred into the land bank. This effort to court capital by making land easily and speedily available has recently backfired as forest-dwelling communities where such a land bank has been declared have protested the beginning of such operations.³³⁴

³³² Interview with the retired DC in Bhubaneswar in August 2019.

³³³ Micheal Levein, 'From Primitive Accumulation to Regime of Dispossession' (2015) EPW Vol. 50 Issue 22.

³³⁴ Arpitha Kodiveri, 'Land Banks: Unsettled Law and Undertermined Rights' in *Law School Policy Review* (November 2018) < <https://lawschoolpolicyreview.com/2018/11/08/land-banks-unsettled-law-undetermined-rights/>> accessed on December 28 2020.

The Gram Sabha through the consent provision is a vital avenue to weigh in on the extractive economy's unchecked expansion. This deliberative forum and its decisions are rendered defunct by the paper state's operation, as will be shown in the next section.

Unfortunately, the forest department, which has jurisdictional and regulatory control in the forest areas, has not used its regulatory might to restrict land acquisition apart from a few cases scattered across the state.³³⁵ The pollution control boards are looped into the single-window clearance mechanism and pressured to provide speedy approvals for the discharge of effluents, among other permissions.³³⁶ The Scheduled Caste and Scheduled Tribe welfare department in Odisha is underfunded and understaffed. They are pressured to deliver on many welfare schemes at their local office, from scholarships to the implementation of the FRA.³³⁷

An interview with a senior bureaucrat reveals how these tensions within the bureaucratic apparatus are ironed out. In an office lined with files and a tiny dusty window for sunlight, this room was emblematic of the functioning of India's democracy, doused in paperwork, and piled up as evidence that bureaucracy has fulfilled its essential function of delivering development. Having worked in the forest department and now in the department of mines, he was aware of the internal workings between these departments. He stated:

These departments are meant to represent divergent interests, but they eventually must collaborate for the economy and investment interest. In simple terms, each department will layout its decision based on its mandate, but after a brief discussion, all interests that counter the growth ideal will be marginalized. For example, we need to build a highway between two cities for better commerce, trade, and connectivity. Forests will be destroyed along the way, people will be asked to move, we need to manage these losses, but we must compromise in the interest of the economy. That is how this system is designed.³³⁸

³³⁵ Ranjana Padhi and Nigamananda Sadangi, *Resisting Dispossession: The Odisha Story* (Palgrave Macmillan, 2020)

³³⁶ Sharachandra Lele and Nakul Heble, 'Changes in Pollution Board Undermine Accountability' in *Deccan Herald* on (June 15 2016) < <https://www.deccanherald.com/content/552524/changes-pollution-board-undermine-accountability.html> > accessed December 28 2020.

³³⁷ The SC and ST welfare department is a department enshrined with the responsibility to coordinate with other government departments to ensure that welfare schemes are appropriately implemented.

³³⁸ Interview with Deepak Mohanty in July 2019.

This interview summarises the way the bureaucracy operates in Odisha with the growth ideal in mind. The Naveen Pattnaik government has been reliant on the bureaucracy to deliver on its ambitious growth trajectory. V. Pandian, Naveen Pattnaik's executive secretary, is seen as the most powerful decision-maker in Odisha, an officer of the Indian Administrative Service himself. He has now laid down a 5T plan for Odisha's governance. This seems to be a shift in its emphasis on speed and efficiency to deliver government services rather than pro-business markers.³³⁹

The influence of this citizen-centric governance strategy is yet to be experienced in forest areas. The pro-business tilt remains at the core while populist welfare schemes of the Naveen Pattnaik government try to create a citizen-based governance façade. Decisions on forest diversion that have fundamentally challenged its trajectory of extractive led growth have emerged from the central government or due to international pressure. Seldom has the Odisha government backed away from this opportunity to extract in favour of securing forest-dwelling communities' rights. However, the government in Odisha has made advances in the arena of redistributive justice with the adoption of a progressive resettlement and rehabilitation framework for land losers.

In its efforts to facilitate business interests, the other phenomenon is that the state is creating exclusive committees to examine forest clearances. The Department of Steel and Mines in Odisha had recently decided to form a committee within the department to investigate forest clearances exclusively. They decided to appoint forest officers who have had experience handling forest clearances within the department to address these issues. The creation of these committees is meant to assist in inter-departmental coordination but instead enable prioritizing business interests.³⁴⁰

Like other extractive states globally, Odisha has reduced its development narrative to extraction-led growth, marginalizing the efforts of the pro-business states' attention towards other sectors. The Naveen Pattnaik government has pursued a litany of welfare schemes for

³³⁹ Sandeep Sahu, 'Perform or Perish! Naveen Pattnaik's ambitious 5T plan to make Odisha efficient takes off' in *The Outlook* (October 2019) < <https://www.outlookindia.com/magazine/story/india-news-my-sarkar-sacksperform-or-perish-naveen-patnaiks-ambitious-5t-plan-to-make-odisha-efficient-takes-off/302190>> accessed on May 2020.

³⁴⁰ Report on Odisha's Trillion Dollar Economy published by Jindal Steel Works (JSW) and Price Waterhouse Cooper in 2019 accessed from Jindal Steel Works.

forest-dwelling communities, yet this has not fundamentally challenged the extractive future the government has for Odisha's growth trajectory.³⁴¹

3. Discretionary Power

Discretionary power is difficult to define but can be understood as the authority to choose among alternative courses of action. Discretionary power is associated with a degree of autonomy in decision-making enjoyed by the administrative or bureaucratic body. While the exercise of discretionary power is essential to regulate, there is a need to preserve the freedom that administrative authorities have in decision-making for the functioning of the modern state apparatus.³⁴²

Discretionary power has also been viewed as strong and weak in relation to creating or interpreting existing legal standards or rules. Dworkin's analytical framework of strong and weak discretionary power was made in the context of judicial discretion but can be applied to the exercise of administrative discretion as well. Strong discretionary power refers to creating standards for decision-making or applying the law as the law is ambiguous. The weaker form of discretionary power involves the interpretation of the existing rules and their application. While this sounds abstract, it becomes useful as I examine the exercise of discretionary power in the consent provision where the rules are ambiguous.³⁴³

Discretionary power is also defined as that arena of enforcement of laws where the executive authority or bureaucracy is allowed to operate based on what they deem is fit. Phillip Cooper describes it as the “power of an administrator to make significant decisions that have the force of law, directly or indirectly, and that is not specifically mandated by the Constitution, statutes, or other sources of black letter law.”³⁴⁴

Administrative discretion drawing from Dworkin and Cooper are those decisions taken by the administrative authority that have the force of law but at times operate outside of it. Discretionary power in the context of the forest clearance process is seen in both of these

³⁴¹ IANS, 'Naveen committed to farmers welfare' in *The Statesman* (February 2016) <<https://www.thestatesman.com/world/naveen-committed-to-farmers-welfare-124496.html>> accessed on May 2020.

³⁴² D.J. Gallagan, *Discretionary Powers a legal study of official discretion* (Oxford University Press, 1990)

³⁴³ Ronald Dworkin, *Judicial Discretion*, (1963) J. PHIL. 60 pp 624, 638

³⁴⁴ Phillip J. Cooper, *Public Law and Public Administration* (F.E Peacock Publishers, 2000)

forms where it involves interpretation of existing laws and how laws apply as well as reinventing procedures for enforcement which is not mandated by any statute as will be seen in the recreation of the consent process by the pro-business state.

The unique aspect of the exercise of discretionary power in this process is in the ability of the local bureaucracy to generate paperwork and paper truth to support a particular legal argument or official narrative in favour of capital. Mayur Suresh argues that it is this ability to produce documentation and files that produce the authority of the state.³⁴⁵ As the forest clearance process and forest rights claims are dependent on providing documentary proof of historical injustice and use of forest land, the state's control over archival sources of older bureaucratic documents becomes an immense resource for them to produce evidence to counter those presented by the forest-dwelling community. It is difficult for forest-dwelling communities to gain access to archives of administrative documents that are maintained by the particular bureaucratic authority. As will be seen in the three cases, the state's ability to harness archival data to counter the evidence presented by the forest-dwelling community becomes key in the production of its authority in forest areas.

Generation of paperwork serves the dual function of producing an official narrative of the historical injustice experienced by forest-dwelling communities as well as controlling the space of legal evidence, which is taken into consideration before a forest clearance is granted. As Akhil Gupta has stated, "Writing and the production of files, therefore, have a double function: it both provides a picture of the poor over whom the state could then exercise its power, but it also was a performative exercise of state power."³⁴⁶ Paperwork is a way as Nayanika Mathur shows for the state to make its presence visible and perform its functions of legal enforcement.³⁴⁷

Discretionary power to limit the deliberative potential of the consent provision can be seen as exercised in three ways in the cases below. Firstly, through legal interpretation and delegated legislation that trump forest rights thus discretionary power as the power of legal

³⁴⁵ Mayur Suresh 'Accountability, Authority and Documentary Fragility: Shadow files and Trial in India'. In Susan M. Sterett, and Lee Demetrius Walker, (Eds.), *Research Handbook on Law and Courts* (Edward Elgar Publishing Ltd, 2019)

³⁴⁶ Akhil Gupta, *Red Tape: Bureaucracy, Structural Violence and Poverty in India* (Duke University Press, 2012).

³⁴⁷ Nayanika Mathur, *Paper Tiger: Law, Bureaucracy and the Developmental State in Himalayan India* (Cambridge University Press, 2015).

interpretation. Secondly by using this ability to generate paperwork or paper truth as well as access and control of the archives to produce legal evidence in the interest of capital. Lastly, discretionary power as reinventing procedure for legal implementation in a manner that trumps substantive rights.

4. Paper state and the Exercise of Discretion in the Three Mining Sites

The term paper state is a concept drawn from the recent work of Nayanika Mathur, which examines the state life of law in a remote district of Uttarakhand.³⁴⁸ Paper state, she says, indicates the literal form of the amount of paperwork involved in bureaucratic efforts to implement a law, but it also refers to the life that the law takes on in the eyes of the state. In this section, through an analysis of the paperwork involved in the implementation of the consent provision and the Forest Rights Act,2006, I unpack what the law looks like from the eyes of the state. The paperwork, I argue, is used to generate the paper truth or the official narrative, including access to legal evidence and historical records. This 'truth' in many instances is removed from the reality on the ground. The generation of paper truth is located in the state's neoliberal developmental agenda as a facilitator of industrialization. India has transitioned from a state-led development model to one where the state actively facilitates industrialization.³⁴⁹

4.1 Construction of the Paper Truth and Exercise of Discretion in the Posco case

The construction of the paper truth is at the heart of the dispute in the Posco case. In this case, the paper truth concerns a letter written by the District Collector of Jagatsingpur on the applicability of the Forest Rights Act,2006, which was present in the archive of bureaucratic documents of the District Collector, which is seldom accessible to citizens. In the construction of this paper truth, what is revealed is the bureaucratic interpretation of the law, which forms the basis for decision-making on granting the forest clearance. The letter dated April 27th, 2011 was submitted by Narayan Jena, the then District Collector, to Mr. Santosh Sarangi, the then commissioner and secretary of the Scheduled Caste and Scheduled Tribe Development Department of the government of Odisha. This letter interpreted the FRA's applicability based

³⁴⁸ Paper state refers to the use of letters, minutes of meetings and report as an integral part of bureaucratic activity and implementation of law. This is drawn from Nayanika Mathur, *Paper Tiger: Law, Bureaucracy and the Developmental State in Himalayan India* (Cambridge University Press, 2015).

³⁴⁹ Atul Kohli, *Democracy and Development in India* (Oxford University Press,2010)

on the historical categorization of the land and the identity of communities dependent on this land. It reaffirmed the bureaucratic interpretation made this far on the inapplicability of the FRA. The letter reads as follows:

On October 4th, 1961, the Government of Orissa and the Development (Forest) Department published a notification u/s 29 of the Indian Forest Act, 1927 declaring the forest land and wasteland as protected forest. The Gram Panchayat of Nuagaon and Dinkia were not part of this notification. In his report dated January 7th, 1950, the Chief Conservator of Forests has not mentioned the forested areas of Nuagaon and Dinkia. It is, therefore, not justified to say that there were any traditional forest dwellers dependent on such forest for their bonafide livelihood needs. Hence there was no traditional forest dweller linked to the area.³⁵⁰

This interpretation was nested in previous government reports whose reading and interpretation rendered the FRA inapplicable to these areas. As the FRA's scope is restricted to forest land, the legal analysis presented in this letter is such that not all land on which rights are being claimed is categorized as forest land.

Further, since the land was categorized as forest land in 1961, it is impossible to state that the local communities depended on forest areas for seventy-five years. Communities have to prove that having lived and depended on forest land for three generations, this would not be possible given that the land was categorized as forest land in 1961.

This official narrative and paper truth shaped the consent provisions applicability and fulfillment as per the 2009 notification. This letter by the collector was accepted by the commissioner of the Scheduled Caste and Scheduled Tribe department. The letter was then forwarded to the Special Secretary of the Odisha Environment Department, who, in his submission to the Ministry of Environment, Forests and Climate Change (MoEF and CC), claimed that the process of implementation of the FRA was complete. This paper trail explains the construction of the paper truth, which renders the FRA inapplicable.

The consent provision operated within this bureaucratic interpretation, where the law remained inapplicable to these areas. This paper truth was systematically contested by the local community, which presented evidence that the area was categorized as part of the

³⁵⁰ Leo Saldanha and Bhargavi Rao, 'Tearing through the Water Landscape' published by the Environment Support Group < <http://www.esgindia.org/campaigns/resources/tearing-through-water-landscape.html>> accessed on April 8, 2019.

forest land and that OTFD communities have resided in the area. The other aspect of constructing this paper truth was that no forest rights claims were made since the local forest rights committee's formation. Interviews with the local community and the independent committee reports confirm that forest rights claims were not made due to the tense atmosphere in the villages since the land was to be acquired for Posco.

The counter-narrative to the paper truth presented by the Posco Pratirodh Sangram Samiti (PPSS) or the committee against Posco was brought to the fore by a committee set up to understand the implementation of the FRA nationally in 2010. N.C Saxena headed the committee, and three members of the committee visited the Posco affected areas. The committee concluded that the paper truth belied the evidence that the committee gained by accessing revenue records and records from the state archives dating back the twentieth century. These records recognized these communities' dependence and residence and concluded that a commons surrounded traditional Indian settlements during that period. The committee concluded that the bureaucracy had not pro-actively looked for such evidence and had arrived at its conclusion without sufficient due diligence.³⁵¹

PPSS, despite the paper truth of the FRA's inapplicability, has filed palli sabha or village assembly resolutions on withholding consent in 2010 and 2011. The resolutions that were filed were not submitted to the MoEF and CC in arriving at its decision.

In the N.C Saxena committee report, it was found that the bureaucracy did not implement the consent provision in these areas as they did not constitute forest land, thus the bureaucracy was not under the obligation to comply with the consent principle. Thus, these resolutions did not form a part of the bureaucratic paperwork submitted to the MoEF and CC for consideration in the forest clearance process.

In response to the N.C Saxena committee's findings, the MoEF set up an independent investigation into the implementation of the Forest Rights Act headed by Meena Gupta.³⁵² This committee challenged the paper truth of the lack of other traditional forest dwellers by

³⁵¹ Report by N.C Saxena committee on the implementation of the Forest Rights Act, 2006.<
http://www.moef.nic.in/downloads/public-information/FRA%20COMMITTEE%20REPORT_FINAL%20Dec%202010.pdf> accessed on April 8, 2019.

³⁵² Meena Gupta was a retired officer from the Ministry of Environment, Forests and Climate Change and the committee was mandated to study the implementation of the Forest Rights Act in Jagatsinghpur.

confirming that there were OTFD communities, providing sufficient proof that they have lived and depended on these forests for seventy-five years. It had suggested that:

The state government's revenue and forest departments should extend all help needed to enable the exercise of rights recognition or rejection to be successfully executed. Efforts should be made to assess the genuineness of the documents through scientific tests.³⁵³

The paper truth was refuted by independent committees that were set up by the MoEF and CC. The Gram Sabha resolutions passed in 2011, withholding consent was reconsidered before granting forest clearance.

4.2 Construction of the Paper Truth and Exercise of Discretion in the Niyamgiri and Kodingamali Case

In the Niyamgiri case, Rayagada and Kalahandi's District Collectors had initially stated that no claims under the Forest Rights Act were received. This formed the basis for granting an in-principal approval with a few stipulated conditions. Public Interest Litigation (PIL) was filed by Biswajit Mohanty, Prafulla Samantara, and others to challenge this in-principal approval and the project at large. The Supreme Court ruled that the forest clearance can be granted to Sterlite, the Indian subsidiary of Vedanta, and not Vedanta itself.

The state filed for final approval from the central government. The FAC decided that it would reconsider the grant of the final approval subject to recognizing community forest rights, which led to the setting up of two independent committees in understanding the implementation of the FRA and the need for consent. It was here that the paper truth generated by the District Collectors came to the fore. The paper truth took two forms. It initially took the form of a certificate to ascertain that the local community had not filed any claims under the FRA. To this, the N.C Saxena committee reflects:

First, they (District Collectors) claimed that there were no claims on the Proposed Mining Lease area. In doing so, they ignored the overwhelming evidence of individual and community claims that have been filed in the Gram Sabhas. They have stated that communities on their own have not claimed such rights. This justification is irrelevant, given that the district

³⁵³ Report by the Meena Gupta committee along with the dissenting note, <<http://www.indiaenvironmentportal.org.in/content/318441/report-of-the-committee-constituted-to-investigate-into-the-proposal-submitted-by-posco-india-pvt-limited-for-establishment-of-an-integrated-steel-plant-and-captive-port-in-jagatsinghpur-district-orissa/>> accessed on April 8, 2019.

committees are required by rules 6 and 7 of the FR Rules to help and guide Gram Sabha's under their jurisdiction to file these resolutions. Part of this support is that the bureaucracy is responsible for information about the FRA and filing and verifying claims. This was completely ignored.³⁵⁴

Like in the Posco case, the committee highlights the bureaucracy's non-responsiveness in assisting with the implementation of the Forest Rights Act. The local bureaucracy, however, changed its interpretation to argue for the non-applicability of the FRA. They argued that there was no provision in the FRA for its retrospective application. In the Niyamgiri case, it is essential to note that the FRA came into being in 2008 while the PML was granted in 2006- a situation where the law was not in operation when the proposed mining lease was being discussed. The use of discretionary power on the applicability of the FRA is evident here.

On July 10th, 2010, the Chief Secretary's meeting stated that they had issued this certification, based on the understanding that the FRA was not retrogressively applicable. Since the site transfer was proposed before its enactment, it did not come under its legal purview. This understanding denied the very purpose of the FRA, viz. to correct historical injustice. They also did not clearly understand the definitions of key terms: claimants, CFR, and Habitat differences.³⁵⁵

In the Niyamgiri case, what came to the fore is an important revelation by the District Collector of Rayagada as documented in the N.C Saxena report. He talks about how the state has exercised its discretion in its reluctance to recognize community forest rights over an area where a mining lease has been granted:

Collector of Rayagada district stated in a meeting with the chairperson on July 9th, 2010, that this particular approach was due to the state government's position in favour of the granting of a mining lease. Because the state government has already decided to transfer the said land for mining, it was not keen to grant community and habitat rights over the PML area to the PTGs.³⁵⁶

³⁵⁴ N.C Saxena committee report appointed by the FAC available at <
http://www.odisha.com/2010/saxena_report_Vedanta.PDF> accessed on May 2020

³⁵⁵ *Ibid* 348.

³⁵⁶ N.C Saxena committee report appointed by the FAC available at <
http://www.odisha.com/2010/saxena_report_Vedanta.PDF> last accessed on May 2020

The exercise of such discretion the N.C Saxena committee shows is illegal. The pro-business interests of the state are seen in this exercise of its discretionary power. It was the Supreme Court decision discussed earlier in 2013 that recognized the Gram Sabha's regulatory authority in deciding on the diversion of forest land.³⁵⁷

In this case, the mechanics of the non-deliberative state at the sub-national level is alive in these administrative practices of interpretations on the applicability of the FRA or restricted recognition of rights when the state has decided to grant the area on a mining lease.

At the central level, the state challenged this pro-business interpretation of the FRA's applicability, a rare instance. Unlike the Posco case, the center chose to defer to the Gram Sabha's decision on the question of diversion of the forest area. In an interview with the local community on how they experienced their interaction with the bureaucracy, Jitu Jakesika a Dongria Kondh leader in Bisshemcuttuck said:

It was a blend of strategies. The international presence of the movement, especially with the investors pulling out, was conducive. The protests in India and abroad, the involvement of many NGOs, the courts' pursuit of justice came together to deliver this outcome. Not to forget that Rahul Gandhi, the ruling party leader, came to visit us and promised to protect Niyamgiri.³⁵⁸

The decision of the state and the Supreme court to recognize the authority of the Gram Sabha cannot be seen in isolation of other efforts by the forest-dwelling community through the Niyamgiri Suraksha Samiti or The Committee to Save Niyamgiri. They had networked with civil society organizations across the world to bring attention to their cause as I will elaborate on further in chapter 9.

As Vedanta failed to obtain bauxite from Niyamgiri, Orissa Mining Corporation (OMC) began to look for alternative bauxite sources to reach the already constructed aluminum refinery in Lanjigarh. OMC is successfully locating an alternative source of bauxite in the Kodingamali hill range in the Koraput district. The success of the Niyamgiri movement in preventing the opening up of the mine has made the forest-dwelling community in Kodingamali vulnerable to the impacts of mining. The forest-dwelling community is not as organized as the forest-

³⁵⁷ Orissa Mining Corporation V Ministry of Environment and Forests WRIT PETITION (CIVIL) NO. 180 OF 2011

³⁵⁸ Interview with Jitu Jaikasaika in February 2020

dwelling community in Niyamgiri as they remain divided on whether mining should take place in their forested areas.³⁵⁹

In an extractive state like Odisha, every hill range is dotted with mines and stories of dispossession. Kodingamali was not different. OMC had first obtained the consent from the Gram Sabha in the surrounding villages to extract bauxite and the construction of a plant by Aditya Alumina Company. Aditya Alumina pulled out of this project, and OMC then decided to use this bauxite reserve for Vedanta.³⁶⁰

The consent obtained by the Gram Sabha and the resolutions obtained for a project by Aditya Alumina was now used for the forest clearance application for Vedanta. As evidence of acceptance of this project, the District Collector has provided the older Gram Sabha resolutions.³⁶¹ The forest-dwelling community contests this as they argue that previously they had given their consent on the basis that a plant would be built. In the present instance, while mining occurs, the plant has been built in the neighboring district of Kalahandi, denying the forest-dwelling community employment opportunities.

The construction of paper truth and discretionary power can be seen in the interpretation that once consent has been obtained for mining an area with a specific company, it is assumed that the consent can be extended to a new project involving the same mine. Although the scale of the project and the companies involved are different. The discretion of selectively choosing evidence of acceptance continues with the symbolic and convenient implementation of the consent provision. Instead of viewing it as an invitation to deliberate, it is seen as a checkbox to be ticked immediately.

4.3 Construction of the Paper Truth and Exercise of Discretion in the Coal mining regions of Sundergarh

“Our land has been banned. We cannot build houses over land that has historically belonged to us, and the expanding coal mine surrounds us,” said a villager in Tumulia in the Himgiri coal block Sundergarh in the eastern Indian state of Odisha. In the Himgiri coal block, a case was filed before the High Court of Odisha challenging land acquisition without the payment of

³⁵⁹ Fieldnotes from my visit in July 2019.

³⁶⁰ Ranjana Padhi and Nigamananda Sadangi, *Resisting Dispossession: The Odisha Story* (Palgrave Macmillan, 2020)

³⁶¹ Interview with the District Collector in July 2019.

compensation by the resident Matthias Oram. In its judgment, the High Court has ruled that land was acquired in 1987 and thus belongs to MCL.³⁶²

The land is muddled in many legal contestations. The land on which the coal mine is operational by the state-owned Mahanadi coalfields is categorized as a scheduled area. Scheduled areas are a protected legal category recognized in the constitution where land cannot be alienated to anybody apart from a scheduled tribe. A landmark judgment by the Indian Supreme Court in 1997 recognized this legal protection and ruled that land in scheduled areas could not be alienated to a private mining company.³⁶³

This legal protection is backed by other laws that protect forest-dwelling communities' rights to their lands and resources, like the Panchayat Extension to Scheduled Areas Act, 1996 and the Forest Rights Act, 2006. Most coal mines are located in India's forest areas. These areas are rife with conflict as the competing interests of forest-dwellers' rights to land and resources and the acquisition of land for coal mines.

Coal mining in India was nationalized with the passing of the Coal Mines (Nationalization) Act, 1973. Coal mining was exclusively operated by the state-owned Coal India and its subsidiaries. The nationalization of coal was initiated in response to bad labor conditions in private coal mines before 1971. The acquisition of land in coal blocks is governed by the Coal Bearing Areas Act, 1957, where the land acquisition process is different. In coal-bearing areas, local communities have a small window to oppose land acquisition compared to land acquisition processes for other purposes. The consent provision has become an arena for articulating dissent by forest-dwelling communities to either prevent the acquisition or negotiate better terms for relief and rehabilitation.

In interviews with the bureaucracy, what emerges is a pattern in the interpretation of this interaction. In the coal-bearing area, the District Collector stated:

This is a scheduled area, forest land, but also a coal-bearing area. The nation needs coal, and we usually approve of the land to be acquired, and the community is appropriately compensated.

³⁶² Mahanadi Coalfields and Another V Matthias Oram and Others Special Leave Petition (C) NO.6933 OF 2007

³⁶³ Samatha V State of Andhra Pradesh (Appeal (civil) 4601-02 of 1997)

The District Collector's office can be seen as a clearinghouse where essential decisions on forest land acquisition are made by pitting one legal provision against another while creating interpretive tools for its reconciliation.³⁶⁴

The interpretive tool deployed in coal-bearing areas is one of compulsory acquisition. The consent process does not influence the acquisition process adequately. This interpretive tool's implementation was seen in Ghattbara, Chhattisgarh, where the local community filed for a community forest right. That was denied as the area was part of an approved coal mining lease.³⁶⁵ The cancellation of community forest rights posed a pertinent question, can forest rights be applied for and exercised over the area that is part of a coal mining lease? The answer again rests with specific local interpretive tools adopted by the bureaucracy. In this instance, the community forest right was rejected because it obstructs mining.

Governance in forest areas where coal is found is embedded in the interpretive tool of compulsory acquisition. It is this inability to challenge the acquisition process that surrounds the implementation of the consent provision. As seen in the Mahanadi Coal Fields case, what emerges is the extension of ownership of land to the coal mining company beyond it being merely leased to the mining company. The consent provision operates in this interpretive grey zone of land being compulsory acquired despite requiring a forest clearance with land eventually being owned by the state-owned mining company.

5. Discretionary power in the eventual decision arrived at, the Gram Sabha resolution and the non-deliberative state.

The Gram Sabha consent provision is mandatory for any decision on the diversion of forest land for a non-forest purpose. The binding nature of the decision made in Gram Sabha resolution is seen by bureaucrats as a hurdle to enable the quick acquisition of forest land. The right to veto recognized through the Vedanta judgment has forced the lower bureaucracy at the district level to deploy its efforts in the creation of paper truth or evidence of acceptance.³⁶⁶

³⁶⁴ Interview with Adivasi communities in Sundergarh in July, 2018.

³⁶⁵ Adivasi Protest in the Gare Palma Coal Mines, Chhattisgarh, India.' (Environmental Justice Atlas, 2012) <<https://ejatlas.org/conflict/ativasi-protest-in-gare-pelma-coal-mine-kosampali-chhattisgarh-india>> accessed on 15th February, 2018.

³⁶⁶ Fieldnotes from February, 2020.

In the forest clearance process, the consent provision is an essential element; however, as stated earlier, discretionary power comes into play in deciding whether it influences the state's eventual decision. An example of this is the justifications for allowing the forest clearance provided to Posco to be transferred to JSW. The FAC minutes read as follows:

In the Forest Advisory Committee's (FAC) minutes of August 16th, 2019 where the forest clearance granted to Posco has been transferred to a different company, JSW. FAC defended their stance upon legal backing and years of scrutiny that the Posco case was subject to, which they believed made it more efficient to transfer the clearance rather than undergo a new process.³⁶⁷

The forest clearance was previously granted in the Posco project despite opposition from some forest-dwelling community quarters. The legal basis of the Gram Sabha resolution was challenged as it did not follow the rules put forth in Odisha Gram Panchayat Act, 1968. Despite challenging its legal basis, what can be drawn from the then Minister for Environment and Forests Jairam Ramesh's speaking order is the emphasis on deferring to the state of Odisha in its decision on the implementation of the FRA and the process for obtaining the consent of the Gram Sabha. The order reads as follows:

The primary responsibility for implementing FRA, 2006 is that of the state government through the institutions of the Gram Sabha, sub-divisional officer (SDO), and the District Collector. I must respect the reports from SDO and the collector. Their views and also of the state government must prevail unless there is overwhelming and clinching evidence to the contrary.³⁶⁸

Instead of challenging the decision by Odisha's extractive state, it was agreed that the MoEF and CC would defer to their judgment.

Noted environmental journalist Nitin Sethi, who has been observing the consent provision and its implementation, alerted me to the importance of understanding consent as a process that perhaps guides decision making but does not form the basis of the eventual decision taken.

³⁶⁷ Arpitha Kodiveri, 'Passing clearances and bypassing consultations' in *The Bastion* <<https://thebastion.co.in/politics-and/passing-clearances-bypassing-consultations/>> accessed on May 2020.

³⁶⁸ Jairam Ramesh, *Green Signals : Ecology, Growth and Democracy in India* (Oxford University Press, 2015)

When asked about the Vedanta judgment, he said:

It is essential to distinguish this judicial decision, the statutory requirement, and the state's powers both at the centre and the sub-national level in making the eventual decision. It is aspirational to interpret that when forest-dwelling communities withhold their consent, the project will not go through. The state retains the power to decide how to interpret the resolution and generate evidence supporting the clearance being granted.³⁶⁹

Discretionary power and how it plays out in the decision making of the consent provision are not restricted to the FRA's applicability. It extends to whether it chooses to incorporate evidence of dissent in the form of the Gram Sabha resolution withholding consent into consideration. It can be argued that discretion here is involved in the complex task of selectively incorporating only evidence of acceptance and not dissent in the paperwork used to arrive at an eventual decision.

Discretion in how to enforce the rules is seen in the manufacture of paper truth and false Gram Sabha resolutions to generate evidence of acceptance. False Gram Sabha resolutions are an effective way of not allowing any voice of dissent even to inform the decision-making process and the creation of evidence of acceptance of the project. This non-deliberative administrative practice has been demonstrated in the section on paper truth in this chapter and the work of investigative journalists in Keonjhar.³⁷⁰

In a candid interview with the land officer at IDCO, he elaborated on how the consent provision is a hurdle and bureaucracy does what it can to speed up the clearance process. He remarked as follows:

The forest-dwelling community and their rights are important. However, we cannot rely on their opinion to make decisions on development that impacts us all. We need to listen to the Gram Sabha, but the decision eventually needs to be taken in the interest of citizens in Odisha and the country at large³⁷¹

Prioritizing other citizens is the classic argument of local interests being compromised on the altar of national interest. While there is truth to this line of argument, I would like to highlight

³⁶⁹ Interview with Nitin Sethi in July 2018.

³⁷⁰ Chitragada Choudhury, 'The Keonjhar Take Over' in *Outlook* (February 2008) <<https://magazine.outlookindia.com/story/the-keonjhar-take-over/296512>> accessed on December 28 2020.

³⁷¹ Interview with the land acquisition secretary in July 2019.

that the state draws its legitimacy of deploying its discretionary power in being the institutional body that can articulate in the national interest. The Gram Sabha resolution then is viewed by many bureaucrats interviewed in this thesis as a way of sensing the discontent, if any, that may be remedied by compensation but never an earnest dialogue on the development prospects keeping the forest-dwelling community in mind.

6. Exercise of Discretionary Power in restricting the applicability of the FRA.

6.1 Discretionary power, the forest department, and the FRA

Discretionary power in the context of the Forest Rights Act and the Gram Sabha consent provision is exercised in the weak and robust form. In this section, I will unpack discretionary power by the forest department, District Collector, and the MoEF and CC. I focus on these three authorities because they are the critical nodes of decision-making on the consent provision and the eventual outcome.

As seen in chapter 2, the FRA operates in a context of conflicting laws as the IFA and the WLPA vest powers in the forest department in settling or denying the recognition of forest rights through specific categorization of forest areas. The Forest Department is the administrative authority vested with powers to regulate conservation rights and modalities in the forests. In the context of the implementation of the FRA and the consent provision, the forest department has used its discretionary power of interpretation of rules in a way that restricts the applicability of the FRA.

An example of such discretionary power is in the Posco case where the forest department argued that the rights were settled back in 1960 and that there were no other traditional forest dwellers in the area. The nature of interpretation stems from the decisions the forest department takes in reconciling these conflicting legislations. Through its working plan in forest areas, the forest department demarcates the forest boundary and how rights can be exercised in these areas. It interprets the geography and legal categorization of forests to enable them to retain control of the forest areas.

In the Niyamgiri case, where the Gram Sabha voted against mining based on the FRA and applied CFR rights, is yet to have their rights recognized. Though the FRA states that rights can be recognized in all forest areas, an administrative practice has been produced which

restricts the recognition of rights in protected areas with the reasoning of exclusionary conservation or if the forest area comes within the ambit of a proposed mining lease area. The bureaucratized process for rights recognition allows. The FRA's non-applicability is the first tool in the playbook of the pro-business bureaucracy in bypassing the consent requirement.

6.2 District Collector and the FRA

The District Collector (DC) is responsible for producing the certificate under the 2009 notification and subsequent 2014 rules of the FCA to determine whether rights have been recognized under the FRA and if the Gram Sabha's consent has been obtained. As obtaining consent is undefined, the DC exercises a strong discretionary power of creating rules and a process where procedural power is used to trump substantive rights.

The District Collector uses creative legal interpretations to restrict the FRA's applicability in collaboration with the forest department, as was seen in the Niyamgiri case. As the N.C Saxena committee report documents:

District Collectors of Kalahandi and Rayagada have certified in writing that there are no claims under the FRA for the area under PML. While justifying the issue of these certificates without proposing the matter of diversion of forest land before the Gram Sabha's, the Collectors and government officials argued on several grounds.³⁷²

This presence of discretionary power is used so that the process is quick and, at times, results in the production of false Gram Sabha resolutions. As stated earlier, the District Collector operates as a clearing house where multiple priorities collide, and the decisions are taken to provide speedy clearances.

6.3 The FAC and the consent provision

The discretionary power of deciding whether forest clearance is granted or not rests with the MoEF and CC. The forest clearance process has often been described as a hurdle in the development process, and with the Modi government coming into power, the emphasis has been laid on granting clearances speedily. The MoEF and CC and the FAC seldom interrogate

³⁷² N.C Saxena committee report appointed by the FAC < http://www.odisha.com/2010/saxena_report_Vedanta.PDF> accessed on May 2020

the state government's documents critically, given the lack of time and the pressure to clear projects.

In an interview with a former member of the FAC, when asked about the consent provision explained:

We are given one week to read documents related to many projects, and we must decide whether a clearance is granted or rejected within one meeting. Working under this kind of pressure, we seldom have the time to either conduct a field-level examination of evidence or judge the paperwork's authenticity. We work on the presumption that the documents submitted are authentic. When communities report violations before the courts or in the media and protests, we are pushed to re-examine these documents.³⁷³

In this candid interview, the former member laid out the mechanics of decision-making within the FAC. Chitragada Choudhury and Aniket Aga who are environmental journalists observe the FAC and forest clearance process as follows:

The tenacious hold of the forest bureaucracy over forest diversion processes is particularly apparent in the Forest Advisory Committee's constitution and operation (FAC) – the only official body in the diversion process that includes members from outside the government. The FAC, tasked with reviewing diversion proposals and making recommendations, is chaired by a senior forest bureaucrat. It includes forest officials, known-official "experts" from forestry and "allied disciplines," as well as representatives from other federal ministries. The Environment Ministry constitutes the FAC, thus determining which interests get articulated and which remain unrepresented in its working.³⁷⁴

When the decision is challenged in court, or news reports emerge, the FAC revisits some of these decisions and interrogates the paperwork submitted by the bureaucracy.³⁷⁵

Discretionary power here is understood as a micro arena where the conflicting interests play out. The ordering of these priorities is guided by the macro-political economy of extraction in

³⁷³ Interview with Mahesh Rangarajan

³⁷⁴ Chitragada Choudhury & Aniket Aga, 'Manufacturing Consent: Mining, Bureaucratic Sabotage, and the Forest Rights Act in India' ((2019) in Capitalism Nature Socialism.

³⁷⁵ I have analysed the minutes of FAC meetings from 2013 to 2020 in relation to mine and steel projects in Odisha. In it I have examined the question of consent and arrived at this finding.

Odisha. The pro-business demands inform the relationship between discretionary power and how it is exercised in the state's consent scenario.

6.4 A note on Judicial Review of administrative action in India's forests.

Judicial review of administrative action as a way of regulating discretion in the context of forest clearance and the consent provision has been informed by judicial activism on forest conservation. The Godavarman case in 1995 reshaped forest governance and the forest clearance process by the creation of the Central Empowered Committee.³⁷⁶ The Godavarman case is where a petition was filed to check illegal timber felling in the Nilgiri hills in southern India, but the Supreme Court kept the case open with a “continuing mandamus” where a bench till today hears cases of violation of the Forest Conservation Act 1980. The CEC has played an active role in seeking clarifications and investigating forest clearances that have been granted.

The court is the site where forest-dwelling communities can challenge administrative decisions on the granting of forest clearance. In the three cases being examined here, legal mobilization strategies involve petitions to the high courts and the Supreme Court to challenge the MoEF and CC's decision. In all these instances, the cases have been filed as Public Interest Litigations.

Discretionary power in the manner it is being used renders the state non-deliberative. The courts function has been to push the MoEF and CC to reconsider its decision in granting the forest clearance. The need to approach courts and other avenues to make the state reconsider its decision is a difficult proposition for forest-dwelling communities as a way of being heard. Many forest-dwelling communities use protests to create porosity in the state's decision making around the forest clearance process.

Brahamar Das recalls an incident in the people's organization against Posco built bamboo gates to indicate their disapproval of the project. They prevented the local bureaucracy and other state officials from entering these areas. This purely territorial expression of protest

³⁷⁶ T.N Godavarman Thirumalpad V Union of India and Other (Writ Petition (CIVIL) NO. 202 OF 1995)

restricted the company temporarily, though the forest clearance legally went on to be granted.

7. Deliberative Governance and The Reimagination Of the Consent Provision

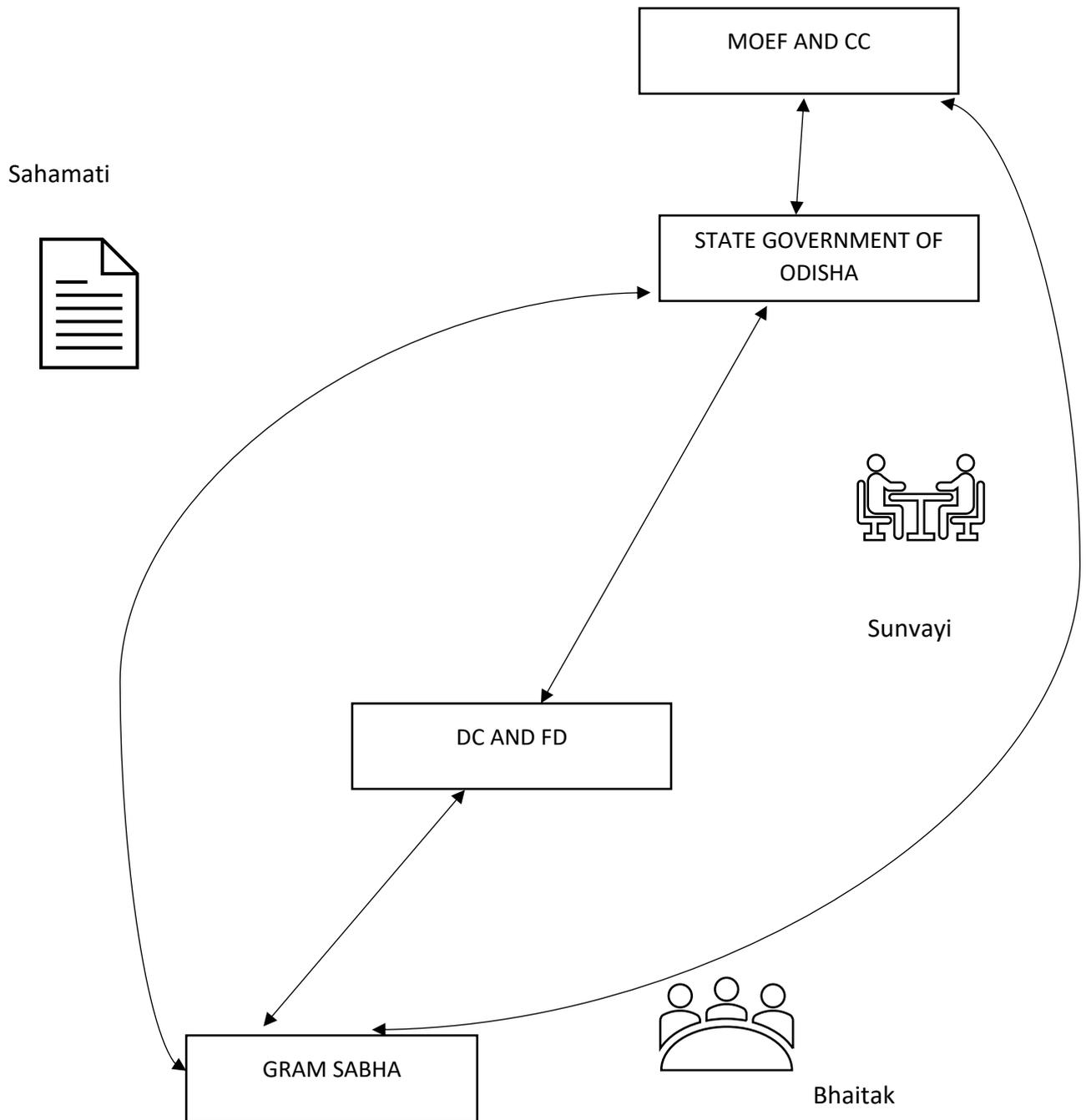


Figure 7: Deliberative Governance and the Reimagination of the Consent Provision

7.1 Deliberative reimagination of the consent process

As is understood in the law and how it is implemented, the consent process is non-deliberative mainly. In interviews with forest-dwelling communities across the three mining sites in Odisha, what emerges is a hopeful retelling of the procedure that guides the consent provision implementation. This deliberative reimagination of the consent process was a response to my question on ways to rectify this legal procedure. A framework of deliberative proceduralism emerged from these interviews.

The forest-dwelling communities in Odisha have been practicing the pathalgadi movement where provisions of the constitution, the FRA, and PESA are carved onto the stone to help outsiders remember the ethics of engagement process of reclaiming the power to interpret the laws. In many interviews, forest-dwelling communities had particular interpretations and understandings of governance that they identified as aspirational and emancipatory. It is in light of these conversations that a deliberative reimagination of the consent process emerged.

The guiding principle behind this deliberative reimagination of the procedure is to place the Gram Sabha at the centre of each decision-making loop and provide an ethos for engagement with the state. Deliberation and consent, as Brahmarao Das described, are an opportunity to take stock and re-evaluate a state's decision. Citizenship as claims-making demands that forest-dwelling communities be an integral part of that decision making procedure.

As I pieced together the aspirational legal interpretation of the consent process, what emerges is a nuanced and more lucid rendering of a legal procedure presently marked by a concentration of power in the District Collector and the Ministry of Environment, Forests and Climate Change.

The deliberative reimagination is rooted in the understanding of shared sovereignty as Rinjo Sikaka described:

The relationship between us and the state must be built through dialogue. We need to work at it and continuously negotiate and renegotiate the terms of engagement. The consent provision is a way to begin that dialogue, but it cannot be reduced to a paper resolution. Decisions need to be a product of sustained dialogue.³⁷⁷

The notion of shared sovereignty is the overarching basis on which this deliberative reimagination of the consent provision rests. Shared sovereignty, as Manorama Kathua described it, is an avenue for dialogue and change in decision-making. The shared sovereignty principle legally requires that laws and decisions imposed on forest-dwelling communities need to be a product of deliberative consideration and not made unanimously by the state. Shared sovereignty, which has been described in chapter 3, requires the relationship with the state to be one of shared decision-making and with an avenue for constant dialogue and engagement.

The typical process derived from the interviews with forest-dwelling communities across the three mining sites is a three-stage process of obtaining consent. It consists of bhaitak or a sit down within the village, sunvayi or a hearing with the state, and sahamati or consent to be obtained after the state makes its decision.

The idea of the bhaitak is similar to what Peter Drahos refers to in his work with Indigenous communities in Australia of a regulatory convening. He states a convening is a forum to bargain, negotiate, settle differences, establish boundaries, and familiarize indigenous people. Bhaitak, similar to a convening, is a forum usually with the Gram Sabha where issues are discussed, deliberated, and recalibrated.³⁷⁸

Inclusion within the Gram Sabha remains a barrier, particularly for Dalit forest-dwelling communities and women. Internal rules that encourage inclusion need to be designed to ensure inclusive participation of women and other forest-dwelling communities to participate in the discussions adequately. In interviews when questions of exclusion were posed, the

³⁷⁷ Interview with Rinjo Sikaka in Niyamgiri on February 2020.

³⁷⁸ Peter Drahos, *Intellectual Property, Indigenous People and their knowledge* (Cambridge University Press, 2014)

response that often came back was one of the needs for deliberative chains or counter-publics, as Lado Sikaka described:

The Gram Sabha is a more extensive forum, but before we present our views before the Gram Sabha, a lot of work occurs to speak with members from across the village. The Dalit community has its leaders who we consult, and similarly, we have a committee of women who discuss the goings-on and share their opinion with us.³⁷⁹

In the following chapter, where I understand the divisions of identity in Odisha's forests, I will conclude with a normative ideal of inclusion, representation, equality, and respect. The bhaitak is not viewed as one event of a sit down where a decision is taken. It is a convening which is a site for iterative and continuous dialogue within the village until a consensus is reached. The deliberative chains or counter publics form an essential part of the informal deliberative governance structure that feeds into the Gram Sabha proceedings.

As Lado Sikaka, the leader of the Niyamgiri Suraksha Samiti, describes, the law needs to incorporate the bhaitak or convening as a core element of the consent process. The bhaitak or sit down, which takes place over time, will produce a deliberative decision to a particular regulatory problem when a broad consensus is reached. The state needs to present the regulatory problem in earnest to the Gram Sabha so that the Gram Sabha can reach this deliberated outcome. Forest-dwelling communities are of utmost importance in a shared sovereignty framework.³⁸⁰

The deliberated outcome is then presented to the District Collector and the forest department, which the forest-dwelling community identified as the key decision-makers locally. The deliberated outcome, once presented, is to be heard or what the forest-dwelling community described as the sunvayi. Rinjo Sikaka describes this encounter as follows:

The state needs to hear us and not merely communicate their decision to us. To be heard entails them coming to our village and listening to our reasoning behind our decision. To be heard demands that they listen to our decision in all its contours and not reject it in the first go. This will equip them to then make a more informed decision within their committees.³⁸¹

³⁷⁹ Interview with Lado Sikaka in Niyamgiri on February 2020.

³⁸⁰ *Ibid* 373.

³⁸¹ Interview with Rinjo Sikaka in Niyamgiri on February 2020.

Once presented to the District Collector and forest department, the deliberated decision can be communicated to the Tribes Advisory Council that can engage with the pro-business bureaucracy in arriving at a just decision that accounts for the considerations of the forest-dwelling community. The empowered space of the Gram Sabha and its decisions need to be reflected in the state's eventual governance outcome.

Once the state of Odisha arrives at a decision, the decision needs to be communicated to the affected communities Gram Sabha for their consent. This process, according to the forest-dwelling communities, will form a deliberative loop. If the Gram Sabha rejects the state of Odisha's decision, the negotiation continues till an agreement is reached. The eventual decision taken by the MoEF and CC will be based on the working agreement submitted by the sub-national unit and is produced through the deliberative loop of this reimagined process.

The agreement between the state of Odisha and forest-dwelling communities does not carry a sense of completion of dialogue. Instead, it is viewed by the forest-dwelling community as an incomplete working agreement founded on a few agreeable compromises. The shared sovereignty framework, which presently exists in the law supporting scheduled areas, does not provide for a governance structure for continuous dialogue. Dialogue instead is episodic based on the power of forest-dwelling communities to approach the courts.

The right to veto exists within such a deliberative process with the avenue for discursive shifts to occur as part of this constant negotiation of the terms of engagement with the state. Self-determination as forest-dwelling communities in Kodingamali described is not the absence of the state but rather the state's presence in a deliberative mode with its willingness to be porous to deliberated decisions.

The Gram Sabha is the micro public where deliberation occurs, which affects the macro questions of development in the forest area. This deliberative governance structure generates a pathway for the micro public and deliberated outcome of the Gram Sabha to impact the decision of the Ministry of Environment, Forest, and climate change on the diversion of forest land.

Sunvayi and sahamati are two concrete ways to manage the interface between the state and the forest-dwelling communities. A workable model of sharing sovereignty where decisions arrived at by the forest-dwelling community in the absence of state interference becomes the

basis for dialogue. Sovereignty is such a deliberative governance model that demands the sharing of discretionary power with the forest-dwelling community.

As seen in this chapter, the discretionary power of the District Collector is expressed in three ways: designing procedures, producing paper truth, and interpreting laws. To counter this, the forest-dwelling community must be endowed with the ability to present evidence and interpretation of laws to operationalize the deliberative governance architecture. Consent provides an opportunity to break away from the pro-business and extractive circuit of decision making to a deliberative and developmental one.

Rinjo Sikaka describes the consent provision as an encounter between the forest-dwelling community and the state when the forest-dwelling community has a decision made in solidarity with the village assembly members. The deliberated decision's communication is coupled with the demand for bindingness in such a deliberative governance structure. The deliberated decision is seen as influencing every stage of decision-making by the state.

Sahamati is where the forest-dwelling community can reject the state's decision if it fundamentally breaches its demands. Only upon a workable agreement arrived at through this process that the state should sign the Memorandum of Understanding (MoU) with different companies to set up their mining operations. As seen in the three mining cases in this thesis, the state signs the MoU and then acquires land. This practice immediately triggers the extractive mode, which quietens the deliberative potential of the consent provision.

This deliberative reimagination of the consent process creates new nodes for deliberation to check the state's pro-business bureaucratic architecture. These deliberative nodes in the form of the Gram Sabha, the District Collector, the district forest officer, and the Tribes Advisory Council will generate new pathways of decision-making that can internally change the functioning of the state in its pro-business mode.

With its decision-making loops requiring constant engagement between the Gram Sabha and the state, the deliberative governance structure provides a concrete opportunity to be in dialogue. Unlike the current process, if Gram Sabhas are to be heard, they must either approach the courts or take to the streets. While this structure does not serve the purpose of the ease of doing business, it seeks to resolve prolonged conflicts and the impasse on land

acquisition, which haunts mining companies well into the lives of their projects as seen in Kodingamali and Sundergarh.

8. Conclusion

In this chapter, I have demonstrated through a detailed description of the state machinery involved in implementing the consent provision how the tensions of competing priorities play out. In the remainder of this chapter, I have demonstrated how discretionary power is exercised to restrict the applicability of the Forest Rights Act and consent provision.

The bureaucracy makes efforts to produce paper truth that confirms evidence of acceptance of the project. Seldom does the evidence of rejection reach the FAC. The discretionary power and production of paper truth are done with an interest to render the state non-deliberative in these decisions. The discretionary power of the state in its production of legal interpretation, paperwork, and reinvention of procedures enables it to use this space to facilitate business interests.

Through these tactics, the state in India's forests is present in its pro-business and extractive avatar, leaving forest-dwelling communities bereft of space for continuous dialogue with the state. The state is supported by the regime of dispossession, pro-business bureaucracy, and the paper state to reassert control over decision making in the diversion of forest land. The alternative deliberative governance structure of the consent provision derived from interviews with the forest-dwelling community offers a pathway out of the non-deliberative modalities of the state. The three-part structure of bhaitak- sunvayi- sahamati ensures that the Gram Sabha is able to influence state decision-making as well as avenues to engage in dialogue with the state to arrive at a working agreement on important areas of decision-making. Deliberative governance provides an avenue for forest-dwelling communities to move past the impasse and potentially entrench the state in its deliberative modality.

6. RECOGNITION, REDISTRIBUTION AND THE SELECTIVELY DELIBERATIVE STATE

1. Introduction

The Supreme Court in the Vedanta case required the state to reconsider its decision of diverting forest land for the bauxite mine. The legal basis of the Supreme Court judgment was the right to the freedom of religion and the need to protect the mountain as it was sacred to the Dongria Kondh community.³⁸² This sacred relationship with the mountain vested the Dongria Kondh community with the decision-making power to grant or reject the mining lease. In this instance, the Adivasi community was thriving in protecting their rights over forest land and resources with the ability to mobilize internationally as indigenous peoples and domestically as particularly vulnerable tribal groups. The state here was deliberative in reconsidering its earlier decision of granting forest clearance.³⁸³ The state's deliberative mode was switched on by the continuous struggle from below of the Dongria Kondh community to be heard by approaching various legal fora and protests on the ground.

In the coastal district of Jagatsingpur in Odisha, where the forest-dwelling community is mostly, non-Adivasi protested against forest land acquisition, not because it was sacred but because it threatened their livelihood. They were unsuccessful in protecting their rights over forest land as Odisha is handing over the land to an Indian steel conglomerate. The differing outcomes are due to many reasons, but these communities' legal categorization is an important one. In this chapter, I will explore whether the identity of these communities matters in the process of claiming forest rights and participation in the consent process? How does their identity shape the decision-making process of the state and within communities?

I argue that forest-dwelling communities' legal categorization is an essential aspect of claiming forest rights and participation in the consent process within communities and their engagement with the state. Communities categorized as Scheduled Tribe (ST), or Particularly

³⁸² Orissa Mining Corporation Ltd V Ministry of Environment and Forests (Writ Petition (CIVIL) NO. 180 OF 2011).

³⁸³ Radhika Borde, 'Differential Subalterns in the Niyamgiri Movement in India' ((2017) Interventions, 19:4 pp. 566-582.

Vulnerable Tribal Groups can access land rights in forest areas more easily under the FRA. Non-ST communities must provide evidence of having lived and depend on forest areas for three generations or seventy-five years, a difficult barrier to overcome to gain their land rights. The state privileges ST communities' claims over non-ST communities. The state perceives ST communities to be the *genuine or authentic* beneficiaries of this Act.³⁸⁴

The identity of forest-dwelling communities influences participation in the consent process as a divide emerges between members who have access to land rights and those who are landless. Such a division is the product of the legal design of the FRA. Another divide rooted in forest-dwelling communities' identity is their differing approaches to justice as they participate in the consent process. While some forest-dwelling community members claim redistributive remedies, others claim remedies of recognition of being Adivasi or Indigeneity.³⁸⁵

These divisions created by legal design and differing approaches to justice are inter-related. This chapter explores these divisions' contours by drawing on Nancy Fraser's work on recognition and redistribution, which serves as a lucid theoretical framework to unpack it.³⁸⁶ Divisions in the law and the implementation of the consent process in the four cases highlight the role that the forest-dwelling community's identity has in informing decisions within communities and in their engagement with the state.

This chapter tries to shine a light inward onto the forest-dwelling community to discuss the challenges of deliberation, inclusion, and discursive pluralism within the gram sabha. The legal categorization of the forest-dwelling communities and their differing approaches to justice determines who has legitimacy in decision-making and those who do not. The division can be defined as a discursive hegemony that is a product of specific recognition and redistribution-based claims. These divisions inform those who are included and heard in the internal deliberations and those who are excluded. Forest-dwelling communities are heterogeneous divided on the vectors of caste, class, and gender. While transferring power to the gram sabha

³⁸⁴ Interview with R.K Sharma and Deepak Mohanty in the Department of Mines and Kishan Kumar who served as a district collector in Kandhamal district.

³⁸⁵ Section 3 of the Forest Rights Act, 2006.

³⁸⁶ Nancy Fraser and Axel Honneth. *Redistribution or Recognition?: A Political-Philosophical Exchange* (Verso, 2003)

is vital in the consent process, in this chapter, I elaborate on the divisions within and ways to move beyond these divisions.

The chapter consists of five sections. Section I shows how claims of recognition and redistribution are addressed within the Forest Rights Act, 2006. The second section will highlight the division created within the FRA based on the identity of forest-dwelling communities. The third section will explore the division between the differing approaches to justice among the forest-dwelling community. Section four will address how these divisions shape the consent process within communities. Section five will argue that the state apparatus and the local bureaucracy in particular privileges ST communities' claims over non-ST communities in recognition of claims of forest rights and the consent process. I further elaborate on how these divisions inform legal mobilization of law and justice. I conclude by arguing that these divisions are reinforced given how the state implements the consent provision and the legal mobilization strategies deployed. Thus, a deliberative democracy approach with discursive pluralism, inclusion, deliberative chains, and extended thinking will provide a framework to overcome these divisions.

2. Recognition, Redistribution, and the Forest Rights Act, 2006

Recognition and redistribution drawn from Nancy Fraser's work identify two critical components of social justice. Recognition refers to the claim where there is a need to understand that equality should be difference friendly as the experiences of injustice are different for differently placed communities. This, Fraser argues, is a status-based claim, and the need for equality should incorporate such claims. Redistribution refers to a claim of adequate and equal distribution of resources as a strategy to counter inequality rooted in the economy and market. Redistribution and recognition are seen as opposed to each other as redistribution demands equality without a difference, while recognition is about the accommodation of difference.³⁸⁷

The struggle for forest rights brings together these divergent strands of social justice in the form of perspective dualism, where recognition and claims for redistribution are read together.³⁸⁸ The Forest Rights Act, 2006, was a social movement product as referred to in

³⁸⁷ Nancy Fraser and Axel Honneth. *Redistribution or Recognition?: A Political-Philosophical Exchange* (Verso, 2003)

³⁸⁸ Ibid 6

chapter 2 that understood social justice through the lens of the perspective dualism of recognition and redistribution. The Forest rights act was a negotiated settlement where claims of recognition and the scope of the Act's applicability were configured and reconfigured.³⁸⁹

In the section that follows this one, I will address the divide within the law of scheduled tribes and other traditional forest dwellers. The claims for redistribution were framed by the need to conserve forest areas. Claims of Recognition and Redistribution are closely tied together within the FRA. Recognition is the first filter that needs to be crossed for redistribution benefits to be gained from the Act. While they are read together, there is ordering and privileging within the Act. Exclusionary conservation practice guides this ordering and privileging within the Act.

How does the law address the claims of recognition and redistribution?

³⁸⁹ Vaidya, Anand Prabhakar, *The Origin of the Forest, Private Property, and the State: The Political Life of India's Forest Rights Act*. Doctoral dissertation, Harvard University (2014) accessed from the author

Recognition	<p>Recognition is rooted in an understanding of historical injustice suffered by the forest-dwelling community. The law, however, makes a distinction between the scheduled tribe and other traditional forest dwellers. Scheduled tribe communities who have been listed and recognized can apply for individual forest rights without additional evidence. OTFD communities have to provide evidence of having lived and depended on the forest areas for seventy-five years or three generations. In the case of community forest rights, the community as a whole can apply for them with evidence of maps of the forest area on which the claim is made.³⁹⁰</p>
Redistribution	<p>Redistribution within the FRA consists of four aspects, namely:</p> <ol style="list-style-type: none"> a. Individual Forest Rights: Where tenurial security over forest land is recognized. b. Community forest resource rights: The forest-dwelling community has the right to access, use, and sell non-timber forest produce. c. Community Forest Rights: Where the forest-dwelling community has the power to manage and conserve parts of the forest area; and d. The right of forest-dwelling communities to clear the forest to the extent of seventy-five trees to establish schools, primary health care centers, among others listed in Section 3(2)³⁹¹

Table 8: Recognition, Redistribution, and the Forest Rights Act,2006.

³⁹⁰ Section 2 of the Forest Rights Act,2006 which defines ‘Other Traditional Forest Dwellers’

³⁹¹ Section 3 (a) to (k) of the Forest Rights Act,2006.

The demands mediate recognition and redistribution within the FRA to conserve forest areas. Conservation in India is a contested terrain and has witnessed two differing approaches to how the law has dealt with it. As argued in the chapter on regimes of dispossession, the Indian Forest Act, 1927, and the Wildlife Protection Act, 1972 are shaped by the practice of exclusionary conservation. Exclusionary conservation practice continues to guide decision making in forest areas on issues of forest rights and recognition.

The FRA was drafted in the shadow of exclusionary conservation practice where the terms of recognition and redistribution demands were restricted. As the FRA was being drafted, it was the then Ministry of Environment and Forests that argued for the inclusion of forest-dwelling communities other than Scheduled Tribe. It would result in conflict on the ground. There was a fear by leading conservationist groups that this category would open up a flood gate for opportunistic claims over forest land. A way to meet this criticism was constructing an evidentiary requirement that is a difficult one to meet. Claims made by OTFD communities are often rejected due to the lack of evidence to support their claim.³⁹²

Recognition within the FRA was grounded on the existing process of forest-dwelling communities being recognized as scheduled tribes. Many forest-dwelling communities have not been scheduled or may be scheduled in one state but excluded in another.³⁹³ The process of being listed on the schedule is determined by criteria like shyness of contact, distinctive culture, and backwardness. There has been a change in the criteria, making it easier for more forest-dwelling communities to be included in the list.³⁹⁴

Being listed as a scheduled tribe enables forest-dwelling communities to better access legal protection within the FRA and other laws. They can draw their legitimacy by the fact that they are viewed as vulnerable and victims of a particular form of historical injustice in the eyes of

³⁹² Documents on the making of the FRA accessed by the author from M.Rajshekhar who applied for them through the Right to Information Act, 2005.

³⁹³ Patrik Oskarsson and Siddharth Sareen, 'Adivasiness as Caste Expression and Land Rights Claim-Making in Central-Eastern India' (2019) *Journal of Contemporary Asia* 50:5, pp 831-847.

³⁹⁴ The Report of the Advisory Committee on the revision of the list of scheduled tribes headed by B.N Lokur 1965 a < <https://tribal.nic.in/writereaddata/AnnualReport/LokurCommitteeReport.pdf> > accessed on May 2020; Press Trust of India, 'Government to do away with 'primitive traits' criteria for recognition of STs' in *The Economic Times* < <https://economictimes.indiatimes.com/news/politics-and-nation/government-to-do-away-with-primitive-traits-criterion-for-st-status/articleshow/47316503.cms?from=mdr> > accessed on May 2020.

the state. This legitimacy derived from state-driven recognition seeps into the local bureaucracy's thought process as they implement the FRA.³⁹⁵

Redistribution claims addressed in the form of land rights is restricted within the FRA as it comes within the ambit of tenurial security. Individual land rights can be inherited but cannot be alienated. The reason for its inalienability is the need to conserve forest areas. The state continues to retain the power to alienate forest land contingent on obtaining the village assembly's consent.³⁹⁶

The practice of exclusionary conservation also frames redistribution in the context of community rights. Community Forest Resource rights are not recognized appropriately. The forest department often mediates the sale of minor forest produce as the Indian Forest Act, 1927 recognizes its power. Community Forest Rights have not been recognized in many parts of India, and one of the reasons for the low recognition of CFR rights is the threat that it poses to the forest department's power.

Recognition and Redistribution within the FRA are tied together and configured by the practice of exclusionary conservation. Forest-dwelling community members that fall outside this rigid packaging of recognition and redistribution are excluded from this law's protection. An example of this exclusion within the law is OTFD community members who find it challenging to provide evidence to claim individual forest rights. Another example would be aspirational forest-dwellers who desire to alienate their land for the entrance of a mining company as the forest rights act does not allow forest-dwelling communities to alienate their IFRs.

It becomes necessary to unpack how recognition and redistribution are addressed in this Act to understand better how the fissures that emerge in implementing the consent provision play out. While the law and the struggle that led to the making of the FRA views recognition and redistribution together, a divide emerges when the demands made by the forest-dwelling community fall outside this rigid packaging of social justice in India's forests. The FRA, one can argue, provides for a recognition-based redistribution in forest areas.

³⁹⁵ Bengt G. Karlsson and T.B Subba, 'Introduction' in Bengt G. Karlsson and T.B Subba (eds), *Indigeneity in India* (Kegan Paul, 2006).

³⁹⁶ Rule 14 of the amended Rules to the Forest Conservation Act, 1980.

On the ground, however, there exists a divide in the claims for justice emerging from the forest-dwelling communities where redistributive claims fall outside of what is present within the Act and what is traditionally associated with recognition-based claims of indigenous communities globally. Such a divide is visible in cases where an extractive company's entrance is viewed as an opportunity by some community members to redress economic inequality. Others reject the extractive company's entrance as it destroys the cultural ties, they have with forest areas and their traditional way of life. If forest-dwelling communities fail to meet the terms of recognition provided within the FRA, they are left out of the redistributive benefits that reinforce the divide. These different approaches to social justice in forest areas is the reality within which the FRA and the consent provision operates.

3. Divide by Legal Design

Indigeneity in India is a contested idea. Amita Baviskar argues that indigeneity is a social fact and a strategy deployed by forest-dwelling communities in search of a better life. It is a resource for claims-making in their struggle for gaining rights over forest land and resources.³⁹⁷ India rejected the idea of recognizing indigeneity given the history of migration and invasions. Who is the original inhabitant is a tenuous question with varied responses in the Indian context.³⁹⁸

Scheduled Tribes forms the legal category for those who are identified as Indigenous or Adivasis in India. Scheduled tribes have had access to protective land rights and reservations based on their identification legally as a vulnerable group.³⁹⁹ The FRA uses this existing legal category as the basis for recognition in understanding who has suffered the particular form of historical injustice that the law seeks to correct.

³⁹⁷ Amita Baviskar, 'The Politics of Being Indigenous' in Bengt G. Karlsson and T.B Subba (eds), *Indigeneity in India* (Kegan Paul,2006).

³⁹⁸ Andre Beteille,' What should we mean by "Indigenous People" in Bengt G. Karlsson and T.B Subba (eds), *Indigeneity in India* (Kegan Paul,2006).

³⁹⁹ Virginius Xaxa,' Tribes as Indigenous People in India' (1999) in Economic and Political Weekly Vol. 34, No. 51

The problem with Indigeneity in India is the divide between tribe and caste; the colonial process of identifying communities has been fueled to divide communities, as Ghurye has argued.⁴⁰⁰ Ghurye made the argument that tribes were part of the Hindu fold and were not culturally distinct.⁴⁰¹ On the other hand, Verrier Elwin asserted the cultural distinctiveness of Adivasi communities and called for the legal protection of their culture.⁴⁰² These two approaches continue to inform law and policy about Adivasi communities. In comparison, there is an effort to mainstream these communities through development-based integration, recognizing their right to self-determination in the form of identity by isolation.⁴⁰³

Baviskar states that India's indigeneity benefits from a dominant stream of environmentalism where the simultaneous pursuit of social justice and ecological concerns makes them the perfect embodiment of a group struggling against social deprivation while leading an ecologically-wise livelihood.⁴⁰⁴ This stream of environmentalism has guided the making of the FRA. The FRA assumes that forest-dwelling communities are better placed in conserving the forests given their innate cultural ability to conserve and the traditional knowledge they are culturally endowed with to make these decisions.

The divide by legal design within the FRA is one of ST and non-ST. The Scheduled Tribes are assumed to be the original inhabitants endowed with cultural distinctiveness, while the Other Traditional Forest Dwellers must prove the basis for such cultural distinctiveness and rights.⁴⁰⁵ The initial draft of the FRA included both STs and OTFDs as eligible for forest rights claims. It was in its multiple iterations that the inclusion and exclusion of OTFDs occurred.

In its suggestions to an alternative Act called the Forest Rights Recognition and Vesting Bill, 2005, the MoEF wanted the Bill to include FDSTs and OTFDs. It argued that most villages in and around forests are mixed villages; that there is no difference in patterns of resource

⁴⁰⁰ Andre Beteille, 'What should we mean by "Indigenous People"' in Bengt G. Karlsson and T.B Subba (eds), *Indigeneity in India* (Kegan Paul, 2006).

⁴⁰¹ G.S Ghurye, *Caste and Race in India* (Popular Prakashan Publications, 1932)

⁴⁰² Verrier Elwin, *A Philosophy for NEFA* (Isha Books, reprinted in 2009)

⁴⁰³ Namita Wahi and A. Bhatia, *The Legal Regime and Political Economy of Land Rights of Scheduled Tribes in the Scheduled Areas of India*, (Centre for Policy Research, New Delhi, 2018).

⁴⁰⁴ Amita Baviskar, 'The Politics of Being Indigenous' 'Introduction' in Bengt G. Karlsson and T.B Subba (eds), *Indigeneity in India* (Kegan Paul, 2006).

⁴⁰⁵ Virginius Xaxa, 'Tribes as Indigenous People in India' *Economic and Political Weekly* Vol. 34, No. 5

extraction between the two; that, as it were, the line differentiating tribal and non-tribal is notoriously fuzzy.⁴⁰⁶

For all these reasons, if only the tribes were given land, social conflict might ensue. This was a ploy by the Ministry to gain control over the drafting of the Act as it was previously noted that it would be adversarial to tribal interests if drafted by the environment ministry.

In an interview, a senior forest officer emphasized that the administrative burden of managing social conflict in forest areas was vested with the forest department, which is the administrative arm of the Ministry of Environment, Forests and Climate Change [which is the new name for the MoEF]. To address this, the suggestion was made to include non-ST forest dweller⁴⁰⁷

This divide by legal design plays out in meaningful ways when the consent provision is being implemented. The evidentiary barrier laid down in the FRA is challenging to meet as many communities as possible in the forest areas do not have access to evidence. To lower this threshold, Rule 13 of the FRA recognizes several documents that can be submitted as evidence for the IFR claims, including an elder's statement reduced to writing. Despite this inclusive list of what is considered evidence in claiming IFR rights, the bureaucratic interpretation and acceptance of these claims prove to be a more demanding threshold to meet.⁴⁰⁸

In an interview with a senior forest official on the claims being made by OTFD communities, what emerges is the understanding that dominates bureaucratic practice in implementing the FRA- as a law to protect the rights of the Scheduled Tribes alone. The senior forest official mentioned when asked about the IFR claims made by OTFD communities:

Many families have encroached on forest land. They have come recently and are beginning to file claims for forest rights. How can we give away forest land to them so

⁴⁰⁶ Documents on the making of the FRA accessed by the author from M.Rajshekhar who applied for them through the Right to Information Act,2005.

⁴⁰⁷ Interview with Vinay Kumar in Bangalore July 2018.

⁴⁰⁸ Rule 13 of the Rules to the Forest Rights Act,2006.

quickly? It is better to reject such claims as the evidence they provide is not sufficient to prove their dependence on forest areas⁴⁰⁹

The forest department's regulatory efforts in preventing what they term an illegal occupation of forest land have created a sense of privileging among IFR claims being made by forest-dwelling communities. The exclusionary conservation strain informs this bureaucratic interpretation of privileging claims made by the scheduled tribe over those made by the Other Traditional Forest Dwellers.

The rate of rejection of individual forest rights claims made by OTFD communities is evidence of this privileging of claims. The data below is evidence of the number of claims made and those that have been recognized.

State	ST claims	ST titles	Percentage of claims rejected of ST communities	OTFD claims	OTFD titles	Percentage of claims rejected of OTFD communities
Chhattisgarh	623,538	361,485	42%	227,501	23,499	89%
Maharashtra	256,654	97,218	62%	109,651	17,909	83%
Odisha	586,179	409,951	30%	30,518	628	97%

Table 9: Table of Statistics of the recognition and rejection of forest rights⁴¹⁰

While OTFD communities find it challenging to have their claims accepted, the increased bureaucratization of the claims process has in turn increased the discretion of the bureaucratic authority to decide these claims, as argued in the previous chapter.⁴¹¹ An

⁴⁰⁹ Interview with a senior forest official who is now the director of the ministry of mines in Odisha.

⁴¹⁰ Asavari Sharma, 'The 'other' in the Forest Rights Act, 2006 has been ignored for years' in *The Wire* (July 2018) < <https://thewire.in/rights/the-other-in-the-forest-rights-act-has-been-ignored-for-years> > accessed on May 31 2020

⁴¹¹ The District Level Committee which is a statutory authority set up within the FRA vets the claims made for eventual recognition. In this committee the district collector and the forest department often reject OTFD claims.

interview with the senior forest official who is a member of the district-level committee that eventually decides on these claims makes clear the bureaucratic skepticism facing claimants:

They produce evidence that can be easily generated. How can we rely on a statement made by an elder reduced to writing? We need hard evidence to make sure that we are giving forest land only to those who genuinely deserve it.⁴¹²

The privileging of claims operates within a filter of those who deserve forest rights and those who do not. The bureaucratic perception of OTFD communities is one of the opportunists using the law to obtain land rights.⁴¹³ In a petition before the Supreme Court which challenges the constitutionality of the FRA, the principal petitioner in the case, Wildlife First, in a press release identifies OTFD communities as a nebulous category that has been used by communities to claim rights over land who are mostly landless due to the failure of land reforms.⁴¹⁴

The danger of accepting OTFD claims is located in the interpretation of the FRA as a land rights legislation. The failure of land reforms in India has left many communities without access to land, and the fear is one of these communities now using the FRA to gain rights over land. While this fear is a genuine one, OTFD communities who have been living and dependent on forest areas for their livelihood are being denied rights to forest land due to this fear. As the Gram Sabha remains the key deliberative node at the local level and in recognition of forest rights, decision making on the genuine nature of the claims should be based on the village assembly's deliberated outcome with room for contestations by the OTFD communities when their claims are excluded. The Gram Sabha as a deliberative forum offers an avenue to discuss, deliberate, and revisit aspects of recognition of forest rights that are contested.

3.1 The Worthy and Unworthy Steward

The privileging is rooted in an understanding of OTFD communities as not deserving of forest rights because they are not viewed as victims of the same historical injustice that ST communities have suffered.⁴¹⁵ They are instead cloaked with the notion of misusing the law. The other reason for the distinction between ST and OTFD communities is the bureaucratic

⁴¹² Interview with Deepak Mohanty in Bhubaneswar in July 2018.

⁴¹³ Interview with Kishan Kumar in Bhubaneswar in July 2018.

⁴¹⁴ Arpitha Kodiveri 'Wildlife First, People Later?' (2018) in *Journal of Indian Law and Society*, Volume 9.

⁴¹⁵ Interview with Deepak Mohanty in Bhubaneswar in July 2018.

perception of the markers of a worthy steward of the forests.⁴¹⁶ In its briefing note, the MoTA describes the cultural inclination among Scheduled Tribes to conserve as follows:

[I]t is well known that the forest-dwelling scheduled tribes reside on their ancestral lands and their habitat for generations and from times immemorial. There is a spatial relationship between the forest-dwelling scheduled tribes and the biological resources in India. They are integral to the very survival and sustainability of the forest ecosystems, including wildlife. The tribal people are inseparable from the ecosystem, including wildlife, and cannot survive in isolation.⁴¹⁷

There is an understanding of ST communities as co-evolving with the ecosystem and an integral part of it. They possess traditional knowledge that has been a product of this co-evolution process with the environment that contains the needed wisdom to conserve the environment.⁴¹⁸ The OTFD community is not seen as possessing such knowledge and cultural traits. This distinction guides the bureaucratic perception such that OTFD communities are not trusted with the duty of conserving the environment and do not possess the traditional knowledge as STs do.⁴¹⁹

The discrimination that OTFD communities face in recognition of land rights is an inability to access the FRA's redistributive remedy. Among the OTFD communities are Dalits or the so-called untouchables who have historically been denied rights over land for being socially categorized as out castes. They struggle to provide evidence in documents showing their dependence on forest areas and the occupation of land for habitation and cultivation. This inability to access the redistributive remedy, in turn, informs their right to participate in the consent process.⁴²⁰

Forest-dwelling communities are heterogenous and are composed of scheduled and non-scheduled tribes. Those categorized as OTFD communities find it harder to have their rights over land recognized. The divide by legal design creates a divide within the forest-dwelling

⁴¹⁶ Arpitha Kodiveri 'Wildlife First, People Later?' in *Journal of Indian Law and Society* (Volume 9,2018)

⁴¹⁷ Documents on the making of the FRA accessed by the author from M.Rajshekhar who applied for them through the Right to Information Act,2005.

⁴¹⁸ Bengt G. Karlsson and T.B Subba,'Introduction'in Bengt G. Karlsson and T.B Subba (eds), *Indigeneity in India* (Kegan Paul,2006).

⁴¹⁹ Fieldnotes based on interviews with senior forest officials in July 2019; Arpitha Kodiveri 'Wildlife First, People Later?' (2018) in *Journal of Indian Law and Society*,Volume 9..

⁴²⁰ Fieldnotes from Talabira, Jagatsinghpur and Niyamgiri,Odisha.

community of the landed and landless. Those with land rights tend to oppose land acquisition by extractive companies as gaining access to land outside the forest area becomes harder. Similarly, landless communities view the entrance of the extractive company as an opportunity for upward mobility.

The deliberation of consent is a tough choice between staying within forest areas or enabling forest land acquisition while negotiating the terms of "integration" into the mainstream economy.⁴²¹The challenge is difficult as forest-dwelling communities have different preferences about the future pathway of development for the community.⁴²²

While some see the extractive company's entrance as a positive one, others see it as a destructive force that will ruin the forests. Rejection of projects couched in a conservation ethos is more likely to receive support from environmental movements than the acceptance of projects with the view to just terms of engagement. The latter are seen as violating some of the values that drive social movements.

Bringing the discussion back to redistribution and recognition, the divide by legal design makes redistributive remedy accessible to Scheduled Tribes while excluding other traditional forest dwellers. The FRA has a rigid understanding of recognition given that forest-dwelling communities are diverse, and many have not been scheduled.

The basis of recognition and its terms are those set by the state that belies India's forests' complex social reality. The legal basis of recognition needs to be expanded to include OTFD communities and Dalit forest-dwelling communities, particularly those who have not been able to produce the required evidence to apply for their rights.

⁴²¹ Namita Wahi and A. Bhatia, *The Legal Regime and Political Economy of Land Rights of Scheduled Tribes in the Scheduled Areas of India*, (Centre for Policy Research, New Delhi, 2018).

⁴²² Refer to chapter three of this thesis on disciplining the capacity to aspire in India's forests.

4. Divide between the understanding of justice and the Production of Discursive Hegemony

4.1 The three typologies of claims of social justice in India's forests

The idea of justice among forest-dwelling communities is a contested one. Drawing from Fraser's conception of recognition and redistribution, we can identify three different approaches to justice in India's forests when forest land is acquired. These approaches are drawn from the narratives of justice explained in interviews in the four mining sites. These justice approaches are viewed as discursive interventions that aim to set the agenda for a potential deliberative engagement with the state.

Identifying the three approaches towards justice in these scenarios are not meant to form an exhaustive list. Rather it is a useful typology to navigate the divide that emerges as the consent provision is being implemented.

The first typology of justice is one of perspective dualism, where recognition and redistribution claims are made to strengthen each other. This is similar to the claim made by the Dongria Kondh in the Niyamgiri struggle. The recognition-based claim protected a territory that was sacred to their community, coupled with the redistributive claim of securing the area as it ensured a perennial source of water. This claim of justice fits conveniently into understanding recognition and redistribution within the Forest Rights Act, 2006.⁴²³

The second typology of justice is primarily redistributive with elements of a recognition-based claim. The Posco struggle is an example of such a typology. In this case, the forest-dwelling community, mostly Dalit, claimed that the steel factory's establishment would hamper their existing agrarian livelihood. The redistributive claim was prioritized in the struggle with the use of recognition-based claims to the extent of showing that their livelihood is more sustainable than an integrated steel plant. Here the pursuit of justice does not fit within the understanding of recognition and redistribution in the FRA.

⁴²³ Nancy Fraser and Axel Honneth. *Redistribution or Recognition?: A Political-Philosophical Exchange* (Verso, 2003)

The third typology of justice is purely redistributive and framed by misrecognition as forest-dwelling communities are shedding away the conventional markers associated with the recognition-based claims. Kodingamali and the protest against the coal mine in Sundergarh fit such a typology of justice as the Adivasi community in this instance is shedding away markers like the cultural association with the land, desire to conserve, and be dependent on forest areas. One notices here that the local community is demanding that the aluminum refinery be set up closer to their villages to obtain jobs in the area. Similar to the earlier typology of justice, this form of a claim for justice does not easily fit within the recognition and redistribution paradigm embedded in the FRA.

These three typologies of justice play out differently in scenarios where forest land is being acquired. These broader claims of justice still operate within the state's plan of development. These claims and movements provide vantage points from which negotiation can occur. Still, they cannot reshape the core development model of the extractive state as the state remains selectively deliberative.

These three typologies of justice occupy a hierarchy in the strategies for legal and political mobilization. There is discursive hegemony of the first typology of justice where it is a neat coming together of recognition and redistribution-based claims. Other discursive interventions are marginalized as they move away from the strain of environmentalism that brought with its legal gains. This discursive hegemony of the first typology of justice that is successful in switching on the state's deliberative mode renders invisible claims of redistribution like resettlement and rehabilitation. In essence, the state continues to hold power in shaping discourse by being responsive to one approach to justice while ignoring the other claims.

4.2 The State's Response to the Claims of Social Justice and Identity: Reinforcing the Divisions

The divisions by legal design and in approaches to justice shape the nature of responsiveness by the state. The state is selectively deliberative, as discussed above, when the identity of the forest-dwelling community is ST, and when the claims of social justice are couched in the convenient coming together of recognition and redistribution. The state choosing to be

selectively deliberative under these conditions or rather a higher likelihood of episodic dialogue compels communities to mobilize law and claims of justice in a manner that allows them to be heard and seen by the state.

As has been argued earlier, the claims of justice have been successful in forcing the state to be deliberative have been that which fits within the first typology of perspective dualism, like Niyamgiri. In the other two typologies, the state is seldom deliberative as it moves away from the understanding of recognition and redistribution within the FRA.

To elaborate, in the second typology, the community does not fit within the recognition-based claims of STs. As many are OTFD communities, they are seen as undeserving of forest rights. Their redistributive claim without fulfilling the FRA's recognition framing fails to convince the state and local bureaucracy of the genuineness of their struggle. In an interview with a senior bureaucrat in Odisha who was active in implementing the FRA stated :

Posco was the tipping point. In the Vedanta case, the claim was genuine; these were Adivasi communities whose rights were affected. In Posco, the local community was using the FRA opportunistically to prevent the acquisition of land. By misusing the law, they have reduced the political will within the bureaucracy to implement it aggressively.⁴²⁴

The third typology of justice, where forest-dwelling communities desire the extractive industries' entrance, does align with the state's development agenda. However, in Kodingamali, the state cannot fulfill the demand being made by the forest-dwelling community as the aluminum refinery has already been established in Lanjigarh. The struggle here is that despite aligning with the state's development plan, the state remains non-deliberative. In this typology, the Adivasi community is misrecognized as they challenge the conventional markers associated with them in the law and bureaucratic perception.

By choosing to be selectively deliberative in its response to claims of justice, the state further reinforces the discursive divide of recognition and redistribution within these communities.

⁴²⁴ Interview with Kishan Kumar in July 2019.

In their earnest attempts to seek dialogue with the state, forest-dwelling communities follow the precedent of strategies that have yielded such dialogue. Within forest-dwelling communities, I have witnessed the exclusion of community members who subscribe to an approach to justice that is purely redistributive. As Jitu Jakesika mentioned

I was ostracized because, at one point, I thought that with the mining company coming in, we would all benefit. I thought justice lies in the security of a job- I did not have room to air out my opinion. I was labeled as a Dalal and as someone who had betrayed the community. I would have preferred if I had a fair hearing within the community before taking such drastic action. Things are changing now. Of course, they are hearing me out.⁴²⁵

As stated earlier, the social reality of India's forests is diverse, with multiple identities and communities co-existing in these villages. Division within these communities occurs as their understanding of justice differs. In the Niyamgiri case, the Dongria Kondh living in the hills subscribed to justice's first typology. The communities living at the base of the hill had sold their land to Vedanta to construct the refinery. Their justice claims were that of the third typology, where they demanded jobs and better rehabilitation from the company.

4.3 Decision making within the Gram Sabha: Reinforcing the Divisions of Legal Design and Approaches to Justice

The divisions by legal design and approaches to justice act as ways to exclude communities from these discussions. With the state privileging cultural claims and rights of STs, the forest-dwelling communities to replicate this form of privileging as they strategize politically and legally; this marginalizes those who are not STs and results in the discursive disenfranchisement of those who desire to engage with the market economy.

The typologies of justice and the divide within communities offer a segue to discuss the limits of recognition within forest areas. Recognition based claims as put forward within the FRA and bureaucratic perception are exclusionary based on communities being identified as STs.

As stated in the earlier section, many forest-dwelling communities fall outside this legal categorization. Their claims of justice do not receive as much attention as the state prioritizes

⁴²⁵ Interview with Jitu Jakesika in Kalahandi on February 2020.

STs over OTFDs; this can be summarized by Ipshita Basu's observation of Jharkhand's politics of recognition.

This poses problems, chiefly because states operate with their own and extremely specific understanding of cultural difference, one which has a particular bearing on the relationship between the state, cultural identity⁴²⁶

In scheduled areas, the affirmative provisions for the protection of STs give them more power in the gram sabha and gram panchayat decision-making process. The primary protective mechanism within Scheduled Areas is that land cannot be sold or alienated to non-STs. This places the claims over the land of non-STs who have been inhabiting the area in jeopardy. In an interview with a Dalit forest-dweller in Ganjam district, which is a scheduled area, he mentioned:

Scheduled Areas grant autonomy and power to just one community in the village who are fortunate to be legally recognized as STs while alienating others in decision-making. It is assumed that they own the land, and we are merely inhabiting here without any ownership rights. Some conflicts emerge, but it is known to many Dalits that the STs will have the final word on how it gets resolved.⁴²⁷

This understanding that STs own the land and decision-making authority excludes non-STs from decision-making. This exclusion does not enable the inclusion of forest-dwelling communities in the consent process. On the other hand, a status model identifies those subjects to status subordination rooted in institutionalized patterns of cultural value.

The divide by legal design is framed by the eligibility to access forest rights and forest land in particular. In the Niyamgiri areas, ST communities have gained access to forest land, while OTFD communities struggle to access these rights. In interviews with the OTFD communities inhabiting the plains, they often articulated how the insecurity of tenure made it difficult for them to reject industrialization, which came with the promise of jobs. As a Dalit forest-dweller described

⁴²⁶ Ipshita Basu, 'The Politics of Recognition and Redistribution: Development, Tribal Identity Politics and Distributive Justice in India's Jharkhand' (2012) in *Development and Change* Volume 43, Issue 6 pp. 1292-1312

⁴²⁷ Interview with Father Albert Das in Ganjam District in July 2015.

We work as agricultural labor in the fields owned and managed by the Dongria Kondh. Instead, we would work in the mining company with better benefits and not be subject to untouchability practiced by the Dongria Kondh. ⁴²⁸

The access to land in forest areas informs how communities negotiate the prospect of acquisition of forest land. Further, it defines their right to participate in decision-making as landless and non-ST communities are marginalized.

The limits of recognition and redistributive remedy within the FRA produce new divisions and forms of inequality within the village. Expanding the terms of recognition within the FRA to access the redistributive remedy can overcome this division. In the section on discursive pluralism, I will elaborate on the legal reform trajectory needed to enable inclusive deliberation within the Gram Sabha.

As redistributive claims are not tied to a particular identity that has come to be reified, it brings within its fold economically marginalized groups who are likely to be affected by the extractive project. The inclusive nature of redistributive claims is visible in the Posco areas where Adivasi communities, farmers, and Dalits have come together in their struggle. Redistributive claims can create solidarity between equally marginalized communities. While recognition-based claims are essential, they need to find a way to bring other forest-dwelling communities who are not STs. Redistributive concerns offer one pathway to achieve this.

In a struggle based on the politics of recognition alone, like Niyamgiri, it has excluded the forest-dwelling communities in the plains who sold their land for setting up the refinery. Nancy Fraser has argued that claims of justice solely rooted in recognition have dislodged important redistributive considerations. A pattern of exclusion is visible in the gram sabha deliberations on the alienation of forest land.

The dislodging of redistributive concerns by specific approaches to justice is a challenge of discursive hegemony. I argue that it can be overcome with the gram sabha being inclusive of competing discourses. The deliberative quality of the gram sabha could be enhanced by discursive pluralism and a constellation of discourses instead of articulating a single approach towards justice in these contested contexts. As a deliberative forum in India's forests, the

⁴²⁸ Interview with Dalit forest dwellers in Niyamgiri in February 2020.

Gram Sabha is in practice far from ideal in its efforts to be inclusive. As I have laid out, the divisions are between tribe and caste, landed and landless, and justice approaches. To move beyond the divide through interviews with forest-dwellers, I offer internal rules for inclusion and discursive pluralism to enable the diversity of preferences to be discussed and debated.

5. Recognition, Redistribution and Legal Mobilization: Mobilizing these divisions based on opportunities within the law to engage in dialogue with the state.

As has been argued earlier in this chapter, the division in the approaches to justice and the legal categorization of communities shapes the manner in which they use the law. In this section, I explore how the forest-dwelling community used the law in particular ways informed by their approach to justice and legal categorization in the four cases.

The state's response to these strategies of legal mobilization has been one that is selectively deliberative. It can be seen as more actively deliberative when the forest-dwelling community has been categorized as a Scheduled Tribe. It involves an approach to justice, where claims of recognition dominate. A senior bureaucrat reflecting on the Niyamgiri case is "A worthy cause where the state should reconsider its decision to acquire land."⁴²⁹

The state's porosity to change its eventual decision on whether forest land should be acquired or not is based on the legal mobilization strategies. A detailed analysis of the state response in these four cases reveals that the legal categorization of the forest-dwelling community matters to how the state perceives injustice in the cases and the approach towards claims of justice. Thus, the law codifies justice and injustice in particular ways through the frame of recognition and non-recognition. This fuels communities to mobilize law in these particular ways trying to shift identities or belong to a recognition frame that further solidifies these divisions.

Scheduled Tribes have more protective laws that they can harness in comparison to non-scheduled tribes. Scheduled tribes have come to be identified as indigenous communities internationally, enabling access to international law to bear upon their struggle. This access

⁴²⁹ Interview with Kishan Kumar in July 2019.

to protective legislation and land rights under the FRA inform their legal strategies. Non-scheduled tribes cannot access as many legal avenues as they construct their legal strategies in overcoming the acquisition of forest land.

By exploring the legal strategies used in the four cases and the corresponding state response, I argue that the community's legal categorization and approach towards justice inform how their legal strategies are constructed, which provides an insight into how legal strategies are formed and what has shaped the state's response. In the table below, I provide an overview of the case, the legal categorization of communities, their approach towards justice, and the corresponding state response.

CASE	LEGAL CATEGORIZATION	LEGAL CATEGORIZATION OF LAND	APPROACH TOWARDS JUSTICE	STATE RESPONSE
Posco	Other Traditional Forest Dwellers which were also denied.	Forest Land	Redistributive with elements of recognition	Rejected the opposition and did not entirely address claims of rehabilitation and resettlement. The land is presently being handed over to JSW.
Niyamgiri	Scheduled Tribes	Forest Land and Scheduled Area	Recognition and redistribution in alignment with the frame of the FRA	Accepted the claim after intervention from the Supreme Court
Kodingamali	Scheduled Tribes	Forest Land and Scheduled Area	Purely redistributive	The state has decided to deliberate on the aspect of rehabilitation and resettlement
MCL	Scheduled Tribes and OTFD communities	Forest Land and Scheduled Area	Redistributive under the political economy of coal	The state and MCL are deliberative to the extent of R and R but not on expanding the coal mine.

Table 10: Legal mobilization across four mining sites.

Scheduled tribes are identified as vulnerable and can harness a multiplicity of protective laws in developing their legal strategies. Non-ST communities have a limited range of laws that they can similarly harness. This is particularly visible in the ability of ST communities to effectively use international law as they are identified as Indigenous peoples. The Niyamgiri case demonstrates this as the Dongria Kondh.

Perceptions of justice determines the range of legal options available too or the applicability of laws, as a redistributive approach towards justice does not have legal protection apart from guidelines at the state level where terms of resettlement and relocation are provided. The Land Acquisition Act,2013 is supposed to apply to forest land for resettlement and rehabilitation, but that is yet to happen. On the other hand, the approach towards recognition is legally protected with a host of environmental laws, the forest rights act, and depending on the categorization of land PESA. The availability of legal avenues alone does not result in a deliberative state; however, it provides additional ways of challenging the state's decision to acquire forest land.

The failure of legal protection for redistributive claims is a lacuna that allows for agent's or Dalal's operation in establishing informal arrangements with landowners. The law's absence fosters a culture of informal negotiations where landowners and the landless begin to sell their land for different sums of money. The redistributive claims made by the community in Kodingamali do not have a legally recognized process under which it can occur. This is the shortcoming of the understanding and implementation of the consent process. Once communities have provided their written consent, they cannot negotiate the terms on which they had provided their consent.

Identity constrains the groups as rights holders in law and shapes the typology of justice they can harness and the possibility of the state to be deliberative. Identity particularly informs the range of laws available to the community in challenging the state's decision to acquire forest land. The range of laws is diagrammatically shown below. The range of laws in no way assures that the state will reconsider its decision to acquire land. Still, it provides the community with more opportunities to challenge the decision and stall the acquisition process. This was an

insight shared in many interviews when asked how the law has been effective in their struggles for forest rights. Brahmaro Das, who had recently filed a case in the National Green Tribunal challenging the decision of the construction of a boundary wall, stated:

The law is not useful in changing the state's decision, but it is useful in keeping them at bay and stalling the whole process. It is a waiting game; they try to acquire land, and through the law, we find a way to challenge them and make sure they are unable to acquire the land immediately⁴³⁰

Recounting his experience of using the law in the Posco struggle, Brahmaro Das reveals an essential motivation in mobilizing the law to slow down the acquisition process. The slowing down of the process of acquisition created using the law in challenging the state's decision provides a critical window for the protests to seep into the milieu in supporting the legal mobilization efforts.

⁴³⁰ Interview with Brahmaro Das in August 2018.

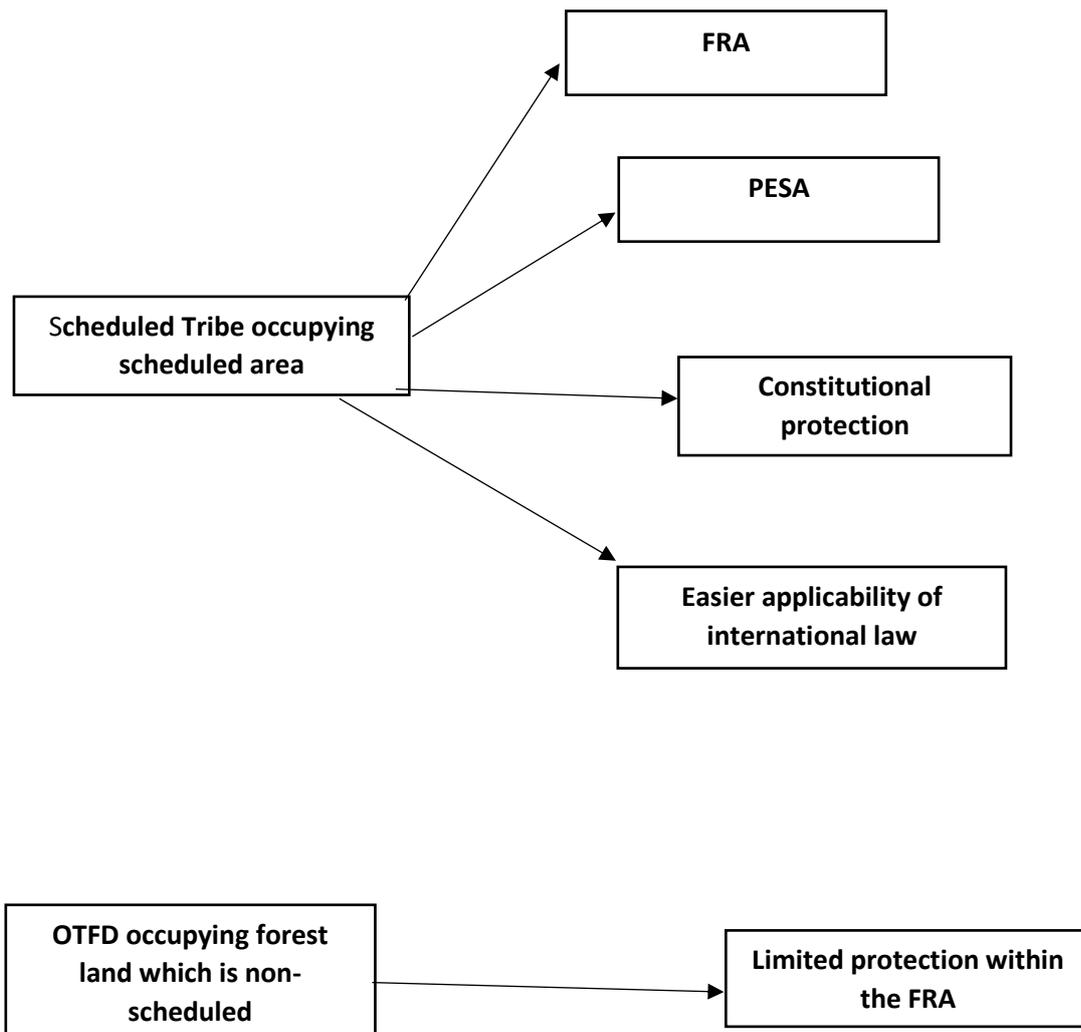


Figure 8: Range of laws available to assert claims of redistribution and recognition.

The environmental laws provide an additional legal foothold in challenging the state's decision to acquire land if the forest-dwelling communities decide to prevent such acquisition. These environmental laws support the claims of recognition and redistribution while ensuring that forest areas are conserved. It is the neat coming together of these competing priorities.

While the range of laws stalls the acquisition process, the state's interaction with these challenges is contingent based on their perception of the claims of justice and the community's identity. As argued earlier, the state is selectively deliberative in these contexts.

The packaging of redistributive claims with those of recognition reduces the scope of purely redistributive claims to find avenues within the law. Legal mobilization works in the perspectival dualism framework of Fraser that is found in the Forest Rights Act, 2006.

6. Discursive Pluralism, Networks of Participation, and Inclusion- Moving Beyond the Divide

The overarching problem of the divisions by legal design and the division in the approaches to justice is discursive hegemony of the first typology of injustice being claimed by forest-dwelling communities who have been identified as Scheduled Tribes. While the first typology of justice places those community members at a discursive advantage, it marginalizes other discursive strands and the ability of those groups to access justice. I have shown how these divisions exclude community members within the gram sabha from participating in these discussions. Though discursive, these divisions are informed by community members' ability to access progressive legislation, land rights, and being seen by the state to be heard.

6.1 Inclusion and Boundedness of Deliberation within the community

There are two interactions where these divisions unfold. Firstly, it is experienced internally within the gram sabha. The other is in engagement with the state, which privileges particular justice and recognition-based claims. The state's interactions and the legal mobilization strategies adopted to be heard and seen by the state reinforce these divisions. Thus, moving beyond the divide requires discursive pluralism, counter publics as networks of participation with the desire for inclusion.⁴³¹

The complex deliberative system for decision-making within the gram sabhas to enable discursive pluralism and inclusion is based on existing institutional mechanisms used in the four mining sites and derived from interviews with the forest-dwelling community response of how these internal divisions can be overcome.

The examples of institutional mechanisms drawn from the four contexts were the elaborate nodes of counter-publics which fed into the gram sabha meetings' discussions. Counter publics are spaces where discursive reactions to goings-on are shared.⁴³² These sites for

⁴³¹ Nancy Fraser 'Rethinking the public sphere: Contribution to the critique of actually existing democracy.' (1990) *Social Text* No 25/26 pp. 56-80.

⁴³² *Ibid* 425.

discussion ranged from the visit to the nearby pond to the market. The counter publics in Niyamgiri hills were formal committees that were part of the customary deliberative governance structure. Each podu or hamlet had sub-committees of women, children, and elders. These sub-committees met and discussed before the meeting of the podu to present their discussions to the larger gram sabha.⁴³³

The Dalit forest-dwelling communities had their informal committee to voice their preferences. Their preferences, however, many interviewees stated were not considered with as much importance. In Jagatsingpur, the PPSS had similarly created sub-committees or working groups of women, children, and elders to contribute to the discussions on developing and conserving the forests in the area.⁴³⁴

Forest-dwelling communities addressed this exclusion problem by creating such informal decision-making fora or counter-publics where alternative discourses could be shaped and discussed. In the four mining sites that I visited, the villages had specific sub-committees for women, Dalit communities, and the youth. These sub-committees, which met before any gram sabha convening, could articulate their discursive disagreements or alignments, which ensured a semblance of discursive representation at the regulatory convening or bhaitak.⁴³⁵

As the forest-dwelling communities are desperate in their attempts to engage in a dialogue with the state and oppose the acquisition, they are forced to subscribe to identity frameworks and narratives of injustice that create such dialogue. Thus, despite the robust deliberative system of chains and counter-publics, their discursive disagreement is ignored, and popular frames of indigeneity and historical injustice are mobilized.

The exclusion that operates to influence the gram sabha decision that corresponds to the legal opportunity structure is seen as a reasonable compromise for a more significant win. As Jitu Jakesika describes

I had to compromise my desire to mobilize my opinion as it would take away from the Niyamgiri Suraksha Samiti's work in opposing the mine. A compromise that the elders insisted

⁴³³ Fieldnotes from February 2020.

⁴³⁴ *Ibid* 427.

⁴³⁵ Peter Drahos, *Intellectual Property, Indigenous People and their knowledge* (Cambridge University Press, 2014)

I make so that a particular narrative of injustice can thrive, and a discourse represented to the state and the outside world.⁴³⁶

Discursive pluralism can exist if forest-dwelling communities are not forced to conform to a particular narrative of injustice and recognition-based claims to be heard by the state. In its deliberative modality, the state should be able to hear the multiplicity of approaches to justice and identity to better represent the aspirations of the forest-dwelling community as opposed to one that limits the expression of the discursive richness in these contested sites.

As Arjun Appadurai argues, deliberations are spaces generated by performative failures to engage in dialogue with the state or others in power. In an attempt to trigger deliberation through creative ways of claims-making like songs in the UN building by an organization working for slum-dwellers rights in Mumbai provide possibilities for generating binding agreements with the state and bureaucracy.

In interviews with forest-dwelling communities, they similarly mentioned that a way to overcome this discursive divide with the state is to use creative methods both within and outside the law to generate such deliberative chains. As Brahmara Das laid this out

We can overcome exclusion within the gram sabha by having sub-committees and pushing our points forward. However, the point that gets represented to the outside world will remain what we need to say for the state to hear us. The only way to transform that is to create pockets of deliberation within and outside the law where the state has to engage with the assortment of approaches.⁴³⁷

While barriers for moving beyond the divide are restricted by the prospect of engagement with the state, Jitu insists that the problem is an internal one. While counter publics can provide discursive representation, he states that the gram sabha decision should be based on consensus internally and not what the state is desirous of hearing. He argues:

If we cannot arrive at a consensus within the community, how can we negotiate with the outside world? We need to have internal rules to arrive at a consensus, which becomes the basis for presenting our views to the state and the company.⁴³⁸

⁴³⁶ Interview with Jitu Jakesika in Bisshemcuttack on February 2020.

⁴³⁷ Interview with Brahmara Das in Dhinkia on July 2018.

⁴³⁸ Interview with Jitu Jakesika in Bisshemcuttack on February 2020.

The deliberative chains and internal consensus strategy are an integral part of the deliberative reimagining of the consent process, namely of the bhaitak or the convening.⁴³⁹ The forest-dwelling communities spoke of a regulatory convening where their priorities, preferences, and competing discourses can be aired, allowing for a meta-consensus on the question of the diversion of forest land. This stage of the deliberative process was to be devoid of external interference of the state, NGOs, and the company.

The forest-dwelling community is particular about the boundedness of this internal deliberative process. Those residing in the village and who had been dependent on the forest resources they stated had to be part of the deliberations. The boundaries of inclusion extended to the involvement of future generations and non-humans too. Rinjo Sikaka eloquently argued that the division of recognition and redistribution could be easily overcome if future generations' lives and aspirations were prioritized. She argued:

Those who want to sell their land have their right to do so, but if they begin to think of their future generations and the environment, they will revisit this hasty decision. The internal deliberations should not be restricted to our priorities alone but extended to future generations and the non-human world. It is narrow to limit our decisions to us who are alive. We need to think of those who are yet to come and the natural world we inhabit.⁴⁴⁰

This extended thinking was operationalized in the discursive discussions that led to the Dongria Khond rejecting the mine. They argued in the present generation that the gram sabha hearing is a mere trustee of the land and resources for the generations to come. This understanding of inter-generational equity pervaded all the mining sites. While in Kodingamali, where open cast mines surrounded the area, the refinery's opening meant better job security for future generations. In Niyamgiri, it took on the form of ensuring access to pure water. While the approaches differed, the presence of future generations and the non-human world bound the discursive agreement with the values of ecological integrity and justice.

⁴³⁹ Arjun Appadurai, 'The Capacity to Aspire: Culture and Terms of Recognition' in *Culture and Public Action* (Eds) by Vijayendra Rao and Micheal Walton (Stanford University Press, 2004)

⁴⁴⁰ Interview with Rinjo Sikaka in Niyamgiri on February 2020.

6.2 Discursive Meta-consensus: The Making of an Incomplete Working Agreement

The bhaitak or the convening would be inclusive of all discourses as Lado Sikaka defined it as a collaborative problem-solving space. The guiding force behind the bhaitak is that of a problem-solving public, given the imminent extraction prospect. Prakash Jena defined this consensus as one that can be fragmented and a working agreement as he reflects on the violence that the division had caused in the villages of Dthinkia and Govindpur:

It is challenging to get everybody to agree on everything. The convening of everyone within the village should be one where we can agree on a few fundamentals to communicate or engage with the state. The state and the company benefit from our festering divisions.⁴⁴¹

As Sunstein has argued, the idea of an incomplete working agreement was an agreement that could be found in the four mining sites. In Kodingamali, while there were divisions based on identity and approaches to justice, an operating agreement within the community was not to let the mine start operations until the state addressed their redistributive justice claims. The terms and details of this agreement were negotiated continuously and renegotiated.

Discursive meta-consensus refers to a non-coercive consensus across these divisions, which can act as the starting point of negotiations with the state.⁴⁴² In a shared sovereignty model of understanding deliberative democracy in India's forests, consent or the bhaitak becomes the site where the communities determine the direction in which they want to steer the discussion with the state. It is an opportunity for the forest-dwelling communities to set the agenda based on which a working agreement can be forged with the state.

Discursive meta-consensus is not a permanent settlement on a particular point of discussion but a place holder in an evolving dialogue. As Dryzek states:

Discursive meta-consensus might therefore have to be treated as provisional and itself contestable. As Mouffe puts it, the "different and conflicting interpretations" of "ethico-political principles" means that "consensus is bound to be a 'conflictual consensus.'⁴⁴³

⁴⁴¹ Interview with Prakash Jena in Jagatsinghpur on July 2018.

⁴⁴² John Dryzek with Simon Niemeyer, *Foundations and Frontiers of Deliberative Governance* (Oxford University Press, 2010)

⁴⁴³ John Dryzek with Simon Niemeyer, *Foundations and Frontiers of Deliberative Governance* (Oxford University Press, 2010)

Discursive meta-consensus then can be contested and revisited. The legal standard of consent forces communities to choose between the binaries of accepting or opposing acquisition instead of enabling a more deliberative process on issues and notions of justice to emerge, be reconciled, and preferences to be articulated.

Consent, as is operationalized now, emphasizes the need for a single voice for or against a development project. This marginalizes these particular positions on development, and the nature of interests' different groups have towards land acquisition. The deliberative reimagination of the consent process is seen as a space for continuous dialogue, grounded in an incomplete working agreement informed by a discursive meta-consensus. Discursive meta-consensus does not provide the certainty that mining companies desire on land acquisition as property rights would, it however offers an opportunity for repairing the relationship between the state and the forest-dwelling community. The principle of shared sovereignty brings with its uncertainty but with the possibility of repair.

7. Deliberative Loop of the Regulatory Convening or Bhaitak

The deliberative reimagination of the convening can be captured in three essential parts, which the bhaitak or regulatory convening consists of before the decision is communicated to the state.

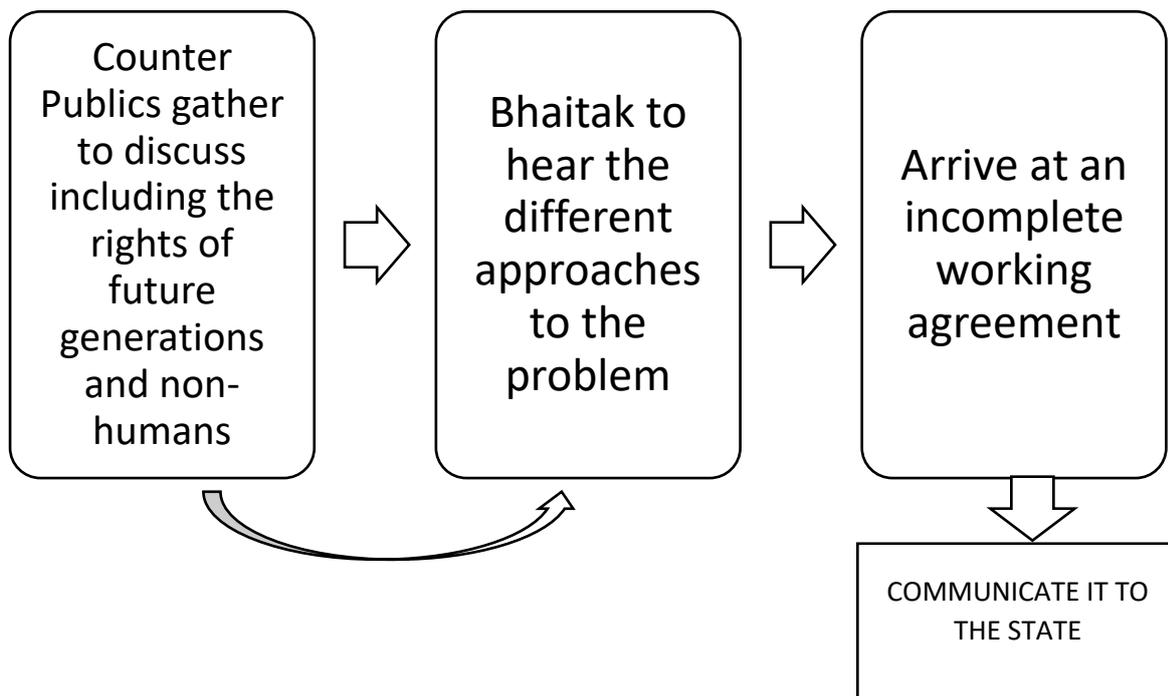


Figure 9: The Bhaitak

The deliberative loop of decision-making internally involves embracing discursive pluralism within the gram sabha derived from the counter publics, which continues until competing discourses and approaches are heard. The internal discussions are guided by the desire to arrive at a working agreement that may not have complete consensus but have a few fundamental questions ironed out.

The deliberative chains informally generated as a part of the protest and mobilization efforts are used to communicate with the state on the incomplete working agreement apart from the sunvayi or hearing with the state. At the sunvayi, the incomplete working agreement is presented, which is to be discussed and understood by the district collector and the Tribal Advisory Council to inform state decision-making on diversion of forest land. This deliberative loop will create nodes for discursive networks to be established within the community and outside. The consent process includes claims beyond the rigid frame of recognition and redistribution that is recognized within the law and by the state.

The incomplete working agreement or incompletely theorized agreement transforms the role of law from one of constraint to one that enables the creation of a binding agreement with

the state grounded in the discursive alignments and approaches to solving the problem of acquisition, conservation, land rights, and cultural claims to land set off by the prospect of diversion of the forest land for extraction.⁴⁴⁴

8. Conclusion

In this chapter, I have demonstrated a divide within the law and approaches to justice, which determines the consent provision's deliberative potential. The state is selectively deliberative and based on the communities' identity and the nature of claims being made. Purely redistributive claims are not adequately addressed by the state, while those couched in the politics of recognition see the involvement of movements and deliberations within the state.

The dilemma of recognition and redistribution shows that the consent provision sits between recognition-based claims of indigeneity and its ecological wisdom critiquing acquisition on the one hand and redistributive claims that seek to focus efforts on relief and rehabilitation on the other. The coming together of both these claims is an anomaly. These discursive divisions are to be deliberated and discussed within forest-dwelling communities in their desire for an incomplete working agreement with the state.

In conclusion, the forest rights and consent provision are firmly rooted in a particular conception of the Adivasi identity. Community members that fall outside of this conception find it harder to use these protective laws. Consent thus can cause the state to be selectively deliberative depending on the identity of the forest-dwelling community and their approach towards justice. The state and social movements privilege claims of recognition over claims of redistribution. The pathway to move beyond the divide is the deliberative loop of the bhaitak or convening. This pathway provides for inclusion through discursive pluralism with the prospect of meta-consensus.

⁴⁴⁴ Cass R. Sunstein, 'Incompletely Theorized Agreements.' (1995) In Harvard Law Review, vol. 108, no. 7, pp. 1733–1772.

7. CONSTRAINING THE CAPACITY TO ASPIRE AND CAPABILITY DEPRIVATION IN INDIA'S FORESTS

1. Introduction

"Change is inevitable, but how we transform is a choice. We seek to assert this choice on how our economic lives change, but we seldom have a say in how this happens."⁴⁴⁵ stated an Adivasi from Tumulia village whose land was being acquired for the expanding coal mine in Sundergarh. The articulation of choice in how the lives of forest-dwelling communities transform is limited and often unheard because of the hegemonic development paradigm of extraction in these areas and a pro-business state.

Forest-dwelling communities are constrained in their choice to choose within the narrow spectrum of engaging with or entirely rejecting the extractive economy in which they are embedded. In the upper reaches of Kodingamali, a unique protest is underway where the Adivasi community has agreed to the mining of bauxite in the range of hills on the condition that the aluminum refinery is relocated closer to them so they can benefit from the employment it will generate.⁴⁴⁶ The history behind the mining of Kodingamali lies in the contestations over forest rights, development, and conservation in the eastern Indian state of Odisha.

The state-owned Orissa Mining Corporation, which is mining Kodingamali, had failed in its promise of providing bauxite to Vedanta Resources Pvt Ltd from the bauxite rich hill of Niyamgiri. Mining in Niyamgiri was stalled after sustained protests by the Dongria Kondh Adivasis because Niyamgiri was sacred to them.

The Supreme Court, in its 2013 judgment, recognized the right of the Dongria Kondh community to decide on whether mining should take place in Niyamgiri. In this referendum, it was decided that bauxite would not be mined.⁴⁴⁷ These differing narratives of forest-dwelling communities in their engagement with mining companies throw light on the

⁴⁴⁵ Interview with Adivasis in Tumulia village in August 2018.

⁴⁴⁶ Fieldnotes from July 2019.

⁴⁴⁷ Orissa Mining Corporation Ltd V Ministry of Environment and Forests (Writ Petition (CIVIL) NO. 180 OF 2011)

diversity of opinions and sentiments towards the entrance of the extractive industry in Odisha's forests.

The questions I seek to address in this chapter drawing on Amartya Sen's work on *Development as freedom* and Arjun Appadurai's work on the capacity to aspire, are how does the political economy of extraction and rigid conservation laws constrain the development choices available to forest-dwelling communities? And how can a deliberative governance structure as articulated by forest-dwelling communities overcome these constraints?⁴⁴⁸

I argue that development possibilities in India's forests are constrained by the hegemonic development paradigm of extraction and the practice of exclusionary conservation entrenched within forest laws. It constrains the spectrum of choices available to forest-dwelling communities by pursuing extraction while marginalizing other development alternatives and rigid conservation laws that restrict access to forest land and non-timber forest resources. I then argue that a deliberative governance structure that reconfigures the pathway of decision-making to include the voice of forest-dwelling communities can offer a way to overcome these constraints.

This chapter's focus is to understand the trappings that restrict the state from operating in a deliberative mode. The political economy of extraction requires the state to operate primarily in its non-deliberative form of being pro-business. The laws of exclusionary conservation reassert state control over forest resources. These limit forest-dwelling communities' ability to nurture their capacity to aspire and have their voices heard in the state's decision-making process.

The chapter begins by unpacking the complicated relationship that forest-dwelling communities share with the state and the market to make sense of the development predicament that forest-dwelling communities find themselves in. I will then speak to the role of the capability approach and the capacity to aspire to understand consent provision. Participation, voice, and agency in the development process are seen in this thesis as an avenue to nurture the capacity to aspire and expand the capability set.⁴⁴⁹ I then explore the

⁴⁴⁸ Amartya Sen, *Development as Freedom* (Oxford University Press, 1999); Arjun Appadurai, 'The Capacity to Aspire: Culture and Terms of Recognition' in *Culture and Public Action* (Eds) by Vijayendra Rao and Micheal Walton (Stanford University Press, 2004)

⁴⁴⁹ Patrick Heller and Vijayendra Rao (Eds), *Deliberation and Development* (World Bank Publications, 2015)

constraints placed on forest-dwelling communities by the political economy of extraction and exclusionary conservation. The chapter concludes with an argument around the need for a deliberative state for forest-dwelling communities to identify and realize their capabilities.

2. Development, Capabilities, and the Capacity to Aspire

2.1 Development, Poverty and the Capability Set

In his important work on *Development as Freedom*, Amartya Sen argues that political freedom to participate in decision-making is at the core of understanding what economic needs mean in a particular context.⁴⁵⁰ While political participation forms an essential aspect of his understanding of development, development he argues is needed to expand an individual's substantive freedoms and capability set.⁴⁵¹

Capabilities refer to the options available to an individual of what he can do and be. Functionings refer to the actual doings and beings that the individual has chosen and values. The options available in an individual's capability set should be equally attractive as possibilities.⁴⁵²

The capability set available to an individual is internally and externally determined. Nussbaum and Sen speak more to the external factors that impact one's capability set, like access to education and healthcare.⁴⁵³ It is development's role to ensure an enabling set of external factors that expands one's capability set. While that is the materiality of the development process, freedom of agency is at the heart of his idea of development.

As Sen states, "The freedom of agency that we individually have is inescapably qualified and constrained by the social, political and economic opportunities available to us."⁴⁵⁴ The agency of forest-dwelling communities is constrained by the precarious political context of forests categorized by the regime of dispossession and the limited spectrum of capabilities available to them to choose from in determining their economic lives.⁴⁵⁵

⁴⁵⁰ Amartya Sen, *Development as Freedom* (Oxford University Press, 1999)

⁴⁵¹ *Ibid* 444.

⁴⁵² *Ibid* 444.

⁴⁵³ *Ibid* 444.

⁴⁵⁴ *Ibid* 444.

⁴⁵⁵ Amartya Sen, *Development as Freedom* (Oxford University Press, 1999)

Drawing from Sen's work, I present the development predicament of forest-dwelling communities in India. This discussion on the predicament of development is contextualized by competing priorities of an extractive economy and conservation in forest areas, which defines the scope of decision-making for forest-dwelling communities.

In adopting a capabilities approach, as Nussbaum said, the question to ask when comparing societies for understanding its basic decency and social justice is "What is each person able to do and to be?" I ask this question of forest-dwelling communities in India - what are they able to do and be? This resulted in a variety of responses during my fieldwork from those wanting to engage with the extractive economy or those wanting to remain in the forest areas pursuing a traditional way of life.⁴⁵⁶

Poverty through the lens of the capability approach is understood as capability deprivation resulting in a narrow capability set.⁴⁵⁷ Critical facilities that boost capabilities like access to education, primary healthcare, and nutrition are yet to reach these remote areas. As a result, forest-dwelling communities are deprived of expanding their capability set in forest areas.

Forest-dwelling communities are seen yearning for the Indian state in its developmental and deliberative avatar. The state has made its presence felt more often for the acquisition of forest areas or conserving these areas, seldom to deliberate forest-dwelling communities' development priorities.

Katharina Pistor, in her book *Code of Capital*, speaks about the role of law in coding capital in that it orders competing claims over assets to include some claims and reject others.⁴⁵⁸ The plight of forest-dwelling communities and their rights over assets is coded in the regime of dispossession. The lack of access to and control over assets like land further restricts forest-dwelling community's freedom in deciding how transformation takes place in forest areas and tilts it towards the pro-business state.

⁴⁵⁶ Martha Nussbaum *Creating Capabilities* (Harvard University Press 2011)

⁴⁵⁷ Amartya Sen 'Rights and Capabilities,' in *Resources, Values and Development*, (Harvard University Press, 1984)

⁴⁵⁸ Katharina Pistor, *Code of Capital* (Princeton University Press, 2019)

2.2 The Capacity to Aspire

This chapter draws heavily on Appadurai's concept of the capacity to aspire, which refers to a cultural capacity to think about alternative futures.⁴⁵⁹ There is an intrinsic link between the argument made by Sen and the capacity to aspire. While Sen argues for expanding an individual's capability set, the capacity to aspire refers to the cultural ability to fathom the direction in which the capability set is to expand.

Aspirations need not always refer to transformations or changes. Still, they can also be determined by choices to restrict change as forest-dwelling communities are often balancing traditional values with future transformations. The capacity to aspire Appadurai asserts is a navigational capacity where a map of aspirations is articulated and navigated through.⁴⁶⁰

Poverty, he argues, is the uneven distribution of the capacity to aspire or deprivation of such a capacity. Combining the capability approach with the capacity to aspire, what emerges is how the capacity to aspire is integral to find pathways to expand the capability set. Similarly, an expanded capability set will nurture the capacity to aspire. The psychology of aspiration that is developed in a secure environment with conducive external conditions enables forest-dwelling communities to build skills that can open the horizon of future possibilities.

Development in this chapter is viewed as that which expands an individual's capability set and where the community's capacity to aspire is nurtured to articulate a map of aspirations and navigate through it as an assertion of their freedom of agency. This perspective on development emphasizes forest-dwelling communities' choice in determining their economic and political future with a deliberative state at the heart of it. The role of law then is to not restrict or interfere with this expansion of the capability set and nurture the expression of the forest-dwelling communities' aspiration.

In a shared sovereignty framework, forest-dwelling communities desire to establish a relationship of collaboration with the state on their own terms and specific areas of decision-making. The consent provision is seen as an avenue to explore that elusive middle ground. I tap into the middle ground in this thesis as a way for forest-dwelling communities to

⁴⁵⁹ Arjun Appadurai, 'The Capacity to Aspire: Culture and Terms of Recognition' in *Culture and Public Action* Eds by Vijayendra Rao and Micheal Walton (Stanford University Press, 2004)

⁴⁶⁰ Arjun Appadurai, 'The Capacity to Aspire: Culture and Terms of Recognition' in *Culture and Public Action* Eds by Vijayendra Rao and Micheal Walton (Stanford University Press, 2004)

determine the terms of engagement with the state and the market as opposed to being viewed as reservoirs of resistance against them. Jaipal Singh, the renowned Adivasi thinker and leader of the Adivasi Mahasabha, has stated while commenting on the isolation of Adivasi communities in his speech "That they no longer have the luxury of isolation but have to find ways to meaningfully engage with the economic and political life of the nation." ⁴⁶¹

3. The Development Predicament in India's Forests

Forest-dwelling communities and scheduled tribes, in particular, have experienced the adverse impact of growth in India. This development predicament is adequately captured in a report by the Xaxa committee as follows:

Despite these special provisions, tribes are among the poorest and most marginalized sections of Indian society. Although numerically only about 8.6 percent, they disproportionately represent the people living below the poverty line, are illiterate, and suffer from extremely poor physical health. To illustrate, 45.7 percent of the population was below the poverty line in 1993-94. In the same year, 63.7 percent of tribal people were living below the poverty line, almost 20 percent than the rest of the country. The poverty figures were 37.7 and 60.0 percent, respectively, in the year 2004-05. The scenario has been similar in the sphere of education and health. The literacy rate of tribes in 2001 was 47 percent as compared to 69 percent for the general population. ⁴⁶²

The development predicament within India's forests has been characterized by the state's presence in its extractive form but absent in fulfilling in its developmental function. Forest-dwelling communities continue to depend on the state for access to education, healthcare, and infrastructure.

As the statistics provided in the Xaxa report show, literacy rates are low, and an increase in infant mortality is evident. The absence of the state in its welfare and the deliberative avatar was felt in the field sites I visited; in many instances, the schools were built, but teachers never showed up. Niyamgiri, which was experiencing a dengue breakout because of the floods, were left without medical attention. ⁴⁶³

⁴⁶¹ A.K Pankaj, *Adivasidom* (Pyara Kerketta Foundation, 2017)

⁴⁶² Report of the High Level Committee on Socio-economic, Health and Educational Status of Tribal Communities in India (Ministry of Tribal Affairs, 2014) available at < <https://www.kractivist.org/wp-content/uploads/2014/12/Tribal-Committee-Report-May-June-2014.pdf>> last accessed on May 28 2020

⁴⁶³ Fieldnotes from July 2019.

As the section on the political economy of extraction will demonstrate, it leaves forest-dwelling communities worse off as the distribution of wealth generated from mining is not adequate and is not redistributed.⁴⁶⁴ In an extractive economy with the absence of the welfare and deliberative state, forest-dwelling community's development is seen as being achieved only by furthering extraction.⁴⁶⁵

In India's forest areas, the economy has primarily been agrarian, with many communities cultivating subsistence. Depending on the degree of dependency on forest areas and the ability to exercise forest rights without restrictions, the economy has been based on the sale of non-timber forest produce like honey, fruits, spices, and medicinal plants.⁴⁶⁶ The relationship with the market has been complicated, where communities have cultivated for sale or harvested to sell non-timber forest produce. It has been mediated through the forest department or non-Adivasi contractors who make a chunk of the money as middlemen.⁴⁶⁷

In his book, Dev Nathan argues for market-based initiatives in enhancing the existing economy of the forest-dwelling community, which will involve a change in the mode of production.⁴⁶⁸ This is visible in many forest areas in India as forest-dwellers have begun cultivating coffee and other cash crops that generate better income. This is possible in forest areas where the regime of dispossession is not so pronounced. Elsewhere such activity is either prevented or regulated by the forest department.⁴⁶⁹

Forest-dwelling communities are seen transforming capitalism instead of rejecting it entirely through the redistributive aspects of the extractive economy or transacting in the market.⁴⁷⁰ Forest-dwellers, particularly Adivasis and Dalits, form a disproportionately large percentage of migrant workers across all sectors, particularly in brick kilns and construction work in the cities. This reality of migration was evident in most of the field sites I visited as many younger

⁴⁶⁴ Prasanta .K. Pattnaik, Pulin.B.Nayak and Santosh.C.Panda Eds *The Economy of Odisha: A Profile* (Oxford University Press,2016).

⁴⁶⁵ Ibid

⁴⁶⁶ Dev Nathan, 'Capabilities and Aspirations' (2005) *Economic and Political Weekly* Vol. 40, No. 1 pp. 36-40

⁴⁶⁷ Rekha M. Shangpliang, 'Forest Legislations and Livelihood Strategies' (2012) *Sociological Bulletin* Vol. 61, No.3

⁴⁶⁸ Dev Nathan, Govind Kelkar and Pierre Walter, *Globalisation and Indigenous Peoples in Asia I*(Sage Publications,2004)

⁴⁶⁹ Ibid 26.

⁴⁷⁰ Alpa Shah, *Ground Down by Growth: Tribe, Caste, Class and Inequality in 21st Century India* (Pluto Press,2017)

men as possible, and women migrated to the neighboring states in search of employment and are known to work under inhuman conditions.⁴⁷¹

Many activists interviewed attributed the inequality of the existing economic system in India's forests to the idea of caste capitalism, which refuses to benefit the poor. The state was referred to by forest-dwelling communities as a Dalal or agent that supports the interests of the rich.⁴⁷² As Atul Kohli writes, the pro-business state is formed by the alliance of particular class interests and the political class involved in India's initial state formation. This pro-business state perpetuates the inequality of a form of capitalism that is as unequal as the caste system and leaves behind forest-dwelling communities.⁴⁷³

The development predicament is situated in the narrow set of choices that force forest-dwelling communities out of the forests to expand their capability set. In instances where forest-dwelling communities desire to stay within the forest areas, they are subject to rigid conservation laws, easy acquisition of forest land for development projects, and a non-deliberative state. This incentivization to move outside the forests further restricts their capacity to aspire as it posits uncertainty on the outcome of such relocation.

The development predicament and the difficulty of staying within or outside forests were best described by a young Adivasi who had migrated from Sundergarh to work in the Tata steel plant in Kalinganagar. He said:

I chose to leave the forests because the income from the sale of minor forest produce was insufficient. I have been sending my children to school, and the expenses began to mount. I packed my bags, came here, and finally landed a job. It is a bit better now that I can send money back home, but it is a sacrifice. I would rather live inside the forests as opposed to the quarters I live in now.⁴⁷⁴

The development predicament in India's forests is palpable in the lived reality of migration, marginalization, and a limited set of choices in nurturing their capacity to aspire and shape their futures.

⁴⁷¹ Barbara Hariss White and Elisabetta Basile *Dalits and Adivasis in India's Business Economy: Three Essays and an Atlas* (Three Essay Collective, 2013)

⁴⁷² Fieldnotes August 2019

⁴⁷³ Atul Kohli, *Democracy and Development in India* (Oxford University Press, 2010)

⁴⁷⁴ Interview with Adivasis in Sundergarh August 2019.

4. Constraining the Capacity to Aspire and Capability Deprivation in India's forests

The development predicament in India's forests has been characterized by capability deprivation and constraining the capacity to aspire. This section explores the role of the political economy of extraction and conservation laws and policies that restrict forest-dwelling communities' development desires.

4.1. The Political Economy of Extraction

A recent report released by Odisha's government, mining giant Jindal Steel Works and Price Waterhouse Coopers, describes the pathway for Odisha's development as one based primarily on extraction. It went on to call the hidden and unexplored resources a gem that was yet to be fully mined.⁴⁷⁵

Odisha has set itself up to be a steel hub and a metal-based economy as it is endowed with large reserves of bauxite, iron ore, coal, manganese, and dolomite. There has not been much room for diverse approaches to crafting the development narrative in an economy transitioning from being dependent on agriculture to one dependent on extraction.⁴⁷⁶ Using the language of the capabilities approach what the political economy of extraction does is prevents the expansion or realization of capabilities that do not fit within the rigid frame of extraction.

The shaping of extractive economies, like Odisha, is characterized by a lack of economic diversification. As the statistics show as follows:

Even these and the presence of natural resources have not resulted in diversification into a related industry such as engineering goods (just 3% in terms of value-added), chemicals (less than 1 percent), food products (4%), and wood products (0.21%), although agriculture dominates Orissa's economy in terms of employment and state domestic product, the agro-based industry has not taken off (just 4% of value-added).⁴⁷⁷

⁴⁷⁵ Report on Odisha's Trillion Dollar Economy published by Jindal Steel Works (JSW) and Price Waterhouse Cooper in 2019 accessed from JSW.

⁴⁷⁶ Prasanta .K. Pattnaik, Pulin.B.Nayak and Santosh.C.Panda (Eds) *The Economy of Odisha: A Profile* (Oxford University Press,2016).

⁴⁷⁷ Prasanta .K. Pattnaik, Pulin.B.Nayak and Santosh.C.Panda Eds *The Economy of Odisha: A Profile* (Oxford University Press,2016).

In areas where mineral deposits are discovered, it has been challenging to convince the state not to extract the resources.⁴⁷⁸ The finite nature of these resources limits extractive economies. A diversified economy will help cope with the post-extractive phase in the state's economic life and its people.⁴⁷⁹ An extractive economy's hegemonic nature prevents a pluralist approach to development, which in turn disciplines the capacity to aspire of forest-dwelling communities who live in areas with rich mineral reserves.

The pro-business state has the monopoly in defining the narrative of development, a monopoly that forest-dwelling communities, through participation in legal mechanisms like consent, struggle to redefine. A diversified economy that embraces alternative approaches to development would nurture 'voice' and the capacity to aspire as choices can be made beyond the extractive economy.

An example of this is in the villages to be affected by the then Posco steel plant. The forest-dwelling community is dependent on a thriving agrarian economy with the sale of betel leaves and cashew. The establishment of the steel plant will result in the loss of jobs. Despite this adverse impact on their livelihood, a steel plant was built by the Indian corporation Jindal Steel Works

As Manorama Kathua, a member of the social movement against JSW elucidates:

We need freedom in deciding whether we want to continue with the current livelihood or lose it all to a steel industry that may not be able to provide us with job security. The agrarian economy is seen as redundant when it is pitted against the extractive economy entrance.⁴⁸⁰

The forest-dwelling community is set to lose its land and livelihood to make way for the steel plant. The forest-dwelling community stated that if the local economy's development were a priority, the building of betel-leaf processing units would have been considered as Bebbington has shown through a comparative study of extractive economies in Peru, Bolivia, and Ecuador that the link between the extractive economy and the local economy is weak.⁴⁸¹

⁴⁷⁸ Sunila S.Kale, 'Business and State in India's Extractive Economy' in Atul Kohli, Christophe Jeffrelot and Kanta Murali Eds *Business and Politics in India* (Oxford University Press, 2019)

⁴⁷⁹ Anthony Bebbington, Teresa Borschlegland Adrienne Johnson, 'Political Economies of Extractive Industry: From Documenting Complexity to Informing Current Debates' (2013) *Development and Change* Virtual Issue 2.

⁴⁸⁰ Interview with Manorama Kathua in July 2018.

⁴⁸¹ Bebbington, Anthony and Abdulai, Abdul-Gafaru and Hinfelaar, Marja and Humphreys Bebbington, Denise and Sanborn, Cynthia, 'Political Settlements and the Governance of Extractive Industry: A Comparative Analysis

The hegemonic nature of the extractive economy is reinforced with the notion that a large-scale mining project's entrance is viewed as a modernization effort. This view of development encompasses transforming a place into a 'modern, capitalist, industrial economy.'⁴⁸² The current agrarian economy then is measured against an attempt to industrialize and modernize.

The promise of development comes with the elusive promise of growth trickling down to the local community. The promise remains elusive because, as Bebbington has argued, development in an extractive economy occurs in highly conflictive social scenarios with disappointing redistributive results.⁴⁸³

In its extractive avatar in Odisha, the state plays an active role in working with mining companies in enabling quick and easy acquisition of land. This is an example of what Bebbington, and others have termed elite strategies of political pact-making, which are deeply affected by the presence of natural resource revenues in ways that then structure subsequent room for maneuver in politics and policy.⁴⁸⁴

This form of elite pact making structures institutions so that it becomes difficult for the consent principle to be realized.⁴⁸⁵ Elite pact-making occurs at multiple levels and stems from the state's desire to act as the facilitator for mining companies in its pro-business avatar, explained in the earlier chapter. This enabling feature, characteristic of making land available, highlights the extractive nature of the state with its pro-business leanings and need to attract FDI.⁴⁸⁶

of the Longue Durée in Africa and Latin America' (June 3, 2017). ESID Working Paper No. 81. Manchester: Effective States and Inclusive Development Research Centre. <<https://ssrn.com/abstract=2986786>> accessed on May 2020.

⁴⁸² R.C. Mascarenhas *Developments in Modern Industrial Capitalism. In: A Comparative Political Economy of Industrial Capitalism.* (Palgrave Macmillan, 2012)

⁴⁸³ Ibid

⁴⁸⁴ R.C. Mascarenhas *Developments in Modern Industrial Capitalism. In: A Comparative Political Economy of Industrial Capitalism.* (Palgrave Macmillan, 2012)

⁴⁸⁵ Nilmadhab Mohanty, *The Political Economy of Mining in India* (Haranand Publications, 2017)

⁴⁸⁶ Sunila S.Kale, 'Business and State in India's Extractive Economy' in Atul Kohli, Christophe Jeffrelet and Kanta Murali Eds *Business and Politics in India* (Oxford University Press, 2019)

4.1.2 Compensatory Nature of Development in an Extractive Economy

While an essential feature of the political economy of extraction has been its hegemonic nature where alternative approaches to development are not considered, another critical aspect is its compensatory nature. Any model of development based on resource extraction is a model of compensation and transfers to those who suffer loss. These transfers can take the form of CSR, public social protection, payment for losses, or indigenous and local development funds. Inclusive development is achieved through compensation. ⁴⁸⁷

The mechanism to address the losses caused by an extractive economy has been through benefit-sharing mechanisms with the local communities. While benefit-sharing can potentially reduce forest-dwelling community's capability deprivation, the redistribution efforts have not been as beneficial.⁴⁸⁸ The extractive avatar of the Indian state is accompanied by it being non-developmental in these remote areas.

Compensation in the extractive economy of Odisha occurs through the mechanism of the district mineral foundation where royalties from mining are deposited with the state and meant to trickle down to the local community. This mechanism of benefit-sharing has failed to compensate forest dwelling communities for the losses suffered. The state is an absentee state as argued in chapter four, the state retreats from fulfilling its developmental functions making room for companies to fill the gap. Thus, forest-dwelling communities are left to experience development in this compensatory form only by allowing for extraction.

4.2. Conservation, Capability Deprivation, and the Capacity to Aspire

4.2.1 Exclusionary conservation and Capability Deprivation

Conservation practice necessarily entails imposing regulations over access to certain resources with specific people or institutions attempting to define who has access to those

⁴⁸⁷ Bebbington, Anthony and Abdulai, Abdul-Gafaru and Hinfelaar, Marja and Humphreys Bebbington, Denise and Sanborn, Cynthia, 'Political Settlements and the Governance of Extractive Industry: A Comparative Analysis of the Longue Durée in Africa and Latin America' (June 3, 2017). ESID Working Paper No. 81. Manchester: Effective States and Inclusive Development Research Centre. <<https://ssrn.com/abstract=2986786>> accessed on May 2020

⁴⁸⁸ Prasanta .K. Pattnaik, Pulin.B.Nayak and Santosh.C.Panda (Eds) *The Economy of Odisha: A Profile* (Oxford University Press,2016).

resources and on what terms.⁴⁸⁹ As chapter two on the regime of dispossession shows, it is evident that forest laws from the colonial period to the present laws like the Wildlife Protection Act have prioritized exclusionary conservation.

Exclusionary conservation practice contributes to capability deprivation as forest-dwelling communities dependent on forests for their livelihood have been denied access to these resources and land for cultivation. The establishment of protected areas like national parks and sanctuaries has created further restrictions on their access to resources, fostering a hostile environment where forest-dwelling communities cannot procure fuelwood or materials to build their homes.

An example of this is in many Tiger Reserves, forest-dwelling communities have been asked to relocate from the core area. The provisions of the Indian Forest Act, 1927 categorize the exercise of forest rights as forest offenses under Section 3 and Chapter 9 of the Act.⁴⁹⁰ The lack of reconciliation between the protective legislation and exclusionary conservation laws has enabled the forest bureaucracy to exercise broad discretionary powers. The forest bureaucracy continues to assert significant power over the regulation of forest rights of the forest-dwelling community.⁴⁹¹

As legislated in the forest laws, conservation has restricted the capabilities and functionings of forest-dwelling communities as to what they can do. Their use of the forest space is mediated by a thicket of laws and extends to how they can engage with the market. An example of this is in the forest areas of Sundergarh. The forest-dwelling community has been prevented from accessing minor forest produce, which they traditionally sold at the nearby market.⁴⁹²

Their substantive freedom is shaped by what the law permits them to do. In such a heavily regulated space, the capacity to aspire remains challenging to cultivate. In an interview with

⁴⁸⁹ Vasant Saberwal, 'Conservation as Politics: Wildlife Conservation and Resource Management in India', (2000) *Journal of Wildlife Law and Policy*, Volume 3, pp 166-173.

⁴⁹⁰ Indian Forest Act, 1927

⁴⁹¹ Arpitha Kodiveri, 'Wildlife First, People Later? – Towards an Experimentalist Governance Approach' (2018) *Journal of Indian Law and Society* Volume 9.

⁴⁹² *Ibid* 485.

Adivasi communities in Sundergarh, they described the situation as being caught between a rock and a hard place:

They want us to conserve the area. In doing so, they restrict our right to access non-timber forest produce like Mahua. We have to collect it and sell it secretly. The forest department claims they own the resources, and the forest rights act says that the resources belong to us. If we are discrete enough, we can eke out a living with subsistence farming and the sale of mahua. To conservation, our ability to engage with the economy or the market on our terms is curbed.⁴⁹³

Exclusionary conservation laws are guided by the prerogative of reducing forest-dwelling communities' dependence on forests and restricting the exercise of their forest rights. Leading conservationists argue that reducing the dependence of forest-dwelling communities on forest areas and relocating them from these areas will ensure that the area is appropriately conserved.⁴⁹⁴ The right to exploit these forests is vested and regulated by the state.

The forest-dwelling community is pushed to the margins and, in many instances, forcefully relocated. Relocation due to conservation efforts has been practiced across the country. The nature of relocation being referred to here is what Kothari and Lasgorceix call induced displacement.

When the relocation is sought or accepted by the communities or families concerned, due to circumstances created by the PA (by itself or in conjunction with other factors), these circumstances could include severe pressure and harassment by officials, deprivation of natural resources that are essential for their livelihoods, denial of necessary developmental facilities, or "sandwiching" between a development project and the PA.⁴⁹⁵

It is this induced displacement by conservation that further restricts the capabilities and functionings of forest-dwelling communities. Development as envisioned under the Forest Rights Act, 2006 is a combination of strengthening the source of livelihood of these communities by access to non-timber forest produce and the ability to cut up to 75 trees per hectare within the forest area to be able to build a school, dispensary or other basic

⁴⁹³ Interview with Adivasi communities in Sundergarh in August 2018.

⁴⁹⁴ Ibid 485.

⁴⁹⁵ Ashish Kothari and Antoine Lasgorceix, 'Displacement and Relocation of Protected Areas: A Synthesis and Analysis of Case Studies' (2009) *Economic and Political Weekly* Vol. 44, Issue No. 49.

developmental projects which are recommended by the Gram Sabha or village assembly.⁴⁹⁶ Development is understood in the frame of the basic needs and creating enabling external conditions within the forest to expand their capability set and nurture the capacity to aspire. The forest laws provide them with a rigid set of options, and not all options, as Sen states, are seen as equitably attractive.

The FRA recognizes forest-dwelling community's right to exploit the forest to the extent needed for access to non-timber forest produce or basic development needs. While this balance is needed to realize the conservation prerogative, it prevents the realization of alternative social and economic futures of forest-dwelling communities. An example is a benefit-sharing model the Supreme Court had proposed for Adivasi cooperatives in running mining operations.⁴⁹⁷

4.2.2 Conservation and the Forest Rights Act

Community-based conservation, which is recognized within the FRA as CFR areas described in the earlier chapter, is where the forest-dwelling community can decide how conservation is achieved in the designated area. This is seen as a way to incorporate the communities' agency in making decisions on how the forest land is used and conserved. This is subject to sustainable use. Younger Adivasi communities, when asked about conservation in Kodingamali, responded :

Conservation of the forests is essential, but why are we entrusted with this responsibility? We want to increase our agricultural activities in the area. Will that be permitted? or what if we aspire to build a processing plant?⁴⁹⁸

Conservation has been an external force that has restricted their capacity to aspire by heavily regulating their participation in the economic, social, and political life within forest areas. In the Niyamgiri case, what was witnessed was the coming together of the interest of

⁴⁹⁶ Section 3(k) of the Forest Rights Act, 2006.

⁴⁹⁷ Rekha M. Shangpliang, 'Forest Legislations and Livelihood Strategies' (2012) Sociological Bulletin Vol. 61, No. 3.

⁴⁹⁸ Interview with Adivasis in Kodingamali in August 2019.

conservation with the assertion of forest rights where the Dongria Kondh opposed the mining of the hills as it was a sacred landscape.⁴⁹⁹

The Vedanta case saw the convergence of the competing interests of forest rights and conservation. The Dongria Kondh community struggled to protect their rights over the Niyamgiri hills by approaching multiple fora both domestically and internationally. The Supreme Court, in response to the ongoing struggle, ruled to devolve decision-making to the forest-dwelling community on whether a mining lease is to be granted. Twelve village assemblies decided to deny the company the right to mine the hills. This case is an example of how forest rights can enable conservation.⁵⁰⁰

The Niyamgiri case is an example where the forest-dwelling community felt strongly about conserving the area. Across the Eastern Ghats stretch, communities are situated differently when it comes to the extractive economy and questions of conservation.

An example of this is Kodingamali, where the forest-dwelling community wants to engage with the extractive economy and reap its benefits. Consent, when viewed as an avenue to deliberate development preferences, can accommodate the range of interests that forest-dwelling communities have.

There remains then in the Kodingamali an open-ended concern of how conservation and the aspirations of forest-dwelling communities should be reconciled. Here I rely on Sen, who suggests that deliberation on these issues should include future generation's concerns. Drawing from the definition of sustainable development, he states that development decisions should include the concern of the quality of life, capabilities, and functioning of future generations and go beyond anthropocentric concerns.

Exclusionary conservation and community-based conservation are choices that forest-dwelling communities should be allowed to deliberate and decide upon. The forest laws as they operate now either dispossess communities from accessing forest land or resources or require them to bear the burden of conservation to obtain their rights. Thus, conservation

⁴⁹⁹ Arpitha Kodiveri, 'Wildlife First, People Later? – Towards an Experimentalist Governance Approach' (2018) *Journal of Indian Law and Society* Volume 9

⁵⁰⁰ *Orissa Mining Corporation Ltd V Ministry of Environment and Forests (Writ Petition (CIVIL) NO. 180 OF 2011)*

limits the capacity to acquire either by forcing communities to live outside of forest areas or allowing minimal livelihood opportunities within forest areas.

5. The Deliberative State

As the previous sections have demonstrated, the political economy of extraction and conservation operates in forest areas that limit the capacity to aspire. The state within the political economy of extraction and in the enforcement of forest laws is largely non-deliberative. It is present in its pro-business and extractive modality.

As the chapter on the non-deliberative state's mechanics has shown, the pro-business state bypasses the consent provision to acquire land quickly. While the conflict perpetuates, the land is often transferred to the mining company. The jurisprudence of repair and the deliberative reimagining of the consent process by forest-dwelling communities speak of a deliberative governance structure situated in a shared sovereignty framework.

The state in India's forests is not merely required in its deliberative mode but has to be accompanied in its developmental avatar as well. The state is present in providing access to necessary facilities like healthcare, education, and nutrition instead of creating a gap to be filled by the extractive company. The deliberatively developmental state will pave the way for creating an enabling environment for forest-dwelling communities to expand their capability set.

The deliberative state is where the state's decision-making nodes are deliberative, and the forest-dwelling community is present in decisive moments of the process. The requirement of bindingness also characterizes the deliberative state to the Gram Sabha's decisions in the bhaitak or convening.

Tapping into the existing deliberative governance structure of the Gram Sabha at the village level, the district collector at the district level, and the tribes advisory council at the state level, a more nuanced understanding of the development needs of the forest-dwelling community can be voiced within state decision-making. As Ranjan Nayak describes, the deliberative governance structure must be angled towards arriving at a working agreement. He referred to the working agreement as *baat cheet se samjauta* or an agreement that is a product of discussion. He describes:

The deliberations with the state must involve changes in their decisions and changes in the way we approach the problem. If we begin to localize our decisions and have the state cooperate with us on the terms that we arrive at together. This can continue to change as long as the avenue for dialogue is available.⁵⁰¹

This idea of a working agreement is similar to an incomplete theorized agreement.⁵⁰² The deliberative loop of bhaitak, sunvayi, and sahamati offers a way to structure the relationship between the forest-dwelling communities and the state in the direction of repair. The consensus to be arrived at with the state cannot be captured in the one-off event of obtaining consent but requires continuing consent or a continuous dialogic process.

The deliberative loop towards a *baat cheet se samjauta* consists of the three-part process of bhaitak-sunvayi and sahamati. However, the difference remains in terms of the conversation, which moves beyond the diversion of forest land to the everyday questions of development, conservation, and access to necessary facilities.

5.1 The political economy of extraction

Land Conflict Watch, a crowdsourced database on land conflicts, reports that there are 737 active land conflicts in India.⁵⁰³ As land conflicts continue, there is a need for the state to move beyond the notion of extraction to a diversified economy. The state's imagination of development is entrenched in the discursive networks of development as extraction.

An incomplete theorized agreement between the state and the forest-dwelling community can dislodge the hegemony of extraction. The working agreement must resonate with discursive pluralism on development. Deliberating development in India's forests will require discursive networks of actors and institutions to be placed within the state and communities where alternative development futures can be discussed.

Discursive networks are governance networks perpetuating a particular approach to development like extraction. As the thesis has shown, these extractive networks enjoy a great

⁵⁰¹ Interview with Ranjan Naik in Sundergarh on July 2018

⁵⁰² Cass R Sunstein, 'Incompletely Theorized Agreements' (1995). Harvard Law Review, Vol. 108, No. 7, p. 1733.

⁵⁰³ John Dryzek with Simon Niemeyer, *Foundations and Frontiers of Deliberative Governance* (Oxford University Press, 2010)

deal of influence within the state or mono-deliberation. There is a need to diversify the networks that have such deliberative influence.⁵⁰⁴

The deliberative loop of bhaitak-sunvayi-sahamati provides an avenue for the forest-dwelling community to challenge the discursive networks of extraction. The district collector's role here transforms from merely communicating the deliberated outcome of the forest-dwelling community to the Tribes Advisory Council and begins to infuse the decision-making of the state at the district level with these development plans.

The deliberative loop need not be triggered during episodes of extraction but become a basis for healing the broken relationship with the state to move in the direction of shared sovereignty. Deliberating development requires that the agenda for discussion and deliberation needs to move beyond the bounds of the extractive economy to discursive pluralism on the issues of development. In such a situation, the Posco villages' robust agrarian economy can be seen as an alternative instead of setting up the integrated steel plant.

The Gram Sabha resolutions contain within them the imagination of alternatives. The Gram Sabha resolution submitted by the Posco affected villages elucidate that the forest-dwelling community seeks to secure its economic future with the expansion of the betel-nut plantations or Kodingamali, where the resolution lays out ten requirements to be appropriately compensated for by the extractive company.⁵⁰⁵

Here, the deliberative loop involves the Gram Sabha, the district collector, the single-window clearance committee, and the state government of Odisha as the institutional nodes.⁵⁰⁶ The terms of the incompletely theorized agreement depend on whether the Gram Sabha agrees to the extractive company's entrance or rejects it.⁵⁰⁷ The diagram below illustrates a reimagination of two processes, one which is the negotiation of the Memorandum of

⁵⁰⁴ Ibid.

⁵⁰⁵ The Gram Sabha resolutions were accessed in Odisha from Sandeep Pattnaik who is a co-ordinator of the Posco Pratirodh Sangram Samiti.

⁵⁰⁶ Scott C. Burris, , Peter Drahos and, Clifford D Shearing, 'Nodal Governance'(2005) Australian Journal of Legal Philosophy, Vol. 30.

⁵⁰⁷ Cass R Sunstein, 'Incompletely Theorized Agreements' (1995). Harvard Law Review, Vol. 108, No. 7, p. 1733.

Understanding between the state, company, and forest-dwelling community, and the other, which is a development beyond extraction

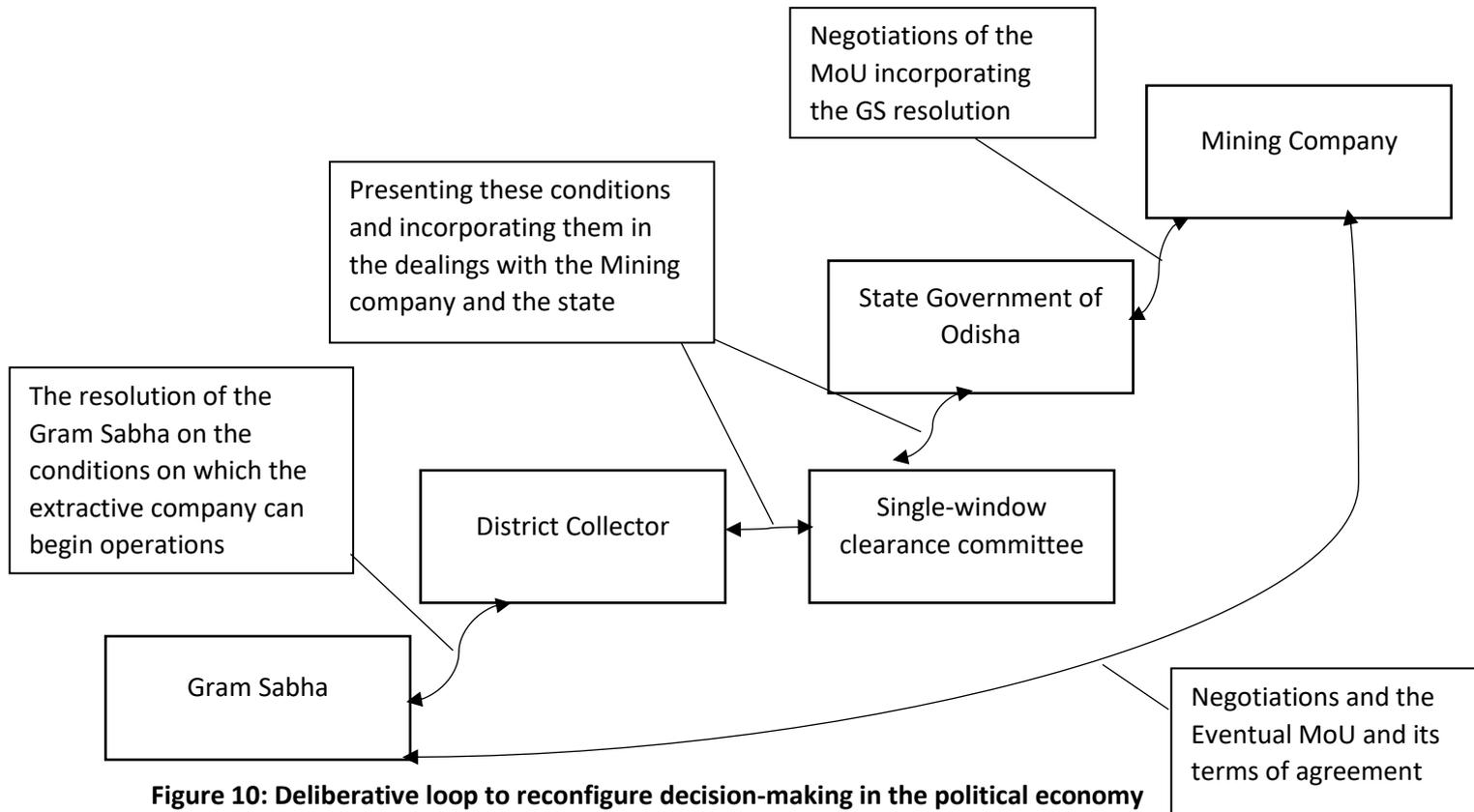


Figure 10: Deliberative loop to reconfigure decision-making in the political economy of extraction.

The MoU presently is an agreement forged between the state and the mining company in isolation of the forest-dwelling community. The deliberative governance structure above will place the community at the heart of the negotiation process. The Gram Sabha (GS) resolution forms the basis of conditions on which the mining company's entrance can be permitted. As the diagram shows, the GS resolution forms the basis for the formulation and negotiation of the MoU. The Gram Sabha will have to be consulted at every stage of the negotiation between the state and the mining company. The MoU is formulated, including the terms of agreement like sharing in profits and resettlement and rehabilitation which are part of the GS resolution. Suppose the Gram Sabha decides against the mining company's entrance, the deliberative loop will be one of the consent process reimagined where development priorities beyond extraction are discussed and deliberated upon.

5.2 Conservation

The challenge of conservation can be effectively dealt with through the deliberative reconciliation of forest laws. In the chapter on the regime of dispossession, I articulated how the forest laws conflict with each other in a manner that reinforces the paradigm of exclusionary conservation. As I have argued earlier in this chapter, exclusionary conservation restricts the livelihood opportunities of forest-dwelling communities and reasserts state control in decision making.

The Tribes Advisory Council, an integral part of the Scheduled Areas governance framework, can change laws and their applicability in scheduled areas. Sudhir Pattnaik, a noted activist who has been working with Adivasi communities in forest areas, speaks to the need to extend this governance framework to all forest areas and recognize the TAC's power to decide on issues of forest laws.⁵⁰⁸ When extended to all forest areas, the TAC framework becomes a committee where the reconciliation of laws can be discussed.

The interpretive power to reconcile conflicting legislation rests with the District Collector and the administration of Odisha's state. There is a need to switch the locus of decision-making to the TAC, where discretionary power concerning interpretation can be made the subject of convening. The scope of the incomplete working agreement has to include aspects of conservation.

The scope for deliberative reconciliation of laws is not restricted to legal interpretation but an agreement that incorporates conservation practice models. The recognition of forest-dwelling communities' community forest rights under FRA provides a useful framework to begin negotiations with the state on how forest areas are to be governed.

From interviews with forest-dwelling communities, the following mechanics of deliberative reconciliation of laws are accompanied by ways to rearrange decision-making on conservation. The deliberative system imagined below facilitates interaction between the forest-dwelling community and the state. The features of bhaitak-sunvayi-sahamati remain

⁵⁰⁸ Arpitha Kodiveri, 'Wildlife First, People Later? – Towards an Experimentalist Governance Approach' *Journal of Indian Law and Society* Volume 9, 2018

the same, but the bureaucratic actors and pathways involved change. Below is a diagram that showcases the deliberative governance possibility for conservation issues.

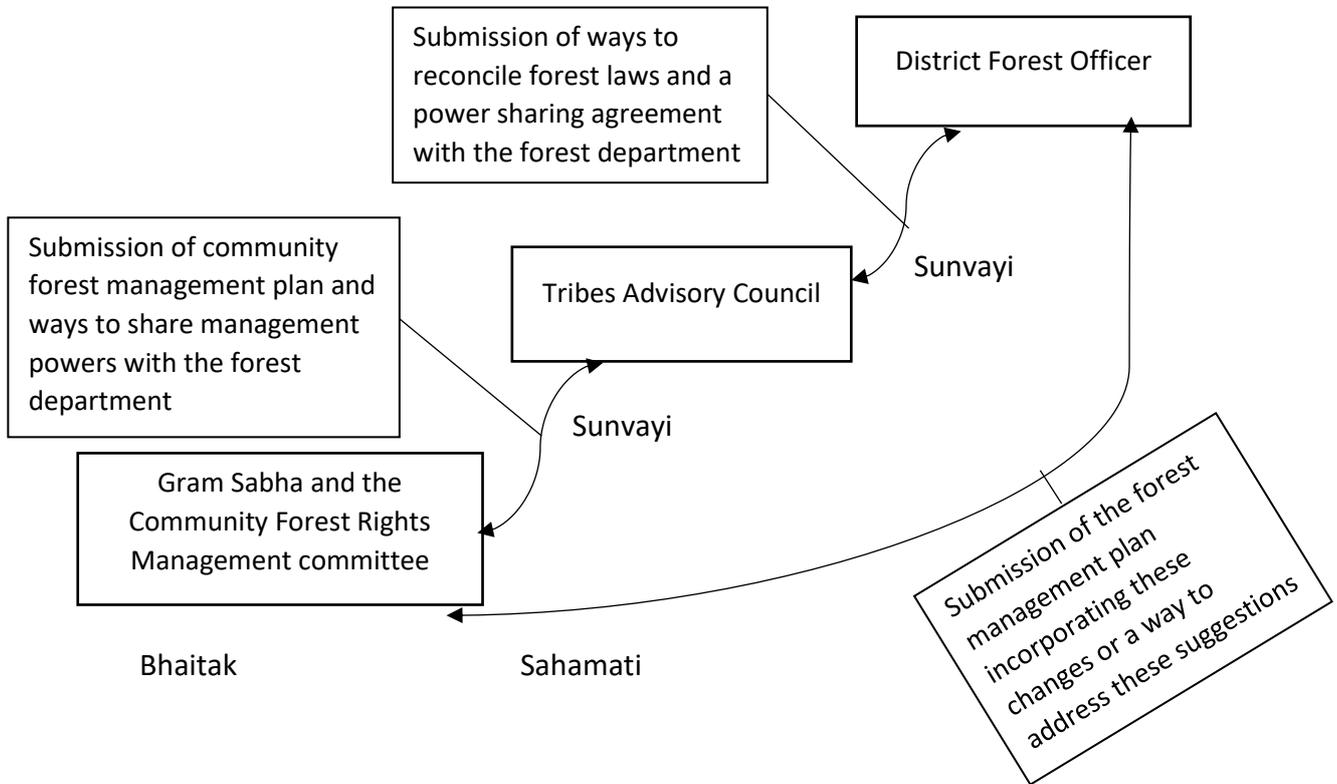


Figure 11: Deliberative loop for decision-making on conservation.

As seen in the diagram, the deliberative loop begins with the Gram Sabha through its community forest rights management committee, which submits a conservation management plan based on their traditional knowledge, customary practices, and deliberated decisions on forest areas' management. Rinjo Sikaka describes these management plans as crafted through dialogue, requiring the state to let go of power or share power in making decisions.

These oral agreements and plans, when reduced to writing, are to be submitted to the Tribal Advisory Council, which has the power at the district level to distill what can be a workable agreement on power-sharing within forest areas on aspects of conservation. Once this is submitted to the District Forest Officer (DFO), the primary decision-making authority in the

forest areas, we can find ways to incorporate these changes within the forest departments working plan for the forest area.

The modality of engagement remains that of bhaitak or a convening within the forest areas, followed by a hearing with the TAC and the District Forest Officer who are now the institutional nodes for reconciliation of laws. A sahamati or consent process is used to build consensus towards an incompletely theorized agreement on conservation. Rinjo Sikaka elaborates that what has to be incorporated within these agreements is that mining cannot take place in certain cases, for example, in sacred groves. He states:

The state must recognize that these management plans will contain provisions where we would like to preserve certain areas due to our sacred association with the land or otherwise.

The Niyamgiri situation could have been entirely overcome if the state and we had a working understanding of how we approach conservation in these forest areas.⁵⁰⁹

The contents of the conservation management plan include areas within the forests that can be diverted and that which has to be preserved. These decisions are presently being made by the district collector and the forest department alone. This deliberative loop will enable a richer process of establishing conservation practice and include forest-dwelling communities' voices in the process.

6. Conclusion

In conclusion, in this chapter, I have argued that development priorities and the capacity to aspire of forest-dwelling communities are often marginalized by concerns of conservation and extraction. The forest-dwelling community can decide whether land should be alienated, if so, on what terms and who should be compensated. The consent provision, if seen as an invitation to deliberate the challenges of development and the priorities of forest-dwelling communities, can transform the pro-business avatar of the state to a deliberative one. In its non-deliberative avatar, the state has silenced the deliberative potential of the consent provided through the paper state's tactics and reliance on businesses to influence Odisha's development trajectory.

⁵⁰⁹ Interview with Rinjo Sikaka in Niyamgiri on February 2020.

A deliberative state that is porous and receptive to voices living on the forest floor can pave the way to address India's forests' development predicament. This, in turn, will create the potential for forest dwellers to improve their capability set and nurture their capacity to aspire.

The making of a deliberative state is a composition of a complex deliberative system involving the state and deliberative nodes outside the state to change the discursive hegemony that currently divides groups and limits their capabilities. This chapter has shown that to nurture the capacity to aspire, an architecture of deliberative loops has to be created in varied decision-making scenarios of conservation, the entrance of an extractive company, or development beyond extraction. These deliberative loops are anchored in the desire for a discussion-based working agreement between the state and the forest-dwelling community.

8. Negotiating Compensation in the Informal: Dalal's and the Social License to Operate

1. Introduction

"We will have to convince the forest-dwellers and find out how we can make this interaction mutually beneficial," ⁵¹⁰narrated Subodh (name changed), a representative of Jindal Steel Works, when asked how they were working with the forest-dwelling community in obtaining their consent in Jagatsingpur.

The deliberative vacuum generated by the state operating in its non-deliberative modalities makes room for intermediaries or Dalals who act as brokers between the interests of the state, the company, and the local community. In this chapter, I will explore the role that Dalals play in implementing the consent provision as a part of the network of a legal interpretive community that works on arriving at informal agreements with forest-dwelling community members.

The Dalal's interestingly frame the consent process as a process of obtaining a social license to operate.⁵¹¹ Dalals and the companies work towards the creation of an informal space where negotiations for a conditional social license can occur to gain physical possession of land. In this chapter, I ask how the informal space of obtaining the social license operates and the role of Dalals in arriving at an agreement with the forest-dwelling community.

In this chapter, I highlight how the terrain on which this negotiation takes place is uneven. The starting point for this negotiation, I show, begins with the idea of conditional support, making no room for the right to withhold consent. The negotiations are about deciding the terms on which resettlement and rehabilitation takes place after land is acquired. The mining companies intend to reduce the conditionalities around the social license such that it facilitates the company's entrance and reduces opposition to the project.

⁵¹⁰ Interview with Subodh in Jagatsingpur in February 2020.

⁵¹¹ Neil Gunningham and Robert Kagan and Dorothy Thornton, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance'. (2004). *Law and Social Inquiry*-journal of The American Bar Foundation - Law Social Inquiry. 29 pp. 307-342.

The chapter will begin with an understanding of the relationship between consent and the social license to operate. I will then explore the role of Dalals in shaping the informal legal space in which negotiations occur. I conclude with an elaboration on bargaining and the nature of individually brokered agreements.

2. Consent and Social License to Operate- The Process of Bargaining.

The Social License to Operate (SLO) refers to an intangible agreement or acceptance of the company's entrance by multiple stakeholders. The social license to operate as a concept gained momentum in the mining sector which was facing negative attention for the harm it does to the environment and local communities. The social license is beyond a political or legal license to operate. Neil Gunningham speaks of the SLO as the set of expectations placed on the business by multiple stakeholders and civil society.

The social license to operate is not a piece of paper or a document like a government license. It is a form of social acceptance or approval that companies or projects earn through consistent and trustworthy behaviour and interactions with their stakeholders. It is a socially constructed perception that your company or project has a legitimate place in that community.⁵¹²

The social license to operate is where the company sets out to meet these expectations laid out by multiple stakeholders. The legal license is a formal legal process of complying with the requirements placed by the law. The social license is a broader framing where companies are seen moving beyond mere legal compliance.⁵¹³ This concept was repeatedly referred to by the land acquisition teams of mining companies interviewed for this thesis when asked about the consent provision. They referred to it as taking people with you in the company's decisions or winning the community's trust.⁵¹⁴

I view the consent provision as a formal legal requirement while the SLO, as understood by the Dalals, refers to that informal space where negotiations occur between the company and the community on compensation and rehabilitation.⁵¹⁵ The SLO here is a narrower concept

⁵¹² Neil Gunningham and Robert Kagan and Dorothy Thornton, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance'. (2004). *Law and Social Inquiry*-journal of The American Bar Foundation - Law Social Inquiry. 29 pp. 307-342.

⁵¹³ *Ibid* 506.

⁵¹⁴ Fieldnotes from February 2020.

⁵¹⁵ Fieldnotes from February 2020.

compared to what Neil Gunningham describes as the legitimacy of the company is drawn from informal negotiation on compensation and not in justifying its place in the community.⁵¹⁶

The consent provision is not an isolated exercise but has to be read with the informal negotiations to obtain the SLO. The consent requirement is treated as something to be ticked in the box of things needed to obtain the legal license. The SLO is a different matter. The company and the Dalal invest a lot of energy in carving out the conditions on which a social license can be obtained, and a foundational agreement is forged on resettlement and rehabilitation between the company and the forest-dwelling community.

Through my fieldwork and interviews, it became evident that the paper state often bypasses the consent provision. A member of the land acquisition team at a private mining company stated:

There is confusion on whether the Gram Sabha consent provision gives the forest-dwelling community the right to veto. The Vedanta judgment has made it amply clear that it does. To avoid this situation, what often happens is that the state bypasses the consent process. We are then left negotiating with the community when they know the project is coming and can map out the terms of that engagement.⁵¹⁷

This insight is useful as it clarifies the interaction between the formal legal process of obtaining consent and how the social license to operate, as understood by the companies, fits into the schema.

The point of departure for the negotiations between companies and communities is not at the fundamental question of the company's entrance into the forest areas but the terms on which their entry is accepted. To realize this shift within communities that are resisting the project's entrance is a slow process involving many micropolitical strategies by companies that I will lay out in the section on Dalals.

The process of obtaining a SLO is a direct engagement between the company and the community. These engagements, however, take place within the broader political economy of extraction and a pro-business state. An example of such an informal negotiation within the

⁵¹⁶ Neil Gunningham and Robert Kagan and Dorothy Thornton, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance'. (2004). *Law and Social Inquiry*-journal of The American Bar Foundation - Law Social Inquiry. 29 pp. 307-342.

⁵¹⁷ Interview with Prashant Mallick from Tata Steel in July 2019.

rigid political economy of extraction is explained by Prashant Mallick who is part of the land acquisition team of Tata Steel in Kalinganagar:

Rabi Jarika who is the leader of the social movement here opposing the steel plant was approached. I sat down with him and explained that the steel plant will be established and as a leader he can decide on what terms this would happen, since opposing it will not yield any outcome. I asked him what he wanted as compensation and what he thought the community required in terms of rehabilitation.⁵¹⁸

The political economy of extraction and the pro-business state quell the avenues available for the articulation of dissent either through the consent provision or protests by the forest-dwelling community. Instead, the forest-dwelling community is left negotiating with Dalals on the terms of dispossession.

These informal negotiations are guided by formal law like the rehabilitation and resettlement policy, 2006 of Odisha, and the Land Acquisition Act, 2013. As discussed in chapter two, the lacunae in forest laws on the aspect of compensation leave forest-dwelling communities without a legal basis to enter into these negotiations. Yet, the policies like the Odisha resettlement and rehabilitation policy provide some legal basis for the informal negotiations to begin.

Protest movements play an essential role in determining the contours of negotiation with the company as they gain bargaining power with the ability to mobilize law domestically and internationally. The SLO is negotiated with different interests at play. Protest movements against the project mobilize the law to challenge the project while the informal negotiations are underway. The politics of obtaining a social license is shaped by the informal negotiations on the ground, legal mobilization before the administrative authorities and courts, and the reputational capital of the mining company, which is at stake.⁵¹⁹

⁵¹⁸ Interview with Prasantha Mallick in July 2018.

⁵¹⁹ Neil Gunningham and Robert Kagan and Dorothy Thornton, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance'. (2004). *Law and Social Inquiry*-journal of The American Bar Foundation - Law Social Inquiry. 29 pp. 307-342.

3. The Dalal

The Dalal was a term used by many interviewees to describe the negotiators that occupied the informal space of bargaining between the forest-dwelling community and the company. Bargaining unlike deliberation is where discussion takes place where each party is interest driven and involve strategic ways to arrive at a lowest common denominator for consensus.⁵²⁰ Bargaining here takes place between the powerfully placed mining company and the marginalized forest-dweller. In this section, I unpack the archetypes of Dalals and the way they operate to identify the conditions of arriving at a social license to operate.

The Dalal broadly refers to an intermediary or an agent who interacts with the forest-dwelling community to understand their demands based on which they are willing to give up their land to the company.⁵²¹

Dalals are usually employed by the company and are sometimes members of the forest-dwelling community and then become a member of the company's local team. The Dalal uses the existing legal requirements of resettlement and rehabilitation as the basis to begin negotiations on the amount of compensation to be given. Dalals are flexible in negotiating terms that go beyond these legal requirements.

An example of this is in Kalinganagar, where compensation for land acquired was not paid by IDCO. Tata steel set up a local team to address the challenge of taking physical possession of the land. The local team worked closely with the community to design the resettlement colony, which included a museum that documents the cultural practices of the Ho tribe.

This has been criticized by many as a way of turning tribal culture into a museum of cultural artefacts and pushing them into the mainstream economy.⁵²² However, I use this example to illustrate how the local team of Dalals pushed the envelope on the resettlement and rehabilitation package to obtain the SLO.

The Dalals have been described by interviewees mostly from the forest-dwelling community as translators between the Adivasi way of life and the mainstream economy. This role is an important one as they communicate the forest-dwelling community's demands to the

⁵²⁰ Emmanuel Ifeanyi Ani, *Is Bargaining a Form of Deliberating?*, *Philosophical Papers*, 49:1, 1-29 (2020)

⁵²¹ Fieldnotes from February 2020.

⁵²² Tanya Li, *The Will to Improve* (Duke University Press, 2007).

company and the state. Dalals are middlemen who either seep into the forest-dwelling community's everyday reality or belong to the community and engage with the company on deciding the terms and conditions of acquisition.

The Dalals are the in-betweeners, who can belong to the world of the forest-dwelling community and the world of the extractive economy. The Dalals cleverly navigate the pro-business bureaucracy that facilitates such acquisition of land while being equally networked with the company. The Dalals are sometimes seen as covert informants who alert the state to dissent that is building up within a forest-dwelling community.

The archetype of the Dalal becomes essential to understand to better grasp who they are and how they operate. These archetypes are drawn from the conversations with interviewees who identified as Dalals and forest-dwelling community members in these three mining sites who described them. The archetypes are not absolute categories but highlight the background and identity of those who act as Dalals.

3.1 Archetypes of Dalals

Dalal archetypes are a mix of those belonging to the forest-dwelling community and those from outside the community. The range of interests they represent is diverse too. Ranging from those opposing the company's entrance to those wanting to profit from it. Dalals thus are difficult to categorize and fix as being representative of a particular interest. Learning who the Dalal is becomes insightful to understand how the forest-dwelling community's voices are articulated on aspects of compensation.

Dalals describe themselves as occupying a morally grey area. Some forest-dwelling communities consider them as a necessary evil to navigate the negotiation process with the companies. Other forest-dwellers view them as those who sold out the forest-dwelling community's interests to pave the way for the industry to enter the forests.

In an interview with a forest-dweller who was losing his land to the expansion of a coal mine, he categorized the Dalal as a collaborator with the mining company:

They are like spies; they work hard to understand what the forest-dwelling community wants. Share that information with the company and carve out the company's path to penetrate our society, forest, and everyday life. They are essential as they understand the worlds of the

Adivasi and the mining company, but they profit from that knowledge, which is problematic!⁵²³

As seen in his description, Dalals are a necessary evil because of their amphibious ability to inhabit the contradictory worlds of the traditional and the market economy, the sustainable and the extractive, the state, and the non-state. Dalals are an important actor as they assist in the process of manufacturing consent.

Who then are the Dalal's, the in-betweeners, the clever ethnographers, and the messengers between actors in this polarised conflict?

3.1.1. The Aspirational Adivasi

As we addressed in the earlier chapter, Adivasi communities and Scheduled Tribes have been categorized as benevolent conservers of the environment. Adivasi communities consist of many interests, and aspiration in Adivasi communities takes different forms. It is challenging to define aspiration and what it means in these three communities. In interviews, aspiration was often a term used to describe a desire to engage with the extractive economy, access education, and move to the nearby towns.⁵²⁴

Sometimes these are decisions taken under compulsion- like the need to find a livelihood, and in other instances, it is an exercise of choice. Dalals who I interviewed in the forest-dwelling communities identified themselves as aspirational and wanted to see progress within their community. This meant deriving benefit from the extractive economy that surrounded them and obtaining jobs there.

An interview with a forest-dweller in the Posco area who had worked as a Dalal stated that he chose to secure a job over the uncertainty of an income he associated with farming. He described his journey of becoming a Dalal as follows.

When I heard that a foreign company was coming into our area, I was initially surprised and began to think about what that might mean for us. I was curious to learn more about the company's potential to transform the local economy, so I spoke with the local bureaucracy and some of the employees of Posco. Before I know it, my curiosity was my acceptance of the

⁵²³ Interview with Adivasis in Tumulia in July 2018.

⁵²⁴ Fieldnotes from February 2020.

company. I found myself receiving an amount of five thousand a month and more to persuade other members of my community to allow for the company to begin its operations here.⁵²⁵

His journey of becoming a Dalal was a narrative that I heard across forest areas in Odisha. The journey typically began with a sense of curiosity about opportunities that the extractive economy may offer and converted into a position where as Dalals they were being paid by the company to assist it in convincing the forest-dwelling community of the benefits of the project.

The sense of curiosity of the extractive economy was likened to a spirit of adventure by Jitu Jakesika. Jitu was a leader and active member of the Niyamgiri Suraksha Samiti fighting against Vedanta. He was passionate about getting an education and wanted to study in the city. With time he was convinced by close friends working as Dalals to approach Vedanta and see if they would be interested in sponsoring his education.

He eventually did approach Vedanta Resources Pvt Ltd, who agreed to sponsor his education in Bhubaneshwar, the capital city of Odisha. This came at a cost. He had to agree to speak in support of the mining company's entrance before the media and the Dongria Kondh community, who were opposing it. When I asked him about what motivated him to make this choice, he said:

I wanted an education; my parents could not afford to send me to college. I was so passionate to venture out, learn, and see other cultures that I was driven to take this offer. I was adventurous, remaining in the forests was essential to me, but I wanted to know what existed outside too.⁵²⁶

This tension of belonging to the forest-dwelling community and discovering what opportunities were available in the "outside" world emerged in most of my conversations with those who chose to work as Dalals. Rinjo Sikaka, who continues to oppose Vedanta and its operations in Lanjigarh when asked what typified a Dalal, spoke quite precisely about this tension of the desire for adventure and belonging in the forests:

Dalals are those who prioritize their aspirations and interests over the community. They have not been able to reconcile with their cultural demands and want to leave the forests to explore

⁵²⁵ Interview with the Dalal in Jagatsingpur in July 2019

⁵²⁶ Interview with Jitu Jaikasaika in Niyamgiri in February 2020.

what lies outside. I have never felt the need to leave, but some do, and they find becoming a Dalal as one way to do that.⁵²⁷

He referred to Jitu's example, who had become a symbol of what it meant to be a Dalal in the Niyamgiri area. For the aspirational Adivasi surrounded by the extractive economy, becoming a Dalal was an avenue to explore opportunities that may come with engaging in the extractive sector and venturing out of the confines of forest areas.

3.1.2 The Dalit Forest Dweller

“The Dalals often belong to the Dalit community,” said an activist who has been supporting forest-dwelling communities across Odisha to fight against mining companies.⁵²⁸ Dalit forest-dwellers have traditionally been the middlemen who connect Adivasi communities to the marketplace to sell minor forest produce. This intricate inter-dependence is shaped by inequities too. Adivasi communities consider themselves superior to Dalit forest-dwellers, and practice untouchability. Dalit-forest dwellers in Niyamgiri are dependent on the Adivasi community for their livelihood as some work as agricultural laborers in their fields.⁵²⁹

This experience of marginalization is made worse as the law provides more protections to Adivasi communities categorized as Scheduled Tribe as opposed to Dalits categorized as Schedule Caste, who find it harder to claim land rights, as I described in chapter six. In many instances, it is the landless Dalit forest-dwelling community members who become Dalals with the hope of upward mobility.

An interview with a Dalit forest-dweller in Niyamgiri revealed a complicated path to choosing to become a Dalal. When asked what propelled him to make this choice, he responded:

My options for livelihood are limited within the forests. I can negotiate on behalf of the Adivasi communities for their profits. I make some money, but it is not enough. I want to send my children to the city for their education. I decided then to use these negotiation skills in another context, working with the mining company that wanted to enter these forests.⁵³⁰

⁵²⁷ Interview with Rinjo Sikaka in Niyamgiri February 2020.

⁵²⁸ Interview with Sharanya Nayak in Niyamgiri on February 2020.

⁵²⁹ Fieldnotes from February 2020.

⁵³⁰ Interview with a Dalit Forest dweller in Niyamgiri in February 2020.

It is not the norm that all Dalit forest-dwellers are inclined to become Dalal; however, the inequities they face push some of them to make this choice. As many fulfil the role of middlemen who negotiate for the Adivasi community in the market economy, they have the ability to apply these skills in the context of land acquisition by the mining company.

Dalit forest-dwellers who chose to work as a Dalal, saw the mining company's entrance as an opportunity for upward mobility, livelihood security, and lesser caste-based discrimination. Still, in many forest areas, the intricate interdependence that has been forged across generations informs their decisions on engaging with the extractive economy and not merely the desire for upward mobility.

3.1.3 The Fixers

In many forested areas where mining companies are working towards gaining physical possession of land, special local teams of fixers are stationed to work with the forest-dwelling community to gain their trust and eventually the social license to operate. These teams are carefully chosen with a particular skill set to embed themselves within the forest-dwelling community to convince them about the benefits that the project would bring and assess what their demands would be of the company.

In my journey across Odisha's mineral-rich belt, I met many fixers whose principal task was to manage contexts where the forest-dwelling community were protesting the company's entrance and to convince them otherwise. The fixers were instrumental in pushing the forest-dwelling community to negotiate and settle.

In an interview with Prasanta Mallick, who was brought into Kalinganagar soon after the devastating death of thirteen Adivasis, he described his task as a fixer as follows:

We do not need the state as IDCO to come in the way of the direct negotiations between the company and the forest-dwelling community. We need to speak with them directly and arrive at a compensation and package rate that works best for them. It does mean that those who oppose our project must give up their struggle, but we work closely with them to share the benefits to the local economy. If they are not convinced, we continue to speak with them and see what happens.⁵³¹

⁵³¹ Interview with Prasantha Mallick in July 2018.

Prasantha alluded to the fixers role being to step in and clean up the mess created by the state and parastatal agencies like IDCO. In Kalinganagar, Prasantha emphasized that IDCO failed to pay the appropriate compensation and failed to compensate some families. Tata steel had to send its local team of fixers to address this conflict and distrust that the forest-dwelling community had towards the company.

The fixers I interviewed had experience in supporting mining companies in setting up new plants and managing stakeholders. Subodh (name changed), who was heading a local team of fixers for Jindal Steel Works (JSW), described his journey of becoming a specialist in stakeholder management in the following way:

I worked in a steel plant where I supported the plant manager to engage with the trade union. I have always tried to remind the mining companies I have worked with about the workers' interests and those who are vulnerable. In the Posco areas, the situation was tense. The South Korean company did not know how to work with the local community. JSW is an Indian company, and we know what the interests of farmers are. I spent time in these villages and heard their stories of loss. I wanted to earn their trust by becoming one of them and representing their interests to the management in JSW to best address it.⁵³²

Subodh describes his role as being the voice of the vulnerable within the company while failing to articulate his role as a negotiator. The fixers are messengers between the forest-dwelling community and the mining company working towards convincing the forest-dwelling community of the benefits the company might bring.

3.1.4 Leader of the Social or Peoples Movement against the Mining Company

Another archetype of a Dalal is the leader of the social movement against the company. These are leaders who have gained authority and legitimacy within the forest-dwelling community and often speak on behalf of the community in negotiations with the state and the mining company. The leaders of these movements, initially being driven by the interest to prevent the company from entering the forests, are pushed to negotiate with the company as the state's use of violence with the presence of law enforcement creates a hostile environment in which protests are heavily regulated.

⁵³² Interview with Subodh in February 2020.

In Kalinganagar, Rabi Jarika, who was the leader of the social movement protesting forest land acquisition, became a Dalal working to convince the community to sell their lands. He also owned a large amount of land and was paid a large sum of money as compensation for his role as a Dalal. In an interview with Soni Soi, who had lost her son in the shootout that took place in Kalinganagar in 2006, she stated:

Our leaders sold out, they had our trust, and they used it against our better interest. We believed that they had the community's interest in mind, but instead, it was their interest to profit from the large amount of land they owned.⁵³³

Subodh mentioned that the social movement leaders would be an initial point of contact within the community, and very often, they enjoyed a lot of power in persuading the community. The leaders of the social movement, like the aspirational Adivasi, operate from within while trying to create an avenue of an alternative when the option of rejecting the entrance of the company collapses.

3.1.5 The Mining Developers and Operators

A new entrant into the actors involved in the informal space of negotiations is the Mining Developers and Operators (MDO). Mining Developers and Operators were initially companies hired to provide technical assistance to the mining company that holds the lease in operationalizing the mine. They play an essential role now, not merely in the mine's operation but also in the initial process of land acquisition.

Thriveni Earth Movers Pvt Ltd, an equipment manufacturing company, slowly moved up the ranks after the iron ore boom in 2003 to become Odisha's key contractor. Prabhakaran, the owner and managing director of Thriveni, in an interview for Scroll, an online news daily, stated that the key to the success of the company as a leading MDO was:

proficiency in mining and the ability to get what he called a "social license" from the local community, essentially, winning them over through jobs and contracts.⁵³⁴

⁵³³ Interview with Soni Soi in February 2020

⁵³⁴ M. Rajshekhar. 'How a Contractor from TamilNadu carved out an enormous mining empire in Odisha' in The Scroll (November, 2015) <<https://scroll.in/article/760562/how-a-contractor-from-tamil-nadu-carved-out-an-enormous-mining-empire-in-odisha>> last accessed on May 2020.

Thriveni continues to operate in the mining sector as an essential player specializing in crafting the terms on which a social license to operate can be won. As the coal mining sector has opened to private companies, MDOs have become prevalent in the operationalization of existing and new coal mines.

In Talabira, a project by the state-owned Neyveli Corporation (NLC) has been controversial as some forest-dwelling community members oppose its entrance. Recently Adani Enterprises Ltd, a private mining company, has been hired as an MDO where the contract between NLC and Adani stipulates that Adani will be responsible for acquiring land.⁵³⁵ MDOs are seen as specialists in winning a social license and navigating the administrative structure in obtaining clearances. They are employed for their expertise in this.

In an interview with Adani's member overseeing this MDO, on the intricacies of obtaining a social license, he stated:

We accumulate learning from our different projects. We have dealt with many communities protesting for a range of reasons. We record our learnings and the strategies that we have used and that which has worked. This forms the basis of how we develop our strategy in Talabira.⁵³⁶

The idea of accumulated learning supports the claim of MDOs as experts in obtaining a social license. The Dalal's playbook in these archetypes has overlapping tactics that I will address in the section below.

4. The Playbook of Strategies to Obtain an SLO: How Dalal's Operate

Each Dalal archetype has its own distinctive tactical approach. These tactics are used across the mining regions, where I conducted interviews. They specifically involve a set of strategies deployed to gain the forest-dwelling community's trust to obtain a social license to operate.

As I argued earlier, these strategies do not operate in isolation from the state, which remains active as law enforcement with the industrial police force. An example of this is in the Posco areas. As JSW was working towards gaining the forest-dwelling community's trust, the

⁵³⁵ Contract negotiation between NLC and Adani as the MDO is <<https://econts.nlcindia.com/nib/prebid/1718000017>> accessed on May 2020.

⁵³⁶ Interview with the Adani team in Bhubaneswar February 2020

criminal charges made against these communities from 2005 remained. The law enforcement agencies continued to threaten the protestors with arrest.

The tactics deployed by the Dalals are contingent on whether the entrance of the company has been accepted or rejected by the forest-dwelling community. If there is a challenge to the companies' entrance, the tactics discussed below become the basis for forging agreements on the terms of compensation.

The tactics outlined below are gleaned from fifteen in-depth interviews with Dalals who belong to different archetypes. These tactics formed the bedrock of their actions and interventions in the informal space of negotiation. These negotiations cannot be categorized as entirely fair as they take place cloaked by a thin veil of the state's threat in its avatar as the police state.

4.1 Going local

Subodh was the head of the local JSW team working at the village level in Jagatsingpur to obtain the social license to operate. His team invested a large amount of their time in listening to the problems and concerns of the forest-dwelling community members who were willing to speak with them. The fixers primarily used this strategy, that many of them described as "going local." This is a term that is associated with many other everyday references, but it meant something quite specific in this context.

My interview with Prashanta Mallick alerted me to the minutiae of this strategy and its importance. He described it as follows:

The company can seep into these community's everyday lives and understand their aspirations, dreams, and thoughts about the future. We need to convince them that their future is secure with the company coming in. We cannot do that if we do not know what they aspire for. It is a slow process of building trust and involves many other accompanying strategies like helping the community with their healthcare needs, building roads, and showing them that we will take care of them while the state has neglected them.⁵³⁷

⁵³⁷ Interview with Prashanta Mallick in July 2019.

This was a stunning revelation into the modalities of Dalals who spend considerable time operating as covert ethnographers, making sense of these forest-dwelling community's lived realities and aspirations, and using this to convince them of what the company can bring.

In my interviews with fixers, the need to develop micro-political strategies is also brought to light, so the forest-dwelling community begins to associate the company with something good.

Subodh described to me a range of such micro-political strategies that they had used:

It was a hot summer day, and coastal Odisha is warm. We decided that we would go to the local school and give a bottle of cold water and frooti (a popular mango beverage) to the children with a school bag that has JSW etched on it. We need to change their perception of the company being an image of all that is wrong but rather an institution focused on their wellbeing. For instance, we attend weddings that happen in the village as well as funerals. We need to show them that we care, and we are here.⁵³⁸

These micro-political strategies lay the foundation for the company to forge social connections with the forest-dwelling community. The SLO negotiation begins with going local, and these detailed strategies are developed with a ear close to the ground.

An interview with a senior official at JSW who works closely with the local team of fixers in Jagatsingpur reveals another layer of the importance of going local. This can be seen from the way he describes the reasons why Posco failed to enter these forested areas.

Posco failed because it did not connect with the local community. The company is in South Korea, and it has no clue how things are done in India. They hardly spoke with local communities directly. They hired people from the community and paid them to convince the others. That is a strategy that backfired. We have chosen instead to locate ourselves within these villages and are involved in their everyday struggles.⁵³⁹

While it might be farfetched to claim that the fixers engage in the everyday struggles, he points to the significance of this strategy of going local and embedding oneself in these communities. In this brief narration of an incident in Jagatsingpur by Subodh, it clarifies how intimate the fixers are with the lived realities of these communities.

⁵³⁸ Interview with Subodh in Jagatsingpur in February 2020.

⁵³⁹ Interview with Ranjan Panda in JSW February 2020.

We had used a drone to get a sense of the amount of settlement in the area and to conduct a survey before we begin construction. A stone struck the drone, and a teenage boy from the local community stole it. We did not call for his arrest; instead, we spoke with his father and asked for the drone to be returned. The father was grateful that we did not press charges. We take this gentle approach to gaining their trust instead of involving the police.⁵⁴⁰

Going local to the fixers is seen as a strategy to operate from a space of empathy to obtain the social license to operate. To conclude, going local is a strategy employed by fixers based on locating themselves within these communities and becoming part of their every day, so the local people shift their perception from seeing the company as an organization that needs to be opposed to one that ensures their wellbeing.

4.2 Dividing communities

The dominant strategy used by all the archetypes of Dalals is to divide communities into the lines of differing ideas of development, notions of aspiration, and the potential benefit that the company's entrance can bring. These are ideological divides and divides based on the identities of the forest-dwelling community members.

A candid conversation with a member of a personal relations agency that had worked closely with the team of fixers in multiple projects, including Posco, revealed the need for such a strategy:

We need to amplify the divide of these communities. Gaining the SLO is a game of numbers. How many members from the local community can we convince that the project will ensure a promising future for the community. Where we are unable to convince them like Niyamgiri, we must retreat. There the community had come together quite strongly that it was difficult for us to penetrate. If there isn't an existing divide, we try to create one, and if that does not work, we have to move away from the area, or it can get ugly with the use of force like Kalinganagar.⁵⁴¹

This interview is evidence of the sophisticated approach to how the SLO is gained. It is a crafty exercise of amplifying divides or creating them. Dalals interviewed for this thesis described the approach of dividing communities as elevating the voices of aspiration. They argued that

⁵⁴⁰ Interview with Subodh in Jagatsingpur in February 2020.

⁵⁴¹ Interview with an associate of Perfect Relations in February 2020.

the protest movements marginalized those who wanted the company in their forests. Using the trope of the involvement of foreign NGOs influencing domestic economic decisions, many Dalals dismissed the legitimacy of protest movements on the ground.⁵⁴²

The strategy of operating from a space of empathy is restricted to those forest-dwelling community members who accept the company's entrance. The Dalals tend to either exclude members of the community that oppose the company from conversations of compensation and rehabilitation and other community activities the company organizes. The divide is amplified through this ability to exclude those opposing the project from the informal space of negotiation. Those who accept the project are dealt with care, and terms of compensation are drawn out. Subodh illustrated this with an example:

As we needed to employ a few locals for some work in the construction of a road. We ensured that this benefit was given to those who accepted the project, while those who protested did not benefit from such employment.⁵⁴³

Subodh mentioned, the divide is essential to dismiss the legal challenges the company face from social movements. In describing his engagement with lawyers who were fighting a case filed by the community members opposing the construction of the boundary wall, he stated as follows:

They have approached the tribunal because we have done something illegal by violating the consent provision. It assumes that all the community members are opposed to the project. We countered that with evidence from others who want the project to develop.⁵⁴⁴

This polarised situation is used by Dalals to their advantage by elevating the voices of acceptance to construct a social license. These voices of acceptance enter the formal legal realm as legal evidence in cases. Companies begin to deploy these strategies early on to combat the legal mobilization strategies used by forest-dwelling communities.

⁵⁴² Fieldnotes from February 2020.

⁵⁴³ Interview with Subodh in Jagatsingpur in February 2020.

⁵⁴⁴ Interview with Subodh in Jagatsingpur in February 2020.

5. Bargaining, negotiations, and the SLO

The realm of bargaining and negotiations in the SLO process, as stated earlier, is limited to claims of redistributive justice. Private companies have more flexibility in moving beyond the legally mandated amounts for compensation. State-owned enterprises lack that flexibility as such decisions must be approved by the board and relevant bureaucratic authorities.

A shift occurs from the deliberative avenue in formal legal requirement of Gram Sabha consent to the one of negotiation and bargaining in the informal. Negotiations take place at an individual level with an unequal distribution of power in determining how the process will occur. This informality works to the advantage of Dalals who are able to broker agreements while occupying a position of power in these negotiations. An example of this is in Kalinganagar where large landowning forest-dwellers were able to get better terms of compensation from Dalals than the smaller landowners who were given a lower amount.

The process of constructing the SLO benefits from the deliberative vacuum present because of the state operating in its non-deliberative modalities. The deliberative vacuum is where the de jure acquisition of land has occurred, and forest-dwelling communities are left without adequate compensation. It is here that the Dalals swoop in to begin the process of informal negotiations through the carefully crafted strategies of going local and dividing communities.

These negotiations and dialogues are unregulated. Some forest-dwelling community members welcome such negotiations as they see it as an opportunity to get out of this complex conflict with some compensation and financial security. Others see it as the only option available as the articulation of dissent is criminalized by the police state.

Manorama Kathua describes this reconfiguration in the process of decision-making with the absence of the state and the presence of the Dalals for negotiation.

The Dalals become the company's face and someone that the forest-dweller can go to discuss how to wrangle his way out of the conflict. The Dalal is present, and the state is absent when the forest-dwelling community is desirous of dialogue or negotiation. That is when negotiations shift to the company and the community without the state.

As has been shown in this chapter, the SLO becomes the site for bargaining and negotiations at the level of individual families on compensation. Once many families agree to sell their

land, a broader community-wide agreement is negotiated on resettlement and rehabilitation. The Diagram below shows the nature of negotiations that take place.



Figure 12: Flow of the Negotiation Process

The Dalal approaches an individual family to negotiate terms. The Dalal then presents that to the land acquisition team of the mining company, which may revert back with an offer. These individually brokered agreements are varied and in interviews, what was revealed was the difference in the amount of compensation received.

An example of such an individually brokered agreement is in Kalinganagar where an Adivasi forest-dweller was promised a house in the rehabilitation colony that was established along with jobs for each adult member of the family. When asked about how the process was to arrive at these terms she said:

They first approached us with the offer of a house and a job for the adult male members of the family in exchange for land. We were losing our farmland and we knew that would not be enough. We spoke to others in the community and they said they were promised jobs for every adult member. We pushed back on this offer and received these terms. The negotiations on the rehabilitation colony took place at the community level in terms of what the houses should look like and what facilities should be made available.⁵⁴⁵

The mining company here replaces the developmental state when arriving at a larger community-wide agreement on rehabilitation and resettlement as the agreement includes access to public facilities like schools, hospitals, and community cultural centres. The mining company becomes a proto-state body operating with the legitimacy derived from these individually brokered agreements and community-wide agreement on rehabilitation and resettlement.

⁵⁴⁵ Interview with an Adivasi in Kalinganagar on February, 2020.

In Kalinganagar, where this form of agreement is operational, forest-dwelling community's inability to access the hospitals or the schools can be seen. Many were promised jobs and are yet to receive them. In light of these failed promises, the bindingness of these brokered agreements is questionable. With the state's retreat, the forest-dwelling community is left with no avenue to hold the mining company accountable to these agreements. Thus, it becomes pertinent for the state to be an arbiter and regulator of the competing interests of business and citizens instead of being absent when informal negotiations are underway.

6. conclusion

In conclusion, the social license to operate is a product of the informal space of negotiations between Dalals and forest-dwellers. Dalals, in their different archetypes, are instrumental in paving the way for the company to enter the forest areas.

The negotiation processes are restricted to chalking out the terms of redistribution in the form of jobs, compensation, and other benefits. The Dalal apart from paving the way for the entrance of the company provides an avenue for members of the forest-dwelling community who wish to bargain and engage with the extractive economy albeit in a context where asymmetry of power exists.

The SLO gained after these strategies are deployed is a tentative one as protests continue for other reasons. As Soni Soi described,

the company claims that it has the SLO and the local community's acceptance. Yet none of us can access the hospital when we are sick, and we cannot access clean water. The state must step in to look after our needs and not the company. The company is only going to think about its profits.⁵⁴⁶

Thus redistribution, resettlement, and compensation may have occurred temporarily. Companies have failed to fill the development deficit in these areas. Social license, which is formed on the basis of bargaining, does not have the capacity to socialize a relationship born out of the desire to extract and profit. Forest-dwelling communities are left to fend for themselves as they wait for the state in its deliberative avatar.

⁵⁴⁶ Interview with Soni Soi in February 2020

9. Complicated Dance with the Law: Strategies of Legal Mobilisation and the Selectively Deliberative State in the Three Mining Sites

1. Introduction

Forest-dwelling communities share a tenuous relationship with formal law, Lado Sikaka describes:

The law is a site for the expression of hope, aspiration, and justice, but it is similarly a site for the powerful to back their unjust acts as being legally just. Because of this dual nature of the law's creature, we cannot reject it. We must belong in it on our terms. We must use the law to influence its understanding of us and our needs. We need it to check its repressive use by the state.⁵⁴⁷

Social movements across the three mining sites have strived to infuse the law with their ideas of hope, aspiration, and belonging despite law being used by the pro-business state to legitimize its decisions. In the three mining sites social movements have strategically used laws like the Forest Rights Act, 2006, the Panchayat Extension of Scheduled Areas Act, 1996 and innovative legal arguments to strengthen the jurisprudence of repair described in chapter three.

Sandeep Pattnaik, an environmental activist who has engaged with social movements against dispossession across Odisha stated:

Our relationship with the law is a complicated dance. Social movements decide when the law steps in and when it steps out. Think of it as a decision to call upon formal law with the hope that we may get some respite and reject the law when we feel it will harm our interests. It is a tactful stepping in and stepping out of the law that gives us the flexibility to achieve our goals.⁵⁴⁸

Legal mobilization is described by the social movements in the three mining sites as the delicate task of deciding when the law steps in and how it interacts with other forms of mobilization like protests. Legal mobilization broadly refers to "law being mobilized when a desire or want is translated into demand as an assertion of rights."⁵⁴⁹ Many social movements

⁵⁴⁷ Interview with Lado Sikaka in Niyamgiri on February 2020

⁵⁴⁸ Interview with Sandeep Pattnaik in Bhubaneswar on August, 2019.

⁵⁴⁹ Richard O. Lempert, 'Mobilizing Private Law: An Introductory Essay.' (1976) *Law & Society Review* 11, no. 2

like the right to housing or the right to a clean environment in India have used the language of rights to translate their wants into legally valid claims.⁵⁵⁰

Legal mobilization in this chapter refers to the use of formal law in multiple sites and forums, particularly courts. Approaching courts has been a traditional legal strategy used by social movements since the requirements of standing were loosened to encourage access to justice through Public Interest Litigations (PILs) in India in the 1970s. The expanded understanding of standing to include cases filed by those in the public interest has opened a floodgate of cases before the High Court and Supreme Court on matters of public policy and the environment.⁵⁵¹ My analysis of legal mobilization extends to other fora apart from courts like independent committees set up by the Ministry of Environment Forests and Climate Change, the local bureaucracy where letters written by social movements are submitted and the use of law in informal negotiations seen in chapter eight.

The use of law by social movements in the three mining sites I show occurs in parallel to other forms of mobilization, including lobbying, negotiations, and protests. Scholars view legal mobilization in an all-encompassing fashion to include these tactics.⁵⁵² I similarly view legal mobilization in this all-encompassing scope.⁵⁵³

This chapter aims to answer the question of how have the forest-dwelling communities used the law? And what legal strategies have they deployed? In this chapter, I also ask: are courts and independent committees as forums where legal mobilization occurs diluting or enhancing the consent provision's deliberative potential?

In describing the strategies used, I demonstrate how each social movement in the three sites operates on an overarching approach that guides their legal strategy. I also show how the distance of the jurisdiction of the legal forum plays an important role in interrogating the economic priorities of Odisha's extractive state to create opportunities for deliberation with the state. I highlight how the avenues used for legal mobilization, namely, courts and

⁵⁵⁰ Kenneth Bo Nielsen and Alf Gunvald Nielsen Eds *Social Movements and the State in India* (Palgrave Macmillan 2016)

⁵⁵¹ Anuj Bhuwania, *Courting the People* (Cambridge University Press, 2017)

⁵⁵² Frances Kahn Zemans. "Legal Mobilization: The Neglected Role of the Law in the Political System." (1983) *The American Political Science Review*, vol. 77, no. 3, , pp. 690–703

⁵⁵³ Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK.' (2012) *Law & Society Review* 46, no. 3 pp. 523-56.

independent inquiry committees challenge the paper truth, or the materiality used to assert state authority by the pro-business bureaucracy.⁵⁵⁴ I further argue that approaching courts has a dual role of inhibiting the deliberative potential of the consent provision as the conflict is decided in an adversarial forum as well as empowering democratic deliberation through its participatory effect.⁵⁵⁵

2. Legal Mobilisation in the three contested sites: Repertoires of Legal resistance

In this section, I describe legal strategies in the three mining sites that have been deployed for two purposes—firstly to prevent the entrance of the mining company into the forest area by withholding consent. Secondly, where the law is used for redistributive ends like accessing better compensation for land acquired. The common thread across the legal strategies deployed is to challenge the failures of the state to deliberate on these matters.⁵⁵⁶

The legal strategy crafted in each of these mining sites is driven by an overarching approach, in Niyamgiri the approach was to harness the legal protection that came with the categorization of forest-dwelling communities as Scheduled Tribe domestically and Indigenous peoples internationally and simultaneously approach multiple fora. In the Posco case as the forest-dwelling community was not identified as Scheduled Tribe it relied on building a robust network of activists across multiple levels of governance to develop a nodally coordinated enforcement pyramid to shape their legal strategy. Lastly, in Sundergarh, the forest-dwelling community was creative in designing campaigns like the pathalgadi movement which brought attention to their rights in a political economy of coal where forest land is compulsorily acquired.

⁵⁵⁴Mayur Suresh 'Accountability, Authority and Documentary Fragility: Shadow files and Trial in India'. In Susan M. Sterett, and Lee Demetrius Walker, (Eds.), *Research Handbook on Law and Courts* (Edward Elgar Publishing Ltd, 2019)

⁵⁵⁵ Cesar Rodriguez- Gravito and Diana Rodriguez-Franco, *Radical Deprivation on Trial* (Cambridge University Press, 2015)

⁵⁵⁶ Drawing from Charles Tilly's work on Repertoires of Contention in his book *The politics of collective violence*, (Cambridge University Press, 2003) to describe tools, tactics and actions available to social movements at a given time I use this term to describe the tools, strategies and tactics used by these movements with the use of law.

3. Legal Strategies in Withholding Consent

3.1 Niyamgiri Case: Repertoire of Legal Resistance guided by claims of recognition as Scheduled Tribes.

The legal route taken, and the choices made by the Niyamgiri Suraksha Samiti (NSS) or Committee to Save Niyamgiri was based on a sophisticated understanding of the empowering potential of mobilizing identity-based claims recognized in law and the typology of justice where claims of recognition and redistribution fit well within the domestic legal framework which was elaborated in chapter six.

The Dongria Khond community is legally categorized as a particularly vulnerable tribal group. A category which comes within the ambit of communities categorized as scheduled tribes within domestic law. The land they inhabit is legally recognized as a scheduled area—these categorizations brought with its constitutional protections that were used in their legal strategies.

As Sandeep Pattnaik described the nuances of how the legal strategy was developed, he said:

The community understood they needed to mobilize on the threat that this project had to their identity. The first set of discussions was always about the legal basis to challenge this project in the best possible way so that their voices can be heard. The attention that the story of the Dongria Khond as the avatar tribe drew was significant. The legal challenge had to replicate this narrative of loss and the need for cultural survival.⁵⁵⁷

With the careful choice of a narrative of injustice, a nuanced legal strategy was developed grounded in the FRA when it was passed. In using this protective legal framework, the NSS approached different fora simultaneously including courts, the local bureaucracy, and independent committees at multiple levels of governance namely local, sub-national, national, and international.

The strategy of approaching all levels of governance and fora relevant to the struggle simultaneously was done with the understanding that they wanted to address the problem from all angles and jurisdictions with the hope that a positive legal outcome in one jurisdiction

⁵⁵⁷ Interview with Sandeep Pattnaik in Bhubaneswar August 2019.

can influence the decision of the state to acquire land and the state will then enter into dialogue with the forest-dwelling community. The use of law was accompanied with protests on the ground in Niyamgiri as well as internationally in London. The strategy of legal mobilization was combined with the tools of political mobilisation.

In the Posco case we will see how the social movement used a nodally networked enforcement pyramid with a sequential approach to escalating from a lower level of governance to a higher level. In the Niyamgiri case the social movement did not follow this sequential approach but instead chose to place the conflict in all relevant jurisdictions at one go. Satya Mahar an activist associated with the NSS described this approach as follows:

We thought we need to make sure that every legal forum was used and since many were available, we targeted them all at the same time. Our approach was guided by the limited resources and time we had. We felt if we combined this strategy of approaching all fora available with protests on the ground the loudness of it all will grab the attention of the state to reverse its decision of acquisition.

This approach of simultaneously approaching fora at multiple levels benefited from the insurgent citizenship practice before the legislature which led to the passing of the FRA in 2006 that provided a new legal hook. The legal strategies below are described as a combination of the laws used, legal arguments presented, and the forum used to file a petition before and after the passing of the FRA. The messiness of approaching different fora from the local bureaucracy, courts, legislature, and international non-judicial mechanisms created an interaction between multiple legal outcomes that laid the foundation for the landmark SC judgement.

3.1.1 Sequence of the Legal Strategy Deployed Before and After the Passing of the FRA

3.1.2.1 PILs before the courts prior to the passing of the FRA

The initial legal challenge to granting forest clearance to Vedanta Resources Pvt Ltd stemmed from two PILs filed by concerned citizens namely, Biswajit Mohanty who is the secretary of a non-profit Wildlife Society of Orissa and R.Sreedhar who is the co-founder of Bionics

Environmental Solutions an environmental think-tank. The two PILs were filed before the High Court of Odisha.

The PILs highlighted the violation of the Environment Protection Act,1986, Forest Conservation Act,1980 and Panchayat Extension of Scheduled Areas Act,1996.⁵⁵⁸The PILs legally challenged the forest clearance granted by laying more emphasis on the argument of conserving the forest areas as the laws and jurisprudence protecting the rights over sacred sites and forest rights was weaker in comparison.

In chapter two I have demonstrated how the lack of implementation of laws like PESA has caused the regime of dispossession to operate in forest areas unchecked. Environmental laws particularly the Environment Protection Act,1986 and the Forest Conservation Act,1980 provided a legal avenue for challenging the regime of dispossession on the grounds of the environmental impact of the project.

An activist with Green Kalahandi, an environmental group active in the Niyamgiri region, described the first set of meetings on the potential legal action being planned:

Vandana Shiva had visited the area, and we had a workshop on how to challenge this mine legally. We proposed that this would be a test case, a case of strategic litigation to further a rights discourse grounded on their sacred rights and the ecological value of these areas.⁵⁵⁹

These PILs were test cases to expand the horizon of environmental jurisprudence on the aspect of the protection of sacred sites and sovereignty claims based on a sacred association with forest land. Anuj Bhuwania in his book *Courting the People* makes a poignant argument of how PILs have come to marginalize the interests of the poor as concerned citizens filing PILs represent a class interest that paves the way for an elitist environmental jurisprudence or what sociologist Amita Baviskar labels bourgeois environmentalism.⁵⁶⁰ The Niyamgiri case is testament of how the legal avenue of PILs when rooted in social movements and filed by these movements can correct the problematic question of representation in public interest cases.

⁵⁵⁸ Kanchi Kohli, 'Yours Today, 'Mine' tomorrow' in Seedling (July,2009) < <https://www.grain.org/en/article/744-yours-today-mine-tomorrow> > accessed on January 26 2021.

⁵⁵⁹ Interview with activist from Green Kalahandi in August 2019.

⁵⁶⁰ Anuj Bhuwania, *Courting the People:Public Interest Litigation in Post-independence India* (Cambridge University Press,2017) and Amita Baviskar, *Uncivil City:Ecology, Equity and the Commons in Delhi* (Sage,2020)

The two PILs were considered and dismissed by the High Court and the Supreme Court (SC), where the court stated that stage II, which is the final stage of granting of the forest clearance, could be provided based on a set of conditions that needed to be fulfilled. The conditions stipulated in the Supreme Court order were on aspects of resettlement and rehabilitation of the Dongria Khond community that will be impacted by the project. It ruled that a special purpose vehicle be created for the development of the Dongria Khond community. It was silent on the question of sacred rights to Niyamgiri. ⁵⁶¹

Another peculiar suggestion made by the Supreme Court was the need for the clearance to be granted to the Indian subsidiary Sterlite and not Vedanta Resources Pvt Ltd, which had a bad track record on compliance to environmental laws. ⁵⁶² Madhu Sarin, a senior activist on forest rights describes the argument as a way of shifting the responsibility of compliance to the Indian subsidiary but refusing to address the elephant in the room, which is the Dongria Khond people's sacred rights.⁵⁶³ This judgement was in response to the move towards disinvestment by the Sovereign Wealth Fund of Norway on the grounds of human rights violations. Thus, approaching fora internationally simultaneously had assisted in influencing the legal outcome before the domestic courts.

Siddharth Nayak, an activist who has been working with local communities who live beside mining areas in Odisha, filed a review petition before the Supreme Court to reconsider its decision. The SC dismissed this review petition because the matter stood settled and that stage II of the forest clearance was to be granted once the conditions laid out were fulfilled. It is important to note here that the legal framing was not grounded on the consent provision or the FRA, which was non-existent then, but on arguments of conservation and rights of scheduled tribes in scheduled areas.

⁵⁶¹ M/s. Sterlite, 3rd respondent herein, then moved an application -being I.A. No. 2134 of 2007 - before this Court, followed by affidavits, wherein it was stated that M/s. Sterlite, State of Orissa and Orissa Mining Corporation had unconditionally accepted the terms and conditions and modalities suggested by this Court under the caption "Rehabilitation Package" in its earlier order dated 23.12.2007. Siddharth Nayak, who was the petitioner in Writ Petition No.549/07, then filed a Review Petition No. 100/2008 and sought review of the order dated 23.11.2007 passed by this Court stating that this court had posed a wrong question while deciding Interlocutory Application. No. 2134 of 2007

⁵⁶² *Ibid* 556.

⁵⁶³ Madhu Sarin, 'Decoding the Niyamgiri Verdict'. *Down to Earth*,2013.

<<https://www.downtoearth.org.in/blog/forests/decoding-the-niyamgiri-verdict-4046>>

3.1.2.2 Independent Committees with the Passing of the FRA

The FRA's passing provided a new legal space to revisit the matter that the SC had ruled on. The FRA, with the consent provision in the 2009 notification, became the legal basis for articulating the rights of the Dongria Khond to reject the state's decision to grant the forest clearance.

Jairam Ramesh, who was the Minister of Environment and Forests at the time, was motivated to revisit the decision of granting stage II of the forest clearance process. In an interview with Jairam Ramesh, I asked what was it that triggered the revisiting of this case, to which he responded:

There were massive civil society protests and legal challenges in multiple fora especially internationally caught our attention, and most importantly, there was a new law in place that had to be complied with before granting the forest clearance. We had to ensure that the FRA was complied with too and then investigate if the clearance can be granted.⁵⁶⁴

The FAC, which is the decision-making authority within the Ministry of Environment, Forest, and Climate Change on granting or rejecting the forest clearance, appointed an independent committee headed by Usha Ramanathan a noted legal scholar to investigate the compliance of the FRA. This is an example of a progressive legislation being retrospectively applied despite the legal conflict being settled in the highest court. The investigation by this committee was an important one as it presented an avenue for the Dongria Khond to present their narrative of rights violations and testimonies of injustice.

Usha Ramanathan, who headed the first of the two independent committees which had been set up, described her visit to the Niyamgiri area as critical in documenting the violations of forest rights:

The bureaucracy that had to implement the Act was visibly compromised and it did not want to challenge the mine's opening. The nature of information reaching the FAC was insufficient, and our committee did the initial task of documenting the violation of forest rights. A whole range of forest rights had been violated, and we suggested that the Act must be implemented before the clearance is granted or rejected. The FRA was a new law then, and the administration and

⁵⁶⁴ Interview with Jairam Ramesh in Delhi in July 2018.

community were struggling with its implementation. However, here I found enough evidence based on interviews with the community that the state had made no effort.⁵⁶⁵

The initial exercise of documentation through the Usha Ramanathan committee was crucial as the Dongria Khond community could incorporate evidence through testimonies that challenged the paper truth presented to the FAC by the extractive state of Odisha. The submission made by Usha Ramanathan reports on the situation in Niyamgiri as follows:

There is unrest palpable among the Dongria Konds. Uncertainty and anger that the company's entry could mean an end to their lives as they know it, and so to their very survival, was in evidence. These concerns need to be addressed.⁵⁶⁶

The Usha Ramanathan Committee had suggested that another committee be set up to examine the violations. This suggestion led to the formation of a four-member committee headed by N.C Saxena, which extensively documented the FRA's violation. In an interview with Lado Sikaka, he described how these committees became a forum for the Dongria Khond community to mobilize the law to represent their interests:

These committees were extremely valuable as it was an opportunity for us to speak to these experts on how this project would impact us. The FRA gave us a new vocabulary to voice our thoughts, and we used it to help these committees document what was happening on the ground. We showed them how our traditional way of life would be sacrificed if this project comes up.⁵⁶⁷

The N.C Saxena committee report was an integral part of the evidence used by the MoEF, FAC, and the challenge before the Supreme Court by Odisha Mining Corporation (OMC) to reject the grant of the forest clearance. Legal mobilization with the passing of the FRA included engaging with the local bureaucracy to ensure its implementation and beginning the process of filing individual and community claims at the Gram Sabha.

⁵⁶⁵ Interview with Usha Ramanathan in New Delhi in July, 2018.

⁵⁶⁶ Usha Ramanathan report submitted to the FAC available at <https://www.banktrack.org/download/fac_draft_report_site_visit_lanjigarh_dongria_kondh_area_/100211_report_site_visit.pdf> accessed on May 2020

⁵⁶⁷ Interview with Lado Sikaka in Niyamgiri in February 2020.

3.1.2.3 Back to the Supreme Court after the passing of the FRA

Orissa Mining Corporation challenged the decision taken by the MoEF of rejecting stage II of the forest clearance. This challenge's legal basis rested on the MoEF violating the previous SC order where it ruled that the forest clearance should be granted once the conditions had been fulfilled. The MoEF, through a letter from Attorney General Golam E Vahanvati, obtained an interpretation of executive authority such that they could violate the initial court order given and use their discretionary power to decide against it.⁵⁶⁸ This is an instance where discretionary power of the executive was used by the state to be deliberative and not operate in its non-deliberative modality of the paper state.

The tone and tenor of legal arguments presented by the lawyer for the Dongria Khond Sanjay Parikh and the counsel for the MoEF and CC Mohan Parasaran was grounded on the findings of the N.C Saxena committee report on the violations of the FRA.⁵⁶⁹

Interestingly, the MoEF and CC had filed an affidavit in this case that the final decision-making power on granting or rejecting the forest clearance rested with the state and not the Gram Sabha. Justice Aftab Alam, however, retorted that as the Dongria Khond community's sacred right was being affected, the decision-making authority had to be vested in the individual Gram Sabha.⁵⁷⁰

Sanjay Parikh, the counsel for the Dongria Khond, spoke to the importance of the community's sacred rights. The discussion that ensued in the court was whether a religious right meant a right to property. The Supreme Court eventually ruled as follows:

Religious freedom guaranteed to STs and the TFDs under Articles 25 and 26 of the Constitution is intended to guide a community of life and social demands. The Articles mentioned above guarantee them the right to practice and propagate matters of faith or belief, but all those rituals and observations are regarded as an integral part of their religion. Their right to worship the deity Niyam-Raja has, therefore, to be protected and preserved⁵⁷¹

⁵⁶⁸ Letter of Attorney General accessed from the Nehru Memorial Archives in New Delhi.

⁵⁶⁹ Inside report from the Supreme Court Niyamgiri Case available at <<http://www.foilvedanta.org/news/inside-report-from-the-supreme-court-niyamgiri-case/>> accessed on May 2020.

⁵⁷⁰ Ibid 563.

⁵⁷¹ Orissa Mining Corporation Ltd V Ministry of Environment and Forests (Writ Petition (CIVIL) NO. 180 OF 2011)

The Supreme Court became the forum for examining the violation of the recently passed FRA and religious rights which were being violated. The legal mobilization efforts were reactive to the legal opportunities available with the passing of the FRA and followed a sequence of going to the court, then the independent committees, and eventually back to the SC.

3.1.2.4 The Gram Sabha and the Consent Provision

A significant legal basis for challenging the mining company's entrance apart from the violation of sacred rights was the right to free, prior, and informed consent. This right was read into the FRA by the N.C Saxena committee and explicitly stated within the executive order of 2009.

The Supreme Court, in its ruling of 2013, read this right as an integral part of protecting the sacred right of the Dongria Khond community over the Niyamgiri hills. The Supreme Court recognized the authority of the Gram Sabha as follows:

We are, therefore, of the view that the question whether STs and other TFDs, like Dongria Konds, Kutia Kandha, and others, have got any religious rights, i.e., rights of worship over the Niyamgiri hills, known as Nimagiri, near Hundaljali, which is the hilltop known as Niyam-Raja, have to be considered by the Gram Sabha. Gram Sabha can also examine whether the proposed mining area Niyama Danger, 10 km away from the peak, would in any way affect the abode of Niyam-Raja. Needless to say, if the BMP, in any way, affects their religious rights, especially their right to worship their deity, known as Niyam Raja, at the top of the hill of the Niyamgiri range of hills, that right has to be preserved and protected.⁵⁷²

This decision of the Supreme Court to transfer decision-making power to the Gram Sabha for the violations of religious rights and the recognition of forest rights resulted in the referendum being conducted in the presence of a district judge. The SC decision remains ambiguous on who has the authority to grant or reject a forest clearance - the Gram Sabha or the MoEF and CC. The consent provision in this judgement is interpreted in a limited manner

⁵⁷² Orissa Mining Corporation Ltd V Ministry of Environment and Forests (Writ Petition (CIVIL) NO. 180 OF 2011)

wherein the sacred association of communities with the land is viewed as a qualifying criterion for forest-dwelling communities to be able to withhold consent.

The Gram Sabha meeting that was conducted for the referendum is where the details of the project and the nature of rights violation were presented. The Gram Sabha now became a site for the community to articulate its dissent against the mining company whose decision had to be heard by the state. The regulatory authority of the Gram Sabha in the forest clearance process was recognized, however after the Niyamgiri experience there has not been another case where forest-dwelling communities have successfully withheld consent in preventing the start of mining operations.

3.2 The Posco Case: Repertoire of Legal Resistance as a strategy of creating opportunities to deliberate with the state through a nodally coordinated enforcement pyramid.

3.2.1 Threshold of Creating Opportunities to Deliberate with a Nodally Networked Pyramid in Legal Mobilization.

The legal mobilization strategies used by the social movement against Posco called the Posco Pratirodh Sangram Samiti (PPSS) shows how this social movement harnessed multiple legal orders, including international soft-law instruments, to pressure Odisha's extractive state to shift to its deliberative mode.

PPSS in an effort to create opportunities to deliberate with the state adopted a legal mobilization strategy of engaging with each level of governance and the judiciary to explore its potential to create room for discussion with the state. Sandeep Pattnaik uses the term threshold as a way to describe the limitation or saturation of a given legal strategy at that particular level of governance in its ability to create an opportunity to deliberate with the state. In order to overcome the saturation caused by the constraints of the political economy of extraction, PPSS would shift to the next level of governance or jurisdiction of a higher court.⁵⁷³

Unlike the Niyamgiri case, the Posco case used the threshold approach as the community is categorised as 'Other Traditional Forest Dwellers', these communities are viewed by the state as the unworthy steward and less deserving of forest rights, described in chapter six.

⁵⁷³ Interview with Sandeep Pattnaik in Bhubaneswar on July 2019.

Thus, the identity of the forest-dwelling community could not be the only basis for forming a legal strategy. This difference is highlighted in the independent committee report by Meena Gupta which investigated the implementation of the FRA in the area as follows:

It is essential to point out that POSCO and Vedanta are quite different projects and operate in different environments and circumstances. Vedanta's alumina plant (and the bauxite mine for which lease was applied for by the Orissa a Mining Corporation) is located in the less developed western part of Orissa, a Scheduled Area which is home to two Primitive Tribal Groups (PTGs). These tribes are forest dwellers whose livelihood and culture depend on the dense forests in the area; displacing them would destroy their lives. Scheduled Tribes enjoy an important Constitutional status, and disturbing or displacing them stands on a different footing from other people's displacement. On the other hand, POSCO's plant is to be in a coastal district, in the more developed eastern part of Orissa; the area is not a Scheduled Area and has virtually no Scheduled Tribe people.⁵⁷⁴

The community's identity and the categorization of land in the Posco affected areas did not enjoy the special protection that Scheduled tribe and Scheduled areas have.

As Prashant Paikaray addressed this difference in the ability of the community to harness the law, he stated:

Unlike Niyamgiri, we did not fit the frame of the Adivasi as is imagined by the state. They are forest-dwellers, but their claim is not necessarily a cultural one but an economic one. They are mobilizing to keep Posco at bay because they want to retain their current livelihood practice. This required us to devise a strategy where we could critically question the development model being used by the state of Odisha.⁵⁷⁵

The privileging of livelihood claims and the use of law in Posco shaped the legal strategy quite differently as opposed to the Niyamgiri case which focused on religious rights of the Dongria Kondh community.

⁵⁷⁴ Report by the Meena Gupta committee along with the dissenting note, <<http://www.indiaenvironmentportal.org.in/content/318441/report-of-the-committee-constituted-to-investigate-into-the-proposal-submitted-by-posco-india-pvt-limited-for-establishment-of-an-integrated-steel-plant-and-captive-port-in-jagatsinghpur-district-orissa/>> accessed on April 8, 2019.

⁵⁷⁵ Interview with Prashant Paikaray in July 2018.

The shift from one level of governance to another is made possible because of a nodally networked enforcement pyramid where networks of activists at multiple levels use plural legal orders to challenge the state's decision made in its non-deliberative avatar. While an enforcement pyramid refers to an escalation in the choice of the legal remedy sought or approach used by regulatory agencies, here we see the nature of escalation in the choice of forums, jurisdiction and legal strategies.⁵⁷⁶

Peter Drahos speaks of a nodally networked enforcement pyramid as a framework to understand how seemingly weak actors might secure the possibility of a treaty on traditional knowledge internationally.⁵⁷⁷ In it, he shows that the nodally networked enforcement pyramid is the coming together of a nodal governance approach to plan the escalation of strategies ordered in the form of different levels of an enforcement pyramid.⁵⁷⁸ Nodal governance refers to understanding the role that nodes, which are a group of actors or the coming together of two networks that shape decisions and governance. These nodes share a common purpose.⁵⁷⁹

The POSCO Pratirodh Sangram Samiti (PPSS) was formed immediately after the MoU was signed between the state of Odisha and Posco in July 2005. In the course of the struggle over fourteen years, they have built what they have termed as networks of solidarity at multiple levels to prevent the entrance of the mining company.⁵⁸⁰ From the local, national to the international. These networks have informed their legal mobilization strategies.

The networks of solidarity were groups consisting of lawyers, activists, writers, and filmmakers in India's major cities, as well as solidarity networks internationally like the Economic Social and Cultural Rights-Network (ESCR-Net), an international network of social movements, activists, and advocates on economic, social and cultural rights. These networks at the multiple levels provided the PPSS with the agility to shift forum, strategy, and jurisdiction.

The shifting of the legal conflict to a different forum at a higher level is seen as a way to build pressure on the government in Odisha to shift to a deliberative mode. As Prashant Paikaray

⁵⁷⁶ John Braithwaite, *To Punish Or Persuade: Enforcement Of Coal Mine Safety* (SUNY Press, 1985)

⁵⁷⁷ Peter Drahos, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) Temple Law Review, 77 pp. 401

⁵⁷⁸ *Ibid* 571.

⁵⁷⁹ *Ibid* 571

⁵⁸⁰ Interview with Prashant Paikaray, August, 2019 in Bhubaneshwar.

described this strategy of escalation and the importance of distance in the jurisdiction, he stated:

We knew that if we used the law only at the local level or within Odisha, we would not be able to challenge the decision taken by the state successfully. One way to describe this is the distance in the jurisdiction is a way to interrogate the state's economic priorities. If you look at the Niyamgiri movement closely, you will see that the international pressure and the central government changed the decision, not Odisha's state government.⁵⁸¹

In interviews, it was argued that pressure on the local bureaucracy built as the mobilization occurred at the national and international level and seldom at the local level.

The move from one level to the next is seen as a show of strength and reach of PPSS. When the pro-business state took to aggressive methods of ensuring compliance towards acquisition, moving to the national level was seen as a way to reduce repression on the ground.

The Gram Sabha resolutions in 2010 indicated that consent was withheld, and that diversion of forest land should not be permitted. Seen in chapter five, the paper state resulted in bureaucratic interpretations that rendered the FRA inapplicable. Below I map the legal mobilization strategies at the local, sub-national, and national levels across the enforcement pyramid and explain how movement between the different levels took place. I examine the choice to escalate across the levels which was made to trigger the deliberative circuit of decision-making within the state. The threshold of creating deliberative opportunities is an effective way to unpack the legal mobilization strategies used by PPSS.

⁵⁸¹ Interview with Prashant Paikaray in Bhubaneswar in July ,2018.

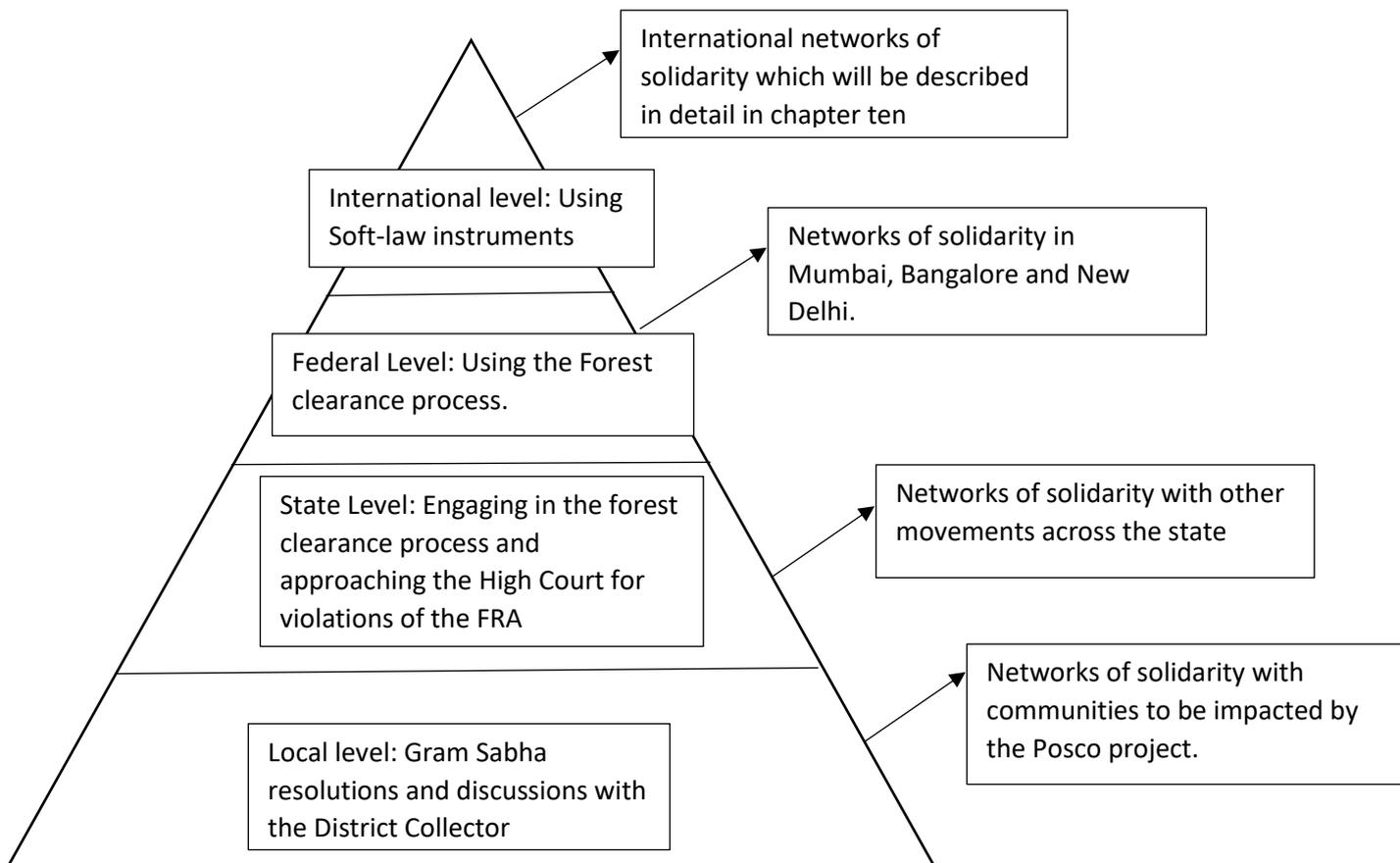


Figure 13 (Same as Figure 2): The Nodally Coordinated Enforcement Pyramid in Legal Mobilization.

Legal victory is one that results in such an episode with the state then overturning its decision to acquire forest land. When legal victory is not achieved at that particular level it is assumed that the threshold has been reached, PPSS then decided to move to the next level to see if such a legal remedy can be obtained. The movement across the different levels was made to increase pressure at the bureaucracy in the local level and hold the company accountable for the community's decision that withheld its consent.

3.2.2 Legal mobilization at the Local Level: Claiming Forest Rights

Legal mobilization at the local level was focused on the implementation of the Forest Rights Act, 2006. Its implementation structure is bottom-heavy and requires initiation by the Gram Sabha. The law mandated the formation of a forest rights committee at the local level, which

would file the forest rights claims. The Gram Sabha or village assembly would then process this.⁵⁸²

The local-level refers to the networks built between the communities that were to be impacted by the Posco project. The proposed Posco project had three parts, the port, the steel plant, and the iron-ore mine.⁵⁸³ PPSS was observant of the scale of impact in different regions. It had begun to collaborate with other social movements who were working with local communities in the areas near the proposed port and the proposed iron-ore mine in Khandadhar, Odisha. PPSS, in this process, built a network of solidarity with five other social movements. PPSS was the node that brought together the five different movements that composed the anti-Posco struggle.

Prakash Paikaray, who is the spokesperson of PPSS, described the network at the local level as follows:

The anti-Posco movement is composed of five parts. They are the movement against the iron ore mine in Khandadhar, PPSS, the community fighting against the proposed SEZ for the captive port in Paradip, the local community wanting to protect the river in the Mahanadi basin where the drinking water would be polluted by the project and lastly, the local community wanting to protect the Hasua lake as they wanted to take water from it for the project. These five movements collaborated with PPSS in building a broader strategy to address the entrance of Posco.⁵⁸⁴

In the course of the struggle against Posco, the link with these social movements became crucial to be able to highlight the large-scale impact of the project, which would acquire 4000 hectares of land. The three-Gram Sabhas in Jagatsingpur were the epicenter of the protests and decision-making on the use of the law. The question of applicability of the Forest Rights Act, 2006 had to be dealt with separately in each social movement, particularly in Jagatsingpur and Khandadhar. By mobilizing against each part of the Posco project, PPSS, along with other social movements, made it difficult for the integrated steel plant to be established.

⁵⁸² Chapter III of the Forest Rights Act, 2006.

⁵⁸³ Samantha Balaton-Chrimes, POSCO's Odisha project: OECD National Contact Point complaints and a decade of resistance <<https://www.deakin.edu.au/alfred-deakin-institute/news/news-archive/2015-archive/oecd-national-contact-point-complaints>> accessed on November 15, 2016.

⁵⁸⁴ Interview with Prashant Paikaray, August 2019 in Bhubaneswar, Odisha.

The local community across the eight villages in Jagatsingpur had formed forest rights committees in 2008. They were unable to file claims due to the ongoing conflict within the community on whether Posco should enter the forest areas or not. The use of false charges and arrests of activists prevented the local community from claiming their forest rights.

Discussed in chapter six, a significant barrier in recognition of the forest rights of OTFD communities was the lack of evidence that communities could provide to prove their dependence on forest land for three generations or 75 years. These barriers prevented the local community from adequately implementing the Forest Rights Act, 2006 as well.

The 2009 notification required that consent be obtained from the different Gram Sabhas who were to be impacted by the project. The community provided Gram Sabha resolutions in 2010, where they withheld consent to prevent land acquisition. These Gram Sabha resolutions guided the petitions filed before the High Court to challenge the decision taken by the state to grant the forest clearance.

At the local level, the degree of state repression by the government of Odisha was high. With the arrests of activists, PPSS felt that it would be strategic to move beyond challenging the implementation of the forest rights act at the local level to the sub-national level in the high court and the National Green Tribunal. This movement to the sub-national level was motivated by an effort to find respite from repression by the government of Odisha at the local level and the exhaustion of legal avenues that could be pursued to enter into a dialogue with the state. Thus, harnessing the resources of the nodally governed enforcement pyramid, PPSS decided to shift the conflict to the sub-national level with the support of the networks of solidarity at that level.

3.2.3 Legal mobilization at the Sub-National Level: Approaching the High Court

At the state or sub-national level, PPSS challenged the environmental clearance process at the National Green Tribunal. Environmental violations are often part of the legal mobilization strategy in preventing the acquisition of land. As progressive environmental jurisprudence has developed over the past decade, it is difficult for companies to be established where environmental impact is significant.⁵⁸⁵

⁵⁸⁵ Shibani Ghosh, *Indian Environmental Law: Key Concepts and Principles* (Orient Black-Swan, 2019)

PPSS worked closely with social movements across Odisha, who were struggling against forced relocation. This network shared knowledge of legal strategies used and supported movements like PPSS in mounting a legal challenge at the sub-national level.

The National Green Tribunal revisited the environmental clearance that had been granted and, in another order, stated that trees could not be felled in the proposed area for the project.⁵⁸⁶ These cases delayed the acquisition on the ground as the parastatal agencies and the company had to wait for the environment and forest clearance before beginning operations.

In withholding consent, the local community challenged the granting of forest clearance to Posco because their consent was not appropriately obtained by filing a writ petition in the High Court in 2011. The forest clearance is decided at the national level. The clearance was granted after examination by two committees set up by the Ministry of Environment and Forests to study the Forest Rights Act's implementation, 2006.

The eventual decision at the federal level relied on the principle of cooperative federalism. It granted the forest clearance on the assurance that the forest rights act will be implemented in the area by the government of Odisha.⁵⁸⁷ The High Court, interestingly, states in its ruling that matters concerning forest clearance, which squarely lies in the jurisdiction of the executive, cannot be decided by the courts. If done, it would amount to judicial overreach.

The High Court defers to the executive, here the government of Odisha. It mainly refers to the executive because it is not the court's role to make decisions on matters concerning economic policy.⁵⁸⁸ The process of creating opportunities to deliberate through the threshold approach is messy as the court shifts accountability from the federal back to the sub-national level.

Sub-national governments or states in India are made to compete with each other in attracting foreign direct investment. It creates a political economy where the swifter the state is in land acquisition- the better are its chances of attracting foreign investment. As Rob Jenkins argues

⁵⁸⁶ Bhrambar Das and Another Vs Union of India and others, Original Application No. 191 of 2018.

⁵⁸⁷ Jairam Ramesh, *Green Signals: Ecology, Growth and Democracy* (Oxford University Press, 2015).

⁵⁸⁸ Nishakar Kathua and Others Vs Union Of India and others, Misc Case No. 8145 of 2011.

Forcible evictions of peasants and harsher labour laws are just two instruments deployed by business-oriented elites to attract their states' capital. In some cases, too, and Nandigram illustrates this very well, states are being encouraged to free up extensive parcels of land as de facto fiefdoms of private capital: this, in effect, is the remit and purpose of the roughly 300 Special Economic Zones ⁵⁸⁹that were formed between 2005 and 2007 under the Act of that name.⁵⁹⁰

The sub-national level is so tied up in its efforts to attract foreign direct investment that to shift to the deliberative mode is a tricky proposition because it implies long term engagement and dialogue. Forcible evictions are often seen by the subnational level as a short term means to the ease of doing business. Nodally coordinated enforcement strategies by activists and communities can have the effect of showing the subnational level that the short term is actually a long-term path of deep cost and conflict.

3.2.4 Legal mobilization at the Federal Level: Independent Committees and the Paper Truth

PPSS at the federal or national level was strongly associated with the Campaign for Survival and Dignity. This was an umbrella network that had been working on many issues on the implementation of the Forest Rights Act, 2006. PPSS established solidarity groups in many cities, including Delhi, Mumbai, and Bangalore. These solidarity groups would bring issues of the Posco affected communities to the cities and hold protests on their behalf. These groups were useful in raising funding and attention to the case beyond the state of Odisha. PPSS also engaged renowned environmental activists like Prafulla Samantray to assist them in their struggle.

The forest clearance was initially granted, but the passing of the Forest Rights Act provided a new legal foothold for PPSS to challenge the decision of the MoEF and CC to grant forest clearance. With the support of its network of solidarity at the national level, PPSS began to produce research reports that challenged the paper truth. Leo Saldanha, a noted environmental activist, produced a detailed report about the landscape and its history. This

⁵⁸⁹ Special Economic Zones are areas where large parcels of land are acquired by the sub-national units for the establishment of industrial hubs with concessions on environment and labour standards. Land acquisition for SEZs occurs in a manner where sub-national laws related to land bypass the consent requirement under the land acquisition act and forest rights act, 2006.

⁵⁹⁰ Rob Jenkins, 'India's States and the Making of Foreign Economic Policy: The limits of the Constituent Diplomacy Paradigm' (2003) *The Journal of Federalism* Vol.33.

report provided much-needed information on the question of the violation of the forest rights act.

PPSS contested the clearance by writing letters to Dr. Jairam Ramesh, the then Minister of Environment and Forests, accompanied with research reports that the clearance did not comply with the new legal requirements of FRA as well as the 2009 MoEF notification.⁵⁹¹In light of this, the MoEF declared that the clearance was conditional on fulfilling the requirements of the August 2009 order.

Accordingly, a letter was then sent to the Chief Secretary of Odisha to comply with the August 2009 order. This letter was then forwarded to the block development officer of Ersama, who ordered that palli sabhas be held by February 2010. The gram panchayats of Dhinkia, Govindpur, and Nuagaon held palli sabhas (they are village assemblies held across a tribal hamlet), where they rejected the diversion of forest land and asserted their rights to govern and manage their forests. However, the registers of the palli sabha or Gram Sabha did not contain details of these proposals.

In the Meena Gupta committee report, the committee appointed by the MoEF to inquire into the implementation of the FRA in these areas, states:

The State Govt is of the view that these resolutions were manufactured subsequently with malafide intention. It does seem a little strange that the Palli Sabhas did not send the resolutions to anyone in the Government between February and July. There are also other inconsistencies: initially, only two Palli Sabha's were stated to have passed resolutions (the Principal Secretary's letter mentions only two), but the POSCO Enquiry Committee was told that there were resolutions of three Palli Sabha. Despite the committee wanting to see the original minutes recorded in the Palli Sabha, no such record could be produced.⁵⁹²

There was another palli sabha resolution that was instead submitted to the FAC, which was from 2008, where it contained details of the formation of forest rights committee's formation in the three-gram panchayats and not about the rejection of the entrance of Posco. Thus, the 2010 resolutions were never submitted to state authorities or discussed in the process until

⁵⁹¹ Jairam Ramesh, *Green Signals: Ecology, Growth and Democracy in India* (Oxford University Press, 2015)

⁵⁹² Ibid 585.

the lack of implementation of the Forest Rights Act, 2006 was brought to light by a committee under the leadership of Dr. N.C Saxena.

These inquiry committees set up by the MoEF to investigate the implementation of the FRA provided the local community with an opportunity to prove wrong the previous bureaucratic narrative that there were no OTFD communities in the area. The inquiry committees became a site of struggle where the articulation of dissent and demand for dialogue with the state was acknowledged. The inquiry committee investigation was where the paper truth generated by the bureaucracy was challenged.

The Meena Gupta committee, which was formed to study the implementation of the forest rights act, however, was divided in its findings. The committee eventually recommended that the implementation of the forest rights act was to be undertaken in earnest. However, on the issue of consent, it was unsure as the Gram Sabha resolutions of 2010 were not present in the original registers of the panchayats.

The forest clearance for POSCO was eventually granted on 31st January 2011 with an assurance from the state of Odisha that it would implement the forest rights act appropriately. A letter was then sent by the government of Odisha in April 2011, where they provided such assurance. This was followed by the submission of two panchayat resolutions in the villages of Dinkia and Govindpur, which were held in February 2011.

Unlike in Niyamgiri, where the eventual authority to decide devolved to the Gram Sabha, in Posco, the executive authority of Odisha's extractive state was recognized. This is partly due to the economic importance attached to this project and the identity of these communities as other traditional forest-dwellers. The state thus chose to be non-deliberative in acknowledging the discontent of the forest-dwelling community. Escalation across the nodally coordinated enforcement pyramid provided a few episodes of deliberation with the state in the form of independent inquiry committees which scrutinized the state's decision to grant forest clearance.

3.3 Mahanadi Coalfields: Repertoire of legal resistance to push back against compulsory acquisition.

The entire district of Sundergarh is rich in coal reserves and is categorized as a Scheduled Area. Despite the protections of being a scheduled area, coal mining is prioritized, and the land is compulsorily acquired. Sunil Nayak of Tumulia village speaks to the challenge of mobilizing the law in a context where the empowering aspects of the consent provision and the Forest Rights Act, 2006 are diluted by the provisions of the Coal Bearing Areas Act, 1957 based on the legal principle of compulsory acquisition that is used by the bureaucracy to reconcile these competing legal frameworks.

The idea that we can oppose the expansion of the coal mine by using the FRA is challenging. We need to be more resourceful in how we use the law to protect our rights. While we might not get the outcome, we think it is still important to challenge the state's decisions and enter into dialogue with the authorities on the decisions they make.⁵⁹³

Unlike in the Niyamgiri case or Posco case, the legal mobilization strategy is used to gain better redistributive outcomes. This was similarly seen in the Talabira region in Sambalpur district, where a private mining company- Adani Enterprises Ltd was beginning coal-mining operations. Forest-dwelling communities were mobilizing the consent provision to use it as leverage for better compensation.⁵⁹⁴

Rajinder, who is the leader of the Communist Party India (Marxist) and leader of the Hemgiri Adivasi Ekta Manch or the Association for Unity of Adivasis in Hemgiri coal block from the area, addressed this strategic use of law with the Hindi term '*bal se var karenge*' literally translated to operating from a position of strength. He provided more details about this strategy.

⁵⁹³ Interview with Sunil Nayak in Sundergarh in August, 2018.

⁵⁹⁴ Manish Kumar, 'Dark Times Await as Odisha's Talabira Forests are Razed' in *Mongabay* (27 December 2019) < <https://india.mongabay.com/2019/12/dark-times-await-odishas-talabira-as-forests-razed-for-mining/> > accessed on June 26 2020.

We know that it is sadly not possible to prevent coal mining from occurring. Coal mining is associated with the nation's pride, so instead of casting the consent provision aside, we use our right to say no to leverage better terms of compensation.⁵⁹⁵

This pragmatic approach towards the consent provision shapes legal mobilization efforts in these areas. Below are some of the efforts made in deploying this strategy. The social movement here has deliberately avoided approaching the courts as the immediate forum for legal mobilization, it has prioritized mobilizing the law to engage with the local bureaucracy and the coal company instead.

3.3.1 Submission of the Gram Sabha resolution

The villages of Tumulia and Siarmal in Sundergarh district submitted Gram Sabha resolutions where they have withheld their consent to expand the coal mine. The Gram Sabha was held in February of 2016, and Sunil a forest-dweller and activist fighting against the mine in Tumulia describes how they have used it as an avenue for documenting their resolution of opposing the expansion of the coal mine.

The social movement has mobilized the community to articulate their dissent in the public hearing process that was held for obtaining the environmental clearance. Unlike the consent process where forest-dwellers can accept or reject the mining project in a public hearing process forest-dwellers can only air their grievances about the environmental impact of the project which will be incorporated in the environment management report that the company has to submit to the MoEF.⁵⁹⁶

In the Gram Sabha resolution submitted by the villages, the forest-dwellers have unanimously denied their consent to expand the coal mine because their forest rights have not been recognized, particularly their community forest rights to conserve these areas. The Gram Sabha resolution has been submitted to the FAC for consideration. The forest clearance is yet to be granted.

⁵⁹⁵ Interview with Rajinder in Sundergarh in August 2018.

⁵⁹⁶ Environment Impact Assessment Notification of 2006.

3.3.2 The future trajectory of legal mobilization- Pathalgadi movement and climate change

The social movement in the form of the Hemgiri Adivasi Ekta Manch battling against the expanding coal mines in Sundergarh has realized the need to be resourceful and novel in their use of the law. The economic need for coal cannot be surmounted by merely deploying the consent provision.

With this push for the novelty to withhold consent, many villages in Sundergarh use the pathalgadi movement. It is a movement where the significant provisions of PESA and FRA are etched on a stone and ceremoniously inaugurated in the presence of the district collector and district level forest bureaucracy.

As forest-dwellers described this strategy of mobilization of law from below and its importance in these areas, they stated:

Legally this land is viewed as a coal-bearing area. The stone's presence will force the bureaucracy and the company to remember that it is a Scheduled Area too and that our consent and rights need to be respected. As important coal is for the nation, our rights are for our survival and future generations.⁵⁹⁷

The state has viewed the pathalgadi movement as an extreme assertion of Adivasi sovereignty, and efforts are underway to quell this movement's rise in different parts of Odisha.⁵⁹⁸ While the pathalgadi movement has hit a roadblock, the forest-dwelling communities in different parts of the coal mining regions of Odisha have begun to use the vocabulary of climate change to frame their struggles. In the Hemgiri Coal Block, Kishan heads a community-based NGO called the Centre for Integrated Tribal and Rural Development supporting the implementation of the FRA. He addresses how their framing of the issue must change:

We have not gotten anywhere using the consent provision or FRA to isolate a broader claim of injustice. If you study the Niyamgiri movement, you will see how their claims as Indigenous communities got global attention. With the increased risk of climate change, our struggle has

⁵⁹⁷ Interview with the forest rights committee in Sundergarh, August 2018.

⁵⁹⁸ Amarnath Tewary, 'The Pathalgadi Rebellion' in *The Hindu* (April 14 2018) <<https://www.thehindu.com/news/national/other-states/the-pathalgadi-rebellion/article23530998.ece>> accessed on January 6 2020.

to be reframed as climate justice and not just environmental justice. This will enable us to use international legal mechanisms too⁵⁹⁹

This sophisticated exercise of reframing is already being tested in Talabira, where Adani's mine faces resistance. The forest-dwelling community has been using the language of climate change to oppose the trees being cut down. Whether this reframing will prevent the expansion of coal mines as India opens up coal mines to the private sector, foreign investment is yet to be seen.⁶⁰⁰

4.Redistributive Claims and Legal Mobilisation in Coal Mining Areas and Other Mining Sites

In this section, I examine the legal strategies used by forest-dwelling communities in the three mining sites for redistributive ends of compensation, resettlement, and rehabilitation once the acquisition of forest land is underway. As discussed in the earlier section, in areas of coal mining, it is amply difficult to challenge land acquisition as it is compulsorily acquired.

In the Posco and Niyamgiri case, the mobilization strategy used for redistributive ends is restricted to informal negotiations with the Dalal or through protests before the local bureaucracy. Protests have been used in these three contexts as an avenue to register discontent in the failure to be adequately compensated, which has pushed the District Collector to be more responsive.

Everyday contestations dominate the legal mobilization strategies for redistributive ends with the local bureaucracy and company and at times approaching the courts. The political economy of coal shaped by compulsory acquisition has propelled the development of a set of strategies used for redistributive ends as the scope for resistance is limited.

4.1 Approaching Courts.

In the coal mining villages of Gopalpur of Sundergarh district, a decision was made to file a writ petition before the High Court of Odisha in 2003 to claim compensation from Mahanadi Coalfields Limited (MCL). Matthias Oram, an Oraon Adivasi, filed a petition in 2003 that land

⁵⁹⁹ Interview with Kishan in Sundergarh in August 2018.

⁶⁰⁰ Manish Kumar, 'Dark Times Await as Odisha's Talabira Forests are Razed' in *Mongabay* (27 December 2019) < <https://india.mongabay.com/2019/12/dark-times-await-odishas-talabira-as-forests-razed-for-mining/>> accessed on June 26 2020.

had been acquired under the Coal Bearing Areas Act and compensation had not been paid.⁶⁰¹The decision to approach the court for the payment of compensation was described as a move made after engaging with the local bureaucracy. The company had failed to produce any just outcomes. Sunil described this decision by stating:

We are a good group of citizens who would like to be compensated for the land that has been acquired. We are not insisting on something extraordinary but merely compliance with the law. Despite multiple letters that had been shared with the administration, no action was taken. It was then that we decided we need to approach the courts for the redressal of our grievance.⁶⁰²

The High Court ruled that MCL and the Central government had to pay adequate compensation to the forest-dwelling community. MCL then challenged the High Court decision because it wanted to denotify these lands as it would not be used by the coal mining company. The Amnesty International report on coal mining in India documents the Supreme Court decision to grant compensation and dismiss MCLs challenge as follows:

In July 2010, the court finally ruled that the affected communities had been wrongfully deprived of compensation. It said the case was a "textbook example" of "a scenario where even the most fundamental obligation under the law is not complied with, and even the fig leaf of legality is dispensed with."⁶⁰³

The Supreme Court decision also laid the foundation for forming a claims commission- a new institutional body to examine the implementation of this judgment. This decision to approach the court was triggered by the local bureaucracy's non-responsiveness to the movement's demands for redistributive justice. This is a visible strategy in the other mining areas, too, but more visible in the coal mining regions of Odisha. To explain this, Sandeep Pattnaik remarked

If we claim redistributive justice before the courts, we secede our political claim of rejecting the project entirely. Thus, legal strategies have to be informed by the social movement's political claims and ideology. In coal-bearing areas, a more pragmatic approach must be taken

⁶⁰¹ Mahanadi Coalfields and Another V Matthias Oram and Others Special Leave Petition (C) NO.6933 OF 2007

⁶⁰² Interview with Sunil Nayak in August 2018

⁶⁰³ Amnesty International India, 'When Land is Lost- Do we eat coal?' (2016) <<https://www.amnesty.org/download/Documents/ASA2043922016ENGLISH.PDF>> accessed on May 2020.

as the state's right of eminent domain is extraordinarily strong. The claims of redistributive justice are all they have.⁶⁰⁴

This brings me back to the recognition and redistribution debate from chapter six. Social movements driven by recognition claims will use supportive legal framing in the arguments and claims before the courts. If redistributive claims are used, it is assumed that their consent has been given for the mining company's entrance, and only the terms of compensation are being contested.

4.2 Going to Court as a Leverage in informal negotiations.

The threat of going to court is another strategy of legal mobilization used for redistributive ends. As Sunil Nayak described, the social movement in Hemgiri coal block often approached courts for redistributive demands if the local bureaucracy has failed to respond to their grievances. As legal mobilization theorists have argued that:

The ability to access a court and hence use the threat of legal action may strengthen an NGO's bargaining power vis-a-vis one of their opponents in a policy process or settlement discussions. It may be the very uncertainty of litigation that becomes a critical legal resource to be leveraged.⁶⁰⁵

This critical legal resource is used in the negotiations and bargaining between the forest-dwelling communities and the Dalals. An example of this is in Jagatsingpur. As Jindal Steel Works (JSW) is working towards gaining physical possession of the land, the forest-dwelling community has entered an understanding with JSW where they will provide conditional support.

Their support for the project is conditional on fulfilling factual claims of compensation, resettlement, and employment. If JSW fails to fulfill these conditions, they have threatened them with legal action before the courts accompanied by large scale protests. The ability to go to court and to reject the project entirely is a bargaining chip that reframes the power

⁶⁰⁴ Interview with Sandeep Pattnaik in August 2018

⁶⁰⁵ Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK.' (2012) *Law & Society Review* 46, no. 3 pp. 523-56.

dynamic in these negotiations. This is one way to use the threat of legal action that has enabled more equitable distribution of power in arriving at a negotiated settlement.

4.3 Protests and Everyday Contestations

The dominant legal strategy that permeates the three contexts is the use of protests and letters in the form of petitions being written to the District Collector and the company's Manager for fulfilling the demands of compensation and to reduce pollution in the area. Whether it is the barricading of the entrance to the villages as seen in Jagatsingpur or sit-ins as seen in Kodingamali and roadblocks in the Hemgiri coal block, these tools to articulate dissent have been leveraged to force the District Collector to heed to the demands of the social movement. Protests are valuable in pushing the pro-business bureaucracy to deliberate over their decisions of redistribution.

In his interview, Prakash Jena defines this functional use of protests to craft spaces and terms of discussion beyond the formal legal avenues provided. In the lead up to the public hearing being organized by JSW, protests were organized to highlight the demands of the conditional support being provided to the company. The protest then created an avenue and forum where these demands could be further discussed beyond the public hearing's formal requirement.⁶⁰⁶

The use of everyday contestations in the form of letter writing is seen in the Himgiri coal block. Sunil Nayak from Tumulia village shared a set of fifty-odd letters that had been written by the forest-dwelling community to the District Collector, the claims commission, and the general manager over the years. One set of letters exchanged between the District collector, and the forest-dwelling community stood out as it provided evidence of how politically charged protests, legal mobilization, and deliberative democracy came together.

⁶⁰⁶ Interview with Prakash Jena in Jagatsinghpur in July, 2018.

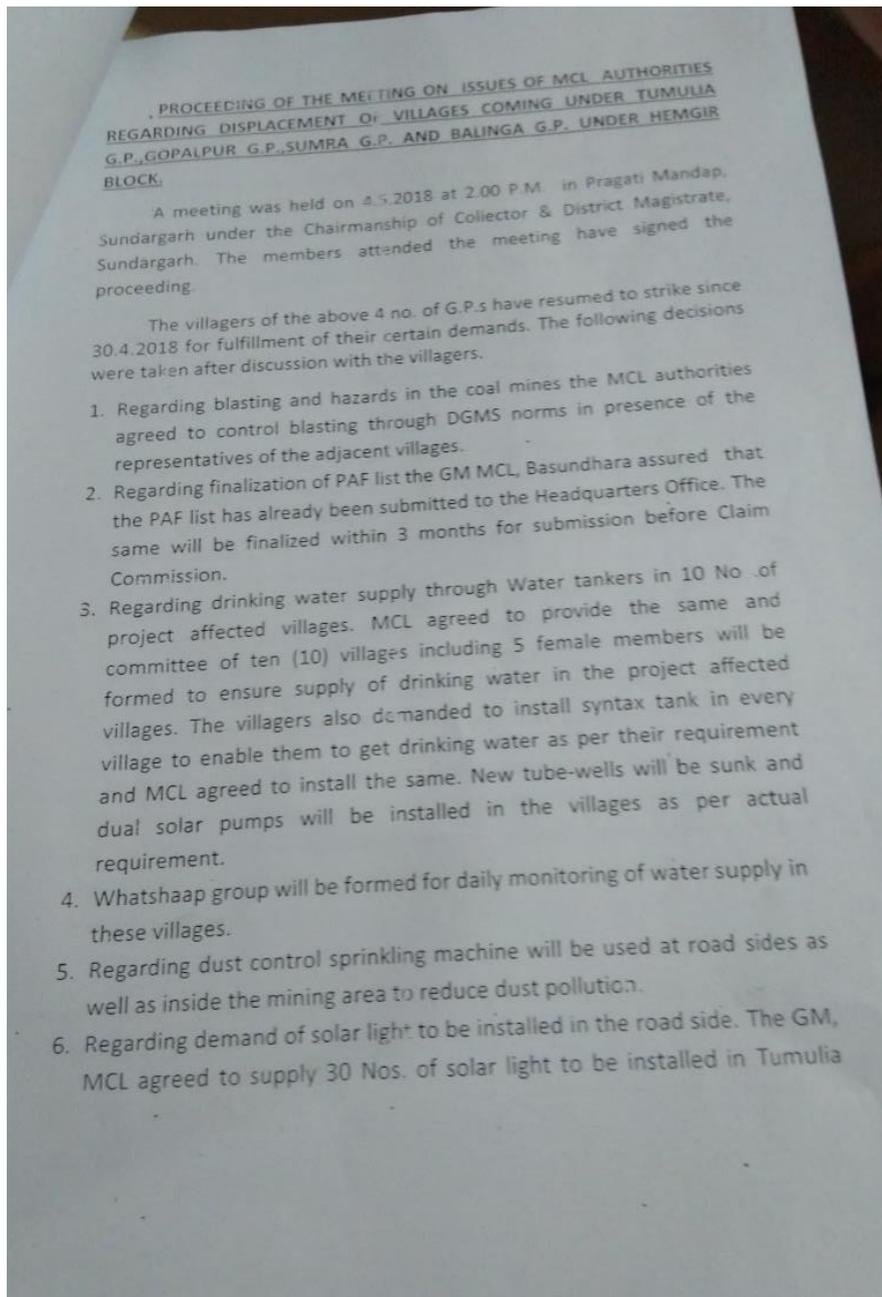


Image 1: Proceedings of a meeting held in Sundergarh by the District Collector

The letter that was sent to the District Collector documented the demands that have been made by the forest-dwelling communities in the four-gram panchayats. The letter's submission was accompanied by a strike organized by the villagers and a condition that the strike would be called off on the fulfilment of their demands.

This strategy of protest and legal mobilization through petitioning by means of many letters created an avenue or a forum for deliberation with the state in the form of a meeting between the District Collector and the forest-dwelling community. The meeting concluded with an

agreement that the local bureaucracy would work towards fulfilling their demands of redistributive justice. In return the forest-dwelling community would call the strike off. These protests and everyday contestations are essential in shaping bureaucratic decision making from below.

Legal mobilization for redistributive ends is not only resolved in the negotiations with the Dalal. It is a continuous process of placing demands and claims-making using the law to make the local bureaucracy responsive to their demands which are practices of insurgent citizenship as described in chapter three.

Legal mobilization strategies laid out in great detail in this chapter show how the strategies range from approaching courts to the creation of deliberative episodes and spaces through everyday contestations of using letter writing, petitioning, and arriving at negotiated agreements through the company's project life cycle.

5. Legal Forums and Deliberative Decision-making

The legal strategies deployed by the social movements referred to here to withhold consent or towards redistributive ends are guided by a fundamental desire to be heard and deliberate with the state on their communities' futures.

Jitu Jakesika, in his explanation of the consent provision, described it while holding a television remote in his hand, which became an effective prop for him to explain his opinion:

You see this remote; it is currently in the hand of the state, and the state decides which channel we see. We need to take the remote back in our hands and decide what our future looks like. The consent provision is a way for the state to come to us and ask us what we need and how we would like to shape the future collectively.⁶⁰⁷

The consent provision is interpreted as the consent principle, which is deeply linked to the right to self-determination. The consent principle is understood as taking the remote control back to their lives and futures.

The previous chapters have shown that it is hard to achieve this deliberative ideal through the appropriate implementation of the consent provision as it currently stands in the law but rather that it needs to be implemented within a framework that connects to bhaitak-sunvayi

⁶⁰⁷ Interview with Jitu Jaikasaika in Bisshemcuttuck in February 2020

and sahamati. The ethos of engagement through this three-part process provides a framework to achieve the deliberative ideal.

The legal mobilization strategies as laid out above converge in their shared purpose of the need for a deliberative state. The decision making of the state is constantly challenged and contested in different fora. In this section of the chapter, I will briefly examine how the choice of forums enables or inhibits deliberative decisions by switching the state's modality from being extractive, pro-business, to deliberative.

As shown earlier, the choice of avenues are predominantly courts and independent committees that have been set up. I will speak about each of these avenues and how they have enabled and inhibited deliberative decision-making.

5.1 Courts and Deliberative Decision making

Courts, as Rawls described them, are viewed as exemplary deliberative institutions.⁶⁰⁸ The deliberative nature of courts is accounted for in their function of being reason-giving, providing justifications for their decisions, and the deliberations that occur within the collegiate.⁶⁰⁹ While courts are deliberative forums that consider the facts, evidence, and narrative of injustice that the litigants place before it, it has to decide within an adversarial form in the common law world, i.e., X Vs Y. It is this adversarial nature of the forum that at times inhibits its ability to contribute to deliberative decision-making.⁶¹⁰ To discard the empowering influence of courts in interpreting and implementing the consent provision would be throwing away the baby with the bathwater.

As a deliberative forum, courts need to be seen through the dual lens of enabling deliberative decision-making or what is labelled as the participatory effect, while inhibiting opportunities to deliberate due to its adversarial nature. I will begin with an analysis of the participatory effect and then speak to the limitations.

⁶⁰⁸ Richard B. Parker "The Jurisprudential Uses Of John Rawls." (1979) *Nomos*, Vol. 20, Pp. 269–295.

⁶⁰⁹ Conrado Huber Mendes, *Constitutional Courts And Deliberative Democracy* (Oxford University Press, 2013)

⁶¹⁰ *Ibid.*

5.1.1 Participatory Effect

The courts in the recognition and enforcement of socio-economic rights have had a participatory effect in enabling democratic deliberation, argue Cesar Rodriguez Garavito and Diana Rodriguez. They state that by inviting participation from NGOs and other non-state actors in the documentation of legal evidence and as witnesses before the courts-the courts create opportunities for deliberation. Similarly, in the remedy provided for in the judgment which suggests structures for continuing deliberation they facilitate democratic deliberation with the state.⁶¹¹

The participatory effect in the context of the consent provision in these three cases is viewed through the criteria of inviting perspectives from NGOs and civil society actors to participate in the court proceedings, the choice of evidence used in arriving at the judgment, and the structures courts have put in place to enable continued deliberation. The participatory effect is distinctly present in the Niyamgiri case and the MCL case, with different arguments being presented before the courts.

In the Niyamgiri case, through the route of PILs, activists were able to petition the court to challenge the decision of the state to grant the forest clearance. In a note by Samrendra Das, who was documenting the court proceedings in the matter, he speaks to the lawyer's arguments representing the Dongria Khond where he used an ethnographic study by Felix Padel to argue about the religious significance of the Niyamgiri hills.

Similarly, the lawyer presented testimonies from Dongria Khond community members to address the importance of the hills to their sacred rights. This sacred relationship with the land was silenced in the paper truth generated by the pro-business state, but through the courts, it was now available and considered by the judges as they decided the case. The participation and voice of the Dongria Khond was now an essential part of the courts' ability to include marginalized voices in deliberation.

The participatory effect of the Niyamgiri judgment lies in the remedy it designed, which was to devolve authority to the Gram Sabha in arriving at the final decision on granting the forest

⁶¹¹ Cesar Rodriguez- Garavito and Diana Rodriguez-Franco, *Radical Deprivation on Trial* (Cambridge University Press, 2015)

clearance. The enforcement of this remedy came in the form of conducting a referendum in a district judge's presence. The referendum ensured that democratic deliberation thrived in this case. However, the important thing to note was this structure was temporary and was an event where consent had to be obtained only once.

In the MCL case, a claims commission had been set up to monitor the judgment's implementation for the just delivery of compensation to the forest-dwelling community. The claims commission continues to exist and is seen as a site for ongoing deliberations on redistributive questions in the Himgiri coal block. This, as opposed to the Niyamgiri case, has put in place a structure for continuing deliberation. When courts offer remedies that establish a process of continuous engagement with the state, they are creating a participatory effect. The shared sovereignty principle is strengthened through such remedies, which enable the state and the forest-dwelling community to collectively problem-solve over the specific legal issue.

5.1.2 Inhibiting Deliberative Decision Making

The challenge for adversarial forums like courts is moving beyond a remedial binary on the consent provision. The court is left deciding on the extremes of development with redistribution or withholding consent entirely. This inhibiting quality of courts was clearly articulated by Prakash Jena, who had witnessed the Posco case's decisions:

The court is an important forum, but it has to pick a side and argue why it chose it. It is a game of winners and losers, and not one where everybody wins or where the burden of the loss is shared equally. It is the finality of the decision it takes in the consent provision that legitimizes one party's decision over another. I would rather have the state work with us, convince us, and likewise, us convince them than approaching the court that will decide who wins.⁶¹²

The inhibiting quality of an adversarial forum is problematic as it polarises the discourse and jurisprudence on the consent provision and moves away from the consent principle and shared sovereignty framework. As seen in the Posco case, the court on the consent provision deferred to the extractive state of Odisha. The jurisprudence on the consent provision through such decisions has relegated it as a hurdle in the development process and lying exclusively in the executive's jurisdiction to decide. These arguments permeate the decision-

⁶¹² Interview with Prakash Jena in July 2018

making at the administrative level as it rushes ahead in providing land quickly to industries. As an interview with a senior bureaucrat in the Revenue and Disaster Management Department revealed

We carefully use the jurisprudence to support our administrative decisions. This is done to prevent a challenge before the courts, but if we are dragged into the courts, it demonstrates our awareness of the jurisprudence and shows our respect for the courts' decisions.⁶¹³

Approaching courts that dominate the legal strategies deployed by social movements in implementing the consent provision pushes the pro-business state to be selectively deliberative based on the decision that differs from one case to the next.

5.2 Independent Committees

Independent committees that have been set up in the Posco case and the Niyamgiri case are an essential intervention in challenging the materiality, which reinforces state authority in decisions on forest clearance as the paper truth silences the priorities, preferences, and decisions taken by the forest-dwelling community.

The N.C Saxena committee challenged the district collector's paper truth and discretionary power by documenting evidence that showed the need for appropriate implementation of the FRA. Similarly, the Meena Gupta committee report spoke to the need for a responsive administration in implementing the FRA. The paper truth was challenged, and the narrative of injustice recrafted by surmounting evidence that supports the claims of the forest-dwelling community.

Independent committee reports are used as evidence in the cases that were brought before the courts. The reports and the N.C Saxena committee report influenced the trajectory of the judgment in the Niyamgiri case. These independent committees are a mirror within the MoEF and Cc, which allows the Ministry to reconsider the evidence provided and change its decision based on new evidence gathered.

⁶¹³ Interview with the senior bureaucrat in Bhubaneshwar in February 2020

6. Conclusion

Legal mobilization strategies are a sophisticated exercise of calling upon the law to bear on the three struggles referred to in this chapter. This chapter identifies the legal strategies deployed by the social movements in the three contested sites. I have demonstrated the repertoires of resistance which translated desires of the social movement into legal violations of the FRA and the consent provision or towards redistributive ends.

When courts are approached, it results in the conflict being decided in its extremities of recognizing the rights of forest-dwelling communities or the rights of the mining company. The many options that lie in-between these extremities become difficult to harness when the conflict is to be resolved in courts.

The overarching motivation that guides legal mobilization by social movements across Odisha's mineral region is the need for the state to operate in a deliberative mode. Lado Sikaka, when asked about what he thinks would be a just outcome from the use of the law, said:

We use the law as a stick to force the state to come into our forests and speak with us. While we want to assert our control, we need support from the state in education, recognition of rights, and healthcare, among others. To me, the right to self-determination is the right to have a continuing dialogue with the state, which is respectful of our decisions.⁶¹⁴

Dialogue and sharing of sovereignty, as Lado Sikaka insists, is a way to influence state decision making in the forests. While legal mobilization has contributed to episodic deliberation, the avenues approached by the forest-dwelling community often reinforced the practices of the state in its non-deliberative mode.

⁶¹⁴ Interview with Lado Sikaka in Niyamgiri on February 2020

10. JURISDICTIONAL LEAPFROGGING

1. Introduction

The decision to use international soft-law instruments which shift the land conflict to an international forum, is triggered by the failure of legal mobilization efforts within India's borders to yield an outcome of deliberation with the state. Domestic legal mobilization strategies and outcomes discussed in the previous chapter mostly reinforce the paradigm of competing sovereignties except when the state is forced to be deliberative like in the Niyamgiri case.

The triggers for mobilizing the land conflict at the international level, apart from the desire for dialogue with the Indian state, is specific to the legal and political circumstances of each conflict. In the Posco areas, as repression from law enforcement was unbearable, Posco Pratirodh Sangram Samiti (PPSS), the social movement, decided to approach international fora for some respite. In Niyamgiri, engagement with Transnational Advocacy Networks (TANs) and organizations working on Indigenous rights pushed them to use international fora to strengthen claims of sovereignty being made within domestic courts. In the coal-bearing areas of Sundergarh, the forest-dwelling community is presently strategizing in the use of international law and climate change policy as domestic law does not provide any room for challenging eminent domain sufficiently. While the initial triggers vary across the three mining sites, what remains common in the strategies used is that of jurisdictional leapfrogging.

Jurisdictional leapfrogging is a term I use to describe the coming together of the legal strategy of forum shifting with the desire to shift the jurisdiction in which the land conflict is decided beyond the bounds of the rigid political economy of extraction domestically.⁶¹⁵ The empowering influence of international law in these conflicts is in its scrutiny of the pro-business modality of the state. The exercise of absolute sovereignty in decision-making by the Indian state is challenged, and the claims of the sovereignty of the forest-dwelling community have the potential to be recognized at the international level. As the right to self-

⁶¹⁵ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000)

determination of peoples particularly Indigenous people as a legal claim has space in international law, though its interpretation and application is contested.⁶¹⁶

Further, multinational companies are held accountable for the violation of the consent provision based on international norms of responsible business conduct, which they are required to comply with. In challenging the pro-business and extractive modality of the state, jurisdictional leapfrogging allows for dialogue to take place between the Indian state and the forest-dwelling community and the company.

The question I address in this chapter is How do forest-dwelling communities mobilize law at the international level and deploy the strategy of jurisdictional leapfrogging? How do these legal outcomes decide internationally to impact domestic level decision making?

Forest-dwelling communities mobilize at the international level through non-judicial redress mechanisms of the Organization for Economic Cooperation and Development (OECD) National Contact Point, Council on Ethics of the Norwegian Sovereign Wealth Fund, and approaching independent members of the UN Human Rights Council or the Inspection Panel of the World Bank. They use the growing arena of responsible investment policies where investment conditionalities require respect for indigenous rights to hold multinational companies accountable.

The shift in the jurisdiction to the international level was enabled by the robust Transnational Advocacy Network (TANs) that each social movement is a part of and thus were able to bring complaints before these fora.⁶¹⁷ TANs refer to a network that includes those actors working internationally on an issue and are bound by shared values, a common discourse and dense exchanges of information and services. TANs assist in framing the issue in a manner that it is comprehensible to target audiences to facilitate action and that it fits in with the favourable international venue. This is visible in the Niyamgiri case where the international NGO Survival International assisted in framing the acquisition of land as a deprivation of the rights of indigenous peoples to aid international action.⁶¹⁸

⁶¹⁶ Elena Cirkovic 'Self-Determination and Indigenous Peoples in International Law.' *American Indian Law Review*, vol. 31, no. 2, 2006, pp. 375–399.

⁶¹⁷ Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998)

⁶¹⁸ *Ibid* 611.

The decisions made internationally have a boomerang effect domestically.⁶¹⁹ In the Niyamgiri case, the decision of the council on ethics to divest from Vedanta influenced the judgment of the Supreme Court, where it held Vedanta accountable. Similarly, Sandeep Pattnaik described how mobilizing at the international level reduced the severity of the repression by law enforcement locally.

I will begin the chapter with an overview of jurisdictional leapfrogging and the non-deliberative state. I then examine the international legal strategies used by the forest-dwelling communities in the three cases. From there, I excavate the influence it has had in domestic level decision-making. I will conclude by showing how this strategy pushes the state to become a part of a web of dialogue and not disengage from a web of control and coercion.⁶²⁰

2. Jurisdictional Leapfrogging and the Non-deliberative state

As the previous chapters argue, there is little room to challenge the exercise of absolute sovereignty by the state as the reparative idea of shared sovereignty has not been adequately institutionalized. To fill the deliberative vacuum, the social movements in the three cases explored avenues outside the borders of the state where its sovereignty, particularly the right to eminent domain, can be challenged.

In an interview with Rajendra Nayak in Sundergarh, who is beginning to mobilize international law against a coal mining project, he states:

The forest areas are precious. The state holds in public trust. We hold it in public trust. When the state makes decisions that violate our right to have a say in the decision-making process, it has violated the ethos of the law of scheduled areas, which is a framework of sharing power and shaping decisions through discussion. These international fora become sites for us to remind the state that eminent domain, absolute sovereignty, and ownership are legal structures that rupture. In contrast, shared sovereignty implemented through the consent provision are ways to work together and heal this rupture.⁶²¹

⁶¹⁹ Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998).

⁶²⁰ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) pp.31

⁶²¹ Interview with Rajendra Nayak in Sundergarh on August 2018.

Rajendra Nayak describes how two generations of his family have been entrenched in this land conflict. The struggle continues to evolve and change as the law domestically and internationally recognizes their right to have a say. The forest-dwelling citizen is an insurgent citizen always working towards reshaping the state, law at multiple levels, and decisions.

With the state operating in its non-deliberative modality, the nodes and networks domestically are forcing a consensus towards extraction. The demands of extraction dominate discursive representation in such a non-deliberative system. The international provides a break away from this discursive hegemony and provides an avenue for deliberation with equal representation of competing discourses and competing claims of sovereignty.

The distance of the jurisdiction from the site of conflict is synchronous with the understanding of a fairer hearing. The particular attention to distance and jurisdiction is guided by the need to reconcile competing claims of sovereignty. In a conversation with Anirudha Nagar, having assisted so many communities in using non-judicial mechanisms, he speaks of this aspect:

The international is where both claims to sovereignty can hold equal weight and can be deliberated upon given international legal frameworks on the rights of indigenous people. Within India and the bounds of domestic law, the legitimacy of the claim to sovereignty is negotiated through the lens of the absolute sovereignty of the Indian state enshrined in colonial forest law and its economic priorities. The international gives them some distance to examine these questions.⁶²²

John Braithwaite and Peter Drahos, in their book *Global Business Regulation*, speak of webs of dialogue and webs of coercion, which play a significant role in the globalization of regulation. Webs of dialogue refer to a web consisting of different stakeholders who share a common purpose to be able to enter into dialogue and create mechanisms or rules for the globalization of regulation. They state:

Dialogue helps actors to define their interests, thereby giving scope for the operation of mechanisms of reciprocal adjustment and non-reciprocal coordination. Mechanisms form part of dialogic webs. Dialogic webs include more than the concrete, lower-order mechanisms we have detailed in our case studies. Higher-order mechanisms like language mix with lower-

⁶²² Interview with Anirudha Nagar in New Delhi on July 2018.

order mechanisms, all connecting to form an intricate reality of persuasion and engagement.⁶²³

The context in which they describe webs of dialogue is focused on business regulation. It applies to the context of legal mobilization of land conflicts at the international level too. The webs of dialogue are desirous of deliberation with the powerful actors to be able to collectively address the regulatory problem. In this instance, the Transnational Advocacy Network (TANs) created by each of these social movements acts as a web of dialogue pushing the state to become an active part of this network or web to discuss and deliberate with the forest-dwelling communities. The Indian state instead responds by using its web of coercion and control configured by its non-deliberative modalities in rejecting the offer to deliberate.

These international fora form a part of a more extensive deliberative system where avenues for dialogue are present beyond the confines of domestic law. The deliberative system consists of nodes and networks of governance that act as points of interaction between the state and the forest-dwelling community caught in this land conflict.

Scholars of the Third World Approaches to International Law (TWAIL) have argued that international law reproduces the needs of capital and allows for a capitalist middle class to thrive. Webs of dialogue and jurisdictional leapfrogging destabilize the role of international law in favour of capital to one that tilts towards the interests of indigenous communities in developing countries. The wins experienced by jurisdictional leapfrogging and webs of dialogue may not be permanent, yet they offer moments of convergence in international law where the interests of capital interact with the demands of indigenous communities.⁶²⁴

B.S Chimni importantly argues that there is the emergence of a new imperialist order with countries like India and China gaining economic power and their role in shaping international law. India and China, he states, fail to dislodge the imperial underpinnings of international law by challenging the liberal international order. Instead, they work to gain authority within

⁶²³ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) pp. 31

⁶²⁴ B.S Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century' (2004) in *Oregon Review of International Law* : Vol. 14, No. 1, p. 017-045

it. As he rightly points out, it is the middle classes within these emerging economies that benefit from global imperialism.⁶²⁵

My fieldwork shows that when those marginalized within the emerging economies use international law and fora effectively, they challenge global imperialism by reshaping international law and mechanisms. An example of this is when Adivasi communities who were being displaced by the construction of the Narmada dam worked to hold World Bank accountable it resulted in the creation of the inspection panel where complaints can be filed against the World Bank for violation of its environmental and social safeguards.⁶²⁶ Globalization of law from below through legal mobilization by marginalized communities creates space within international law for it to be reframed in the direction of scrutinizing global capitalism and extraction.⁶²⁷

As chapter 6 has shown how law constructs identities and access to legal opportunity structures, it holds true for accessing international law too. The Dongria Kondh community in Niyamgiri articulated their claims for justice as ones of recognition as Indigenous communities, this enabled them to create strong bonds with TANs working on the rights of indigenous communities as well as favourable legal outcomes in these fora. The Posco case where the community was largely agrarian failed to enmesh its social movement in TANs working on the rights of indigenous communities but were able to forge connections with international networks working on economic and social justice. The legal outcomes were not as favourable in this case but as I will show later in this chapter using international fora became a way to reduce repression faced by communities on the ground.

3. International legal instruments Involved.

In these cases, mobilization at the international level has used soft-law instruments, mainly the Organization for Economic Cooperation and Development (OECD) guidelines for Multinational Enterprises hereinafter referred to as the OECD guidelines for MNEs, the Ethical

⁶²⁵ B.S Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century' (2004) in *Oregon Review of International Law* : Vol. 14, No. 1, p. 017-045

⁶²⁶ Namita Wahi, 'Human Rights accountability of the IMF and the World Bank: A critique of existing mechanisms and Articulation of a Theory of Horizontal Accountability' (2005) *International Journal of Law and Policy* Volume 12 pp 331.

⁶²⁷ Boaventura de Sousa Santos, Cesar Rodriguez Gravito (Eds), *Law and Globalisation from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005)

guidelines of the Norwegian Sovereign Wealth Fund, and the World Bank Safeguards. These soft-law instruments are accompanied by their unique enforcement mechanisms, which have been categorized as non-judicial redress mechanisms. They involve mediation and recommendations to redress the conflict, unlike the adversarial setting of the courts.

The OECD guidelines are government-backed guidelines for responsible business and provide a framework for conduct across the criteria of social, environmental, and human rights responsibilities. They are applicable to companies that are headquartered in an OECD member country and to companies where investment comes from an OECD member country. For instance, in the Niyamgiri case, the guidelines were applicable as Vedanta was headquartered in the United Kingdom, which is an OECD member country. The enforcement mechanism is National Contact Points (NCPs) set up by each member country where complaints of the violation of the guidelines can be filed.

The Norwegian Government Pension Fund, also referred to as the Sovereign Wealth Fund (SWF), is one of the largest sovereign funds in the world. Its investments are guided by the ethical guidelines that were drafted in 2004.⁶²⁸ The ethical guidelines have a broad set of criteria for filtering investments, including environmental damage and gross human rights violations. The ethical guidelines of the Sovereign Wealth Fund guide disinvestment decisions of the wealth fund too. The Council on Ethics (CoE) examines the investment portfolio against these guidelines. It produces reports on which the council recommends to the Norges Bank whether investments should be made or recommends divestment from the company.⁶²⁹

The World Bank safeguards are applicable when the world bank funds a project. The state must comply with the safeguards, which range from aspects of due process to other environmental and human rights standards. It has been referred to as project law, which is a legal structure imposed upon the state's existing domestic legal obligations to comply with as a conditionality that is attached to the funding received.⁶³⁰ As India's coal mining sector has benefitted from such funding, I will briefly explore how the world bank's safeguards impact decisions locally in the latter part of this chapter. The enforcement mechanism for the

⁶²⁸ Anita Halvorssen, 'Using the Norwegian SWF's ethical guidelines as a model for investors', (2011)

⁶²⁹ Anita M. Halvorssen & Cody D. Eldredge, 'Investing in Sustainability: Ethics Guidelines and the Norwegian Sovereign Wealth Fund' (2014), *Denver Journal of International Law and Policy* 42 pp.389

⁶³⁰ World Bank's environment and social policies < <https://www.worldbank.org/en/projects-operations/environmental-and-social-policies> > accessed on January 7 2020.

safeguards is the inspection panel that receives complaints of the violation of these safeguards.

A point of difference between these three soft-law instruments is that the OECD guidelines and the ethical guidelines are applicable to companies and international investors specifically. The World Bank safeguards, on the other hand, apply to the state which has obtained such funding. The Niyamgiri and Posco case's decisions will illustrate that despite the guidelines applying to companies, it will bring to light the violation by the Indian state of its international legal obligations under United Nations Declaration on the Rights of Indigenous People (UNDRIP) and International Labour Organization convention 169, as well as its domestic legal obligations. My inquiry into the role of these international soft law obligations is restricted to the provision of the right to free, prior, and informed consent or consultation and provisions concerned with the due process requirements in land acquisition. The specific provisions on the right to free, prior, and informed consent are as mentioned below:

Instrument	Provision on Consent or Consultation	Interpretation in the case
OECD guidelines for MNEs	Consent is considered within the ambit of consultation with stakeholders on the nature of the project's environmental impact. ⁶³¹	<p>In the case brought before the Norwegian and Dutch NCP, the local community had argued that meaningful consultation had not taken place. These were national NCPs where NBIM and ABP were minority shareholders in the case. They were asked to conduct a human right due-diligence because of their involvement in Odisha's Pohang steel project.</p> <p>In the Niyamgiri case, the UK NCP found Vedanta to violate the guidelines based on a lack of adequate and timely consultation with the Dongria Kondh community.</p>
Ethical guidelines of the Sovereign Wealth Fund	It is considered to fall within the ambit of gross human rights violations. ⁶³²	In its decision on divestment from Vedanta Resources Pvt Ltd, the lack of obtaining the village assembly's consent as required under national law and the use of force and intimidation against the community resisting the mine was considered as a gross human rights violation. ⁶³³

Table 11: International Instruments, cases, and interpretation of FPIC

⁶³¹ OECD guidelines for Multinational Enterprises available at < <https://www.oecd.org/corporate/mne/>> last accessed on January 7 2020.

⁶³² Annual report of the Council on Ethics from 2014 available at < <https://nettsteder.regjeringen.no/etikkradet3/files/2017/02/Council-on-Ethics-2014-Annual-Report-1.pdf>> last accessed on January 7 2020.

⁶³³ Annual report of the Council on Ethics from 2014 available at < <https://nettsteder.regjeringen.no/etikkradet3/files/2017/02/Council-on-Ethics-2014-Annual-Report-1.pdf>> accessed on January 7 2020.

Table 10 continued

<p>World Bank Environmental and Social Framework</p>	<p>This framework was recently changed to incorporate the standard of Free, Prior, and Informed Consent is required of Indigenous and other traditional communities. It is required in specific instances where there is an adverse impact on their traditional lands of Indigenous communities, or It will lead to the relocation of the communities or have a significant impact on their cultural heritage.⁶³⁴</p>	<p>This framework is yet to be implemented. However, the earlier version of the environment and social safeguards did require consultation with local communities impacted by projects. The inspection panel, which is the panel before which complaints can be filed for violation of the framework or safeguards, was approached by forest-dwelling communities who had lost their land to coal mining.</p>
--	--	---

Table 10: Instruments, cases, and interpretation of FPIC

As can be seen in these soft-law standards, FPIC though not explicitly present in the soft-law instruments, has formed part of the decision-making process by the enforcement bodies like the NCPs as will be seen in the description of the cases below.

These soft-law instruments accompanied by their enforcement mechanisms, act as a pathway to scrutinize India's hard law international treaty obligations. In an interview with a member of the Council on Ethics, he elucidated how international law helped frame their discussions and interpretations of the ethical guidelines. On FPIC specifically, he stated:

In understanding whether the company has earnestly tried to consult or obtain the community's consent, we rely on the UNDRIP and other international treaty obligations. We look at how they have gone about fulfilling domestic legal requirements, but we extend our scrutiny to international legal standards. We have a dual expectation of the companies that are to be compliant with domestic legal requirements and international legal requirements.

⁶³⁴ World Bank's environment and social policies available at < <https://www.worldbank.org/en/projects-operations/environmental-and-social-policies>> accessed on January 7 2020.

The National Contact Point's statements in the Niyamgiri case do this too, where it examines the company's conduct in compliance with international legal standards and the domestic legal requirements. In its statement, the UK NCP highlighted how Vedanta violated the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), International Labour Organization convention 169, and domestic legal requirements under the Forest Rights Act, 2006, as does the report produced by the CoE of the SWF.

The decisions made by the NCPs and the CoE do not rely on the guidelines alone but draw on the support of international law and understandings within it of the rights of indigenous communities. The reputational risk associated with an adverse finding from the NCP or a decision to disinvest by the Council on Ethics and Norges Bank are hard consequences of these soft law instruments and put pressure on the corporation and, through it the state to ensure better enforcement of domestic and international legal requirements on consent and due process.

In holding corporations accountable international investors used two strategies: disinvestment from the company and the other is the 'voice' strategy. Disinvestment or exit strategy is where the investor decides to sell their shareholding or divest from the company because of their involvement in violations of FPIC, among other human rights criteria.⁶³⁵

'Voice' strategy refers to the strategy of engaging with the company or state, as can be seen in the World Bank case, where it helped shape a resettlement and rehabilitation policy as part of its funding of coal mining in India. Investors can influence companies and the state by laying down conditions for providing a loan or investment. This chapter explores the influence that the 'voice' strategy has had in supporting the ongoing struggles locally on due process, particularly the consent of local communities whose land is being acquired.⁶³⁶

⁶³⁵ Dietsch, P, 'Exit versus voice – options for socially responsible investment in collective pension plans' (2020). *Economics and Philosophy*, 36(2) pp. 246-264.

⁶³⁶ Ibid 629.

Interestingly, as the recent amendment to the World Bank safeguards required FPIC to be adhered to, the Indian government was not in favor of this change. In its response, the Indian government argues on the grounds of sovereignty that domestic standards on FPIC should suffice, as seen in the quote below:

We are not comfortable with this provision. Domestic laws of acquisition and protection of such communities already provide adequate safeguards, including consent before the acquisition can occur in some instances. Thus, the Bank needs to rely on such domestic laws/guidelines where the domestic law rules, etc., take care of such issues.⁶³⁷

These international soft-law standards are pathways for examining the companies and the state's enforcement of its international and domestic legal obligations. It becomes a site to revisit the conflict that has been considered settled within the nation-state's boundaries.

4. The Boomerang Effect

The boomerang effect was drawn from the work of Margaret Keck and Kathryn Sikkink refers to the situation where domestic social movements do not have recourse to any avenue to articulate dissent and hold the state accountable. In order to build pressure, they bypass the state with the help of TANs, and that pressure results in progressive decisions domestically. The boomerang effect is seen in the three cases with the choice of mobilizing at the international level.⁶³⁸

The impact on domestic level decision-making was seen in the influence that the decisions made in these fora across the three mining sites shaped judicial decision-making, challenged the paper truth of the pro-business bureaucracy, and infused higher legal standards in the functioning of governance in the extractive areas.

Mobilizing internationally has caused the mining companies involved to change their internal policies on human rights and the right to free, prior, and informed consent at the behest of the investors deploying the voice strategy. These impacts collectively opened a window for

⁶³⁷ India's written response on World Bank's consultation on "Update and Review of the World Bank's Safeguard Policies & Proposed Environmental and Social Framework" available <https://consultations.worldbank.org/Data/hub/files/comments_of_govt_of_india_on_the_wb_consultation_of_new_ess_framework_19_01_2015.pdf> accessed on January 7 2020

⁶³⁸ Margaret.S.Keck and Kathryn Sikkink, *Activist Beyond Borders: Advocacy Networks in International Politics*,(Cornell University Press, 1998)

the state and company to reconsider its decision and thus providing forest-dwelling communities a potential avenue for deliberation with the state. The details of these impacts are described in the section below.

4.1 Council on Ethics on the Niyamgiri Case

The ethical guidelines form the basis on which the Council on Ethics (CoE) advises the Norges Bank on whether a particular company complies with the guidelines or not. The CoE has a dedicated group of researchers internally and a network of consultants externally that examine the corporate conduct and compliance with the standards laid out in the ethical guidelines. In the interviews with the CoE and the staff members, what emerged as a problem was the difficulty in filtering through all the companies as the Sovereign Wealth Fund had invested in 9000 companies.⁶³⁹

Reliance was placed on media reports and Transnational Advocacy Networks to bring issues to the attention of the CoE. In the Niyamgiri case, the matter was brought to their attention by Roger Moody, an expert on transnational mining companies and human rights violations. He edits the website mines and communities, which documents similar conflicts like Niyamgiri.⁶⁴⁰

The Dongria Kondh, through the local organization of the Niyamgiri Suraksha Samiti (NSS) began to agitate and protest to prevent the mining of their sacred hills. NSS led the protest locally but developed networks at the national and international levels. International NGOs like Survival International, Amnesty International, and Action Aid played an active role in highlighting the issues internationally and approaching available avenues internationally for redress.⁶⁴¹ In this process of seeking international avenues, Roger Moody, who had been in touch with activists locally like Prafulla Samantray who had filed cases before domestic courts and part of this TAN internationally, brought the case to the attention of the CoE.⁶⁴²

⁶³⁹ Interviews with the Council members and staff, Norway on June,2018.

⁶⁴⁰ *Ibid* 27.

⁶⁴¹ Felix Padel and Samrendra Das, *Out of This Earth: East India Adivasis and the Aluminum Cartel* (Orient Blackswan,2010).

⁶⁴² Interview with Hilde Jervan on June,2018.

The Council on Ethics (CoE), in considering the nature of violations of the ethical guidelines, had depended heavily on the report by the Central Empowered Committee (CEC) in India.⁶⁴³ The CEC report documented the violations by Vedanta in Niyamgiri. The lack of appropriate consultation with the local community was listed in this report.⁶⁴⁴ The CoE, in examining its case, had hired local consultants to gather evidence to support the claims that human rights violations had taken place. They received some documentary films and a broad set of documents that provided proof of such violations.⁶⁴⁵

The evidence did not focus on the violations only at Niyamgiri but extended to the forced eviction of tribals in Vedanta's other mine in Chhattisgarh and Vedanta's copper smelter plant in Tuticorin. Once the report was drafted, which included the nature and extent of violations of the ethical guidelines, the CoE deployed the voice strategy where it began to engage with Vedanta on these violations. Vedanta denied these allegations and said that no human rights or environmental standards were violated.⁶⁴⁶

The CoE, after multiple conversations with the corporate social responsibility office of Vedanta, decided to recommend disinvestment. Norges Bank accepted this decision. This was a huge blow to Vedanta's reputation, and many international investors followed suit after the decision of the SWF.⁶⁴⁷ The Church of England Funds disinvested from Vedanta after a brief field investigation in Niyamgiri after the SWF decision, where it was found that the local community was coerced into handing over their land.

The decision of the CoE had a domino effect.⁶⁴⁸ In interviews with the members of the CoE, I learned that it was seen as setting the benchmark when it came to ethical investing. Once companies are excluded from the SWF, they find it harder to procure funding internationally. The Niyamgiri struggle got a boost in international attention and validation to the claims being made by the social movement of violations of environmental and human rights standards both domestically and internationally.

⁶⁴³ Report by the Central Empowered Committee (2005)
<http://assets.survivalinternational.org/static/files/behindthelies/CEC_report_smaller.pdf> accessed on May 2020.

⁶⁴⁴ *Ibid* 637.

⁶⁴⁵ Interview with Hilde Jervan on June, 2018.

⁶⁴⁶ *Ibid* 639.

⁶⁴⁷ *Ibid* 239.

⁶⁴⁸ Interview with Edward Mason from the Church of England on May 2019.

In its report providing reasons for the disinvestment from Vedanta, the CoE makes the following statement:

According to the Supreme Court Central Empowered Committee (CEC), Vedanta's land in Orissa is part of a so-called Schedule V area. This means that land cannot be transferred to private companies without the affected tribal peoples' consent. According to the law, a "Gram Sabha" (a village meeting) must be held, including all villages that will be affected by the mining project, in this case, 12 villages and 5 000 inhabitants. The approval from the Gram Sabha through a No Objection Certificate is necessary to validate the land transfer. Gram Sabha was held on 26 June 2002. According to the Indian human rights organization *Samata*, not one of the 12 villages gave written consent to Vedanta's transfer of land. Despite this, it seems as if the Gram Sabha approved it.⁶⁴⁹

The report details how national laws and procedures required that consent of the gram sabha be obtained, which had not been complied with. This bolstered the legal claim that was made by the local community impacted by the proposed bauxite mine. In an interview with one of the members of the CoE, he reflected on how one understands compliance when deciding on disinvestment. He stated:

Compliance has to occur at three levels, domestic legal standards, international legal standards, and ethical guidelines. The international standards form the primary frame against which compliance is measured. In the case of FPIC, however, it is difficult, as domestic legal standards differ, and there is no clarity on how FPIC is to be realized in international law. Hence, we see if how loyal the company has been in its efforts to obtain consent.⁶⁵⁰

This is telling of the confusion that issues of indigenous rights and FPIC have for responsible investors. The CoE members in the case of Vedanta had felt that in the Niyamgiri instance, following through with the Vedanta project would amount to genocide. This decision by the CoE had an indirect influence on the Supreme Court's decision to recognize the right to FPIC and implement it more rigorously.⁶⁵¹

As Vedanta came to be blacklisted, the judges within India did not want to be associated with permitting mining by such a company. This is the speculative reasoning made by many

⁶⁴⁹ Recommendation of the Council on Ethics on Vedanta Resources Pvt Ltd.
<<https://etikkradet.no/files/2017/02/RecommendationVedanta.pdf>> accessed on May 2020.

⁶⁵⁰ Interview with a member of CoE on June, 2018.

⁶⁵¹ Interview with Jairam Ramesh and Mohammad Khan in New Delhi on July 2018.

activists who were involved in the struggle. Though this is a progressive decision, an article by Madhu Sarin, an advocate of forest rights and one of the members of the drafting committee on the Forest Rights Act, 2006, stated:

The judges have only attempted to protect themselves from being charged with permitting mining by a company blacklisted by the Norwegian government's ethics committee for environmental and human rights violations. While saying no to Vedanta, they have happily empowered themselves to invite Sterlite, a part of the Vedanta group and severely indicted by the Norwegian ethics committee, to apply for mining Niyamgiri.⁶⁵²

The impact of this decision by the CoE, though progressive in part, has also been interpreted as a way to recognize the right of the subsidiary, which is based in India. In interviews with local activists, they stated that regulators would prefer that international mining companies operate through Indian registered subsidiaries to reduce the compliance requirement to the national legal framework.

This is similar to the decision taken by the Indian government in rejecting funding by the World Bank for the Narmada project to prevent the politicization of the issue internationally.⁶⁵³ The international oversight in domestic level decision making is seen as unwanted interference. Interviews with activists reflect that bringing the case before a forum internationally can activate deliberative decision-making circuits domestically. In the Niyamgiri case, such transnational legal activism ensured that the implementation of the consent provision was examined with care by the local bureaucracy.⁶⁵⁴

Using the 'voice' strategy the international investors engaged with Vedanta and recommended that it change its corporate behavior and internal policies to match international standards on human rights. This propelled Vedanta to create a new position of chief sustainability officer. Tony Henshaw was brought in to fill this position. He had vast experience working on issues of human rights and business in South America and other parts of Asia. In an interview with him, he recollected that in his first meeting with the Chief Executive Officer of Vedanta, Anil Agarwal, he had to explain who indigenous people are and

⁶⁵² Madhu Sarin, 'Decoding the Niyamgiri Verdict'. *Down to Earth*, (2013).

<<https://www.downtoearth.org.in/blog/forests/decoding-the-niyamgiri-verdict-4046>> accessed on May 2020.

⁶⁵³ Interview with local activists in Bhubaneswar in August, 2018.

⁶⁵⁴ Interview with the District Collector in Kalahandi on July 2018.

how their rights were being violated in Niyamgiri. He was instrumental in drafting Vedanta's internal human rights policy.

The internal policies in Vedanta today state that it adheres to the international standards of FPIC. Whether it has influenced corporate behavior is hard to tell. Tony Henshaw stated

They were sincere in their efforts to change. However, the recent incident in Tuticorin where protestors were killed for bringing to light the environmental violations by Vedanta Resources Pvt Ltd, I do not know if things have changed. Conflicts transform companies like Vedanta are dependent on the leadership to choose to implement these policies. All I could ensure was to put the policies in place.⁶⁵⁵

Protests were also staged outside the Annual General Meeting (AGM) in London where activist shareholders within the AGM raised questions about the violations in Niyamgiri.⁶⁵⁶ International investors have played a key role in pushing for transformation internally within Vedanta to adopt a set of policies that will guide their engagement with indigenous people going forward.

Despite these progressive policies, Vedanta continues to confront legal hurdles as it continues to violate environmental and human rights standards for mining projects in India and Zambia.⁶⁵⁷ Vedanta applied to the CoE in 2016 for being reconsidered by the SWF. Hilde Jervan, who was investigating this request for reconsideration, stated that Vedanta had made changes internally with these policies. Yet, their practices on the ground remained were still non-compliant of these standards.⁶⁵⁸ Thus, responsible investment practices and international investors can act as a catalyzing force to bring about change in a company's policies. But it remains an open question as to whether internal policy change in a company ends up as a behavioral change on the ground. In Vedanta's case, this is an ongoing process. The Niyamgiri case has brought with it increased civil society attention to the company's activities.

⁶⁵⁵ Interview with Tony Henshaw in Mumbai on December, 2018.

⁶⁵⁶ *Ibid* 649.

⁶⁵⁷ Recommendation of the Council on Ethics on Vedanta Resources Pvt Ltd. <<https://etikkradet.no/files/2017/02/RecommendationVedanta.pdf>> accessed on May 2020.

⁶⁵⁸ Interview with Hilde Jervan on June, 2018.

4.2 OECD guidelines on MNEs and the Niyamgiri Case

Survival International, a global NGO that works on indigenous peoples' rights and registered in London, got involved with the Niyamgiri case early on and offered support to the Dongria Kondh in their struggle. In 2008, as an international ally to the Niyamgiri movement, Survival international filed a complaint before the United Kingdom National Contact Point (UK NCP) on the violation of the OECD guidelines for Multinational Enterprises by Vedanta, registered in the London Stock Exchange and thus attracted the application of the OECD guidelines.

In its complaint, Survival International listed the following as violations:

- a. To respect the human rights of those affected by its activities in a manner consistent with the host government's international obligations and commitments (Part II, paragraph 2)
- b. To develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate (Part II, paragraph 7); and
- c. To engage in adequate and timely communication and consultation with the communities directly affected by its environmental, health, and safety policies (Part V paragraph 2(b))⁶⁵⁹

The complaint emphasized the violation of the right to free, prior, and informed consent of indigenous communities. The content of these complaints uses provisions of international law to strengthen the claims of violations alongside the guidelines.⁶⁶⁰

While the guidelines demand adequate communication and consultation, in its complaint, Survival International speaks to the need for FPIC. When this complaint was filed, there was no domestic legal provision in India that recognized consent requirements. In the complaint, it states as follows:

⁶⁵⁹ OECD guidelines for Multinational Enterprises available at < <https://www.oecd.org/corporate/mne/>> last accessed on January 7 2020.

⁶⁶⁰ Survival International Vs Vedanta Resources Pvt Ltd (2008) < https://www.oecdwatch.org/cases/Case_165> accessed on January 7, 2021.

International human rights lawfully endorse this position, recognizing as it does that the free, prior, and informed consent ("FPIC") of an indigenous people must be obtained for any project likely to affect its lands, territory, or other resources.⁶⁶¹

The complaint relies on India's obligations under international law to fulfill the consent requirement. Survival International in filing this complaint framed the injustice experienced by the Dongria Khond as the violation of rights of indigenous peoples internationally.⁶⁶² This complaint then resulted in a statement by the UK NCP that emphasized that Vedanta was in clear violation of these guidelines on all accounts and required to adhere to international law on Indigenous rights including FPIC and the requirement for adequate and timely consultation under the OECD guidelines for multinational enterprises. The UK NCP states as follows:

Vedanta has not respected the rights and freedoms of the Dongria Kondh consistent with India's commitments under various international human rights instruments, including the UN International Covenant on Civil and Political Rights, the UN Convention on the Elimination of All Forms of Racial Discrimination, the Convention on Biological Diversity, and the UN Declaration on the Rights of Indigenous People.⁶⁶³

The final statement also provided recommendations that emphasized the need to consult the Dongria Khond community members. In its recommendation, it states as follows:

Vedanta should immediately and adequately engage with the Dongria Kondh seeking, in particular, the Dongria Kondh's views on the construction of the bauxite mine, access of the Dongria Kondh to the project affected area, ways to secure the Dongria Kondh's traditional livelihood, and exploring alternative arrangements (other than resettlement) for the affected Dongria Kondh's families. The company should respect the outcome of the consultation process.⁶⁶⁴

The recommendations also emphasized Vedanta's need to adopt robust internal policies that recognize these requirements of consultation, human rights, and indigenous rights impacts.

⁶⁶¹ Survival International Vs Vedanta Resources Pvt Ltd (2008) < https://www.oecdwatch.org/cases/Case_165> accessed on January 7, 2021.

⁶⁶² Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998).

⁶⁶³ Final statement by the UK National Contact Point in the Vedanta case < <https://www.business-humanrights.org/en/latest-news/doc-final-statement-by-the-uk-national-contact-point-for-the-oecd-guidelines-for-multinational-enterprises-complaint-from-survival-international-against-vedanta-resources-plc/>> accessed on January 7 2021.

⁶⁶⁴ Ibid 657.

The tool it suggested drawn from the United Nations Guiding Principles on Business and Human Rights is human rights due diligence.⁶⁶⁵ In an interview with Tony Henshaw, who was brought in to address these requirements, he said:

While the UK NCP decision may not have had a massive impact on the Indian state's decision-making, it created a churn within the company to actively look at these issues and find a self-regulatory mechanism to address them. Else it was losing a considerable amount of international investment and suffering reputational damage.⁶⁶⁶

In a report that Survival International was asked to produce to see if Vedanta implemented the recommendations of the UK NCP, it concluded that no substantial change in conduct was visible locally. While these recommendations shaped internal policy and self-regulatory mechanisms, it remained a paper tiger that did not translate into significant change on the ground and in the lives of the forest-dwelling community.

A nuanced way of locating the UK NCP statement amidst various legal strategies deployed and outcomes is to see it as a small win lending impetus to the social movement and holding the Indian state and Vedanta accountable to its violations of international law. This nuanced perspective on the multiplicity of legal fora explored was provided by Sharanya Nayak, a member of Action Aid who assisted the international legal mobilization process on the Niyamgiri case said:

The UK NCP's final statement, the decision of the SWF to disinvest, were all wins that provided momentum locally on pushing those legal arguments within the Indian judiciary too. While it did not directly influence legal decision-making locally, it provided legitimacy to legal arguments being made in the courts as they had formed the basis of these decisions.⁶⁶⁷

The OECD complaint was a way of jurisdictional leapfrogging, and a way to challenge domestic legal decisions that had at that point seemed settled but went on to be reconsidered as the then Ministry of Environment and Forests withdrew the forest clearance that had been granted.

⁶⁶⁵ Chapter II of the UN Guiding Principles on Business and Human Rights <https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf> accessed on January 28 2021.

⁶⁶⁶ Interview with Tony Henshaw in Mumbai on December, 2018.

⁶⁶⁷ Interview with Sharanya Nayak in Niyamgiri on February 2020.

4.3 OECD guidelines on MNEs and the Posco Case

This was an avenue introduced to the movement through a workshop held by OECD watch, a network of non-profits who work on the use of these guidelines in 2012 which Sandeep Pattnaik the key legal strategist for the social movement Posco Pratirodh Sangram Samiti (PPSS) in the Posco areas attended. PPSS, which coordinated the legal mobilization efforts, thought through the choice of approaching the OECD National Contact Points (NCPs) quite carefully.

A drawback PPSS felt was that the mechanism required them to engage in a mediation process with Posco, which was against their political stance of preventing POSCO from entering the area. To harness the available mechanism while not compromising on the political stance, they chose to use another people's movement, Lok Sakthi Abhiyan, led by Prafulla Samantray, to file the complaint. Lok Sakthi Abhiyan was part of their network of solidarity.⁶⁶⁸

Thus, the complaint was filed in the name of Lok Sakti Abhiyan and not PPSS. Sandeep Pattnaik recalls that there was concern over the OECD's image as a bastion of neoliberal development. Engaging with such an institution could compromise the movement's discourse of resistance. After a lot of deliberation, they developed an alternative approach to engaging with the OECD and the guidelines to Multinational Enterprises. Here, they concluded that they would use the mechanism on their terms. They would not use it to reach a compromise with POSCO but to garner international attention over the issue. The complaints were filed by civil society organizations in different countries⁶⁶⁹

The choice of which national contact point to file the complaint in was the question that governed the discussions that followed. The options for the choice of the avenue were determined by two conditions based on the criteria for the applicability of the OECD guidelines. Firstly, to check if there is an international investment towards the project from an OECD member country. Secondly, if the company, in this case, like Posco, is headquartered in an OECD member country or is operating in an OECD member country.⁶⁷⁰

⁶⁶⁸ Interview with Sandeep Pattnaik in Bhubaneswar on July 2019.

⁶⁶⁹ Interview with Sharanya Nayak in Niyamgiri on February 2020.

⁶⁷⁰ OECD guidelines for Multinational Enterprises < <https://www.oecd.org/corporate/mne/>> accessed on January 7 2020.

There were four avenues or national contact points that emerged as potential options. They were the United States, a significant shareholder in the company, Netherlands, and Norway, which had minor shares in the company, and South Korea, where POSCO was headquartered.

Sandeep mentions that a lot of work went into choosing the NCP by carefully examining the pros and cons of each country. Netherlands and Norway were known to uphold high human rights standards, and the NCP had a track record of decisions that held corporations accountable for human rights violations. This history of respect for human rights and the progressive decisions of these NCPs made them zero-in on these two NCPs.⁶⁷¹

The United States NCP was rejected. It was thought that the United States did not acknowledge or appropriately implement the OECD guidelines, and the NCP did not have a progressive track record of holding corporations accountable. The South Korean NCP was chosen with the objective that it might engender a response from Posco on the issues raised. Each complaint provided different outcomes. In the table below, I provide a brief overview of the decisions. The complaint was filed on the grounds of violating the standard of meaningful consultation by the company with different stakeholders.

⁶⁷¹ Interview with Sandeep Pattnaik in Bhubaneswar on July 2019.

OECD NCP	DECISION
Norway	The Norwegian NCP accepted the complaint and tried to facilitate a mediation process, but the Norwegian Pension Fund refused to cooperate and engage with the process. It, however, held that minority shareholders are responsible for conducting human rights due diligence as well. ⁶⁷²
The Netherlands	The Dutch NCP accepted the complaint and asked minority shareholders, which was the pension fund, ABP. In this case, the NCP tried to organize a fact-finding mission with ABP members, the complainant's representatives, and, eventually, POSCO. They were unable to arrive at an agreed set of terms for the fact-finding mission. The complainants further refused to engage in a dialogue as land acquisition for the project was ongoing. ⁶⁷³
South Korea	The South Korean NCP rejected the complaint in 2013 because it could not arrive at a decision that fell clearly within the ambit of the Indian authorities. It deferred to the state authorities in Odisha to deal with these complaints. ⁶⁷⁴

Table 12: Outcomes in the different NCPs in the Posco case

⁶⁷² Final Statement by the Norwegian NCP. < https://complaints.oecdwatch.org/cases/Case_260> accessed on January 7 2021.

⁶⁷³ Final Statement in the Posco case by the Netherlands NCP. < <https://webcache.googleusercontent.com/search?q=cache:3XYMctyKFL0J:https://www.oecdguidelines.nl/binaries/oecd-guidelines/documents/publication/2015/1/6/final-statement-abp-apg---somo-bothends/final-statement-somo-bothends-apg-abp2.pdf+&cd=1&hl=en&ct=clnk&gl=it>> accessed on January 7 2021.

⁶⁷⁴ Decision of the South Korean NCP in the Posco case available at < https://complaints.oecdwatch.org/cases/Case_260> accessed on January 7, 2021

While the outcomes differed across the different NCPs, the impact of this process was two-fold. It set a new precedent where the OECD NCPs of Netherlands and Norway held that minority shareholders could be held accountable if due diligence is not appropriately conducted. At the local level, the international attention that followed these complaints reduced the state's repressive use of violence in generating compliance. This is an example of how the capitalist underpinnings of international law can be challenged by the insurgent forest-dwelling citizen who mobilizes at the international level.

Sandeep said that filing the complaints enabled PPSS to challenge the state outside the confines of the political economy of extraction and harness international standards to make them applicable domestically.⁶⁷⁵ While the application of these international standards proved problematic when it came to the local bureaucracy's actions, it did reduce the use of violence.⁶⁷⁶

These complaints also forced Posco to respond to its efforts to comply with these standards. This was the first time that Posco released a statement that directly addressed human rights violations' accusations. Though Posco went on to deny being involved in such violations, it provides insight into the company's efforts to comply with domestic and international law. Posco's statement accuses PPSS of being driven by vested interests within and outside India to malign Posco.⁶⁷⁷

4.4 UN statements and Research Reports on the Posco case

The struggle against Posco gained international importance as it was a multinational company and many international NGOs formed part of their network of solidarity described in the previous chapter. The networks of solidarity internationally formed a robust TANs and a web of dialogue.

⁶⁷⁵ Interview with Sandeep Pattnaik in Bhubaneswar on July 2019.

⁶⁷⁶ Interview with Sandeep Pattnaik in Bhubaneswar on July 2019.

⁶⁷⁷ Samantha Balaton-Chrimes, 'POSCO's Odisha project: OECD National Contact Point complaints and a decade of resistance' (2015) <<https://www.deakin.edu.au/alfred-deakin-institute/news/news-archive/2015-archive/oecd-national-contact-point-complaints>> accessed on January 7 2021.

Significant members of the TAN were with Economic Social and Cultural Rights Network (ESCR-Net) which was a network of NGOs globally and the Human Rights Clinic at NYU law, which visited the area and produced a report titled the 'Price of Steel'.⁶⁷⁸This report made its way to the UN Human Rights Council, which under pressure from ESCR-Net and eight members from the council, released a statement opposing this project.⁶⁷⁹

It was only when the action was taken at an international level that Posco chose to respond to the allegations by releasing statements in opposition to the ones made against them. Posco-India immediately released a response, denying these allegations and conveying that it was abiding by international business and human rights standards. The UN Human Rights Council then used its special procedures function to request a response from South Korea in holding Posco to account. These initiatives internationally added pressure locally as the alternative narratives of human rights violations gained legitimacy. Local activists felt that this symbolized the strength of the movement.⁶⁸⁰

The Korean Civil Society, through an informal network, released a fact-finding report of the violations by Posco in Odisha. Other International NGOs like the Norwegian Forum for Environment and Development, Earth rights International played a crucial role in addressing these human rights issues before international investors and the OECD National Contact Points.⁶⁸¹

Miloon Kothari, who was then the United Nations Special Rapporteur, condemned this project for its scale of violations and mentioned its impact in the Universal Periodic Review submitted by India in 2012.⁶⁸² PPSS was also associated with the Mining Zone Peoples Solidarity Group, a group of international researchers working on India's new economic policies. They produced

⁶⁷⁸ International Human Rights Clinic, ESCR-Net, The Price of Steel: Human Rights and Forced Evictions in the POSCO-India Project (New York, NYU School of Law, 2013)

⁶⁷⁹ Ibid 672.

⁶⁸⁰ Statement of Posco < <https://www.escr-net.org/member/posco-pratirodh-sangram-samiti-ppss>> accessed on January 28 2021.

⁶⁸¹ Reports by the civil society actors available at < https://complaints.oecdwatch.org/cases/Case_260> accessed on January 7 2020.

⁶⁸² Universal Periodic Review submitted by India in 2012 < https://www.upr-info.org/sites/default/files/document/india/session_13_-_may_2012/wghruprinds132012wgonhrinindiaandtheuncomprisingofactionaidindiae.pdf> accessed on January 28 2021.

a report titled 'Iron and Steal' that focused on the impact of Posco in the Khandadhar area.⁶⁸³ These international activists and organizations shaped the nature and use of international law by the local community in their struggle against Posco.

As described in chapter nine, the nodally networked enforcement pyramid, PPSS decided to shift the conflict to the international level as none of the levels of governance below yielded an avenue for dialogue with the state. One of the most significant contributions made by solidarity-based networks internationally is researching human rights violations. The reports ranged from those produced by the mining zone people's solidarity network, fact-finding reports by the Korean civil society organizations, and a report titled 'The Price of Steel' by ESCR-Net and the International Human Rights Law Clinic at NYU.⁶⁸⁴ These reports systematically challenged the paper truth on which the official narrative rested.

4.5 Coal Mining in India and the Initial mobilization of International Law by Forest-dwelling communities

Coal was nationalized in 1973 to ensure scientific technology in mining and the protection of labor rights. The nationalization of coal led to the formation of the world's largest coal miner, Coal India (CIL).⁶⁸⁵ CIL is a state-owned corporation and was a recipient of a loan from the World Bank in 1997. The loan came intending to support India's reform and expansion in the coal sector. The loan consisted of two components, firstly, Coal Sector Rehabilitation Project (CSR) and the Coal Sector Environmental Social Mitigation Project (CESMP). This was to assist in CIL's efforts to mitigate the environmental and social impacts of expanding its mining operations.⁶⁸⁶

Before investment by the World Bank, the laws governing consultation with the local communities were the Coal Bearing Areas Act (CBA). The CBA provides a short period within which land-dependent communities can challenge the acquisition of land. The Doctrine of Eminent Domain largely determines the acquisition of land for coal mining. The loan provided

⁶⁸³ Report by the Mining Zone Peoples Solidarity Group available at < <http://miningzone.org/wp-content/uploads/2010/10/Iron-and-Steal.pdf>> accessed on January 7, 2021.

⁶⁸⁴ International Human Rights Clinic, ESCR-Net, *The Price of Steel: Human Rights and Forced Evictions in the POSCO-India Project* (New York, NYU School of Law, 2013)

⁶⁸⁵ Sudarshan Varadhan, 'Worlds largest coal miner looking to buy metal mines abroad' *Reuters* (New Delhi, 2017)

⁶⁸⁶ Kuntala Lahiri-Dutt, 'Coal Sector Loans, and Displacement of Indigenous People' (2004) *EPW* Vol.39 Issue No.23.

by the World Bank brought with it the application of environmental and social safeguards of the Bank and access to the inspection panel- an internal grievance redressal mechanism in the event of a violation of the safeguards. The environmental and social safeguards from 1997 required that local communities be adequately consulted before the acquisition of land. The lack of adequate consultation and improper relief and rehabilitation became the subject of a complaint filed by a local NGO from the Parej East Mines in Jharkhand, India, in 2001.⁶⁸⁷ This was one of the first cases to be filed before the IP, this resulted in two field visits by the Inspection Panel (IP) and a report by them recognizing the violations of the safeguards.⁶⁸⁸

The report of the IP in the Parej East case was met with a meek response by the management of the World Bank. They reaffirmed that efforts were made to comply with the safeguards. The outcome of this process of filing the complaint before the inspection panel highlighted the inconsistency within the operation of the Bank and their efforts to make coal mining more sustainable in India.⁶⁸⁹

The Bank management called upon the Government of India to set up an independent monitoring panel to inspect the forest-dwelling communities' grievances. Though this complaint did not result in a drastic shift in policy related to forest-dwelling communities, what has occurred is the revision of CIL's relief and rehabilitation policy. Kuntala Lahiri Dutt argues that the opportunity that the World Bank offered was to claim legal violations that did not have a legal basis in domestic law in India at the time.⁶⁹⁰ The cases brought before the courts were dismissed, as legal violations were not found in land acquisition.⁶⁹¹

With the recognition of the right to consent under the FRA, forest-dwelling communities have begun mobilizing in India's coal belt to avoid dispossession.⁶⁹² The problem remains in prioritizing the need for coal mining for rural and urban electrification, causing the CBA to

⁶⁸⁷ The complaint before the Inspection Panel under the Coal Environmental and Social Mitigation Project <[http://ewebapps.worldbank.org/apps/ip/PanelCases/23-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/23-Investigation%20Report%20(English).pdf)> accessed May 4, 2018.

⁶⁸⁸ Kuntala Lahiri-Dutt, *The Coal Nation: Histories, Ecologies and Politics of Coal in India* (Ashgate, 2014).

⁶⁸⁹ *Ibid* 682.

⁶⁹⁰ Kuntala Lahiri-Dutt, 'Coal Sector Loans, and Displacement of Indigenous People' (2004) EPW Vol.39 Issue No.23.

⁶⁹¹ Central Coalfields Ltd. V State of Jharkhand and Others S.L.P (c) No. 6374 of 2002.

⁶⁹² Amnesty International, 'When Land is Lost, do we eat coal?' (2014) <<https://www.amnesty.org/download/Documents/ASA2043912016ENGLISH.PDF>> accessed on May 4, 2018.

supersede the FRA requirements. Things are further complicated with India's commitments under the Paris Agreement. In its nationally determined contribution, India aims to reduce the emission intensity of its Gross Domestic Product by thirty-three to thirty-five percent.⁶⁹³ The increased demand for coal is embedded in the regulatory pressures of reducing carbon emissions. The consent of indigenous communities now forms an essential aspect of climate justice within international law. A report by the special rapporteur on indigenous people's rights observes that the protection of land rights and FPIC is vital in dealing with climate change concerns.⁶⁹⁴

Forest-dwelling communities have begun mobilizing the climate change discourse to assert their rights over land and the requirement of consent. Jurisdictional leapfrogging is more subtly observed here as energy security is a domestic concern and causes struggles for consent to operate in the political economy of energy security. In contrast, climate change, being a global concern, gives social movements the ability to join transnational advocacy networks with such a framing.⁶⁹⁵

The transnational dimension is now significantly amplified with the divestment movement. The divestment movement bypasses the state to address the large institutional investors on an ethical claim that investment should promote renewable energy and move away from coal.⁶⁹⁶ The World Bank and the Sovereign Wealth Fund have withdrawn their financial assistance to Coal India in response to the divestment movement. In February 2018, the Ministry of Coal had decided to privatize coal mining to make mining more efficient.⁶⁹⁷

The strategies used by forest-dwelling communities to mobilize the law against Coal India have shifted from accessing mechanisms like the Inspection Panel to bypass the state by working with transnational advocacy networks battling climate change. This includes the

⁶⁹³ India's Intended Nationally Determined Contribution (2015)
<<http://www4.unfccc.int/ndcregistry/PublishedDocuments/India%20First/INDIA%20INDC%20TO%20UNFCCC.pdf>> accessed on May 4, 2018.

⁶⁹⁴ Report of the Special Rapporteur on the Rights of Indigenous Peoples (2017)
<www.ohchr.org/EN/HRBodies/HRC/RegularSessions/.../A_HRC_36_46.docx> accessed on May 4, 2018.

⁶⁹⁵ Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998).

⁶⁹⁶ Julie Ayling and Niel Gunningham, 'Non-state governance and climate policy: The fossil fuel divestment movement' (2015) *Climate Policy*.

⁶⁹⁷ *Ibid* 690.

disinvestment movement. The effectiveness of these strategies is yet to be seen as India privatizes coal mining.

In Sundergarh, villagers in Tumulia begin to position their legal mobilization efforts based on being climate warriors. In an interview with Rajendra Nayak, he said, "We are working to protect the earth from the disastrous effect that the mine will have on carbon emissions and the climate. We are looking to now hold the state and the company accountable to climate change commitments and not merely our right to free, prior, and informed consent."⁶⁹⁸

5. The Risk of Disinvestment

In all the cases referred to above, disinvestment is viewed as a positive outcome of mobilizing at the international level. Targeting international investors allows communities to shift their conflict to an international forum. However, there is a risk attached with disinvestment, wherein forest-dwelling communities lose out on the ability to access international forum and harnessing higher legal standards derived from investor guidelines. For example, when India refused funds from the World Bank in the Narmada case it reverted back to lower legal standards on relief and rehabilitation. The forest-dwelling community being displaced by the construction of the dam could not bring a complaint before Inspection Panel. Disinvestment brings with it the removal of the international layer of oversight.⁶⁹⁹

In an interview with Martin Norman, who works with Greenpeace in Norway and heads their sustainable finance campaign and was instrumental in the inclusion of the climate change criteria in the ethical guidelines of the SWF when asked about the risk of disinvestment, he stated:

It is difficult, while disinvestment reduces the capital flow to unsustainable industries, it also takes away from the tension of the international investors' potentially higher standards and the violations taking place domestically.⁷⁰⁰

The 'voice' strategy can be useful in maintaining another layer of oversight and influencing the corporation's behavior. It is difficult to measure which of the two is better. The risk that

⁶⁹⁸ Interview with Ranjendra Nayak in Sundergarh on July 2018.

⁶⁹⁹ Namita Wahi, 'Human Rights accountability of the IMF and the World Bank: A critique of existing mechanisms and Articulation of a Theory of Horizontal Accountability' (2005) *International Journal of Law and Policy* Volume 12 pp 331.

⁷⁰⁰ Interview with Martin Norman in Norway on June, 2018.

disinvestment poses is by eliminating the dialectic between what can be seen as higher legal standards and domestic legal standards, which can be fruitful in arriving at a more just decision.

As seen in the Vedanta case, the CoE report highlights violations of domestic and international law. In India, where international law is not used often in shaping law and jurisprudence on indigeneity and natural resource conflicts as it challenges sovereignty over decision-making, this offers a pathway for the potential entrance of international law.⁷⁰¹ This is not to always assume that international standards are higher than domestic legal standards, but this is particular to the discussion of FPIC and due process standards in land acquisition.

6. Conclusion

The strategies used by the communities of jurisdictional leapfrogging has resulted in different outcomes in each of the cases examined in this chapter. It demonstrates that such a strategy can generate episodes of deliberation between the state and forest-dwelling community as well as between the company and the forest-dwelling community. In mobilizing at the international level forest-dwelling communities shape international law and mechanisms and infuse it with progressive jurisprudence on environment and human rights.

The three cases show us that mobilizing at the international level has had a boomerang effect. In conclusion, jurisdictional leapfrogging is vital part of a spectrum of legal strategies deployed by local communities in land-related struggles to draw the Indian state in its non-deliberative avatar into a web of dialogue. Once the state enters the web of dialogue it requires engagement with the interest of forest-dwelling communities impacted by these land conflicts.

⁷⁰¹ Bengt G. Karlsson and T.B Subba, 'Introduction' in Bengt G. Karlsson and T.B Subba (eds), *Indigeneity in India* (Kegan Paul, 2006).

TANs have played a significant role in enabling the social movements in the three mining sites to access international fora. As Usha Ramanathan, a member of the committee which had been set up to examine the situation of the implementation of the Forest Rights Act, 2006 in the Niyamgiri area, recalled:

The whole local bureaucracy seemed like Vedanta bought it over. Even the district collector was speaking their language. By using international mechanisms, the local community-built pressure from the outside as the room to maneuver locally was nearly impossible. The Norwegian decision made a dent in how decisions were made domestically, particularly in the Supreme Court.⁷⁰²

These strategies are examples of stories of struggle that provide social movements with some respite from the domestic context where political economy considerations make it difficult to entrench a deliberative relationship with the state.

⁷⁰² Interview with Usha Ramanathan in New Delhi on July 2018.

11. THE MAKING OF A DELIBERATIVE STATE IN INDIA'S FORESTS

1. Introduction

The forest law regime of dispossession accompanied by the enabling legislation for the ease of doing business lays the foundation for a governance structure that prioritizes extractive interests over interests of forest-dwelling communities' rights. The consent provision is an opportunity for the state to switch from its non-deliberative to its deliberative modality. This chapter will highlight the barriers present in the making of the deliberative state.

Drawing from the deliberative governance elements across the earlier chapters, I summarize the nodes and networks of decision-making that would make the deliberative state a permanent feature of governance for India's forest, rather than a network that fades in and out of operation to be replaced by other state modalities such as the paper state.⁷⁰³ The question that this chapter seeks to address is what are the nodes and networks of decision-making that can form the building blocks of the deliberative state in India's forests ?

A deliberative reimagination of the consent process along with the nodes and networks of decision-making proposed by forest-dwelling communities form the building blocks for the deliberative state. The aspirational legal interpretation grounded in the principle of shared sovereignty provides an avenue to re-examine the nature of deliberative democracy in India's forests and the desired relationship with the state.

The state, through its governing institutional nodes, triggers a circuit that enables capital accumulation from extraction to entrench a non-deliberative modality. The non-deliberative modality dilutes the threat of a challenge to capital accumulation that comes with the principle of shared sovereignty.⁷⁰⁴ The state is forced to be deliberative in the Niyamgiri case

⁷⁰³ Peter Drahos, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) Temple Law Review 77 and John Dryzek with Simon Niemeyer, *Foundations and Frontiers of Deliberative Governance* (Oxford University Press, 2010)

⁷⁰⁴ Peter Drahos, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) Temple Law Review, 77 pp. 401

after the pressure of rulings from the Supreme Court and action by international financial institutions.⁷⁰⁵

The deliberative state is a state whose institutional nodes and circuit of decision-making involves forest-dwelling communities. The existing institutional architecture with its nodes and networks consists of a deliberative system that considers the forest-dwelling community's voices in state decision-making, yet these nodes are suppressed and are unable to influence the shape of events and outcomes. Instead, the pro-business bureaucracy, through its single-window clearance mechanism, ensures that the state is responsive to the voice of mining companies while it ignores the concerns of the forest-dwelling community.

The nodes and networks that form the building blocks of the making of the deliberative state are as follows:

- a.** Nodes and network of decision-making for the deliberative reconciliation of laws: In this governance framework, I speak to the shift of the power of the district collector in the reconciliation of laws to the Tribes Advisory Council and the Gram Sabha who can share equal influence in these decisions. To borrow from the theory of nodal governance, what I argue for here is the shift in the district collector as the superstructural node with the power, resources, and mentality to decide over these matters to the institutional nodes of the TAC and the Gram Sabha. This will enable a shift in the mentalities of the institutional nodes that form part of this network of decision-making.
- b.** Nodes and network as part of the deliberative reimagination of the consent process: The consent provision and its implementation, as has been demonstrated in this thesis, is dominated by the pro-business mentality of the institutional nodes. The deliberative reimagination of the consent process creates a network of decision-making where the gram sabha operates as the node deciding and exerting influence on whether forest land is to be acquired or not.
- c.** Nodes and networks of decision-making in breaking the extractive circuit: Here, the nodes and networks which enable capital accumulation are reconfigured, with the gram sabha

⁷⁰⁵ Orissa Mining Corporation Ltd V Ministry of Environment and Forests (Writ Petition (CIVIL) NO. 180 OF 2011)

occupying the position of the institutional node that shapes the events and governance outcome by incorporating the voices of the forest-dwelling community.

- d. Nodes and networks of decision-making in breaking the exclusionary conservation circuit: Here, the existing node and network are reimagined to give forest-dwelling communities a voice in the management and conservation of forests. The existing institutional nodes of forest governance are reconfigured to align with the mentality of community-based conservation and shared decision-making.

The chapter will begin with a need to re-examine the relationship between the state and forest-dwelling communities in India's forests based on the principle of shared sovereignty and the jurisprudence of healing and repair. I then take on the entrenchment of the non-deliberative state modalities of reinforcing conflicting legislation, the extractive circuit, and the circuit of exclusionary conservation by offering an alternative approach of deliberative governance and its associated nodes and networks. This approach is a pathway to breaking out of these circuits inspired by the reimagination of forest-dwelling communities' consent process.

2. Reimagining the Relationship Between the State and Forest-Dwelling Communities: Listening to The Jurisprudence from Below

"The state is part of the decision-making architecture; by constantly framing our relationship with the state as one that is adversarial, we have lost opportunities to enter into dialogue," said a young Adivasi in Kodingamali.⁷⁰⁶ The dispossession regime solidifies the adversarial relationship between the state and forest-dwelling communities; however, the shared sovereignty framework creates room for dialogue. As discussed in chapter three of this thesis, the shared sovereignty framework is a legal concept that emerged in my interviews with the forest-dwelling community.

The forest-dwelling communities in Odisha's forests described their present relationship with the state as one of competing sovereignties as opposed to the notion of shared sovereignty. The notion of sovereignty is described by forest-dwelling communities as the ability to self-govern and as being relational to the nation-state where its presence and absence can be negotiated. The Indian state is seen as asserting absolute sovereignty by the forest-dwelling

⁷⁰⁶ Interview in Kodingamali on July 2019.

communities when it should be a relationship as Jaipal Singh had imagined of respect and reciprocity.⁷⁰⁷

The shared sovereignty framework, forest-dwelling communities argued, is embedded in the Panchayat Extension of Scheduled Areas Act, FRA, and the consent provision. Jitu Jakesika described his understanding of shared sovereignty as one enshrined in law as follows:

PESA, FRA, and the consent provision recognize the gram sabha as a regulatory authority and an essential decision-making institution. The gram sabha is where decisions are made and then communicated to the formal state's institutional structures. When we read the laws this way, what we see is that the forest-dwelling community shares power, authority, and legitimacy alongside the Indian state to govern the forests.⁷⁰⁸

This legal interpretation of restructuring the relationship with the state from competing sovereignties to one of shared sovereignty would require the deliberative circuit described in the previous chapters to be entrenched. The gram sabha in such a framework emerges as an integral institutional node in the deliberative governance structure, which shapes and influences governance outcomes.⁷⁰⁹

The idea of shared sovereignty is being experimented with within the framework agreement in the Nagaland conflict. Nagaland is a sub-national unit in the north-eastern part of the Indian state. Nagaland has historically witnessed a struggle for separate statehood by indigenous communities in the area. Nagaland's shared sovereignty is understood as a separate nation within the Indian nation-state, which respects the sovereignty of Nagaland in all areas of decision-making. The terms and conditions of the agreement of shared sovereignty are yet to be decided. The Naga experiment alerts us to the difference in understanding Odisha's shared sovereignty as opposed to other parts of India.

In Odisha, the forest-dwelling communities spoke of shared sovereignty as a process of making decisions together on governance with the nation-state. Shared sovereignty is a departure from the more radical description of the relationship between the state and forest

⁷⁰⁷ Speech by Jaipal Singh Munda in *Debates of the Constituent Assembly of India* (vol IV ,22 July 1947) at 751.

⁷⁰⁸ Interview with Jitu Jakesika in Niyamgiri on February 2020.

⁷⁰⁹ John Dryzek with Simon Niemeyer, *Foundations and Frontiers of Deliberative Governance* (Oxford University Press,2010)

dwellers in terms of absolute self-determination. On this more radical view, the Indian state is rejected because it illegitimately interferes in the exercise of indigenous sovereignty that should be left to pursue its own development agenda.

As Pooja Parmar argues in her piece on undoing historical wrongs, Jaipal Singh Munda imagined a relationship with the Indian state built on the demand for freedom, respect, and reciprocity.⁷¹⁰ The scheduled areas are the legal construct for recognizing these values. The shared sovereignty framework is aptly captured in a brief encounter with Rinjo Sikaka in Niyamgiri. He describes it as

The Indian state exists with its multiple development programs, audits, and surveys. The exercise is a strange one where they enter into our lives, extract information, or give us some food or medicine and leave. We are but a bullet point in their list of things to do for Adivasis. That will not work, they need to roll up their sleeves and be present in our struggles, and we need to problem-solve together.⁷¹¹

As described earlier in this thesis, the state in Odisha is present in its extractive and pro-business modality. Many expressed the view that a relationship of care and mutual respect was the way to repair this fraught relationship.

The starting point for repair is to reimagine the connection between the state and communities on the basis of the principle of shared sovereignty supported by the jurisprudence of healing described in chapter three which includes the public trust doctrine. The Doctrine of Eminent domain does not rest with the Indian state alone, and it is shared with the forest-dwelling community and negotiated by the values of stewardship and inter-generational equity.

The deliberative state enables a negotiated settlement on different decisions with a shared jurisdiction of decision-making. Many forest-dwelling communities expressed the need for a working agreement. Chapter two shows that forest laws are in conflict, and the state exploits this conflict using its discretionary power to reassert control over forest land. The working

⁷¹⁰ Pooja Parmar, 'Undoing Historical Wrongs: Law and Indigeneity in India.' (2012) *Osgoode Hall Law Journal* 49.3 pp. 491-525.

⁷¹¹ Interview with Rinjo Sikaka in Niyamgiri on February 2020.

agreement will be a way for forest-dwelling communities to check the use of discretionary power and form an integral part of the governance architecture.

The working agreement represents a working consensus between the state and forest-dwelling communities on which the operation of conflicting legislation rests. Jitu Jakesika described the need to establish such a working agreement with the state of Odisha and the Indian state so that there was the certainty of land tenure, forest governance, and acquisition, and the nature of decision making was a product of continuous dialogue and negotiation. The ethos of engagement with the state was based on the three-part process of bhaitak-sunvayi and sahamati. The consent provision was seen as an element of arriving at this working agreement, which was localized in its applicability and enforcement.

The description 'Constitution within a constitution' is used by the noted tribal activist Dr. B.D Sharma who was the principal drafter of PESA, to describe the institutional arrangement of the scheduled area.⁷¹² Forest-dwelling communities deepened this understanding as not merely a constitution within a constitution but an agreement of how these constitutions interact and the terms on which they can co-exist. Scheduled area provisions define the contours of autonomy and the modality of relating to the nation-state. However, these provisions do not bring administrative structures' the flexibility to enforce bottom-up decisions, something that Jaipal Singh Munda brought up in the constituent assembly debates.

A senior bureaucrat criticized the feasibility of such an approach. He critiqued it because this would mean an inability to standardize policies and implementation of laws. While this criticism holds what a working agreement enables is a mechanism to ensure dialogue on all aspects. It would allow for the implementation of laws that would fit the local context and offer room for experimentation of how the relationship between the state and the forest-dwelling communities could be repaired.⁷¹³ The working agreement is seen as a meta-consensus agreement holding different moving parts. As described in this thesis, the consent process's deliberative circuits are pathways of decision-making to work with the state in arriving at a working agreement.

⁷¹² B.D Sharma, *Unbroken History of Broken Promises* (Freedom Press and Sahyog Pustak Kuteer,2010)

⁷¹³ Interview with a senior bureaucrat in Bhubaneshwar on February 2020.

3. The Building Blocks of the Deliberative State

3.1 Deliberative Reconciliation of Laws

The forest laws in India conflict, as seen in chapter two. The reconciliation of these laws is undertaken by the district collector and district forest officer using their discretionary power of legal interpretation. The deliberative state's first building block is to shift the reconciliation of conflicting forest laws from the institutional node of the district collector and district forest officer to the gram sabha and tribe's advisory council. The governor gives effect to these models of reconciliation in the scheduled areas governance framework.

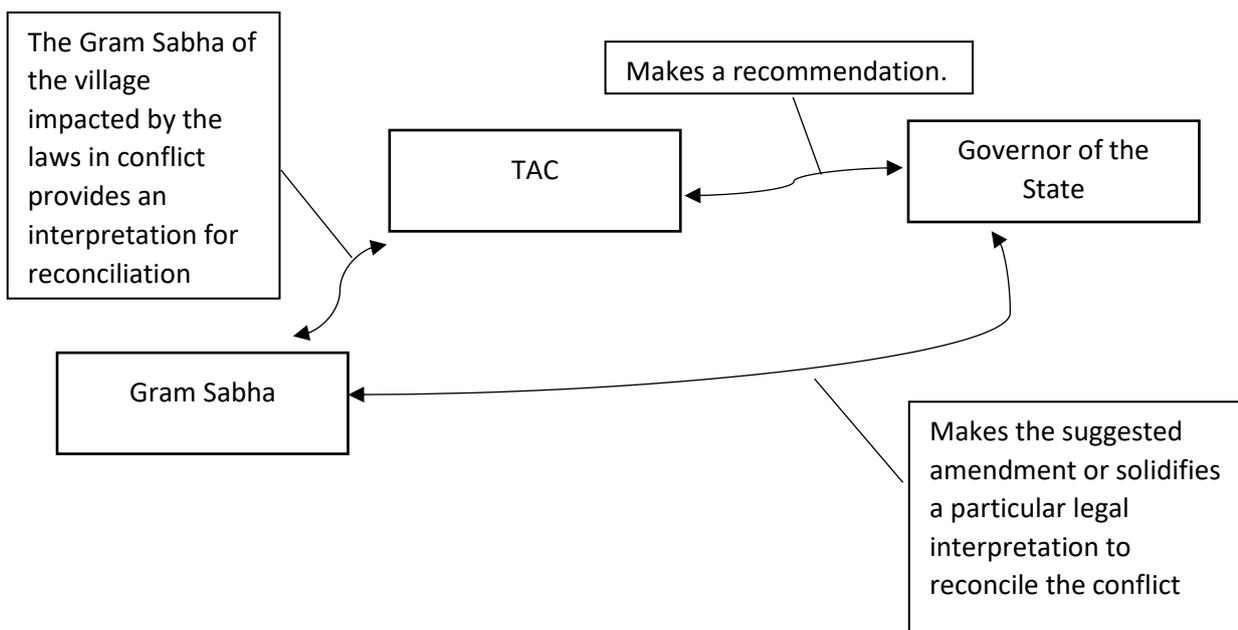


Figure 14: Deliberative circuit of nodes and networks of decision-making for reconciliation of forest laws

This deliberative circuit ensures that unilateral legal interpretations that reassert state control over forest areas can be challenged. A more just mechanism of reconciliation can be arrived at. The deliberative reconciliation of conflicting laws is an essential pathway to arrive at a working agreement with Odisha and the Indian state regarding legislative decision-making.

The scheduled areas provision has within it the deliberative governance structure with the gram sabha along with the TAC as the nodes for deciding on the applicability of laws and amendments which may be necessary. This deliberative governance structure has seldom been used. The deliberative state in India's forests would require that this governance structure forms an integral decision-making pathway. The Deliberative reconciliation of laws allows for the integrated operation of statutes for the forest areas guided by the principle of shared sovereignty.

3.2 Deliberative Reimagination of the Consent Process- setting the tone for a deliberative process.

The Deliberative reconciliation of laws provides an avenue for redesigning the enforcement of laws within the forest areas. In my interviews with forest-dwelling communities on what they thought the consent process should look like, many described the ethos of the three sequences of deliberation, namely, Bhaitak or a regulatory convening, Sunvayi or the hearing with the state, and sahamati which is an agreement or consent to a decision. This aspirational reconstruction of the consent process may offer an alternative pathway of decision-making and reconfigure the nodes and network involved in its implementation in forest areas.

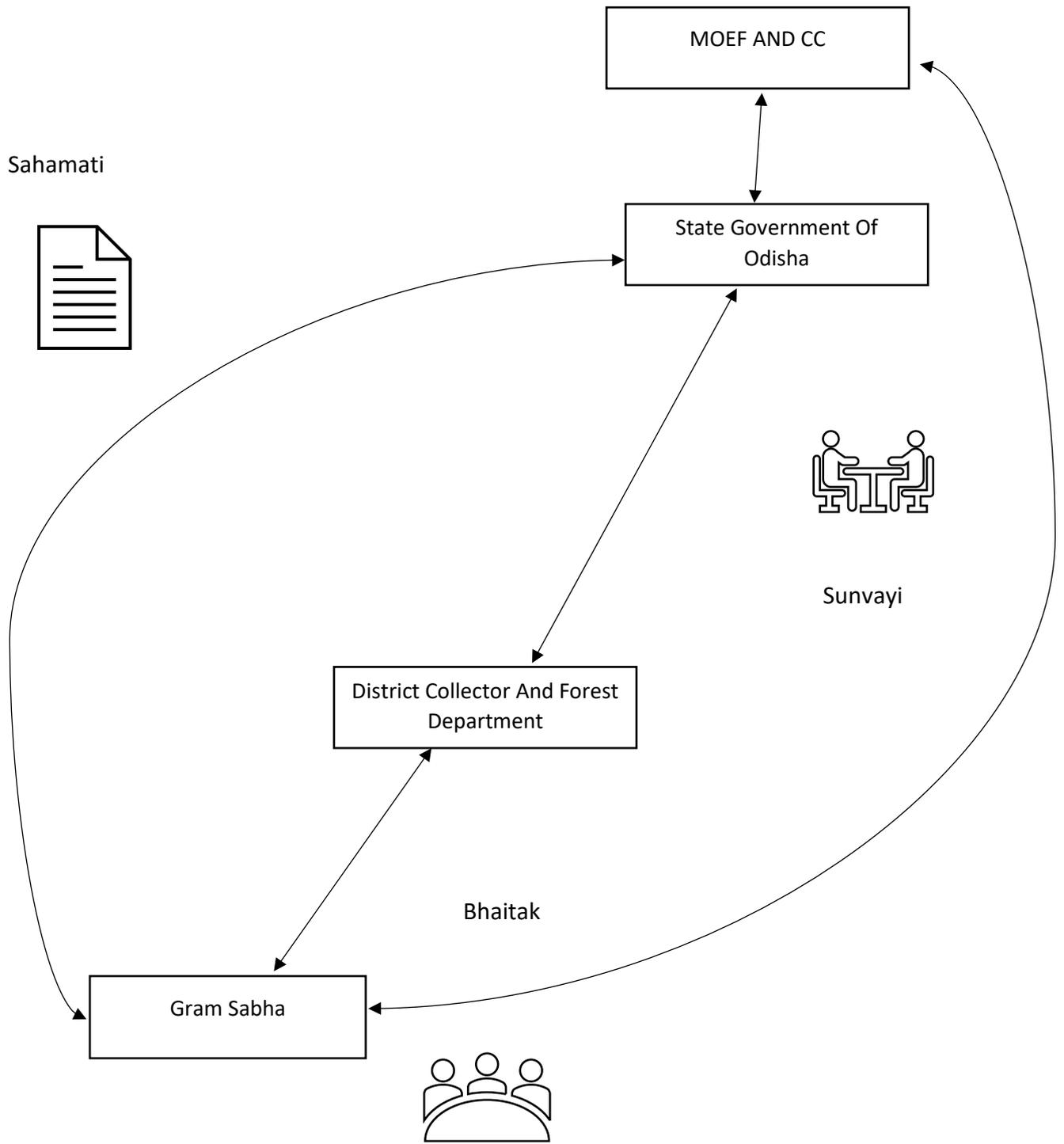


Figure 15: Nodes and network of decision-making of the consent process as reimaged.

This three-part process defines the ethos of engagement with the state. The process is grounded in the gram sabha's deliberated outcome, which sets the state's agenda for decisions to be taken. The hearing before the state and the consent of the state's decision is a continuing circuit of engagement.

The deliberative reimagination of the consent process provides a framework for engagement that helps switch the state's pro-business modality to a deliberative one by reshaping the bureaucratic structure and nodes that make decisions. The deliberative reconciliation of laws and restructuring the circuit of the bureaucracy of decision-making in India's forests will create deliberative pathways to arrive at an incomplete theorized working agreement.

3.3 Breaking the Extractive Circuit

The state's extractive modality is entrenched in a pro-business bureaucracy that fails to discipline capital but facilitates its operation by making land acquisition easy for the purpose of capital accumulation. As shown in this thesis, the extractive circuit of decision-making consists of a single-window clearance mechanism that seeks to bypass any window available within the law for discussion and deliberation with the forest-dwelling community.

Prakash Jena, who has been fighting against the acquisition of land in Jagatsinghpur since 2005, speaks of what he calls the original sin that triggers the extractive circuit into operation. He states:

The signing of the MoU without as much as an exchange with the forest-dwelling communities or notifying us that this is being done is what begins the land conflict. We are then required to conform to the acceptance of extraction and no room to push back against it.⁷¹⁴

The extractive circuit can be broken if forest-dwelling communities are allowed before signing the MoU to deliberate over what options are available; such an interaction between nodes can change the mentality of the pro-business bureaucracy.

The consent process, as reimagined, provides a basis for articulating an alternative deliberative pathway of decision-making as elaborated in chapter 7 of this thesis. The diagram

⁷¹⁴ Interview with Prakash Jena in Jagatsinghpur on July 2018.

below shows the aspirational legal approach that forest-dwelling communities have articulated while negotiating the prospect of extraction.

The gram sabha remains the initial deliberative forum and node of deliberative governance to decide on the prospect of extraction and the place to formulate conditions on which it can begin operations. A resolution on these matters forms the basis for negotiation with the mining company. As a senior bureaucrat and land acquisition officer in Coal India described

We tend to assume that we can sign these MoUs and eventually find a way of acquiring the land. It is not a well thought out process. We need to be realistic and understand that communities live in these forests and need to find a way to take them together on this decision. Otherwise, we are merely subscribing to an ad-hoc approach of dealing with conflict with suppression later.⁷¹⁵

These wise words describe the need to approach the forest-dwelling communities from the get-go if the land conflicts are to be avoided and preventing an inordinate delay in making land available to extractive companies if forest-dwelling communities agree.

⁷¹⁵ Interview with a senior bureaucrat in Coal India on May 2019.

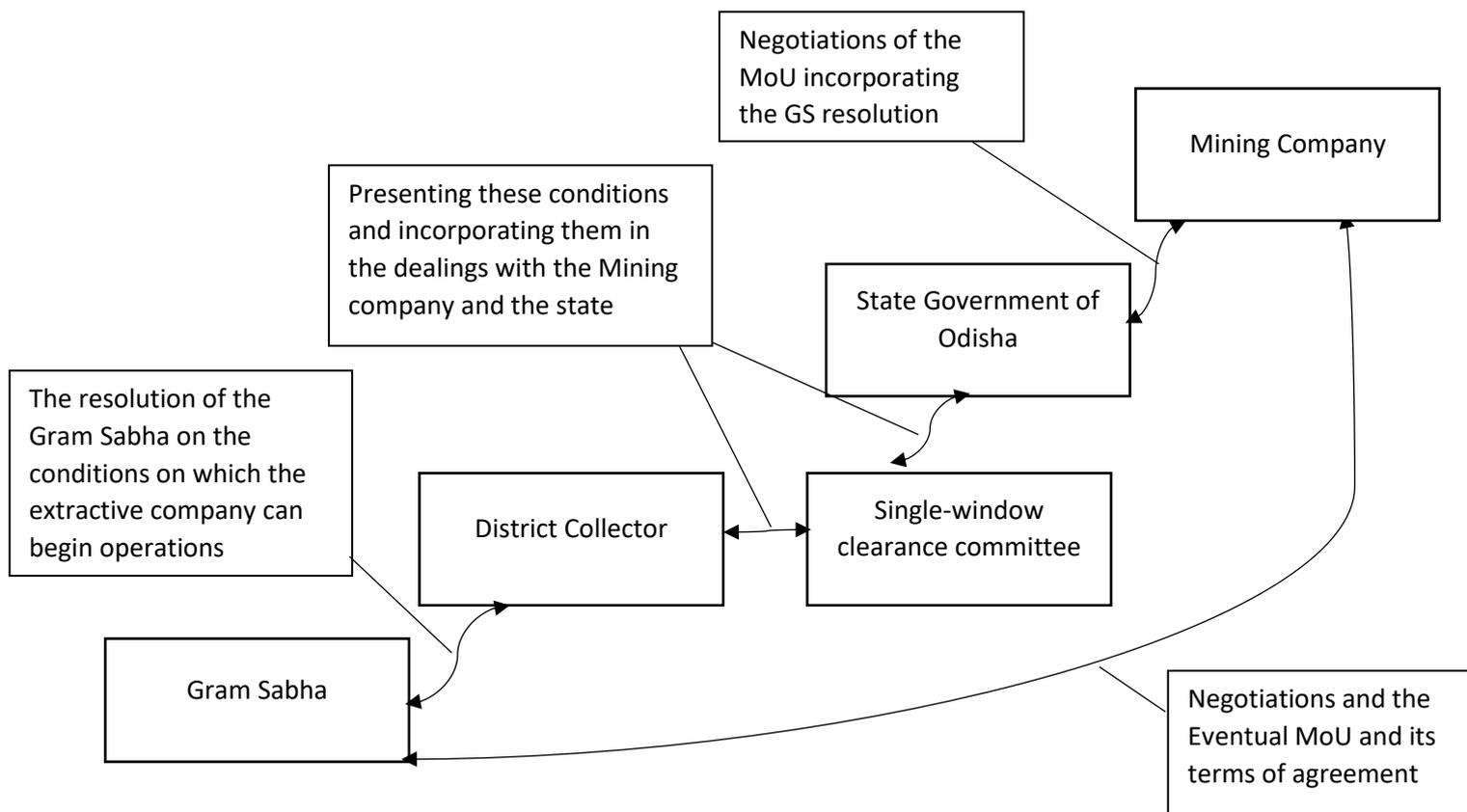


Figure 16: Breaking the extractive circuit with this reconfigured governance structure.

This deliberative circuit with the sequence of bhaitak- sunvayi and sahamati is a way to break the extractive circuit and forge the deliberative state's beginnings. The deliberative state here requires that states' negotiations with extractive companies are bottom-up instead of an imposition of an MoU with conditions that are not acceptable to forest-dwelling communities. This approach perpetuates Odisha's land conflicts.

Deliberative governance is not restricted to negotiating the extractive company's entrance alone. It is a wider process of exploring other avenues of livelihood and development. The opportunities to deliberate as the consent provision provides are restricted to discussions on engaging with the extractive economy or rejecting it entirely.

Development planning in scheduled areas is determined by a tribal sub-plan that exclusively attends to these districts' needs through specific government programs and interventions. PESA recognized the right of the gram sabha to decide on development plans and their execution. Both of these progressive attempts at involving forest-dwelling communities in

decision-making have not been adequately implemented due to the state's extractive modality.

The deliberative governance framework proposed by forest-dwelling communities is similar to the diagram above, where it requires development plans to emerge from the gram sabha to be shared with the district collector and be part of the working agreement with the state of Odisha and the centre for approval of funds to realize these development plans.

3.4 Breaking the circuit of exclusionary conservation.

The thesis has shown the Indian Forest Act and the Wildlife Protection Act function as a paradigm of exclusionary conservation. Conservation of India's forests is a contested terrain with an assortment of approaches. Exclusionary conservation pushes forest-dwelling communities outside of forest areas and restricts their forest rights in protected areas.

A deliberative governance approach that rests on the ethos of engagement of bhaitak-sunvayi-sahamati assists in breaking away from the circuit of decision-making that entrenches state control over forest areas to the exclusion of forest-dwelling communities. In the chapter on disciplining the capacity to aspire, I articulated the deliberative governance structure derived from my interviews with forest-dwelling communities in the three mining sites. The diagram below highlights the deliberative circuit.

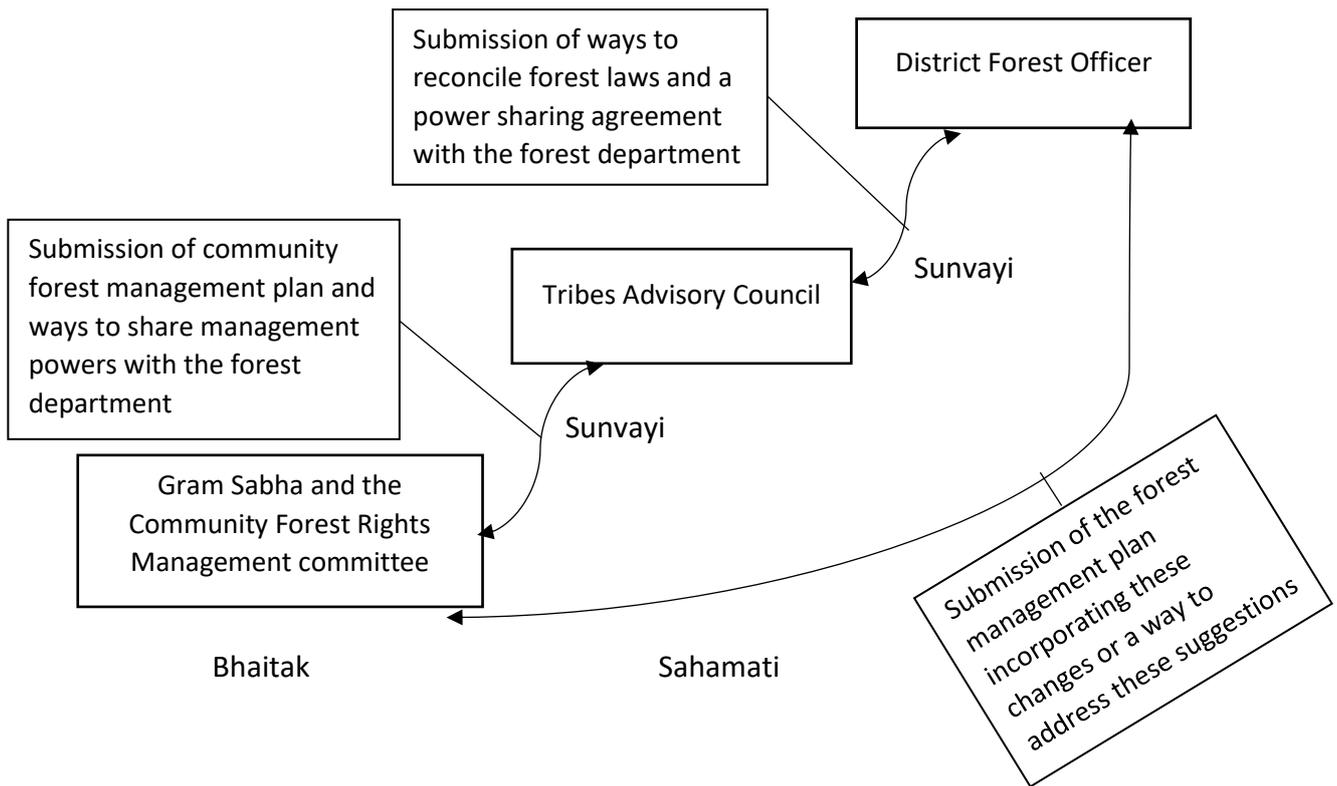


Figure 17: Breaking the circuit of exclusionary conservation.

Deliberative reconciliation of laws is seen as a definitive way to break out of the circuit of exclusionary conservation. The gram sabha is the institutional node along with the community forest rights management committee that triggers the deliberative circuit and sets the agenda for the same with its management plan and power-sharing agreement.

This deliberative approach will allow for the fuller implementation of the FRA, which is presently constrained by the conflicting laws. This deliberative governance structure will push for discursive diversity and change the mentality of institutional nodes within the state in how it thinks about conservation issues beyond the lens of inviolate spaces. The working agreement reached through the deliberative reconciliation of laws and a localized forest management plan will sustain conservation efforts and provide a workable basis to share the responsibility of stewardship between the state and forest-dwelling communities.

4. The Working Agreement

Forest-dwelling communities across the three mining areas spoke of deliberations with the state leading to a working agreement, continually being negotiated, and re-negotiated. As stated earlier in this thesis, the working agreement is the meta-structure on which the operationalization of laws and development decisions rest. Forest-dwelling communities identified the specific areas which would serve as the sites for beginning the negotiations as development, conservation, legislative reconciliation, and engagement with the extractive industry.

Rajendra Nayak described the working agreement eloquently when asked about this term as I heard it in other contexts- he stated:

A working agreement is an agreement that we have arrived at after considerable back and forth with the state. It is an agreement for a certain period and needs to be revisited. The agreement will give us the certainty of what to expect from the state and not be suddenly bombarded by notices of acquisition.⁷¹⁶

The working agreement was seen as an agreement on the core issues, which were settled albeit briefly and could be revisited or re-negotiated. The ethos of engagement in arriving at this agreement remained the same as bhaitak-sunvayi-sahamati. When I dug for more details on what they imagined would be the contents of this agreement, Rinjo Sikaka described it as follows:

It should contain details like when the state can interfere in internal matters, what we need from the state in terms of education, health, and other requirements and how we can decide together on how to conserve or use these forest areas. The agreement should guide our relationship, and from it, other things can flow⁷¹⁷

While the agreement's contents differed in each mining area, what remained constant was the understanding that this working agreement was a guiding document that repaired the relationship between the state and forest-dwelling communities. The working agreement brought a sense of certainty in shaping deliberation while being embedded in the ethos of engagement of bhaitak-sunvayi and sahamati.

⁷¹⁶ Interview with Rajendra Nayak in Sundergarh on July 2018.

⁷¹⁷ Interview with Rinjo Sikaka in Niyamgiri on February 2020.

The making of the deliberative state as forest-dwelling communities described it is a process where deliberative governance is harnessed through the circuits mentioned above, and micro-agreements on aspects of development, conservation, and reconciliation of laws are arrived at. These micro-agreements will help produce a more comprehensive working agreement that reconfigures the relationship between the state and forest-dwelling communities.

5. A Note on The Deliberative State in Modi's India : A workable possibility?

Modi came into power in 2014 with a sweeping mandate of development and economic growth and the desire to overcome corruption. Large scale corruption had defined the second term of the United Progressive Alliance with the Indian National Congress in power till 2014. The Modi government in its seven years of being in power has been marked by incremental and systemic changes to India's constitutional values, institutions and ideals of democracy. These systemic changes have penetrated the institutional autonomy of the executive and the judiciary.

Authoritarianism has crept its way into both institutional functioning and justice delivery. It is what Kim Lane Scheppele has termed autocratic legalism where legal autocrats across recent authoritarian governments use the law in ways to dismantle the constitution.⁷¹⁸ Something that is seen in Modi's use of law in India as Khaitan argues is a death by a thousand cuts. In his research of the multiple changes made to executive accountability mechanisms from demographic change, unfair legislative processes, reducing space for participation by the opposition and attack on judicial independence to name a few has created ample room for law and policies to be deployed in ways that dismantle the constitution by creating a majoritarian version allergic to dissent.⁷¹⁹

One arena which has been marked by this autocratic legalism has been how environmental laws have been made and passed without legislative deliberation. It began with an attempt to amend the progressive land acquisition law to do away with its consent provision and then extended to a complete overhaul of the forest law regime in the direction of greater state

⁷¹⁸ Scheppele, Kim L. 'Autocratic Legalism,' University of Chicago Law Review: Vol. 85 : Iss. 2 , Article 2. (2018)

⁷¹⁹ Khaitan, Tarunabh. "Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India" *Law & Ethics of Human Rights*, vol. 14, no. 1, 2020, pp. 49-95

control. These amendments and legal reforms have been done with the ease of doing business in mind and strengthening the state and business nexus.

As Khaitan argues about the disregard to procedural requirements like the consent provision as follows:

A managerial discourse that promised probity, decisiveness, and efficiency (and painted political opponents as well as checking institutions as corrupt, indecisive, or inefficient), and a welfarist-developmental-populist discourse that characterized procedural requirements as hurdles that got in the way of delivering development to the people.⁷²⁰

Given this existing political reality in India, what are the possibilities of the making of the deliberative state in India's forests. The present political climate makes it harder for this reimagined nodal arrangement to be realised, however the need for deliberative governance has been strengthened with these changes as a way out of this creeping authoritarian approach to law making and implementation. The social movements by forest-dwellers and their engagement with constitutional and environmental law has been more strategic in response to the challenges posed by the Modi regime.

An example of this is the Pathalgadi movement which began as a way for forest-dwelling communities to reignite the debate of self-determination and self-governance. This moment of excessive repression by the Indian state in forest areas has enabled communities to form new alliances at multiple scales which had not existed before like the coming together of the Dalit movement with the Adivasi communities in Odisha and elsewhere. These new alliances and reinvigoration of debates of constitutional morality and self-determination offer a fertile ground to mobilize for a deliberative relationship with the Indian state.

However, the acceptance of this alternative in the current political climate is a difficult one. Legal gains to foster this deliberative relationship will be led by micro legal interventions at the local bureaucracy and challenges before the judiciary. A larger rearrangement of the governance architecture will be an incremental process of these insurgent legal interventions challenging the sovereignty of the Indian state. As Modi is overhauling the environmental governance architecture, opposition to it has created an avenue for these reimagined

⁷²⁰ Khaitan, Tarunabh. "Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India" *Law & Ethics of Human Rights*, vol. 14, no. 1, 2020, pp. 49-95.

possibilities to be presented as alternatives within social movements. Since the damage done to institutions by the Modi regime in forests can be undone forest-dwelling communities argue by a combination of these reparative legal interventions at the micro scale of finding ways to share power with the Indian state in forest areas and mobilisation of larger governance alternatives. An example of this is the legal mobilization efforts that the forest-dwelling communities I interviewed have undertaken and continue to undertake which can inform the making of the working agreement as well as a larger deliberative governance architecture that can replace the present repressive one.

6. Conclusion

In conclusion, this thesis has demonstrated the state's multiple modalities and how pathways might be built through these modalities to reach and entrench a deliberative one. The non-deliberative modalities can be challenged by incorporating a deliberative reimagination of decision-making circuits as forest-dwelling communities have articulated.

My data speak to a jurisprudence and regulatory approaches from below that provide insight into how forest-dwelling communities can engage with the law and reconfigure it to ensure that there is room for deliberations to challenge the present manner in which the state operates. The deliberative circuit charted by forest-dwelling communities provides an alternative way out of the bind of the shifting modalities of the non-deliberative state. The working agreement that forest-dwelling communities describe as the eventual outcome of ongoing deliberation can heal the state's ruptured relationship.

To conclude, as Lado Sikaka clarifies on the need for healing with the state thinking of future generations, he says:

All relationships need care, we are ready to put in the effort, but the state has to let us in. We need to work together, understand each other, and find ways to co-exist peacefully. There is no point in constant conflict; it strains us but perhaps works to their advantage. In the long run, as our next generation comes into being, we wish they can inherit a healed relationship with the state and not the one that is so broken.⁷²¹

⁷²¹ Interview with Lado Sikaka in Niyamgiri on February 2020.

As Lado mentioned these words, it reminded me of the potential that this deliberative reimagination had to take something that was broken and fix it slowly with care. Deliberative governance and this radical reimagination of decision-making structures can mend the state's dominance to one of shared sovereignty.

REFERENCES

BOOKS

1. A.H Somjee, Democracy and political change in village India; a case study (Orient Longman, 1971)
2. Akhil Gupta, Red Tape: Bureaucracy, Structural Violence and Poverty in India (Duke University Press,2012).
3. Akhileshwar Pathak, Laws, Strategies and Ideologies-Legislating Forests in Colonial India, (Oxford University Press, 2002)
4. Alf Gunvald Nilsen, Adivasis and the State:Subalternity and Citizenship in India's Bhil Heartland (Cambridge University Press,2018)
5. Alpa Shah, Ground Down by Growth: Tribe, Caste, Class and Inequality in 21st Century India (Pluto Press,2017)
6. Alpa Shah, In the Shadows of the State: Indigenous Politics, Environmentalism and Insurgency in Jharkhand,India (Duke University Press,2010)
7. Alyson Warhurst, Environmental degradation from mining and mineral processing in developing countries : corporate responses and national policies (OECD Publications and Information Centre [distributor], 1994.)
8. Amartya Sen, The Argumentative Indian: Writings on Indian History, Culture and Identity (Penguin Books,2006)
9. Amartya Sen, The argumentative Indian: Writings on Indian history, culture, and identity (Macmillan,2005).
10. Amita Baviskar, In the Belly of the River (Oxford University Press,1995)
11. Amita Baviskar, Uncivil City:Ecology, Equity and the Commons in Delhi (Sage,2020)
12. Amrendra Das, Performance of Public and Private Mining Firms in India (Cambridge University Press,2013)
13. Ana FilipaVrdoljak (Ed), The cultural dimension of human rights (Oxford University Press,2013)
14. Anna Lowenhaupt Tsing, Friction : an ethnography of global connection (Princeton University Press,2005)
15. Anuj Bhunia, Courting the People (Cambridge University Press, 2017)
16. Appadurai, Arjun, 'Sovereignty Without Territoriality: Notes for a Postnational Geography' in P. Yaeger (Ed) The Geography of Identity (University of Michigan Press,1996;
17. Archon Fung and Erik Olin Wright, *Deepening Democracy:Institutional Innovations in Empowered Participatory Governance* (Verso,2003).
18. Arnulf Becker Lorca, Mestizo international law : a global intellectual history 1842-1933 (Cambridge University Press, 2014)
19. Ashish Kothari, Neera Singh and Suri Saloni, People and Protected Areas: Towards Participatory Conservation in India, (Sage Publications,1996).
20. Ashwini Kr. Pankaj Adivasidom: Selected Writings and Speeches of Jaipal Singh Munda (PyaraKerketta Foundation,2017)
21. AtulKohli and Prerna Singh, Routledge handbook of Indian politics (Routledge, 2013)

22. AtulKohli, Christophe Jeffrelot and KantaMurali Eds Business and Politics in India (Oxford University Press,2019)
23. Atul Kohli, Democracy and Development in India: From Socialism to Pro-Business (Princeton University Press,2009)
24. Austin Sarat (Ed), Studies in law, politics, and society (Emerald, 2015.)
25. Ayesha Jalal, Democracy and authoritarianism in South Asia : a comparative and historical perspective (Cambridge University Press, 1995). Ronald Niezen and Maria Sapignoli (Eds), Palaces of hope : the anthropology of global organizations (Cambridge University Press, 2017).
26. B.H Baden Powell, A Manual Of Jurisprudence For Forest Officers: Being A Treatise On Forest Law and the Branches of General Civil And Criminal Law which are Connected with Forest Administration with a Comparative Notice of the Chief Continental Laws (Superintendent of Government Printing in India,1882)
27. Barbara Hariss White and Elisabetta Basile Dalits and Adivasis in India's Business Economy: Three Essays and an Atlas (Three Essay Collective, 2013)
28. Ben Saul, Indigenous peoples and human rights : international and regional jurisprudence (Hart Publishing, 2016)
29. Bernard Cohn, Colonialism and Its Forms of Knowledge (Princeton University Press,1996)
30. Beth A. Simmons, Mobilizing for human rights : international law in domestic politics (Cambridge University Press, 2009.)
31. Boaventura de Sousa Santos, Cesar Rodriguez Gravito (Eds), Law and Globalisation from Below: Towards a Cosmopolitan Legality (Cambridge University Press,2005)
32. Brendan O'Leary and Patrick Dunleavy, Theories of the State:The Politics of Liberal Democracy (Macmilla,1987)
33. Bronwyn Carlson, The politics of identity : who counts as Aboriginal today? (Aboriginal Studies Press, 2016.)
34. Cesar Rodriguez- Gravito and Diana Rodriguez-Franco, Radical Deprivation on Trial (Cambridge University Press, 2015)
35. Charles E. Harvey, The Rio Tinto Company : an economic history of a leading international mining concern, 1873-1954 (A. Hodge, 1981)
36. Chhatrapati Singh, India's Forest Policy and Forest Laws, (Natraj Publishers,2000).
37. Conrado Huber Mendes, Constitutional Courts And Deliberative Democracy (Oxford University Press,2013)
38. D.J Gallagan, Discretionary Powers a legal study of official discretion (Oxford University Press,1990)
39. Dana L. Brown and Ngaire Woods (Eds), Making global self-regulation effective in developing countries (Oxford University Press, 2007.
40. Daniel J. Rycroft and Sangeeta Dasgupta (Eds), The politics of belonging in India : becoming Adivasi (Routledge, 2011)
41. David Harvey, 'The New Imperialism', Oxford University Press, 2003.
42. Dev Nathan, Govind Kelkar and Pierre Walter, Globalisation and Indigenous Peoples in Asia I(Sage Publications,2004)
43. Dolly Kikkon, Living with Oil and Coal: Resource Politics and Militarisation in Northeastern India (University of Washington Press,2019).

44. Donald N. Zillman, Alistair R. Lucas, and George (Rock) Pring (Eds), Human rights in natural resource development : public participation in the sustainable development of mining and energy resources (Oxford University Press, 2002)
45. Dorothee Baumann-Pauly and Justine Nolan (Eds), Business and human rights : from principles to practice (Routledge, 2016)
46. E.Venkatesu, Democratic Decentralization in India (Routledge,2016).
47. Emilio F. Moran and Elinor Ostrom (Eds), Seeing the forest and the trees : human-environment interactions in forest ecosystems (Mit Press, 2005)
48. Erica Schoenberger, Nature, choice and social power (Routledge, 2015)
49. Evaristus Oshionebo, Regulating transnational corporations in domestic and international regimes : an African case study (University of Toronto Press, 2009)
50. Felix Padel and Samrendra Das, Out of This Earth: East India Adivasis and the Aluminum Cartel (Orient Blackswan,2010).
51. Felix Padel, The Sacrifice of Human Being:British Rule and Kondhs in Odisha, (Oxford University Press,2001).
52. G.S Ghurya, The Scheduled Tribes of India (Routledge,1980)
53. G.S Ghurye, Caste and Race in India (Popular Prakashan Publications,1932)
54. Giles Mohan, Structural adjustment theory, practice and impacts (Routledge, 2000)
55. Granville Austin, Working of a Democratic Constitution (Oxford India,1999).
56. Greg Urban (Ed), Corporations and citizenship (University of Pennsylvania Press, 2014)
57. Iris Marion Young, Inclusion and Democracy (Oxford University Press,2000)
58. Jacqueline Vaughn,Conflicts over natural resources : a reference handbook (Contemporary World Issues,2007)
59. Jairam Ramesh and Muhammad Ali Khan, Legislating for Justice (Oxford University Press,2015)
60. Jairam Ramesh, Green Signals : Ecology, Growth and Democracy in India (Oxford University Press, 2015)
61. James Anaya, Indigenous People in International Law, (Oxford University Press 2004)
62. Jane Carey and Jane Lydon, Indigenous networks : mobility, connections and exchange (Routledge,2014)
63. Jayati Ghosh, 'The Market that Failed: A Decade of Neoliberal Reforms in India' (Left Word Books,2002).
64. Jean Dreze and Amartya Sen, India: Development and Participation (Oxford University Press,2002)
65. Jean-François Hennart, A theory of multinational enterprise (University of Michigan Press,1982)
66. Joel S. Migdal, Atul Kohli, Vivienne Shue, State power and social forces : domination and transformation in the Third World (Cambridge University Press, 1994)
67. John Braithwaite and Peter Drahos, Global Business Regulation (Cambridge University Press,2000).
68. John Braithwaite, 'To Punish Or Persuade: Enforcement Of Coal Mine Safety'(SUNY Press, 1985)
69. John Dryzek with Simon Niemeyer, Foundations and Frontiers of Deliberative Governance (Oxford University Press,2010)
70. John H. Bodley, Victims of progress (Rowman & Littlefield, 2015)
71. John Parkinson and Jane Mansbridge, Deliberative Systems: Deliberative Democracy in the large scale (Harvard University Press,2012)

72. John Ruggie, *Just Business: Multinational Companies and Human Rights* (Norton Global Ethics Series, 2013)
73. Jon P. Gunnemann Ed, *The Nation-state and transnational corporations in conflict*, Rudolph C. R yserwith special reference to Latin America (Praegar, 1975).
74. Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *The Good Polity: Normative Analysis of the State*, Alan Hamlin and Phillip Petit, editors, New York: Blackwell, 1989
75. Julia Eckert, *Law against the state : ethnographic forays into law's transformations* (Cambridge University Press, 2012)
76. K.Sivaramakrishnan, *Modern Forests: Statemaking and Environmental Change in Colonial Eastern India* (Stanford University Press, 1999).
77. Kabir Sanjay Bavikatte, *Stewarding the Earth: Rethinking Property and the Emergence of Biocultural Rights* (Oxford University Press, Delhi 2014).
78. Kanchan Chopra, *Development and Environmental Policy in India* (Springer, 2017).
79. Kanchi Kohli and Manju Menon, *Business in the Environmental Crisis'*, (Sage Publications, 2013)
80. Karen Engle, *The elusive promise of indigenous development : rights, culture, strategy* (Duke University Press, 2010)
81. Katharina Pistor, *Code of Capital* (Princeton University Press, 2019)
82. Kathy Charmaz, *Constructing grounded theory: A practical guide through qualitative analysis* (Sage, 2006)
83. Kaushik Basu and Ranjan Ray, *Markets and Governments* (Oxford University Press, 2003).
84. Kenneth Bo Nielsen and Alf Gunvald Nielsen Eds *Social Movements and the State in India* (Palgrave Macmillan 2016)
85. Kirsten Anker, *Declarations of interdependence : a legal pluralist approach to indigenous rights* (Ashgate, 2014)
86. Kuntala Lahiri-Dutt, *The Coal Nation: Histories, Ecologies and Politics of Coal in India* (Ashgate, 2014).
87. Lawrence Susskind, *Environmental Diplomacy* (Oxford University Press, 1996)
88. Lyuba Zarsky (Ed), *Human rights and the environment : conflicts and norms in a globalizing world* (Earthscan, 2002)
89. Mahesh Rangarajan, *Nature and Nation: Essays in Environmental History* (Permanent Black, 2015).
90. Mahmood Mamdani, *Citizen and subject : contemporary Africa and the legacy of late colonialism* (Princeton University Press, 1996)
91. Maine, H.S, *Village-communities in the East and West*. (Henry Holt and Company, 1876)
92. Margaret.S.Keck and Kathryn Sikkink, *Activist Beyond Borders: Advocacy Networks in International Politics*, (Cornell University Press, 1998).
93. Mark Goodale and Sally Engle Merry (Eds), *The practice of human rights : tracking law between the global and the local* (Cambridge University Press, 2007)
94. Mark Robinson and Gordon White (Eds), *The democratic developmental state : politics and institutional design* (Oxford University Press, 1998)
95. Martha Nussbaum *Creating Capabilities* (Harvard University Press 2011)
96. Matthew Craven, *The decolonization of international law : state succession and the law of treaties* (Oxford University Press, 2007)

97. Mattias Åhrén, *Indigenous peoples' status in the international legal system* (Oxford University Press, 2016)
98. Michael LeVine, *Dispossession without Development* (Oxford University Press, 2018).
99. Miguel Centeno ; Atul Kohli ; Deborah J. Yashar ; with Dinsha Mistree, *States in the developing world* (Cambridge University Press, 2017).
100. Mikkel Berg-Nordlie, Jo Saglie and Ann Sullivan (Eds), *Indigenous politics : institutions, representation, mobilisation* (ECPR Press, 2015)
101. Nancy Fraser and Axel Honneth. *Redistribution or Recognition?: A Political-Philosophical Exchange* (Verso, 2003)
102. Nandini Sundar ed., *Legal Grounds – Natural Resources, Identity, and the Law in Jharkhand*, (Oxford University Press, 2009).
103. Nandini Sundar, Niel Thin and Roger Jeffery, *Branching Out: Joint Forest Management in India* (Oxford University Press, 2002)
104. Nayanika Mathur, *Paper Tiger: Law, Bureaucracy and the Developmental State in Himalayan India* (Cambridge University Press, 2015).
105. Nayanika Mathur, *Paper Tiger: Law, Bureaucracy and the Developmental State in Himalayan India* (Cambridge University Press, 2016)
106. Neil Gunningham, Peter Grabosky with Darren Sinclair, *Smart regulation : designing environmental policy* (Oxford : Clarendon, 1998)
107. Nilmadhab Mohanty, *The Political Economy of Mining in India* (Haranand Publications, 2017)
108. Niraja Gopal Jayal, *Citizenship and its Discontents: An Indian History* (Harvard University Press, 2013)
109. Paul Schiff Berman, *Global Legal Pluralism* (Cambridge University Press, 2012).
110. Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*, (Routledge, 2014)
111. Peter Drahos, *Intellectual Property, Indigenous People and Their Knowledge* (Cambridge University Press, 2014)
112. Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press, 2007).
113. Phillip J. Cooper, *Public Law and Public Administration* (F.E Peacock Publishers, 2000)
114. Pranab Bardhan, *The Political Economy of Development in India* (Oxford India, 1984).
115. Prasanta .K. Pattnaik, Pulin.B.Nayak and Santosh.C.Panda Eds *The Economy of Odisha: A Profile* (Oxford University Press, 2016).
116. R.C. Mascarenhas *Developments in Modern Industrial Capitalism*. In: *A Comparative Political Economy of Industrial Capitalism*. (Palgrave Macmillan, 2012)
117. R.P. Joshi and G.S. Narwani, *Panchayat raj in India : emerging trends across the states* (Rawat Publications, 2002)
118. Ramchandra Guha and Madhav Gadgil, *This Fissured Land- An Ecological History of India*, (University of California Press, 1992).
119. Ramchandra Guha, *India after Gandhi* (Harper Collins, 2007).
120. Ramchandra Guha, *Makers of Modern India* (Penguin Books, 2010).
121. Ranjana Padhi and Nigamananda Sarangi, *Resisting Dispossession: The Odisha Story* (Palgrave Macmillan, 2020)
122. Richard Rottenburg ; translated by Allison Brown and Tom Lampert, *Far-fetched facts : a parable of development aid* (The MIT Press, 2009)

123. Ridwan Laher and Korir Sing'Oei (Eds), *Indigenous peoples in Africa : contestations, empowerment and group rights* (Africa Institute of South Africa : Institute for Global Dialogue, 2014.)
124. Rob Jenkins, Loraine Kennedy, Partha Mukhopadhyay (Eds), *Power, policy, and protest : the politics of India's special economic zones* (Oxford University Press, 2014)
125. Robin S. Gendron, Mats Ingulstad, and Espen Storli (Eds) *Aluminum ore : the political economy of the global bauxite industry* (UBC Press, 2013)
126. Roger Cotterrell, *Law's community : legal theory in sociological perspective* (Oxford University Press, 1995)
127. Roger Cotterrell, *Living Law: Studies in Legal and Social Theory.* (Ashgate, 2008)
128. Rudolph C. R yser, *Indigenous nations and modern states : the political emergence of nations challenging state power* (Routledge, 2012)
129. Seyla Benhabib, 'Toward a Deliberative Model of Democratic Legitimacy.'" In Seyla Benhabib (Ed) *Democracy and Difference.* (Princeton University Press, 1996)
130. Shibani Ghosh, *Indian Environmental Law: Key Concepts and Principles* (Orient Black-Swan, 2019)
131. Sue Farran, James Gallen, Jennifer Hendry, Christa Rautenbach (Eds), *The diffusion of law : the movement of laws and norms around the world* (Ashgate Publishing, 2015)
132. Surabhi Ranganathan, *Strategically created treaty conflicts and the politics of international law* (Cambridge University Press, 2014)
133. Suzana Sawyer and Edmund Terence Gomez (Eds), *The politics of resource extraction : indigenous peoples, multinational corporations, and the state* (Palgrave Macmillan : United Nations Research Institute for Social Development, 2012.)
134. Tanya Li, *The Will to Improve* (Duke University Press, 2007).
135. Teresa Joseph and Siby K. Joseph Eds *Deliberative Democracy: Understanding the Indian Experience* (Routledge, 2018)
136. Thomas Niederberger, Tobias Haller, Helen Gambon, Madlen Kobi and Irina Wenk (Eds), *The open cut : mining, transnational corporations and local populations* (Lit Verlag, 2016)
137. Tirthankar Roy, 'India in the World Economy: From Antiquity to the Present' (Cambridge University Press, 2012).
138. Verrier Elwin, *A Philosophy of NEFA* (Reprinted by Isha Books, 2009)
139. Verrier Elwin, *The Baiga* (Gyan Publishing House, 2007)
140. Vivian E. Thomson, *Climate of capitulation : an insider's account of state power in a coal nation* (MIT Press, 2017)
141. Xaxa V. *Tribes and Development- Retrospect and Prospect In: Social Exclusion and Adverse Inclusion, Development and Deprivation of Adivasis in India*, eds. D. Nethan and V. Xaxa, (Oxford University Press, 2012).

BOOK CHAPTERS

1. Ahlawat, 'Caste and Dynamics of Inclusion and Exclusion in Local Governance'. In P. Judge (Ed.), *Mapping Social Exclusion in India: Caste, Religion and Borderlands* (pp. 192-214). (Cambridge University Press, 2014).
2. Amita Baviskar, 'The Politics of Being Indigenous' 'in Bengt G. Karlsson and T.B Subba (eds), *Indigeneity in India* (Kegan Paul, 2006).

3. Andre Beteille,' What should we mean by "Indigenous People" in Bengt G. Karlsson and T.B Subba (eds), *Indigeneity in India* (Kegan Paul,2006).
4. Arjun Appadurai,' The Capacity to Aspire: Culture and Terms of Recognition' in *Culture and Public Action*Eds by Vijayendra Rao and Micheal Walton (Stanford University Press,2004)
5. AseemaSinha,'An institutional perspective on the post-liberalization state in India' in Akhil Gupta and K.Sivaramakrishnan (eds), *The State in India after Liberalization* (Oxford University Press, 2011).
6. Bengt G. Karlsson and T.B Subba,'Introduction'in Bengt G. Karlsson and T.B Subba (eds), *Indigeneity in India* (Kegan Paul,2006).
7. Hann, Chris 'Introduction. The embeddedness of property' in Chris Hann (Ed) *Property relations: renewing the anthropological tradition*. (Cambridge University Press, 1998)
8. Joshua Cohen,'Procedure and Substance in Deliberative Democracy' in Seyla Benhabib (Ed) *Democracy and Difference* (Princeton University Press,1996); Seyla Benhabib (Ed) *Democracy and Difference* (Princeton University Press,1996).
9. Kathryn Henne,'Multisited fieldwork in regulatory studies' in Peter Drahos (Ed) *Regulatory Theory: Foundations and Applications* (ANU Press,2017)
10. Mayur Suresh 'Accountability, Authority and Documentary Fragility: Shadow files and Trial in India'. In Susan M. Sterett, and Lee Demetrius Walker, (Eds.), *Research Handbook on Law and Courts* (Edward Elgar Publishing Ltd, 2019)
11. Neeladri Bhattacharya,' Remaking Custom:The Discourse and Practice of Colonial Codification' in R.Champalakshmi and S.Gopal (Eds) *Dissent and Ideology: Essays in Honour of RomilaThapar*(Oxford University Press, 1996).
12. Peter Evans,' Bringing Deliberation into the Developmental State' in Patrick Heller and Vijayendra Rao (Eds) *Deliberation and Development : Rethinking the Role of Voice and Collective Action in Unequal Societies. Equity and Development* (World Bank, 2015).
13. Ramchandra Guha, 'The Past and the Future of Indian Forestry' in *Deeper Roots of Historical Injustice: Trends and Challenges in the Forests of India*, (Rights and Resources Initiative,2012),
14. Sieder, Rachel. 2010. "Legal Cultures in the (Un)Rule of Law: Indigenous Rights and Judification in Guatemala." In *Cultures of Legality: Judicialization and Political Activism in Latin America*, edited by Javier Cuoso, Alexandra Huneeus, and Rachel Sieder, 161-81. Cambridge: Cambridge University Press.
15. SunilaS.Kale,'Business and State in India's Extractive Economy' in AtulKohli, Christophe Jeffrelot and KantaMurali (Eds) *Business and Politics in India* (Oxford University Press,2019)
16. Thomas Blom Hansen,' Sovereigns Beyond the State' in Thomas Blom Hansen and Finn Stepputat (Eds) *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* (Princeton University Press, 2005)
17. UpendraBaxi,'Developments in Indian Administrative Law' in Abdul GafoorNoorani (eds) *Public Law in India* (Vikas Publishers,1982).

JOURNAL ARTICLES AND REPORTS

1. Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK.' (2012) *Law & Society Review* 46, no. 3 pp. 523-56.
2. Alf Gunvald Nilsen, 'Adivasis In And Against The State', (2012) *Critical Asian Studies*, 44:2, 251-282
3. Anaya, S. James and Puig, Sergio, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples' (2017), *University of Toronto Law Journal* 67.
4. Anita M. Halvorssen & Cody D. Eldredge, 'Investing in Sustainability: Ethics Guidelines and the Norwegian Sovereign Wealth Fund' (2014), *Denver Journal of International Law and Policy* 42 pp.389
5. Anthony Bebbington, Teresa Bornschlegland Adrienne Johnson, 'Political Economies of Extractive Industry: From Documenting Complexity to Informing Current Debates' (2013) *Development and Change Virtual Issue 2*.
6. Arun Bandhopdhyay, 'The Colonial Legacy of Forest Policies in India' (2010), *Social Scientist* Vol.38, No1/2 pp 53-76.
7. Ashish Kothari and Miloon Kothari, 'Structural Adjustment Vs Environment' [1993] *Economic and Political Weekly* Vol. 28, No. 11 pp. 473-477.
8. B.S Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century' (2004) in *Oregon Review of International Law* : Vol. 14, No. 1, p. 017-045
9. Bob, Clifford. 2007. "'Dalit Rights are Human Rights": Caste Discrimination, International Activism, and the Construction of a New Human Rights Issue" *Human Rights Quarterly* 29(1):167- 193.
10. C.R Bijoy, Shankar Gopalakrishnan and Shomona Khanna, 'India and the Rights of Indigenous People' (2010) Published by Asia Indigenous Peoples Pact.
11. Cass R Sunstein, 'Incompletely Theorized Agreements' (1995). *Harvard Law Review*, Vol. 108, No. 7, p. 1733.
12. Cesar Rodriguez-Garavito, 'Ethnicity.gov: Global Governance, Indigenous Peoples and the Right to Prior Consultation in Social Minefields' (2010) *Indiana Journal of Global Legal Studies* Vol.18.
13. Chietigj Bajpae, 'Modi, India and the emerging global economic order' (2016) *Journal of Asian Public Policy* Vol.9 No.2.
14. Chitrangada Choudhury & Aniket Aga, 'Manufacturing Consent: Mining, Bureaucratic Sabotage, and the Forest Rights Act in India' ((2019) in *Capitalism Nature Socialism*.
15. Christopher Wright and Alexis Rwabizambuga, 'Institutional Pressures, Corporate Reputation, and Voluntary Codes of Conduct: An examination of the equator principles' (2006) *Business and Social Review*.
16. David Szablowski, 'Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice' *Canadian Journal of Development Studies* 30.1-2 (2010): 111-130.
17. Dev Nathan, 'Capabilities and Aspirations' (2005) *Economic and Political Weekly* Vol. 40, No. 1 pp. 36-40
18. Dietsch, P, 'Exit versus voice – options for socially responsible investment in collective pension plans' (2020). *Economics and Philosophy*, 36(2) pp. 246-264.
19. Elena Cirkovic 'Self-Determination and Indigenous Peoples in International Law.' *American Indian Law Review*, vol. 31, no. 2, 2006, pp. 375–399.

20. Elisa Morgera and Louisa Parks, 'An Interdisciplinary Methodology for Researching Benefit-Sharing as a Norm Diffusing in Global Environmental Law' (2014) Edinburgh School of Law Research Paper No:2014/42
21. Emmanuel Ifeanyi Ani, 'Is Bargaining a Form of Deliberating?', *Philosophical Papers*, 49:1, 1-29 (2020)
22. Esteban Perez Caldentey, 'The Concept and Evolution of the Developmental State' (2008) *International Journal of Political Economy* Vol 37, No.3.
23. Evans, Peter B. 'Predatory, Developmental, and Other Apparatuses: A Comparative Political Economy Perspective on the Third World State.' (1989) *Sociological Forum*, vol. 4, no. 4, pp. 561–587
24. Frances Kahn Zemans. "Legal Mobilization: The Neglected Role of the Law in the Political System." (1983) *The American Political Science Review*, vol. 77, no. 3, , pp. 690–703
25. Helen Stacy, 'Relational Sovereignty' (2003) *Stanford Law Review* 55;
26. Ipshita Basu, 'The Politics of Recognition and Redistribution: Development, Tribal Identity Politics and Distributive Justice in India's Jharkhand' (2012) in *Development and Change* Volume 43, Issue 6 pp. 1292-1312
27. Ipshita Chaturvedi, 'A Critical Study of FPIC in the Context of the Right to Development: Can "Consent" be Withheld?', *Journal of Indian Law and Society*, Volume 5. Pp 38-60. Available at <http://docs.manupatra.in/newslines/articles/Upload/7C24A805-996C-4515-AEC9-C0AC22E41573.pdf>. Last visited on November 30th, 2017.
28. J. Marshall Cornwall, 'Essays, The Memoirs of Lawrence, Second Marquess of Zetland' (1957) *The Geographical Journal*. 123(3):409-409.
29. Jaganath Pathy, 'Panchayati Raj and Decentralisation of Political Power' (1980) *Social Scientist*, Vol. 8, No. 9 pp. 36-41
30. Jagannath Panda, 'Narendra Modi and his Mode of Governance' (2016) *Journal of Asian Public Policy* Vol.9 No.2.
31. Jody Emel, Matthew T. Huber, Madoshi H. Makene, 'Extracting sovereignty: Capital, territory, and gold mining in Tanzania' (2011) *Political Geography*, Volume 30, Issue 2.
32. Julie Ayling and Niel Gunningham, 'Non-state governance and climate policy: The fossil fuel divestment movement' (2015) *Climate Policy*.
33. Kundan Kumar and John Kerr, 'Democratic Assertions: The Making Of India's Recognition of Forest Rights Act' *Development and Change* 43(3): 751–771
34. M. Candea 'Arbitrary locations: In defence of the bounded field-site', (2007) *Journal of the Royal Anthropological Institute* 13(1) pp 167–84.
35. Manju Menon, Kanchi Kohli, 'Re-engineering the Legal and Policy Regimes on Environment' [2007] *Economic and Political Weekly* Vol.43, No.23.
36. Martha Macintyre, 2007, 'Informed Consent and Mining Projects: A view from Papua New Guinea', *Pacific Affairs* 80 (1, Spring). Pp 49-65
37. Matilde Adducci, 'Neoliberalism, Mining and Labour in the Indian State of Odisha: Outlining a Political Economy Analysis' (2017) *Journal of Contemporary Asia* Vol.4 Issue 4.
38. McEntire, Kyla Jo, and Michele Leiby, and Matthew Krain. 2015. "Human Rights Organizations as Agents of Change: An Experimental Examination of Framing and Micromobilization" *American Political Science Review* 109(3):407-426.
39. Merry, Sally Engle, and Rachel E. Stern. 2005. The female inheritance movement in Hong Kong: Theorizing the local/global interface. *Current Anthropology* 46.3: 387–409

40. Micheal Levein, 'From Primitive Accumulation to Regime of Dispossession' (2015) EPW Vol. 50 Issue 22.
41. NamitaWahi and A. Bhatia ,*The Legal Regime and Political Economy of Land Rights of Scheduled Tribes in the Scheduled Areas of India*, (Centre for Policy Research, New Delhi, 2018).
42. NamitaWahi,'Human Rights accountability of the IMF and the World Bank:A critique of existing mechanisms and Articulation of a Theory of Horizontal Accountability' (2005) International Journal of Law and Policy Volume 12 pp 331.
43. Nancy Fraser 'Rethinking the public sphere: Contribution to the critique of actually existing democracy.' (1990) Social Text No 25/26 pp. 56-80.
44. NandiniSundar,'Custom' and 'Democracy' in Jharkhand.' (2005) *Economic and Political Weekly*, vol. 40, no. 41, pp. 4430–4434.
45. Neil Gunningham and Robert Kagan and Dorothy Thornton,'Social License and Environmental Protection: Why Businesses Go Beyond Compliance'. (2004). Law and Social Inquiry-journal of The American Bar Foundation - Law Social Inquiry. 29 pp. 307-342.
46. NielGunningham and Darren Sinclair, 'Regulatory Pluralism: Designing policy mixes for Environmental Protection' (1999) Law and Policy Vol.21.
47. O. Springate-Baginski et al,'Redressing Historical Injustice Through the Indian Forest Rights Act,2006', Institute for Pro-poor Growth
48. PatrikOskarsson and SiddharthSareen, 'Adivasiness as Caste Expression and Land Rights Claim-Making in Central-Eastern India',(2020)Journal of Contemporary Asia,50:5,831-847.
49. Peter Drahos,' Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) Temple Law Review, 77 pp. 401
50. Pooja Parmar, 'Undoing Historical Wrongs: Law and Indigeneity in India.' (2012) *Osgoode Hall Law Journal* 49.3 pp. 491-525.
51. Radhika Borde,'Differential Subalterns in the Niyamgiri Movement in India' ((2017) Interventions, 19:4 pp. 566-582.
52. Rao, Vijayendra, and ParomitaSanyal,'Dignity through Discourse: Poverty and the Culture of Deliberation in Indian Village Democracies.' (2010) The ANNALS of the American Academy of Political and Social Science 629, no. 1: 146–72.
53. Rekha M. Shangpliang, 'Forest Legislations and Livelihood Strategies' (2012) Sociological Bulletin Vol. 61, No.3
54. Rob Jenkins,' India's States and the Making of Foreign Economic Policy: The limits of the Constituent Diplomacy Paradigm' (2003) The Journal of Federalism Vol.33.
55. Ron, James, Howard Ramos, and Kathleen Rodgers. 2005. "Transnational Information Politics: NGO Human Rights Reporting, 19862000" International Studies Quarterly 49(3):557-587.
56. Ronald Dworkin, Judicial Discretion, (1963) J. PHIL. 60 pp 624, 638
57. S. James anaya, 1997, *on justifying special ethnic group rights: comments on pogge*, Nomos, Vol. 39, Ethnicity and Group Rights (1997), pp. 222-231
58. Samantha Balaton-Chrimes, 'POSCO's Odisha project: OECD National Contact Point complaints and a decade of resistance' <<https://www.deakin.edu.au/alfred-deakin-institute/news/news-archive/2015-archive/oecd-national-contact-point-complaints>> accessed on November 15, 2020.

59. Scott C. Burris, Peter Drahos, and Clifford D Shearing, 'Nodal Governance' (2005) Australian Journal of Legal Philosophy, Vol. 30.
60. Shalini Randeria, 'Cunning States and Unaccountable International Institutions: Legal Plurality, Social Movements and Rights to Local Communities to Common Property Resources' (2003) Arch.europ.sociol XLIV.
61. Shalini Randeria, 'Glocalization of Law: Environmental Justice, World Bank, NGOs and the Cunning State in India' (2003) Current Sociology Vol.51.
62. Shankar Gopalakrishnan, 'The Forests Rights Act: Political Economy of "Environmental" Questions' Economic and Political Weekly VOL LII NO 31 (2017)
63. Siddhartha Mukherjee, 'Land Acquisition in Contemporary India: The Growth Agenda, Legislation and Resistance' (2017) Indian Journal of Public Administration Vol 63(1).
64. Subbiah Kannapan, 'The Tata Steel Strike: Some Dilemmas of Industrial Relations in a Developing Economy' (1959) Journal of Political Economy Vol. 67, No. 5
65. Tamanaha, Brian Z., 'Understanding Legal Pluralism: Past to Present, Local to Global' (2007) Sydney Law Review, Vol. 29.
66. Tania Li Murray, 'Articulating Indigenous Identity in Indonesia: Resource Politics and the Tribal Slot.' (2000) *Comparative Studies in Society and History*, vol. 42, no. 1, pp. 149–179.
67. Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, (2011) Northwestern Journal of Human Rights 54.
68. Tole, L., Koop, G. (2011). Do environmental regulations affect the location decisions of multinational gold mining firms? *Journal of Economic Geography*, 11(1), 151-177.
69. Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) Third World Series Art 6 Vol.4.
70. Usha Ramanathan, 'A Word on Eminent Domain' Published in Lyla Mehta ed., *Displaced by Development – Confronting Marginalisation and Gender Injustice* (New Delhi: Sage, 2009), p. 133.
71. Vasant Saberwal, 'Conservation as Politics: Wildlife Conservation and Resource Management in India', (2000) Journal of Wildlife Law and Policy, Volume 3, pp 166-173.
72. Virginius Xaxa, 'Tribes as Indigenous People in India' (1999) in Economic and Political Weekly Vol. 34, No. 51
73. Wahi, N., Bhatia, A., Gandhi, D., Jain, S., Shukla, P., and Chauhan, U. [SEP] *Land Acquisition in India: A Review of Supreme Court Cases from 1950 to 2016*, Centre for Policy Research, New Delhi, 2017.

LIST OF TABLES AND FIGURES

Table and Figure Number	Title	Page Number
Table 1	Details of the Case Studies	18
Table 2	List of Key Interviews	26
Table 3	Forest Laws and the Regime of Dispossession	60
Table 4	Laws relating to the Right to Self-Determination	63
Table 5	Mandates of Different Ministries	70
Table 6	Categorization of Forest Area and the Right to Self-determination	74
Table 7	Legal categorization of forest-dwelling communities and their associated rights and entitlements	107
Table 8	Recognition, Redistribution and the Forest Rights Act,2006	179
Table 9	Statistics of the Recognition of Forest Rights	185
Table 10	Legal mobilization across the four mining sites	197
Table 11	International instruments used, cases and interpretation of FPIC	301
Table 12	Outcomes of the different NCPs in the Posco case	315
Figure 1	Processual Mapping and Associated Interviews	20
Figure 2	Social movement network of resistance in the Posco case	21

Figure 3	Process of Deliberative Reconciliation of Laws	89
Figure 4	Procedural Map of Deliberative Decision-making	117
Figure 5	Process of the consent provision as present in the Forest Conservation Act	140
Figure 6	Process of the consent provision reinvented by the pro-business state	143
Figure 7	Deliberative governance and reimagination of the consent process	167
Figure 8	Range of laws available for recognition and redistributive claims	200
Figure 9	The Bhaitak	207
Figure 10	Deliberative loop for breaking the extractive circuit	229
Figure 11	Deliberative loop of decision making for conservation	231
Figure 12	Flow of the Informal Negotiation Process	253
Figure 13	Nodally coordinated enforcement pyramid	271
Figure 14	Deliberative circuit of nodes and networks of decision-making for reconciliation of forest laws	331
Figure 15	Nodes and network of decision-making of the consent process as reimagined.	333
Figure 16	Breaking the extractive circuit with this reconfigured governance structure	336

Figure 17	Breaking the circuit of exclusionary conservation	338
-----------	---	-----