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CHANGING POLITICAL ECONOMY OF COAL MINING, THE RIGHTS OF FOREST-DWELLERS AND DUE PROCESS IN INDIA'S COAL BEARING AREAS

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Abstract

Land acquisition for coal mining takes place in accordance with the Coal Bearing Areas Act, 1957 (CBA). The process for the acquisition of land is quicker with limited due process standards. The legal landscape that governs land acquisition saw a paradigm shift towards the involvement of landowners in the acquisition of land and better standards of compensation with the passing of the Land Acquisition Act, 2013 and the Forest Rights Act, 2006.

In this paper we explore the changing political economy of coal and the challenges it presents for the implementation of due process standards. The paper also engages with India's climate change commitments and the influence that its energy policy has on coal mining and associated land acquisition. The argument that the paper presents is the selective reconciliation of laws on aspects of relief and rehabilitation of local communities as opposed to the due process standards which continue to be compromised.

Key Words: Coal Mining, Consent, Due Process and Land Acquisition in India



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1. Introduction

“Our land has been banned, we are unable to build houses over land that has historically belonged to us and we are surrounded by the expanding coal mine”¹ said a villager in Tumulia in the Hingiri coal block in Sundergarh in the eastern Indian state of Odisha. 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. In a landmark judgement 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.² This legal protection is backed by other laws that protect the rights of forest-dwelling communities 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 conflicts as the acquisition of land for coal mines compete with the rights and interests of forest-dwellers to land and resources

Coal mining in India was nationalized in 1971 with the passing of the Coal Mines (Nationalization) Act, 1973. This meant after the passing of this law coal could only be mined by the state-owned Coal India Limited and its subsidiaries. The nationalization of coal was initiated in response to bad labour conditions in private coal mines prior to 1971. The acquisition for land in coal blocks is governed by the Coal Bearing Areas Act, 1957. This land acquisition process under this law is different from the land acquired for other government purposes, which is governed by the new Land Acquisition Act, 2013. In coal bearing areas local communities have a little window to oppose the acquisition of land in comparison to land acquisition processes for other purposes. In 2009, under the Forest Rights Act a notification was passed the then Ministry of Environment and Forests to obtain the consent of the village assembly prior to the acquisition of forest land.³ This provision was strengthened by the Supreme Court judgement in 2013, where a private mining company was

¹ Interview conducted during fieldwork in July, 2018



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prevented from beginning mining operations over a sacred hill Niyamgiri as they failed to obtain consent from the local community. This provision has become an arena for the articulation of dissent by forest-dwelling communities in an effort to either prevent acquisition or negotiate better terms for relief and rehabilitation.

2. The Legal Landscape of Public Participation in India's Forest Laws

Environmental conflicts in India's forests are shaped by the inheritance of a colonial legal framework of land acquisition and forest governance. This colonial legal framework was governed by the need for increased state control over forest land and resources. This desire for increased state control meant that decisions of land acquisition and deforestation were made by excluding the interests of communities impacted by them.⁴

The active environmental movement in the 1970s beginning with the Chipko movement saw the assertion of rights of local communities dependent on the land and forests for their livelihood. The nationwide movement for '*jal, jungal aur zameen*' or 'water, jungle and land' made no significant impact on the legislative process but was successful in bringing many cases before the Supreme Court through the tool of Public interest litigation.⁵ This contributed to the development of a progressive environmental jurisprudence.⁶ Thus, the lack of provision for public participation within the environmental legal framework led impacted local communities to the courts to resolve such conflicts. In 1994, India like other developing countries introduced Environmental Impact Assessment (EIA) as an essential legal tool in making decisions on development project keeping in mind its ecological impact. As part of the EIA process in 1997, public hearing was introduced as a mandatory procedural requirement for all development projects which was later amended in 2006. The public hearing entailed the disclosure by the project proponent of the potential environmental harm caused by the project through the executive summary of the environmental impact assessment report and giving the impacted community an opportunity to put forth their grievances.



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The grievances raised by the local community were required to be addressed in the final report to be submitted by the project proponent. This was seen as the primary space within the law for impacted communities to raise their objections to a project. Yet, despite this procedural right of consultation local communities did not succeed in substantially influencing administrative decision making and had to resort to filing cases before the judiciary.

The failure of the public hearing process to adequately engage with the impacted communities had pushed environmental activists and local communities to demand for a higher legal threshold of consent. This demand was at the core of the new legislative initiative called the Forest Rights Act, 2006 (FRA). The FRA aimed to change the colonial forest governance system with a more socially just legislation where the rights of forest dwelling communities were recognised including their right to free, prior and informed consent. It was in a notification in 2009 by the Ministry of Environment, Forests and Climate Change where it was stated that diversion of forests would require the consent of the village assembly or gram sabha. The procedural right of giving or withholding consent was further strengthened by a landmark judgement of the Supreme Court in the Vedanta case where it held that a referendum has to be held with the local community members for a mine to be established in the Niyamgiri hill range. The process of using a referendum for asserting the right to give or withhold consent was used for the first time.

In 2013, the then congress government amended the colonial land acquisition act of 1894 to include the procedural requirement of consent of land owners.

This transition from a consultation based legal regime to a consent based legal regime is a product of judicial activism, environmental movements on the ground and a government which engaged with the Adivasi communities. Interestingly, as these developments were taking place domestically, it was not reflected internationally in India's commitments to international legal instruments that recognize the right of prior, informed consent (PIC). India has a peculiar relationship to the rights to PIC of Indigenous communities internationally, though a signatory to the ILO Convention 107⁷, Convention on Biological Diversity and international human rights law as it fails to recognize the term Indigenous peoples. The Indian government does not recognize indigenous people as its

⁷ ILO convention 107 was the first convention that recognized the human rights of indigenous people, yet it was criticized for its assimilationist goals.



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stand is that all Indians are indigenous. As India is shaped by a history of migration and invasion the process of recognizing who is indigenous and who is not can be a difficult proposition.

This stand taken by the Indian government has adversely impacted the ability of Adivasi communities to avail of the legal benefits that International law has to offer particularly in relation to the right of PIC. In discussions on the principle of FPIC, India has always critiqued it as an obstacle to the development process and has been more comfortable with the legal standard of consultation and is thus not a signatory to the ILO Convention 169.⁸ As the new environmental and social safeguards of the world bank which incorporated the requirement of consent were being negotiated, India insisted that it preferred the legal requirement of consultation as opposed to consent in availing of bank loans and financial assistance.⁹ With India prioritising economic growth and increasing foreign direct investment we begin to see a host of business related legislative reforms being introduced in 2015. These reforms are being undertaken with the assistance of the World Bank in enabling India to move further up in the 'ease of doing business' Index. These reforms include proposed amendments¹⁰ to the land acquisition laws which seek to do away with the requirement of consent of local communities.

3. Does Consent Matter?

After the landmark Niyamgiri judgement subsequent amendments were made to the Rules of the Forest Conservation Act, 1980 in 2014 to include the requirement of gram sabha consent in the forest clearance process. Since 2014, the implementation of the consent requirement has been subject to bureaucratic sabotage.

¹⁰ The amendments being referred to here is dilutions of the consent provision under the Forest Rights Act, 2006 through executive orders as well as the introduction of an ordinance to do away with the consent provision in the Land Acquisition Act, 2013. The ordinance eventually lapsed and was not passed.



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The Rules recognise vast discretionary power of the district collector in implementing this provision. The consent requirement procedurally is reduced to the production of a certificate by the district collector guaranteeing that consent has been obtained by the village assembly and that the forest rights have been settled. In an insightful article by Chitrangada Choudhury titled ‘The Keonjhar Take Over’ she documents how false resolutions by the village assembly have been produced by the local bureaucracy to obtain the forest clearance for the mining of iron ore.¹¹

This bureaucratic trap dilutes the deliberative potential of this legal avenue of obtaining consent. The deliberative potential here refers to the possibility that the legal avenue provides for deliberation on the choices available for communities and their negotiation with the state and company on these aspects. As the bureaucracy in many instances assumes consent and produces paperwork to assert that the process has been lawfully conducted, what forest-dwelling communities are left with is a hollowed-out experience of a possible democratic engagement with the state. The existence of the bureaucratic trap should not be seen as a mere product of legal design where discretionary power has gone unchecked but needs to be located within the political economy of extraction.

As per a recent report released by Price Waterhouse Coopers and JSW, Odisha, aims to be a trillion-dollar economy primarily based on extraction. The state’s push towards extraction is configured by the demands of ‘ease of doing business’ requirements like granting speedy clearances and environmental approvals. This economic prerogative makes provisions like the consent requirement difficult to comply with in its spirit.

The challenge that a progressive legal provision like the consent requirement poses is the lack of political will in its implementation and shying away from engaging with its deliberative potential. The state is present in forest areas in multiple roles. It works to extract resources, acquire land and to provide welfare services. However, engagement of the state with forest-dwelling communities on their development priorities and the manner in which they intend to shape their future has seldom occurred. The state one can argue has been extractive, pro-business but never deliberative. The lack of implementation of the consent requirement is a mere symptom of a larger problem, which is the



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crisis of deliberative democracy in India's forests as the state continues to take unilateral decisions on questions of development and conservation in India's forests.

4. Changing Political Economy of Coal

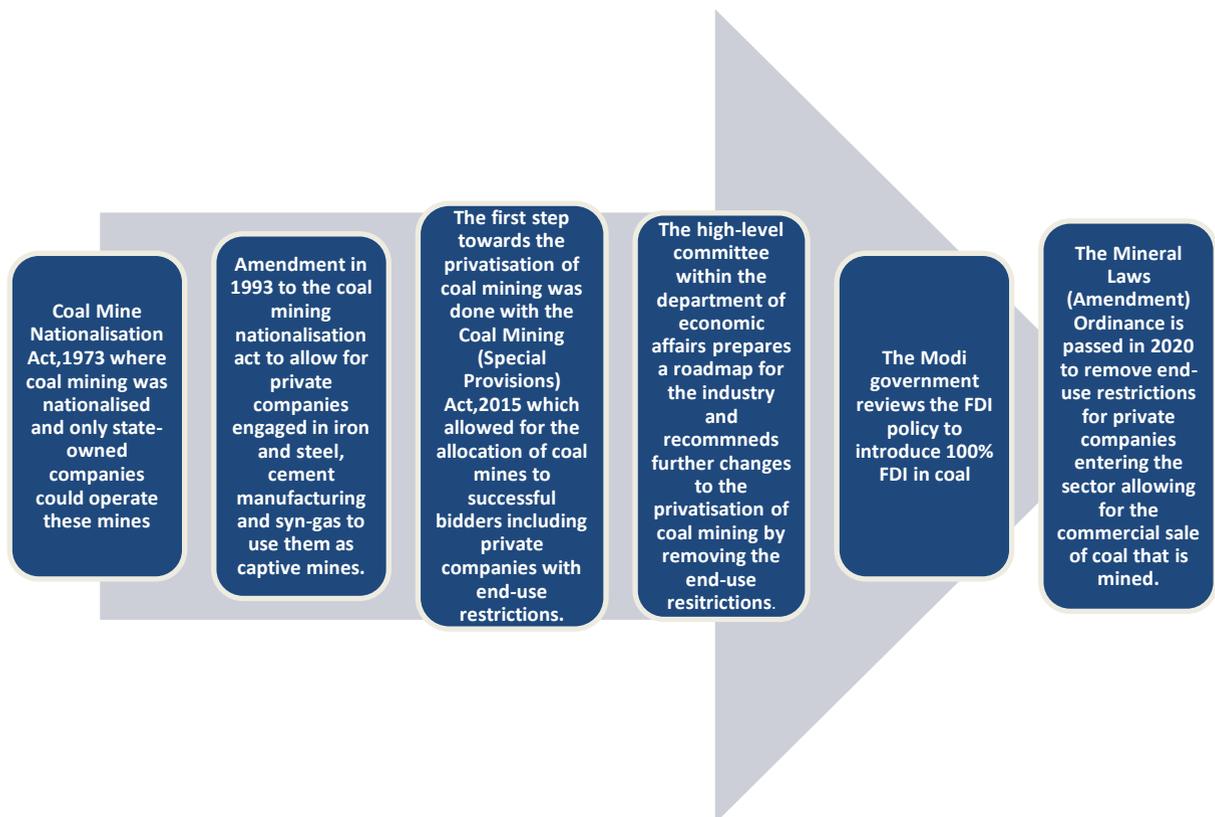


Fig 1: Timeline for the change in the political economy of coal from nationalization to privatization



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Coal mining in India came to be nationalized in 1973 due to complaints by the left parties of violation of labour rights in the coal mines. Till 1993, there was no significant changes in the political economy of coal. Land acquisition in coal bearing areas continued to be governed by the Coal Bearing Areas Act, 1957. It was in 1993 with an amendment to the nationalization Act that private companies were permitted to mine coal for captive use purposes only if they were engaged in iron and steel, cement, syn-gas and generation of power. It was in 2015 that a decisive shift towards privatization took place with the passing of the Coal Mining (Special Provisions) Act, 2015 where all private companies were allowed to bid for coal blocks. This was followed by a high-level committee within the Department of Economic Affairs recommended in September 2019 the privatization of coal mining with the objective to increase efficiency and the introduction of newer technologies in the mining process.¹² An important aspect of their recommendation was that the discrimination between private companies and PSUs be reduced by allowing private companies to acquire land under the CBA.

This decision was accompanied by another move to open up the sector to hundred per cent of foreign direct investment.¹³ The final move to completely opening up the coal mining sector was to do away with the end-use restrictions imposed and allowing all private companies to engage in the sale of coal commercially with the Mineral Ordinance (2020).

These changes were not welcomed by forest-dwelling communities on the ground as they fear an increase in coal mining and labour unions protested as they are concerned about worsening of labour conditions. Uncertainty remains in the air with these drastic transformations in coal mining. “When land is acquired for coal mining, it is an exercise of compulsory land acquisition” stated a land officer at Mahanadi Coal Fields.¹⁴



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This is the bureaucratic perception of land acquisition for coal, despite the need for consent of local communities, it is seldom implemented or complied with meaningfully. As a community leader in Tumulia reflected, “They never obtained our consent for the expansion of the mines, we instead passed a resolution from the village assembly stating that we reject such a proposal and have submitted it to the local authorities”¹⁵ Whether this resolution will be adequately considered in decision making or not is yet to be seen. In many instances, however, land is provided for coal mining even though communities are opposed to it. The priority for acquisition for coal is because, India continues to remain dependent on coal for its electrification, despite India pursuing an ambitious project on renewables. This project of energy transition will take more time and coal will remain the primary source of electricity.

In an effort to enable quick land acquisition process for coal, A committee of secretaries met earlier in September, 2019 to recommend that compliance with safeguards within the Forest Rights Act, 2006 will not be required.¹⁶ This proposed de-linking of the FRA to create an enabling environment for private players to enter the sector will shrink the democratic space available to forest-dwelling communities to articulate their interests in this changing political economy of coal.

5. Consent, land acquisition and the Coal Bearing Areas Act, 1957

Free, Prior and Informed Consent made its way into the legal regime governing the acquisition of forest land in 2014 with amendments to the Forest Conservation Act, 1980. The Rules require that the district collector obtain a certificate from the village assembly stating that consent has been given or withheld for such acquisition. The procedural guidelines for obtaining consent and decision making thereafter by the local bureaucracy are ambiguous. This ambiguity creates room for the exercise of large discretionary power by the bureaucracy.



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Evidence has emerged from Keonjhar in Odisha where resolutions by the village assembly have been forged and land is being acquired on the basis of these forged resolutions.¹⁷ The discretionary power of the bureaucracy has been used to bypass the earnest implementation of the consent provision. The lack of regulation of the exercise of discretionary power by the bureaucracy becomes more problematic as it is used to make key decisions on the resolution of conflicting laws.

The laws which govern the acquisition of forest land are in conflict with each other. This is particularly visible in coal bearing areas. As stated earlier the acquisition process in coal bearing areas is governed by the coal bearing areas act. This Act provides for a provision where objection to the acquisition of land can be articulated, however the central government is merely obligated to consider these objections.¹⁸ If it is satisfied that land should be acquired, it has the power to file a declaration of acquisition. In forest land, compliance with the forest clearance process is required where consent of the gram sabha is to be obtained. How then does the objections raised under the CBA and the withholding of consent interact? This interaction is contingent on the interpretation of these provisions by the local bureaucracy.

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. Coal is needed by the nation and we usually approve for the land to be acquired and the community is appropriately compensated.” The district collector’s office can be seen as a clearing house where important decisions on the acquisition of forest land are made by pitting one legal provision against another whilst creating interpretive tools for its reconciliation¹⁹.

If the interpretive tool deployed in coal bearing areas is one of compulsory acquisition, the consent process does not influence the acquisition process adequately. The implementation of this interpretive tool was seen in Ghattbara, Chhattisgarh where the local community filed for a community forest right and it was granted. However the state government, later cancelled these titles against the consent of the community to give way for a coal mining.



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This posed a pertinent question, can forest rights be applied for and exercised over area that is part of a coal mining lease? The answer again rests with specific local interpretive tool adopted by the bureaucracy. In this instance the community forest right was rejected on the basis that it comes in the way of 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. In many instances land which has been leased to the mining company is seen as a form of ownership of the land. In the coal bearing areas of Sundergarh where the Mahanadi coalfields operates, the high court judgement states that the land now belongs to the mining company. This is another interpretive grey zone where land being leased to the state-owned coal mining company is legally recognized as ownership of the land. Consent operates in this interpretive grey zone of land being compulsory acquired despite requiring a forest clearance and land eventually being owned by the state-owned mining company.

In the changing political economy of coal what is likely to occur is the extension of the privileges of easy acquisition process under the Coal Bearing Areas Act, 1957 to private companies. In a bid to incentivize privatization the central government brought out an ordinance in 2020. A curious provision of this ordinance is the extension of forest and environmental clearances for a period of two years in an effort to make the process simpler for private companies to enter into the sector when the lease is being transferred from the old lease holder to the new lease holder. It has also done away with the end-use restrictions, once the mines have been auctioned. These provisions in an effort to create an enabling environment for business are compromising the deliberative potential of the consent provision under the FRA.²⁰

At least 15 cases of land conflicts involving coal mines have been documented by Land Conflict Watch, a network of researchers tracking land conflicts across India. These cases are spread across Chhattisgarh, Jharkhand, Madhya Pradesh, Maharashtra, Odisha and West Bengal.



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They affect at least 2,26,034 people either directly or indirectly. At least Rs. 82, 471 crores of investments are locked up in these cases, with 21,554 hectares of conflicted land. Thirteen of these conflicts involve both common and private land. At least six of these cases involve the non-settlement/violation of the Forest Rights Act, 2006.

6. Selective reconciliation of laws

In a set of documents obtained about the internal policies of Coal India what is visible is the efforts by the state-owned company to reconcile the changing legal landscape of land acquisition with the companies approach to acquisition. Interestingly, the extent of such reconciliation is restricted to only the question of rehabilitation and resettlement while due process considerations are not addressed.

The absence of specific provisions in the internal policy to align themselves with the due process requirements put in place within the FRA and FCA is evidence of the understanding of compulsory acquisition that has seeped into the manner in which the company operates. In an interview with the land acquisition officer of MCL when asked about how land is acquired, he mentioned that land was compulsorily acquired by the state while it was the responsibility of the company to arrive at a relief and rehabilitation package.

The assumption of compulsory acquisition without interrogation of the due process requirements put forth in the FRA and FCA either by the bureaucracy or the company renders the provision of consent as a merely symbolic one. The selective reconciliation can be attributed to this assumption which forces the company to focus its efforts on relief and rehabilitation. The local community struggling against the expanding MCL coal mine in Sundergarh makes a key observation, Ranjith a young leader of the movement against MCL and member of the Communist Party of India Marxist stated

The state owns the land and the coal, we are pawns that can be shifted easily. If we oppose the project the question they pose is are you against the nation? They equate coal with nation building which is why acquisition is compulsory. A link between coal, electrification and national development is what fuels this interpretation by the local bureaucracy.²¹

²¹ Interview by Arpitha Kodiveri in August, 2019.



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Kuntala Lahiri-Dutt in her book coal nation speaks to this link between coal mining, electrification and national development.²² The unique aspect of coal she argues is the imperative for it to be mined as a foundation for economic growth. The political economy of coal prior to privatization was largely state-owned, which furthered the nexus between the state, coal mining and the prerogative of national development. The challenge now with the changing political economy is how this narrative of national development is used by the private companies in easily acquiring large swathes of land.

While this paper sketches the various legal aspects of interpretation and mechanisms to bypass consent, the core argument being presented is the dominance of the doctrine of eminent domain in coal bearing areas. Land acquisition in coal bearing areas should adopt the due process requirements as a way to address the growing concerns of climate change. In the next section with an overview of the climate change commitments, we will argue that harnessing the deliberative potential of the consent provision might be a way forward from overcoming the bind of compulsory acquisition.

7. India's climate change commitments

Under the Paris Agreement, India has committed to reducing its emissions by 30-35% and to increasing the share of non-fossil fuel-based energy resources to 40% of installed electric power capacity by 2030. There seems to be a double speak, however, in India's commitment to non-fossil fuel-based energy and the opening up of coal mining to the private sector and Foreign Direct Investment.²³ These emission reduction targets will be difficult to achieve if even a marginal increase in emissions from coal mining is experienced. This begs the question of whether the rhetoric of energy security trumps considerations of climate change. India has made efforts to increase its reliance on solar power with its national solar mission and the launching of the international solar alliance.



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These efforts, however, may remain in vain if dependency on domestic fossil fuel remains as a report by the Brookings Institute indicates that India will largely depend on coal till 2030 and beyond despite its ambitious project of energy transition to renewables²⁴.

If one is to adopt a climate justice perspective in unpacking the changing political economy of coal in India, what emerges is an important question of how to balance the rights of forest-dwellers, meeting the set climate change targets and ensuring energy security. A recent report by the inter-governmental panel on climate change and land recognised the need to recognise the community land tenure of indigenous communities to be able to effectively meet climate change targets.²⁵ If India was to adopt an aggressive climate action policy it would demand that energy transition be accompanied with better implementation of the Forest Rights Act, 2006 where community land tenure is recognised. Instead, implementation of the Act has been poor and is subject to many dilutions.

8. Can Deliberative Democracy be a pathway out of this bind?

Deliberative democracy stems from Habermas's work on communicative action where he argues for the need for citizens to be integral to decision-making on how public good is defined. It requires that consensus or confluence of competing claims are discussed and an agreement is eventually reached.²⁶ Deliberative democracy is an alternative I would like to place to navigate the need for a delicate balance between the rights of forest-dwelling communities, climate change commitments and energy security or national development is active deliberation.

The consent provision within the Forest Rights Act, 2006 should be implemented meaningfully instead of being diluted so that decisions on coal mining can be subject to scrutiny and discussion. Environmental governance in India has offered spaces where such deliberation can take place but has not been adequately implemented. If these avenues like the need for consent can be harnessed to better manage these competing interests.



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Deliberative democracy as a democratic theory lays emphasis on the role of discussion and deliberation in arriving at decisions based on consensus of different stakeholders. The palli sabha's or the village assemblies in Odisha and elsewhere have a rich culture of deliberation and discussion which can be harnessed to collectively address the challenges of conservation and development in India's coal bearing forested areas.

Deliberative democracy acknowledges that communities are not homogenous and are a constellation of multiplicity of interests, in arriving at decisions it becomes important then to negotiate and unpack the preferences of the different members of the community and arrive at a consensus.²⁷ The consent requirement when viewed through the lens of deliberative democracy transforms from a mere procedural requirement to one where the state works with the forest-dwelling communities to address not just questions of acquisition of forest land but the everyday issues like access to health care.

Deliberative democracy would also require communities opposing these mining projects to deliberate with the state. In many forest areas, the struggle for autonomy and self-determination by forest-dwelling communities has kept the state at bay as the state has often been seen as an oppressive force in these areas. Self-determination in its present form however continues to be dependent on the state in a myriad of ways. While it would be difficult to reduce state interference entirely given the legal structure that enables state control, deliberative democracy can guide us to the elusive middle ground where autonomy of forest-dwelling communities is respected and the state is responsive to the demands of these communities.

While this sounds idyllic, it is pragmatic in addressing the rise of land conflicts and demands for distributive justice by forest-dwelling communities. Deliberative democracy in India's forests demands a deliberative state apparatus that is present and builds trust with the forest-dwelling community. This would strengthen the legal and political terrain on which an extractive economy can be checked for its excesses in the form of human rights or environmental violations.



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Deliberation can enable local-level problem solving and restrict the expansion of coal mines where local communities suffer from pollution and other challenges. While opening up coal mines cannot be entirely banned as India is yet to be entirely electrified, deliberative democracy can usher an understanding of the imperfect alternatives where it accounts for the competing claims and interests. This would require a responsive forest bureaucracy, strong village level institutions and most importantly flexibility in finding ways to meet energy demands which can allow for bureaucratic thinking to move beyond the interpretation of these laws as one that provides for compulsory acquisition. Deliberative democracy relies on reasoned arguments to form the basis of decision-making and if such reasoning can begin at the village level, it can potentially change the nations approach to this difficult bind that it finds itself in.

9. Conclusion

India finds itself in a difficult spot in reconciling these conflicting priorities, however doing away with legal protections of the rights of forest-dwelling communities will increase the incidence of land conflicts on the ground. Deliberative democracy can be a pathway out of this bind if meaningfully implemented where local communities are seen as integral part to finding a way out of this muddle. A step in this direction would be, as I have argued elsewhere, to strengthen the legal structure that supports deliberation than shrinking such spaces. Thus, this move of privatising coal mining should be backed by legislative amendments that extend the application of the FRA and LARR to coal bearing areas as well as binding laws that address the climate change commitments. This set of legislative amendments will ensure that privatisation of coal mining takes place in a regulatory environment where energy security is balanced with the rights of local communities and climate change.



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