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RESEARCH ARTICLE

Adjudicating Human Rights: Bounded Deliberative Democracy

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Abstract

Judges' role in adjudicating constitutional human rights is frequently criticised as undemocratic, fuelled by recent United States Supreme Court judgements on abortion, gun rights and the environment. But human rights of those without political power are insufficiently protected by decision-makers accountable only to majorities. This paper develops a model of human rights adjudication which enhances democracy rather than detracting from it. Human rights disputes should not be determined through bargaining, which reflects the power of different interests, but through 'value-oriented' reasoning, where parties adduce reasons aiming to convince others, while remaining open to persuasion. This is the essence of deliberative democracy. However, this is not open-ended deliberation. Although human rights are abstract, requiring further interpretation in particular contexts, they establish a 'realm of meaning' setting the boundaries within which deliberation can occur. This is bounded deliberation. Courts should enhance deliberative democracy by requiring decision-makers to demonstrate that they have addressed human rights questions in a value-oriented manner, rather than reflecting political, numerical or economic power. This includes ensuring a variety of perspectives and that marginalised voices are taken seriously. The paper uses examples from different jurisdictions, including India, South Africa and the US, to demonstrate the possibility of this model.

Keywords: adjudicating constitutional human rights; bounded deliberative democracy; declaration of incompatibility; demosprudence; dissenting opinions; Habermas; Indian Oxygen and Vaccination Covid case; judge's role in constitutional human rights; meaningful engagement; right to food case

I Introduction

The role of the judiciary in a democracy, always contested, has come under renewed scrutiny as the US Supreme Court, composed of a majority of justices appointed for their explicitly political views, has set about stamping those views on judgments ranging from removing the right to abortion,[1] to upholding the right to own guns in

[1] *Dobbs v Jackson Women's Health Organization,* 142 S Ct 2228 (2022) (US Supreme Court) ('*Dobbs v Jackson Women's Health Organization*').

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public,[2] to preventing environmental regulation.[3] At one level, this appears to vindicate the cogent critics of constitutional human rights adjudication as undermining the right to participation at the core of democracy.[4] However, the prospect of leaving human rights entirely to majoritarian institutions only accountable in periodic elections holds out even less hope for marginalised individuals and groups who can never expect to prevail in the increasingly polarised political fray.[5] This paper argues that, rather than focusing on a bipolar choice between justiciability and non-justiciability of human rights, the real challenge is to formulate a democratically justifiable role for the courts in human rights adjudication.

Deliberative democracy offers a way to fashion such a role. It does so by distinguishing between 'interest-governed bargaining', where success depends on relative economic, political or numerical strength, and 'value-oriented' decision-making, where parties adduce reasons which aim to convince other participants, while remaining open to persuasion by others. Under interest-governed bargaining, preferences are predetermined and fixed, whereas value-oriented co-ordination facilitates revision of initial preferences during the process of deliberation to encompass others' perspectives.[6] In this paper, I argue that human rights questions, whether in courts, legislatures or elsewhere, should not be decided according to the power of predetermined, fixed interests (interest-governed bargaining). Instead, human rights questions should be addressed in a deliberative, or value-oriented manner, where the persuasiveness of the principles advanced, rather than factual power, should be the reason for adopting it, and where all participants come to the process aiming to persuade but are also open to be persuaded. Deliberation is not, however, open-ended: it is 'bounded' in that it is directed towards interpretation and application of open-textured human rights instruments. I have called this theory 'bounded deliberative democracy (BDD)'.[7]

With the adoption of BDD by the Indian Supreme Court in its decision on the distribution of oxygen and vaccines during the Covid-19 pandemic,[8] it is worth revisiting and further developing this framework. This paper argues that open-textured constitutional human rights provisions establish a 'realm of meaning'[9] which is not

[2] *New York State Rifle & Pistol Assn v Bruen,* 142 S Ct 2111 (2022) (US Supreme Court) (*'New York State Rifle & Pistol Assn v Bruen*').

[3] *West Virginia v Environmental Protection Agency,* 142 S Ct 2587 (2022) (US Supreme Court).

[4] Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) (*'Law and Disagreement*'), 213; Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346; Roberto Gargarella, *The Law as a Conversation among Equals* (Cambridge University Press, 2022).

[5] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008).

[6] Jürgen Habermas, *Between Facts and Norms,* tr William Rehg (Polity Press, 1997).

[7] Sandra Fredman, 'Adjudication as Accountability: A Deliberative Approach' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013) ('Adjudication as Accountability: A Deliberative Approach'); Sandra Fredman, *Comparative Human Rights Law* (Oxford University Press, 2018).

[8] *In Re: Distribution of Essential Supplies and Services During Pandemic* 2021 SC 236 (Indian Supreme Court) (*In Re: Distribution of Essential Supplies and Services During Pandemic*').

[9] Robert Cover, 'The Supreme Court, 1982 Term; Foreword: Nomos and Narrative' (1983) 97(1) *Harvard Law Review* 4.

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fixed but is also not unbounded. It is in this space that deliberative democratic reasoning should occur. The role of courts in human rights adjudication is to enhance deliberative democracy by requiring elected lawmakers and executive decision-makers to demonstrate that they have addressed human rights questions in a value-oriented manner, rather than reflecting political, numerical or economic power. Courts should not prescribe to elected representatives or the government exactly what decisions should be taken. Instead, legislatures and executives should be required to give clear, evidence-based, and persuasive reasons, not based on factual power, as to why their decisions are human rights compliant. Courts are well-placed to perform this function in that judicial decision-making is essentially deliberative rather than based on interest-bargaining. Judges should not make decisions based on parties' relative power, but on whether parties' reasoning is convincing.

The paper is normative, setting up a framework for critiquing or supporting judicial practice. At the same time, the normative principles are tested against relevant instances of judicial practice in the US, UK, South Africa and India. These jurisdictions share a predominantly common law framework of public law, while displaying contrasting trajectories of human rights adjudication. The aim is not to provide a full set of case-studies but to refine and sharpen the theory.

Part II sets out the basic contours of BDD as a normative approach to human rights adjudication which can enhance rather than undermine democracy. Part II demonstrates how adjudication based on BDD can work in practice. It examines the recent Indian Supreme Court judgement which expressly used BDD to address the question of how the rights to life and equality should be fulfilled in the supply of oxygen and free vaccines during the Covid-19 pandemic. A further demonstration is provided by the principle of 'meaningful engagement' developed by the South African Constitutional Court (SACC) and adopted by the Delhi High Court. Part II also briefly considers the declaration of incompatibility in the UK *Human Rights Act 1998* ('*HRA*'). It should be stressed that these cases are chosen to illustrate how BDD can work in practice. It does not assume that this is the consistent practice of the courts mentioned. In fact, the Indian Supreme Court has frequently adjudicated on human rights in ways that fall below the demands of BDD.

Part III addresses four major challenges facing BDD. The first is whether it is possible to facilitate deliberative participation in human rights adjudication, given that courts are generally far more hospitable to elites than to broad-based popular inclusion. This section examines the role of social movements, using specific examples, to illustrate the potential of wider civic involvement in enhancing a democratic deliberative approach to the interpretation of human rights in the course of adjudication. Drawing on insights from 'demosprudence,' it shows how social movement participation has widened the perspectives available to courts in developing the substantive meaning of key human rights. This demonstrates that the challenge of facilitating deliberative participation in human rights adjudication can, in particular circumstances, be met.

The second challenge is whether we can ensure that participation is not based on interest-bargaining but is instead both deliberative and bounded. Some social movements amplify the voices of powerful interest groups, blurring the distinction between

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social movements and interest groups. They might also use their position to further marginalise and silence groups with little political or social power. This is where boundedness is crucial. Participants' contributions must not only be value-oriented rather than interest-based, but also fall within the realm of meaning of the human right at issue. Additionally, specific measures are required to ensure that pathways to participation for less powerful groups remain open.

The third challenge concerns the risk that adjudication, far from facilitating deliberative inclusion, might stifle deliberative democracy. Lengthy litigation can divert energy and resources, and legal frameworks can distort social objectives, alienating participants. This section responds firstly by emphasising the role of adjudication in requiring proper deliberative procedures to be put in place, including that marginalised voices are taken seriously. Secondly, BDD should prevent distortion of social objectives by opening the interpretative space of human rights adjudication to a variety of deliberative perspectives.

The fourth section of Part III responds to Waldron's assertion that resort to majority decision-making in adjudication leads to the anti-democratic result of a majority of three out of five judges binding elected representatives. It argues that the deliberative method changes this calculus from a bargaining paradigm, in which relative numerical strength matters, to a value-oriented paradigm, in which the power of reasoning matters. This gives a key role to dissenting opinions, which should be regarded as part of the deliberative process, rather than as the losers in an interest-based battle.

The paper contributes to the Federal Law Review's special issue on deliberative rights theory, and focuses on human rights adjudication. It refers to human rights expressed in constitutions (South Africa, India and the US) or statutes (the *HRA*), rather than international human rights. Its scope is confined to human rights adjudication, rather than constitutional review more generally.

II BDD in principle

A The democratic objection

The paradox of human rights adjudication has been much discussed.[10] Giving judges power to interpret human rights appears to fly in the face of the basic principle that fundamental decisions in society should be taken by the people themselves.[11] However, if it is entirely left to elected representatives to interpret and apply human rights, those who have little power in the political fray will be perpetually marginalised. The challenge is therefore to find a role for justiciable human rights which reinforces democracy and the right to participate rather than detracts from it.

The most cogent articulation of the democratic objection is that of Waldron. For him, giving judges the power to decide the content of human rights entails a profound disrespect for people in their democratic capacities. There is no reason why a

[10] Waldron (n 4); Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023); Mark Tushnet, 'Dialogic Judicial Review' (2009) 61 *Arkansas Law Review* 205; Paul Craig, 'Political Constitutionalism and the Judicial Role: A Response' (2011) 9(1) *International Journal of Constitutional Law* 112.

[11] Waldron, *Law and Disagreement* (n 4) 15, 222.

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decision by a majority of judges, he argues, should be given more weight than the majority of the electorate.[12] This makes two problematic assumptions: firstly, that there are sufficient opportunities for equal participation within the political system; and secondly, that justiciability entails giving judges the last word on the matter.[13] To establish a role for courts which complements and reinforces democracy requires a response to both.

B Enhancing democratic participation: deliberative democracy

The assumption that there are sufficient opportunities for equal participation in the political system is difficult to sustain. Casting a vote in periodic elections gives barely any real participative power to individual voters. Schumpeter described democracy as a process whereby elite teams seek popular endorsement by any means at their disposal,[14] and exercise power with relative autonomy between elections. Any potential accountability is attenuated, since 'popular opinion' is as much shaped by political representatives as a response to it. Meanwhile the voices of the media, big business, and other powerful bodies drown out those of ordinary people. This account, although written in 1967, continues to resonate in the 21st century, given the additional power of social media to amplify powerful voices and create echo-chambers where only similar points of view are voiced or heard.[15]

Clearly, democratic defects in the political system need to be addressed by improving genuine participation in politics rather than, as Gargarella has cautioned, taking away more power from the people and giving it to the courts.[16] One way forward is political pluralism. On this view, while individuals acting alone are relatively powerless, meaningful political participation can be achieved when individuals combine into interest groups. Individual rights to participate are safeguarded because any group can enter the political marketplace to protect its interests. Because alliances are continually reconfigured, power is not concentrated for too long in any particular set of interest groups.[17] However, not all individuals are able to organise around common interests, and if they are so organised, to have equal access to the pluralist political marketplace.[18] The tendency to reinforce concentrations of power and inequalities among various competing groups is now readily acknowledged.[19] Even when blatant exclusionary practices are not in place, it is clear, as Rawls acknowledged, that social and

[12] Ibid 251.

[13] Fredman (n 5) 80.

[14] Joseph Schumpeter, 'Two Concepts of Democracy' in Anthony Quinton (ed), *Political Philosophy* (Oxford University Press, 1967) 153.

[15] Cass R Sunstein, *#Republic: Divided Democracy in the Age of Social Media* (Princeton University Press, 2018).

[16] Gargarella (n 4) 180, 182.

[17] David Held, *Models of Democracy* (Stanford University Press, 3rd ed, 2006) 158; Paul Phillip Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford University Press, 1991) ch 3.

[18] Robert Dahl, *Dilemmas of Pluralist Democracy: Autonomy vs. Control* (Yale University Press, 1982).

[19] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) 135.

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economic inequalities in a modern democratic state are so large that those with greater wealth and position usually control political life and enact legislation and social policies that advance their interests.[20] Concentrations of wealth and power inevitably skew decision-making in favour of interest groups made up of those with power in society.

It is here that the value of theories of deliberative democracy becomes apparent.[21] Central to deliberative democracy is Habermas' distinction between 'interest-governed' and 'value-oriented' co-ordination.[22] 'Interest-governed' bargaining is communication for the purpose of forcing or inducing the opponent to accept one's claim. Success depends on relative economic, material, political or numerical strength rather than on good reasons or the power of the better argument. Each person's or group's interests are presumed to be fixed and unchangeable. As a result, the solution is either victory or surrender, or some trade-offs to reach a compromise. This contrasts with 'value-oriented' coordination. Instead of factual power, such coordination is based on the ability to adduce reasons which can convince all the parties. The parties enter the process aiming to justify their position by appealing to reasons that all parties can accept. At the same time, all parties are willing to be persuaded by arguments put forward by other parties. Unlike interest-governed bargaining, a value-oriented approach does not assume a set of fixed and unchangeable interests. Instead, participants can become aware of the extent to which they may have adapted their preferences to their limited circumstances, or have been influenced by powerful forces in society, and a wider range of perspectives may be opened up.[23] Initial preferences may be revised to encompass the perspectives of other participants.[24] While outcomes of interest group bargaining reflect the balance of power between groups, deliberation stands out as an alternative which can transcend inequalities in bargaining power.[25] In place of defeat or victory, coordination takes place through rationally motivated deliberation.[26]

One clear challenge for deliberative democracy relates to how decisions can be reached when differences of opinion remain. Early generations of deliberative theory suggested that consensus is both a desirable and feasible aim of deliberation.[27] However, deliberative scholars increasingly point to the practical impossibility of reaching unanimity in circumstances of value heterogeneity. Indeed, insisting on an ideal of rational agreement might undermine the deliberative values of inclusiveness and pluralism. [28] One way forward is Sunstein's notion of incompletely theorised

[20] John Rawls, *Justice as Fairness* (Harvard University Press, 2001) 148–50.

[21] Habermas (n 6); Joshua Cohen, 'Deliberation and Democratic Legitimacy' in A Hamlin and P Pettit (eds), *The Good Polity* (Blackwell, 1989); Andre Bächtiger et al (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press, 2018).

[22] Habermas (n 6) 139-41.

[23] Cohen (n 21).

[24] Habermas (n 6) 27.

[25] Fredman (n 7) ch 2.

[26] Habermas (n 6) 139–40, 165.

[27] Cohen (n 21); Habermas (n 6) 139-40.

[28] Iris Marion Young, 'Activist Challenges to Deliberative Democracy Publicity and Deliberation: Democratic Ideals in Dispute' (2001) 29(5) *Political Theory* 670, 676-81.

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agreements. This allows agreement on outcomes without agreeing on the most general theory that accounts for it.[29] Gutmann and Thompson go further and acknowledge that deliberative democracy does not always or even usually lead to agreement. Instead, they argue, 'citizens and their representatives should try to find justifications that minimise their differences with their opponents.'[30] These approaches modify deliberative democracy to the extent that, in putting forward their reasons, participants are not aiming to achieve agreement, but to encourage each other to take a broader perspective, to promote mutual respect, to find what common ground there might be, and to expand their understanding so that mistakes might be corrected.[31]

Nevertheless, not all decision-making can satisfy deliberative democracy. Deliberative democracy requires decision-makers to justify their decisions by reference to reasons that all can regard as sound, even if they cannot command a consensus.[32] At the same time, deliberative procedures will always co-exist alongside interest-bargaining. Habermas concedes that in complex societies, interests are frequently sufficiently diverse that consensus is impossible.[33] In such cases, majority voting or bargaining between success-oriented parties who are willing to cooperate is required. Even so, deliberative procedures are necessary to ensure that all interested parties have an equal opportunity to influence one another. Sunstein describes the legislative process as a continuum. At one pole, interest group pressures are determinative, while at the other end, legislators engage in deliberation and interest group pressures play little or no role. Along the continuum, outcomes depend on an amalgam of pressure, deliberation, and other factors.[34]

While interest-based bargaining is an inevitable and often an appropriate component of democracy, it is argued here that human rights should not be decided on the basis of interest bargaining.[35] If they were, those with superior numerical, political or financial power might always trump the rights of those without power. The power of the principle must itself be the reason for adopting it, rather than the numbers of those who back it.[36]

Is it therefore possible to argue that courts, suitably adapted, can improve the process of democracy by steering decision-making on human rights away from interest-bargaining towards a deliberative approach? This is the aim of the principle of BDD, elaborated below.

[29] Cass R Sunstein, *Designing Democracy What Constitutions Do* (Oxford University Press, 2001) 50–65.

[30] Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004) 7.

[31] Ibid 10–12.

[32] Cass R Sunstein, 'Beyond the Republican Revival' [1988] 97 *Yale Law Journal* 1539.

[33] Habermas (n 6) 166.

[34] Cass R Sunstein, 'Interest Groups in American Public Law' (1985) 38(1) *Stanford Law Review* 29, 48–9.

[35] Sandra Fredman, 'From Dialogue to Deliberation: Human Rights Adjudication and Prisoners' Right to Vote' (2013) *Public Law* 292; Fredman (n 5).

[36] Fredman (n 5) ch 2.

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C The judicial role: a deliberative approach

Waldron's second assumption is that justiciability gives judges a non-revisable power. But this generalises from the US constitutional model,[37] according to which the Supreme Court can strike down legislative decisions by interpreting a broad, open-textured, centuries-old constitution. However, in other jurisdictions, human rights are justiciable without judges having the last word.[38] Scholars have built on these different constitutional models to develop several theories as to how the judicial role can complement democratically elected institutions. John Hart Ely's 'representation-reinforcing' theory views judicial review as legitimate when it facilitates the representation of those who are systematically marginalised in majoritarian politics.[39] Dialogic theory focuses on courts' potential to participate in a dialogue with governments so that legislatures can address human rights concerns while still achieving the original purposes of the legislation.[40] A more recent theory regards rights protection as a collaboration between executive, judiciary and legislature.[41]

BDD recognises the value in these approaches but takes them further. Legislative decision-making should remain at the centre of the articulation of human rights and the delivery of human rights responsibilities. However, human rights decision-making should be based on value-oriented reasoning, not interest-group bargaining. It is here that courts can fulfil a democratic role. When human rights are at issue, courts should augment democratic participation by steering decision-making away from interest-bargaining towards value-oriented deliberation and by functioning as a forum for deliberation. Moreover, the arguments of the parties, as well as both majority and dissenting judgements, feed into the wider deliberative process.[42] This mirrors the insights of 'systemic deliberative democracy,' which illuminate ways in which deliberative and democratic weaknesses in one institution of government can compensate for weaknesses in other parts.[43] Most recently, Levy has argued that courts should engage in 'deliberative system reinforcement to try to make legal rights practice align better with systemic deliberative democracy.'[44]

BDD goes beyond the dialogic approach by focussing not simply on the interaction between courts and the legislature and executive in human rights adjudication, but also on the quality of the reasoning in all these arenas as well as in civil society. Similarly, although BDD has always been based on collaboration between the branches

[37] Waldron (n 4) 213.

[38] *Canada Act 1982 (UK)* c 11 sch B pt 1 s 33 *('Canadian Charter of Rights and Freedoms'); Bill of Rights Act 1990* (NZ) s 6; *Human Rights Act 1998* (UK) s 4 (*'HRA'*); see also Fredman (n 6) 81.

[39] Ely (n 19).

[40] Peter Hogg and Allison Bushell, 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)' (1997) 35(1) *Osgoode Hall Law Journal* 75; Tom Hickman, 'Constitutional dialogue, constitutional theories and the Human Rights Act 1998′ (2005) *Public Law* 306-35; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law Books, 2001).

[41] Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press, 2023).

[42] Fredman (n 6) ch 4.

[43] John Parkinson and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012) 3.

[44] Ron Levy, 'Rights and Deliberative Systems' (2022) 18(1) *Journal of Deliberative Democracy* 27, 38.

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of government, its emphasis on deliberative reasoning in all spheres of human rights decision-making goes beyond the proposal of 'calibrated constitutional review.'[45] It is through requiring human rights determinations to be justified in a value-oriented or deliberative manner rather than through interest-bargaining that courts' key role in democratic resolution of human rights disputes should lie.

(iii) The realm of meaning: The boundaries of deliberation

There is, however, a sense in which deliberative democracy appears incompatible with the essence of human rights adjudication. Deliberative models require an open-ended approach, allowing the process to produce a solution which cannot be pre-determined. To prescribe substantive outcomes, on this view, would improperly constrain the process of deliberation.[46] Cohen maintains that, apart from sharing a commitment to deliberative democracy itself, participants need not share a conception of the good.[47] Deliberative theorists do acknowledge that democratic deliberation must be safeguarded by procedural constraints, such as the requirements of value-oriented reasoning, equal participation and mutual respect.[48] Nevertheless, Gutmann and Thompson argue that 'procedural and substantive principles should both be systematically open to revision in an ongoing process of moral and political deliberation.'[49]

Human rights adjudication, by contrast, appears to be oriented towards a particular end, that is, human rights compliance. This is, however, only partly true. Human rights are challenging because they are neither fully determined nor open to unrestricted deliberative solutions. If they were fully determined, then both courts and legislatures could simply apply formulaic responses. Both institutions would be bound by the same mandatory norms, and neither would be superior. However, the issue is more complex. Human rights are open to a range of interpretations in particular contexts. Similarly, whether human rights have justifiably been limited inevitably requires a judgement. At the same time, human rights are not simply open moral questions. They are based on a consensus developed over time as to what the fundamentals of being human in a political society require. It is within the framework set by this prior deliberative consensus that current decision-making must take place. Deliberation in the human rights context is therefore 'bounded' in that it is directed towards interpreting open-textured human rights instruments, determining whether limits imposed by governments are justifiable, and considering how human rights duties should be specified and implemented.

The model proposed here is therefore not one of pure deliberative democracy, but of 'bounded deliberation'. Deliberation is bounded in that it operates within the constraints of human rights, which are themselves a product of prior deliberative consensus. This takes BDD beyond Ely's pure proceduralism, or the minimalism advocated by Sunstein to avoid incorporating courts into deep moral controversy. The bounded nature of the deliberative orientation instead reflects the need, articulated by Post and

[45] Kavanagh (n 41) 267.

[46] Gutmann and Thompson (n 30) 25.

[47] Cohen (n 21) 23.

[48] Gutmann and Thompson (n 30) 26.

[49] Ibid 25.

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Siegel, for 'more than a theory of constitutional conflict avoidance; they need a theory about how to protect constitutional ideals under conditions of constitutional conflict. What is more, they need substantive constitutional ideals.'[50] Open-textured constitutional human rights provisions establish a 'realm of meaning'[51] which is not fixed but is also not unbounded. It is in this space that deliberative democratic reasoning occurs.

BDD allocates a specific role to courts in human rights adjudication, namely, to insist on a particular kind of reasoning when making decisions regarding human rights. The primary responsibility for articulating and delivering human rights responsibilities should lie with Parliament. But decision-makers must be capable of persuading the court that they have fulfilled their human rights obligations. Crucially, reasons must be value-oriented rather than interest-governed. This is particularly true for decisions which affect those without the power to influence the decision. Courts should not prescribe to elected representatives exactly what decisions should be taken. Instead, they should be required to justify why those decisions have been made against the framework of human rights, considering both the pre-existing deliberative consensus and reasonable disagreement. Failure to meet these criteria would trigger judicial intervention, but primarily in the form of requiring a decision to be reconsidered rather than a substitution on the merits. This was the approach of the Indian Supreme Court in the *Oxygen Distribution* case (below), and is stronger than the declaration of incompatibility under the HRA, which, while encouraging reconsideration, does not mandate it.[52] By requiring decision-makers to lay out and substantiate their reasons, with evidence where appropriate, courts should encourage decision-makers to make human rights decisions in a deliberative way in the legislature and elsewhere.

BDD also places constraints on judges in adjudicating human rights. Judges are required to listen to different perspectives and demonstrate how these have shaped the outcome, in ways which can convince all participants of proper value-oriented consideration of the meaning and application of human rights even if some participants disagree. For example, Post and Siegel, while disagreeing in substance with the outcome of the US abortion case of *Planned Parenthood v Casey*,[53] nevertheless credit the Court for eloquently articulating the ideals of both sides of the abortion debate and 'fashioning a constitutional law in which each side can find recognition.'[54] This is reflected in the Court's own words: 'The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by

[50]Robert Post and Reva Siegel, 'Roe Rage: Democratic Constitutionalism and Backlash' (2007) 373 *Harvard Civil Rights - Civil Liberties Law Review* 373, 377.

[51]Cover (n 9).

[52]*HRA* (n 38) s 4.

[53]*Planned Parenthood v Casey*, 505 US 883 (2005) ('*Planned Parenthood v Casey*').

[54]Post and Siegel (n 50) 428.

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the Nation.'[55] This contrasts with the *Dobbs* case,[56] in which judges came to the court with a clearly stated pre-commitment to reversing the right to abortion. BDD therefore acts as a discipline on judges as much as on lawmakers and can be a bulwark against the risk that political appointments of judges, or more subtle identification with elites, will enable those in power to capture the adjudicative role.

(iv) The court as a deliberative forum

At first sight, courts are an unlikely option for triggering a deliberative approach to human rights. Adversarial litigation appears to be a paradigm interest bargaining framework. However, adversarial procedures do not mean that decision-making is interest-governed. The parties' political, numerical or economic strength should not be the basis of judicial decisions on human rights, but the strength of their reasoning. Judges are required to come to the process open to the possibility of being persuaded, and the outcome is often a synthesis of the arguments of both sides. In this sense, judges' approach should be value-oriented in a deliberative manner. As Gutmann and Thompson put it: 'With all its imperfections, judicial deliberation comes closer to serving the ideal of a common perspective than does … interest-group bargaining.'[57] For example, lawmakers might defend prohibitions on prisoners' right to vote because they command popular support. However, disenfranchisement of citizens is a paradigm case in which such interest-based reasoning is inappropriate. But nor should courts dictate the outcome. Courts should instead demand a deliberative explanation for the legislature's chosen solution, requiring factual claims to be supported by evidence, and policy claims by principled reasons. For instance, lawmakers have claimed that the prospect of being deprived of the right to vote is a deterrent to potential lawbreaking. But when called upon by a court to support this assertion, evidence was not forthcoming. A more evidence-based policy can then be required.[58]

It could be objected that requiring judges to use value-oriented reasoning undermines the principle that judges should not decide issues based on their own personal predilections. This misinterprets the value-oriented reasoning. It is not the judges' own personal values that matter. Judges should require participants to provide an account, not based on interest-bargaining, capable of convincing others of how their interpretation advances constitutional human rights. Governments, in particular, should use value-oriented reasoning to explain how they propose to fulfil their human rights obligations and why any claimed limits are justifiable. This is not to say that judges should claim to be neutral. It is crucial to acknowledge that judges inevitably make value-judgements.[59] But relevant values are not individual judges' personal preferences. BDD entails an explicit commitment to the high-level value of human rights and the value of deliberative democracy. This requires judges to have an open mind and precludes a

[55] *Planned Parenthood v Casey* (n 53) 865 – 6.

[56] *Dobbs v Jackson Women's Health Organization* (n 1).

[57] Amy Gutmann and Dennis Thompson, 'Moral Disagreement in a Democracy' (1995) 12(1) *Social Philosophy and Policy* 87, 109.

[58] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* Case CCT 03/04 [2004] ZACC 10 (South African Constitutional Court); Fredman (n 40).

[59] K Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal of Human Rights* 146.

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prior commitment to an outcome. It is for this reason that the majority judgement in *Dobbs*,[60] overturning the right to abortion in *Roe v Wade,*[61] does not meet the standard of BDD. Alito J, who penned the judgement, had articulated his commitment to overturn *Roe v Wade* from early in his career.[62] Other majority justices had made the same commitment during their confirmation hearings. Closing the door on a deliberative response does not fulfil the criteria of BDD.

(v) Facts and Deliberation

A further challenge concerns fact-finding and access to information by participants, especially given the exponential rise in fake news and increasingly polarised governments. Where issues are highly polarised and disputed, such as Covid vaccinations and electoral fraud, the ability of the powerful, whether in politics, business, or social media, to 'transform fact into opinion'[63] appears to put the deliberative process on an unsteady footing.[64] Particularly concerning is the current situation in the US, in which allegations of election fraud and a 'stolen' election have embedded themselves in popular culture and are unresponsive to factual refutations. Court cases are pulled into the rhetoric with claims of 'weaponising justice.'

Bringing a deliberative perspective to the fact-finding process requires an acknowledgement that facts themselves might be contingent, departing from Arendt's conviction of the need to establish truth outside politics.[65] Habermas suggests that political deliberation can have 'truth-tracking potential,'[66] although only if some demanding conditions are met.[67] His belief that democracy has the structures and procedures to push towards truth might be idealistic, and his preconditions too difficult to achieve. Chambers therefore focuses on how to establish and justify claims about truth. Crucially, 'those discourses have certain procedural requirements: no coercion, freedom to raise any objection, all inquirers have equal standing, and so on.'[68] Rather than truth, the goal becomes accuracy, which can be 'facilitated and encouraged through structural and regulatory features in the public sphere.'[69] This chimes with BDD, which entails a central role for human rights adjudication in demanding evidence-based justifications from governments who seek to limit human rights in the public interest. Although there may not always be an objective truth,

[60] *Dobbs v Jackson Women's Health Organization* (n 1).

[61] *Roe v Wade,* 410 US 113 (1973).

[62] Reva B Siegel, 'Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance' (2023) 101(5) *Texas Law Review* 1127, 39; Mark Lemley, 'The Imperial Supreme Court' (2021) 136(1) *Harvard Law Review* 97.

[63] Hannah Arendt, 'Truth and Politics' in David Wood and José Medina (eds), *Truth: Engagements Across Philosophical Traditions* (John Wiley & Sons, 2005) 300.

[64] See further Ron Levy and Kate Ogg, 'Deliberative Rights Theory' in this symposium.

[65] Arendt (n 63).

[66] Jürgen Habermas, 'Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research' (2006) 16(4) *Communication Theory* 411.

[67] Ibid.

[68] Simone Chambers, 'Truth, Deliberative Democracy, and the Virtues of Accuracy: Is Fake News Destroying the Public Sphere?' (2021) 69(1) *Political Studies* 147, 153.

[69] Ibid 148.

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there should be a proper defence of the accuracy of the evidence. Courts are well placed to do this.[70] For example, in the *Oxygen and Vaccines* case (below), court orders requiring detailed evidence-based justification of policy decisions relating to the right to life, demonstrated where policy was not securely founded in evidence and therefore formed the basis of constructive and co-operative deliberative problem-solving.

This should extend to robust requirements for providing information to participants in deliberative fora. Meaningful engagement relies on access to information, which parties to a deliberation might not be able to obtain. For example, freedom of information claims were central to the ability of the participants in the Indian Right to Food cases, described below, to fully contribute to the process.

This is not to ignore the obstacles faced in accessing courts, nor to pretend that under existing institutional and procedural arrangements courts function properly to amplify and include the voices of those excluded from interest-governed decision-making. Part III of this paper sets out some of these challenges and elaborates on possible responses.

Part II Bounded deliberative democracy in action

(i) The Covid Oxygen case

A clear example of BDD in action comes from the Indian Supreme Court in cases concerning the provision of oxygen and access to free vaccinations during the worst of the Covid-19 pandemic. In late April 2021, when India was experiencing a 'terrifying increase in coronavirus cases,'[71] the Court used its unique powers to initiate its own proceedings (the *suo motu* writ petition) to direct the Central Government to report on various issues in relation to its response to the virus. These included the supply and allocation of oxygen, and the provision of free vaccines. In its Order delivered on April 30th, 2021,[72] the Court expressly cited the BDD approach. In particular, it declared, 'this bounded-deliberative approach is exercised so that the UOI [Union of India] and States can justify the rationale behind their policy approach which must be bound by the human rights framework which presently implicates the right to life under Article 21 and right to equality under Article 14 of the Constitution.'[73] The Court emphasised that its aim was not to usurp the role of the executive and the legislature, but to facilitate a dialogue of relevant stakeholders, the UOI, the States and the Court.

To this end, the Court required the government to file detailed affidavits setting out the basis for its policies on the specified issues. In relation to oxygen, which was in critically short supply in several areas, the Court requested information such as the projected demand for oxygen, steps taken and proposed to augment its availability,

[70] Levy (n 44) 32.

[71] Martin Farrer, 'Why is India seeing such a huge surge in Covid-19 cases?', *The Guardian* (online, 21 April 2021) https://www.theguardian.com/world/2021/apr/21/why-is-india-seeing-such-a-huge-surge-in-covid-19-cases.

[72] *In Re: Distribution of Essential Supplies and Services During Pandemic* (n 8).

[73] Ibid [5]; Fredman, 'Adjudication as Accountability: A Deliberative Approach' (n 7).

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monitoring mechanisms for ensuring supply, especially to critically affected States, the formula for allocation and how States' needs were communicated daily to central government. On the vaccination programme, the Court requested, inter alia, that the Government set out the basis and rationale for its policy on pricing of vaccines, specifically the decision to provide the vaccine free only for over 45-year-olds, leaving individual States to negotiate a market price for 18–45-year-olds in their States.

The nature of the deliberation in court in these cases is an encouraging demonstration of the potential for a court to act as a catalyst for value-oriented co-ordination rather than antagonistic interest-based bargaining. In relation to oxygen, the Solicitor-General, acting for Central Government, sought to provide facts and figures to show that there was no shortage of oxygen nationally. He blamed shortages on individual States' failure to collect oxygen supplies. Counsel for the Government of the National Capital Territory of Delhi (GNCTD) submitted that there was an acute shortage in the capital because too little oxygen had been allocated. The Court insisted that recriminations between Central Government and GNCTD 'can furnish no solace to citizens whose lives depend on a thin thread of oxygen being available.'[74] Instead, the Court facilitated a co-operative response. During the hearing, both parties assured the court that issues would be resolved completely in a spirit of co-operation, with the Solicitor-General confirming that the deficit of oxygen would be rectified. Deliberation in the Court further enabled all the parties to see where blockages were arising and work together on concrete solutions.

The vaccination issue required more direction from the Court to achieve a plausible, value-oriented set of justifications, bounded by the rights to life and equality. Here too the Court began by reiterating that 'we do not attempt to delve into the role of the executive in designing policy choices. We are merely seeking to enter into a dialogue with the relevant stakeholders in order to ensure probity and transparency of the measures underway. We are cognisant that it is ultimately up to the executive to frame and implement policies that it deems appropriate, with the topmost regard to public interest.'[75] Nevertheless, the Court did not find the Government's explanation of its policies on free vaccines persuasive in a deliberative sense which furthered the constitutional rights to life and equality. For under 45-year-olds, State Governments and private hospitals were tasked with directly procuring vaccines, charging accordingly. The Government asserted that this policy was based on 'the concept that creating an incentivised demand for the private manufacturers in order to instil a competitive market [would result] in increased production of vaccines and market-driven affordable prices.'[76] However, the Court found that this breached the right to equality of all citizens and undermined the principle of vaccines as a valuable public good. Compelling State Governments to negotiate with manufacturers on the grounds of promoting competition and attracting new vaccine manufacturers was likely to result in serious detriment to those aged 18 to 44, especially since manufacturers were offering a lower price to Central Government than to State Governments. 'Prima facie, the rational method

[74] *In Re: Distribution of Essential Supplies and Services During Pandemic* (n 8) [29].
[75] Ibid [32]
[76] Ibid [38].

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of proceeding in a manner consistent with the right to life (which includes the right to health) under Article 21 would be for the Central Government to procure all vaccines and to negotiate the price with vaccine manufacturers.'[77] Although the Court re-emphasised that it was not passing a conclusive determination on the constitutionality of the current policy, it held that Central Government should consider revisiting its current vaccine policy to ensure it withstood the scrutiny of the right to equality under Article 14 and the right to life in Article 21 of the Constitution.[78] To facilitate a deliberative approach by decision-makers themselves, rather than determining the policy itself, the Court asked government to provide further information on key issues such as whether other alternatives had been considered. Perhaps most searching was the requirement to explain whether relevant studies had been relied on to arrive at the conclusion that decentralised procurement would prompt competitive markets to increase production and ultimately reduce prices,[79] enhancing the quality of value-oriented deliberation, rather than permitting Government simply to provide opportunities for powerful market actors to profit from the crisis.

This was followed by a further Order, on 31st May 2021, where the Court re-iterated that its observations and directions were in consonance with a bounded-deliberative approach.[80] Consistently with this approach, it had perused numerous affidavits by members of civil society and individual State governments as well as gaining assistance from its own appointed Amici. While emphasising that the judiciary has neither the authority nor competence to assume the role of the executive, the Court stressed that 'soliciting constitutional justification for policies formulated by the executive is an essential function, which the courts are entrusted to perform.'[81] This did not involve second-guessing executive choices between two competing and effective policy measures. Instead, the Court was 'assuming a dialogic jurisdiction with respect to the management of the pandemic. Hence, this Court would, under the auspices of an open court judicial process, conduct deliberations with the executive where justifications for existing policies would be elicited and evaluated to assess whether they survive constitutional scrutiny.'[82]

Following this approach, the Court found that in practice, the Liberalised Vaccination Policy might not be capable of spurring competitive prices and higher quantities of vaccines. This was based on evidence that individual state and local municipalities had been unsuccessful in negotiating with foreign manufacturers because the latter preferred dealing with federal governments. Central Government was better placed, given the size of the population, to bargain for higher quantities of vaccines at reasonable prices.[83] Added to this was the fact that the government

[77] Ibid [39].

[78] Ibid.

[79] Ibid [40].

[80] *In Re: Distribution of Essential Supplies and Services During Pandemic (no 2)* (Indian Supreme Court) [2] (*In Re: Distribution of Essential Supplies and Services During Pandemic (no 2)*; Fredman, 'Adjudication as Accountability: A Deliberative Approach' (n 7).

[81] *In Re: Distribution of Essential Supplies and Services During Pandemic (no 2)* (n 80) [14].

[82] Ibid [17].

[83] Ibid [21].

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had both financed and facilitated or augmented the production of the vaccines, so that it was not fully accurate to say that private manufacturers had borne the risk and cost of manufacture alone.[84] At the same time, the Court commended the co-operation between the UOI and private manufacturers in developing and distributing vaccines.

As well as assessing the deliberative quality of Government justifications, the Court consistently tested these against the bounds set by the constitutional rights to equality and the right to life.[85] In the earlier Order, it highlighted concerns as whether marginalised members of society could access vaccinations if vaccinations for 18–44-year-olds were available exclusively through online registration. Further information elicited from the government made it clear that there was a serious digital divide, with marginalised sections of society bearing the brunt of inaccessibility. This, the Court held, could have serious implications for the rights to equality and health of persons in this age-group. Rather than dictating what should be done to improve the situation, the Court, in the spirit of BDD, requested the government to explore and report back on other options to expand accessibility. In addition, civil society brought to the Court's attention the fact that the platform was not accessible to persons with visual disabilities. The UOI was requested to file an affidavit with its responses to each of the issues raised, annexing documents reflecting its thinking in reaching its vaccination policy. Notably, on 7th June 2021, Prime Minister Modi announced that Central Government would bear all vaccine procurement costs and provide them free to the states for all those above 18 from June 21st.[86]

(ii) Meaningful engagement

A more partial context in which BDD principles are apparent is the principle of meaningful engagement developed by the SACC. The principle was first formulated in *Occupiers of 51 Olivia Rd*,[87] in which occupiers of dilapidated buildings in Johannesburg challenged the City's attempts to evict them on health and safety grounds. In an interim order issued on 30 August 2007, the Court required the parties to 'engage with each other meaningfully … and in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the duties of citizens concerned' to resolve the dispute. It also required the parties to engage with each other 'by making the buildings as safe and conducive to health as is reasonably practicable.'[88] They were required to report on the results of the engagement, and the resulting agreement was endorsed by the Court.

In its subsequent judgement, the Court characterised meaningful engagement as a two-way process which could contribute towards resolving disputes through increased

[84]Ibid [33].

[85]Ibid [31].

[86]SCO Team, 'COVID Coverage: National Pandemic Policy -June 7th', *Supreme Court Observer* (Web Page, 7 June 2021) https://www.scobserver.in/journal/covid-coverage-national-pandemic-policy-7th-june/.

[87]*Occupiers of 51 Olivia Road v City of Johannesburg* [2008] ZACC 1 (Constitutional Court) ('*Occupiers of 51 Olivia Road v City of Johannesburg*').

[88]Ibid [5].

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understanding and sympathy.[89] The objectives of engagement might include whether the City could help in alleviating the dire consequences of eviction; whether the buildings could be rendered relatively safe for an interim period; and when and how the City could or would fulfil its obligations to the occupiers. The process should take into account the vulnerable situation of people about to be evicted. The large numbers of people affected enhanced the need for structured, consistent and careful engagement.[90]

Meaningful engagement was given a more clearly deliberative framing by the Delhi High Court in *Sudama Singh* and *Ajay Maken*.[91] In these cases, informal dwellers who had lived in shacks (jhuggis) in Delhi for many years were evicted and their homes demolished without notice, consultation, or a resettlement plan. In finding the evictions unlawful, the Court held that a clear set of procedures should be followed, including a right to meaningful engagement in relation to relocation plans. Muralidhar J characterised meaningful engagement as a 'deliberative democratic practice', in which 'the Court becomes both a democratic space where such dialogue can take place and also the Constitutional authority that facilitates it. The State is obliged to take into confidence the affected groups about the schemes for rehabilitation it proposes for them and is prepared to review and re-shape them based on their inputs.'[92]

Arguably, however, the principle of meaningful engagement, at least as articulated by the SACC, gives too little weight to the 'bounded' element of BDD. In *Olivia Road*, the Court held that, as long as the response of the City was reasonable, it complied with its duty to engage meaningfully. This did not necessarily mean that housing had to be provided. According to Yacoob J, it may in some circumstances be reasonable to provide no housing at all.[93] Yet deliberation should not simply collapse into a reasonableness standard of scrutiny. It should be oriented towards a plausible interpretation of the rights to housing, livelihood, health and equality, as well as towards an effective means of compliance with those rights. This lack of attention to the boundedness element led Wilson to suggest that the concept of engagement is 'normatively empty'[94] and others to supply normative principles to guide the process.[95] In addition, although the SACC made it clear that it was necessary to ensure that the process is genuinely participative,[96] more attention should be paid to the extent to which the power of the parties continues to influence the process. This is particularly true where the common law of property favours the property holder.[97] Although the SACC has been

[89] Ibid[15].

[90] Ibid [19].

[91] *Sudama Singh v Government of Delhi* (2010) 168 DLT 218 (Delhi High Court) ('*Sudama Singh v Government of Delhi*'); *Ajay Maken v Union of India* WP(C) No 11616/2015 (Delhi High Court) ('*Ajay Maken v Union of India*').

[92] Ibid [78].

[93] *Occupiers of 51 Olivia Road v City of Johannesburg* (n 87) [18].

[94] Stuart Wilson, *Human rights and the transformation of property law in South Africa* (Juta, 2021) 63.

[95] Sandra Liebenberg, 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (2016) 19 *Potchefstroom Electronic Law Journal* 1.

[96] *Occupiers of Erven 87 and 88 Berea v De Wet NO* [2017] ZACC 18 (Constitutional Court).

[97] Wilson (n 94) 63.

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clear that the right to property is not unassailable in the face of rights of homeless people, it has yet to find that meaningful engagement applies to private property-holders.[98] Finally, it is important that the value of deliberation be upheld against suggestions that the absence of proper procedure has not affected the outcome, or that it could be cured by subsequent consultation (a futility argument).[99]

(iii) Declaration of Incompatibility

A different approach is found in the HRA. Because Parliamentary sovereignty remains the central pillar of UK constitutionalism, there is no possibility of an entrenched Bill of Rights, giving judges a strike-down power. Instead, judges are enjoined to interpret legislation so far as possible as consistent with the rights in the European Convention on Human Rights, which is domesticated through the Act. Alternatively, the court can make a declaration of incompatibility, which, instead of invalidating the provision, leaves it up to Parliament to make appropriate changes. The declaration of incompatibility is generally characterised as epitomising a dialogic approach to human rights adjudication, in that the courts and legislature interact in bringing legislation into line with human rights commitments.[100] There is a sense in which it might partially achieve the aims of BDD.[101] However, there is still no explicit commitment to insisting on a value-oriented approach within ensuing Parliamentary debates. Because domestic courts are highly deferent to legislative initiatives, they have not sufficiently emphasised the need for detailed and evidence-based deliberative justification of limitations on rights.[102]

Part III Challenges

In this Part, I address four major inter-related challenges to BDD, and how the theory can be elaborated to address these. Firstly, how can deliberative participation be facilitated through the court process? Secondly, how does the boundedness of human rights interact with deliberative participation? Thirdly, how do we avoid the risk of adjudication stifling deliberative democracy? Fourthly, how is judicial legitimacy maintained and how should dissenting opinions be viewed?

(i) Facilitating deliberative participation: the role of social movements

A key challenge facing a theory of BDD is to determine how deliberative participation might be facilitated through the court process. One of the most trenchant criticisms of an approach which puts deliberative democracy at the centre of human rights adjudication is that courts are inevitably elite and open to domination by the rich and powerful.

[98] Ibid 63.

[99] *Residents of Joe Slovo Community v Thubelisha Homes* Case [2009] ZACC 16 (Constitutional Court) [302]-[303].

[100] Hickman (n 40).

[101] Fredman (n 35).

[102] *R (on the application of DA) v Secretary of State for Work and Pensions* [2019] UKSC 21; Meghan Campbell, 'Might makes right: the two child limit and justifiable discrimination against women and children' 43(4) *Journal of Social Welfare and Family Law* 467.

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Not all participants have the same level of articulacy, nor the same skills in expressing a perspective and convincing others. Given the barriers to accessing justice, very few will even find their way into the deliberative forum.

This points to the crucial need for institutional reform. Courts in human rights litigation can only play a legitimate role if they make it possible for even the weakest voice to be heard and give equal persuasive power to all. As Baxi puts it, the key question is how judges 'talk about and listen to the worst-off peoples …. Who do the Justices listen to when they refer to 'people' or the "demos"? Are they better listening posts in a plebiscitary democracy than the legislators?'[103] Broadening the basis of participation in human rights adjudication must therefore entail more than gestures of inclusion into a structure already predetermined by over-representation of powerful groups. It requires a genuine opportunity to enter the deliberative process as to the interpretation of human rights.

This raises the question of whether it is possible to facilitate deliberative participation in human rights adjudication. This section examines the role of social movements, using specific examples to illustrate the potential of wider civic involvement in enhancing a democratic deliberative approach to the interpretation of human rights in the course of adjudication. Drawing on the insights of 'demosprudence,' this section demonstrates that it is possible for social movements to enter the deliberative process and widen the perspective of courts in interpreting human rights such as rights to life, access to health care, and disability and gender equality. Thus, the challenge of facilitating deliberative participation in human rights adjudication can, in particular circumstances, be met.

(a) 'Demosprudence' and democratic deliberation

To counter the dominance of elites in judicial proceedings, recent studies have examined the role of social movements in broadening deliberative participation in human rights adjudication. Guinier and Torres argue that it is necessary to 'expand the lexicon of lawmaking … to acknowledge the work of social movement actors. … Rather than deferring to appointed judges as the preeminent authority for understanding or applying the Constitution, these local movements often introduce new sources of interpretive authority that ultimately change the cultural norms of the larger society.'[104] This led them to develop the theory of 'demosprudence,' which aims to capture ways in which courts and social movements influence each other to interpret the meaning of the law.[105] Importantly, social movements, as understood by theorists of demosprudence, are wholly different from interest groups. Interest groups are largely composed of elites and engage in conventional politics by trying to influence those who exercise state power in conventional ways. By contrast, social movements build solidarity to

[103]Upendra Baxi, 'Law, Politics, and Constitutional Hegemony: the Supreme Court, jurisprudence, and demosprudence' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 100.

[104]Lani Guinier and Gerald Torres, 'Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements' (2014) 123(8) *Yale Law Journal* 2740, 2759.

[105]Ibid 2756.

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amplify collective voices from the perspective of those for whom the normal political channels of politics are impervious.[106] Through social movements, minorities can protect their rights by opening spaces within the constitutional status quo to forge new understandings.[107] Engaging with the law through litigation is one of many techniques, which include protests, strikes and grassroots organisation. Baxi similarly draws on the concept of demosprudence to argue for a recognition that courts do not have hegemony over the interpretation of constitutional human rights.[108]

Guinier and Torres point to the experience of the civil rights era in the US to demonstrate how social movements made some legal conclusions not just more likely, but also inevitable. In that sense, they argue, social movements became sources of law. Lawmaking is 'the work of mobilised citizens in conjunction with, not separate from, legal professionals.'[109] Baxi is similarly enthusiastic about the experience of demosprudence in India. Indeed, he points to the radical opening of the Indian Supreme Court to the voices of the most disadvantaged to show that demosprudence was discovered in India well before the term was invented by American constitutional scholars.

> The Court does not merely relax the concept of standing but radically democratises it; no longer has one to show that one's fundamental rights are affected to move the Supreme Court or the High Courts, but it remains sufficient that one argues for the violations of the worst-off Indian citizens and persons within India's jurisdiction. Other-regarding concern for human rights has now become the order of the day and this concern has prompted a creative partnership between active citizens and activist justices. New human rights norms and standards not explicitly envisaged by the original constitutional text stand judicially invented.[110]

As will be seen below, both in the US and India, demosprudence captures only a handful of instances, and indeed, might enable powerful groups to avail even more effectively of judicial processes to entrench their position. Nevertheless, it is worth examining those cases which do instantiate demosprudence to reflect on how they might be replicated.

(b) Deliberative participation: The right to life as the Right to Food

Possibly the high-water mark of demosprudence in India has been the right to food campaign. Prompted by the paradox of mounting starvation deaths and an increase in unused food stocks, the People's Union of Civil Liberties moved the Court to transform the right to life in Article 21 of the Indian Constitution into a powerful right to food.[111] In a series of judgements commencing in 2001, the Court accepted the

[106] Ibid 2757.
[107] Ibid 2756.
[108] Baxi (n 103) 100.
[109] Guinier and Torres (n 104) 2753.
[110] Baxi (n 103) 96.
[111] *Right to Food Campaign*, https://www.righttofoodcampaign.in/about.

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petitioners' argument that the right to life with dignity included the right to food.[112] The approach was clearly deliberative. Rather than reflecting the relative strength of the parties through an interest-governed approach, the Court expressed its anxiety 'to see that poor and the destitute and the weaker sections of the society do not suffer from hunger and starvation. The prevention of the same is one of the prime responsibilities of the Government – whether Central or the State. Mere schemes without any implementation are of no use. What is important is that the food must reach the hungry.'[113]

The deliberative process continued for over a decade, as the Court considered submissions from grassroots organisations, government representatives and court-appointed commissioners. In interim proceedings for continuing mandamus, the participation of activist organisations with local knowledge was particularly important in fleshing out the detail of what the right to food entailed and how it should be enforced. As Chitalkar and Gauri put it, 'Network organisations act as petitioners who bring claims before the court, as advisors helping the court with evidence to help shape its decisions, and as monitors that report to the court on implementation (or lack thereof). They frequently file follow-up applications asking the court to clarify, reiterate, modify, expand or improve the orders.'[114] Particularly important was their role in providing necessary data to assist the court towards a deliberative response, including countering government's assertions about scarcity of resources.

As well as feeding directly into the development of the right to food through court proceedings, activists on the ground relied on the vocabulary of binding legal rights to demand compliance. Thus, the Court's continuing involvement was both a response to and a catalyst for a well-organised, grass-roots activist campaign of fact-finding, compliance monitoring, and strategic litigation.

(c) Deliberative participation in action: the right of access to health care

A further demonstration of demosprudence in action comes from South Africa, where, despite a devastating epidemic of HIV/AIDS leading to millions of deaths, President Thabo Mbeke insisted on a policy of AIDS denialism, rejecting scientific evidence that HIV causes AIDS, and that anti-retroviral drugs significantly reduce mortality associated with HIV infection.[115] This included refusing widespread access in the public health system to nevirapine, a drug proved to be safe and effective in preventing transmission of HIV during childbirth, and which had been offered free to the SA government. In an important case brought to the SACC, the social movement led by the

[112] *People's Union for Civil Liberties v Union of India and Others* Writ Petition (Civil) 196 of 2001 (Indian Supreme Court). Supreme Court hearings on this case were held at regular intervals between April 2001 and February 2017. About 43 orders are recorded: see https://www.righttofoodcampaign.in/legal-action/supreme-court-orders and http://www.righttofoodindia.org/orders/interimorders.html.

[113] Ibid. Interim Order of May 2, 2003, *People's Union for Civil Liberties v Union of India and Others* Writ Petition (Civil) 196 of 2001 (Indian Supreme Court).

[114] Poorvi Chitalkar and Varun Gauri, 'India: Compliance with Orders on the Right to Food' in Malcom Langford, Cesar Rodríguez-Garavito and Julietta Rossi J (eds), *Social Rights Judgments and the Politics of Compliance: Making It Stick* (Cambridge University Press, 2017) 288-314, 304-5.

[115] Edwin Cameron, *Witness to AIDS* (Tafelberg, 2005).

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Treatment Action Campaign (TAC) argued that the right of access to health care in section 27 of the Constitution included the rights of pregnant women and their newborn babies to have access to nevirapine.[116] Their perspective was a powerful contribution to the Court's decision that the right of access of health care required the government to 'devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.' This led to the adoption of a comprehensive strategy for HIV/AIDS care, management, and treatment.[117] To monitor implementation and hold authorities to account, activist groups created a model of localised deliberative democracy, including a monitoring forum to share best practice solutions. Particularly important was TAC's strategy of creating numerous opportunities for government to avoid litigation by entering into informed, transparent, and participative discussion.[118] As Heywood concludes: 'TAC has proved convincingly that expressing poor people's needs as human rights demands and taking advantage of the Constitution and other legal instruments to pursue these demands has great redistributive potential. … In fact, the [National Treatment Plan] campaign shows that strategic and political use of law, as long as it is backed up by research, education and mobilisation, creates a space where poor people can contest the policies and practices of both government and pharmaceutical companies - and can make gains.'[119]

(d) 'Framing' as deliberative participation

Social movement participation in the deliberative interpretation of human rights can further be demonstrated through the concept of 'framing'. Vanhala uses 'framing' to examine how social movements transform their vision into plausible rights claims, using strategic litigation to imbue existing legal frames with new meanings.[120] Her research shows how the disability rights movements in Canada and the UK reframed the dominant 'medical model' of disability in disability discrimination law. Instead, through successful test cases before the Supreme Court of Canada,[121] these movements infused the legal definition of disability with the insights of the 'social model,'[122] which recognises the disabling nature of the built and social environment.[123] Similarly, women's organisations in several jurisdictions successfully reframed the concept of

[116] *Minister of Health v Treatment Action Campaign (no 2)* (2002) 5 SA 721 (South African Constitutional Court) [135].

[117] Mark Heywood, 'Shaping, Making and Breaking the Law in TAC's Campaign for a National Treatment Plan' in P Jones, K Stokke and M Heywood (eds), *Democratizing Development: The Politics of Socioeconomic Rights in South Africa* (Brill/Nijhoff, 2005) 181.

[118] Ibid 186.

[119] Ibid 206; see Mark Heywood, 'South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health' (2009) 1(1) *Journal of Human Rights Practice* 14.

[120] Lisa Vanhala, *Making Rights a Reality?* (Cambridge Univeristy Press, 2010) 31.

[121] Ibid 45; *E (Mrs) v Eve* [1986] 2 SCR 388; *Eaton v Brant County Board of Education* [1997] 1 SCR 241; *R v Latimer* [1997] 1 SCR 217; *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519; *Council of Canadians with Disabilities v VIA Rail Canada Inc* [2007] 1 SCR 650.

[122] Theresia Degener, 'Disability in a Human Rights Context' (2016) 5(3) *Laws* 35.

[123] Vanhala (n 120).

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sex discrimination to include pregnancy discrimination.[124] Likewise, discrimination against part-time workers was reframed as indirect discrimination on grounds of sex.[125] *Brown v Board of Education* led to the reframing of race discrimination to include segregation.[126] Such cases have had an important impact on the development of the law. The social model of disability was further developed and incorporated into the UN Convention on the Rights of Persons with Disabilities. The recognition of pregnancy as a form of discrimination by the ECJ meant that all EU member states were required to give protection to pregnant workers, leading the UK to include pregnancy as a protected ground under the Equality Act 2010.[127] The Civil Rights Act 1964 outlawed segregation in public places.[128]

(ii) Conditions of participation: bounded deliberation

The above has demonstrated that it is possible for social movements to enter the deliberative process and widen the perspective of courts in interpreting key human rights. However, demosprudence should not be idealised. It too needs to be bounded by the realm of meaning of human rights, orienting deliberation towards plausible interpretations of constitutional human rights. Some social movements amplify the voices of already powerful elite interest groups, blurring the distinction between social movements and interest groups.[129] They might also use their position to further marginalise and silence groups with little social and political power. This is where boundedness is crucial. This section argues that all deliberative participation must fulfil the conditions of BDD, namely, that contributions are value-oriented rather than interest-governed, that participants come to the process willing to modify their perspectives, and that they can show that their contributions fall within the realm of meaning of the human rights at issue. Additionally, specific measures are required to provide pathways to participation for less powerful groups.

This is where BDD goes beyond demosprudence in introducing a substantive limitation. Guinier and Torres regard demosprudence as applying to the whole spectrum of social movements. For them, demosprudence is not a philosophy of the right or the left. Demosprudence should reflect on 'democracy-enhancing and meaning-making capacity of the conservative social movements of 1980s and 90s, not just democratic meaning-making role of the civil rights or women's rights movement of the 1960s and 1970s.'[130] This might include gun rights movements and evangelical Christians, as long as the aim is to enhance the democratic potential in society.[131] However,

[124] C-177/88 *Case C-177/88 Dekker v Stichting Vormingscentrum voor Jonge Volwassenen Plus* [1990] ECR I-3941 (ECJ); C-32/93 *Webb v EMO Air Cargo Ltd* [1994] IRLR 482 (ECJ); Sandra Fredman, 'A Difference with Distinction: Pregnancy and Parenthood Reassessed' [1994] 110 *Law Quarterly Review* 106.

[125] Case 96/80 *Case 96/80 Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] ECR 911 (CJEU); Case 1007/84 *Case 170/84 Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607 (CJEU).

[126] *Brown v Board of Education,* 347 US 483 (1954) (US Supreme Court).

[127] Sandra Fredman, *Discrimination Law* (Oxford University Press, 2022) ch 8.

[128] *Civil Rights Act of 1964*, 42 USC § 201(a) (1964).

[129] *New York State Rifle & Pistol Assn v Bruen* (n 2); *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 (Constitutional Court).

[130] Guinier and Torres (n 104) 2751.

[131] Ibid 2756.

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under a bounded deliberative approach, it is not sufficient for a social movement to be democracy-enhancing. In human rights adjudication, the discourse brought to court by social movements must be value-oriented rather than interest-governed, and there must be a good faith attempt to provide an interpretation of rights and their application which is plausible and consistent. This is not to say that conservative social movements should not be listened to. All participants in the deliberative process should be taken seriously, as long as they fulfil the conditions of bounded deliberation.

(a) The role of boundedness: Affirmative Action in the US

Affirmative action cases in the US are a clear example of the importance of boundedness in complementing demosprudence. Many cases challenging affirmative action are brought by rejected white applicants for university places, backed by social movements advocating for privileged groups, which frame the claim as one of unlawful race discrimination by universities against these individuals. Given that it is the university who is the respondent, the court need not hear directly from beneficiaries of affirmative action, who are by definition members of marginalised groups for whom affirmative action is essential to redress historical and ongoing race discrimination against them.[132] Responding to this framing, the US Supreme Court now treats affirmative action as a breach of equality rather than a means to achieve equality, with any exceptions subject to a close to impossibly high standards of scrutiny.[133]

In such a situation, the BDD model requires that the less powerful groups affected, here beneficiaries, should be able to contribute their perspectives to the deliberation. It also requires the outcome to be bounded, in that it is capable of convincing others that it is a plausible interpretation of the constitutional human right at issue. This is not to say that there is a single right answer, nor that everyone is actually convinced, but that the reasons given are capable of convincing rather than reflecting the balance of power.

(b) The role of boundedness: Public Interest Litigation in India

This dilemma has also played out in the Indian Supreme Court, which has radically revised its procedure to permit marginalised groups to access courts, known as Public Interest Litigation or PIL. As Baxi describes it, a novel conception of judicial power and process developed. 'Adjudication emerges as a form of social conversation among the activist judicial and social/human rights movements ….'[134] Rather than a transfer of hierarchical power to the court, litigation is characterised as a trigger for democratic interaction between judges, government actors, and different social and political

[132] *Grutter v Bollinger* 539 US 306 (2003) (*'Grutter v Bollinger'*); *Students for Fair Admissions v Harvard* 600 US 181 (2023) (*'Students for Fair Admissions v Harvard'*); *Regents of the University of California v Bakke* 438 US 265; *Fisher v University of Texas (No 1)* 133 S Ct 2411 (2013) (US Supreme Court); *Fisher v University of Texas (No 2)* 136 S Ct 2198 (2016) (US Supreme Court); *South African Police Service v Solidarity obo Barnard* (n 129).

[133] *Adarand Constructors v Pena* 515 US 200 (1995); *Grutter v Bollinger* (n 132); *Students for Fair Admissions v Harvard* (n 132).

[134] Upendra Baxi, 'The Avatars of Indian Judicial Activism' in S Verma and Kusum (eds), *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (Oxford University Press, 2000).

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groups. Groups without a voice in the political process can enter the conversation and shape its outcome.

While the notion of a social conversation has great potential for a deliberative model of adjudication, it underestimates the extent to which louder voices can frame the terms of litigation and silence others. Capture by more articulate and powerful groups has been clearly seen in recent decades in India, where middle class groups, ostensibly furthering environmental causes, have used the PIL mechanism to spur the Court into ordering wholescale removal of poor people from their housing.[135] In this context, as Baxi puts it, the social conversation easily moves along an 'axis of discursive inequality.'[136]

The power of litigants to influence courts' perspectives can be illustrated by contrasting cases initiated by slum-dwellers asserting rights to livelihood, with those initiated by environmentalists or middle-class property owners asserting rights to a cleaner city. In O*lga Tellis,*[137] commenced by two pavement-dwellers and a journalist, the Court evinced sympathy for the pavement-dwellers, describing their plight with great sympathy, and even stressing their 'respectability'. In stark contrast, in *Almitra Patel v Union of India*, initiated by middle-class environmentalists, the Court referred to the pavement-dwellers as undeserving encroachers on public land.[138] Indeed, it declared, 'rewarding an encroacher on public land with free alternate site is like giving a reward to a pick-pocket.'[139] This set the scene for a spate of orders for eviction of slum-dwellers in major cities in India, often initiated by middle or upper-class residents' associations using the PIL jurisdiction.[140] The evictions frequently took place well before the affected groups were given notice or opportunity to express their needs, thus depriving them of the opportunity to engage in the deliberative process.

BDD requires courts to resist the more powerful parties' power to frame the action by insisting both that a range of perspectives be heard, and that the deliberation is value-oriented towards fulfilment of constitutional human rights. Such an approach is evident in *Sudama Singh*,[141] and *Ajay Maken,*[142] where the Delhi High Court stressed that jhuggi dwellers should not be treated as secondary citizens, or illegal occupants without rights. As we have seen, the court required the respondents to engage meaningfully with those they sought to evict. This is the deliberative element. Moreover, deliberation is bounded. The Court held that any relocation of jhuggi dwellers should be consistent with their rights to life, livelihood and dignity.[143]

[135] Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press, 2017).

[136] Ibid 173; P Craig and S Deshpande, 'Rights, Autonomy and Process: Public Interest Litigation in India' (1989) 9(3) *Oxford Journal of Legal Studies* 356.

[137] *Olga Tellis v Bombay Municipal Corporation* [1986] AIR SC 180 (Indian Supreme Court).

[138] *Almitra Patel v Union of India* [1998] INSC 35 (Indian Supreme Court).

[139] Ibid.

[140] Bhuwania (n 135) ch 3.

[141] *Sudama Singh v Government of Delhi* (n 91).

[142] *Ajay Maken v Union of India* (n 91) 142 – 3.

[143] *Sudama Singh v Government of Delhi* (n 91).

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These are isolated instances, not matched by the Indian courts' record for breaches of civil liberties.[144] Nevertheless, as Bhatia puts it, Indian constitutionalism at its best can embody an anti-hierarchic approach, and constitutional pathways towards freedom and dignity remain.[145]

(iii) The risks of juridification: stifling deliberative democracy

The sections above established that deliberative participation in human rights adjudication is possible, primarily through the involvement of social movements, provided participants' contributions are value-oriented rather than interest-governed. This section confronts a third challenge, namely that participating in the process of human rights adjudication might stifle deliberative participation in human rights formation and implementation by civil society. Litigation is lengthy and expensive, taking the passion out of social movements, especially if test cases are unsuccessful. Social objectives are squeezed into legal frameworks which distort their meaning, and participants feel sidelined by legal procedures. This risk has been powerfully articulated in the collective bargaining field, where researchers have highlighted ways in which collective conflicts are neutralised through legal regulation.[146] Disputes are re-routed into courts, which deal with them through the lens of individual contracts, defusing the immediate power of collective disputes and undermining collective strength.[147]

Gargarella is particularly scathing about courts, arguing that the predominant practice of constitutional interpretation has 'reached scandalous levels that … often approach delirium.'[148] Instead, he looks to deliberative assemblies in Canada, Ireland and Argentina as nascent opportunities to advance the ideal of law as a conversation among equals. These demonstrate, in his view, that meaningful, democratic discussion of fundamental rights is desirable and possible; that rights and democracy are intimately connected; and that decisions on 'issues of public interest can be reached through deliberative, inclusive conversation.'[149]

There are two ways in which BDD can address these critiques: first in achieving the background requirements for deliberative, inclusive conversation; second, by including a wide range of deliberative perspectives.

(a) Complementary role of courts: facilitating deliberative participation

Gargarella insists that to be deliberative, 'there must be effective debate, where people criticise each other and change their minds.' And to be inclusive, the debate must be 'literally open to "all" people and make a genuine effort to include as wide a variety of

[144]Gautam Bhatia, *Unsealed Covers: A Decade of the Constitution, the Courts and the State* (Harper Collins, 2023).

[145]Ibid preface.

[146]Jon Clark, 'The Juridification of the Industrial Relations: A Review Article' (1985) 14 *Industrial Law Journal* 69, 71.

[147]Otto Kahn-Freund, *Labour and the Law* (Stevens, 2nd ed, 1977).

[148]Gargarella (n 4) 319.

[149]Ibid 320.

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perspectives as possible.'[150] It is here that human rights adjudication, under BDD, can play a role, not by usurping the forum, but by insisting on these preconditions.

This is borne out by Parthasarathy and Rao's research into *gram sabhas*, constitutionally mandated village assemblies in India.[151] G*ram sabhas* could be regarded as deliberative assemblies. However, they would not be able to perform this function without a constitutional mandate and State interventions facilitating equal participation. Parthasarathy and Rao find that the scale of deliberation through *sabhas* is remarkable, not just because *sabhas* thrive despite inequality and illiteracy, but also because all genders and castes can exercise voice, challenge entrenched social hierarchies, and demand improvements from elected officials.[152] Nevertheless, discourse in *sabhas* often reflects existing patterns of social standing, with elites dominating and women remaining relatively silent even when attending in significant numbers. This is where it becomes crucial to ensure that the preconditions for effective participation are put in place through value-oriented State policy and law. The constitutional mandate for *sabhas* is key, making them difficult to dislodge and obliging governments to facilitate their functioning.[153] This is augmented by State interventions to build women's networks and teach them to engage with village government. The research showed that these interventions significantly increased women's presence and frequency of speech at the *sabha,* bringing *sabhas* closer to the deliberative ideal. The experience of *sabhas* demonstrates that, once the preconditions for meaningful deliberation are set in place, deliberative institutions can help societies in the direction of greater equality and social inclusion. However, where those preconditions are not met, courts play an important complementary role to facilitate the background conditions for equality of participation.

(b) Including a range of deliberative perspectives

The second response to the juridification critique is to reiterate that the objective of opening the interpretative space of human rights adjudication to a variety of deliberative perspectives is precisely to prevent a legal frame from obliterating social meanings. Juridification is a risk to collective bargaining when an individualistic mode of contractual doctrine is superimposed on the employment relationship, denying the role of collective action to counteract employer power.[154] Deliberative democracy demands that a collective perspective be brought into this interpretative space. But collective bargaining, being an interest-governed form of conflict resolution, might itself leave out of account the weaker and more vulnerable members of the workforce, meaning their voices need also be heard. Moreover, where collective strength is lacking, deliberative human rights adjudication is necessary to ensure the rights of workers are respected even when employers are overwhelmingly powerful.

[150] Ibid.

[151] Ramya Parthasarathy and Vijayendra Rao, 'Deliberative Democracy in India' in Andre Bächtiger et al (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press, 2018).

[152] Ibid 814.

[153] Ibid 815.

[154] Kahn-Freund (n 147); B Wedderburn, *The Worker and the Law* (Pelican, 3rd ed, 1986).

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(iv) Majority decision-making and the role of dissent

Equally challenging is the question of how good faith disagreement between judges should be resolved without undermining legitimacy. For Waldron, resort to majority decision-making is particularly concerning, leading to the apparently outrageous result that a majority of three out of five judges can make authoritative decisions which bind elected representatives. This, however, ignores the deliberative process. Under the bounded deliberative democratic approach, judges are required to give reasons for their decisions which are capable of persuading others that the interpretation of the human right before them is cogent, or that the balance drawn between a right and a proposed limit is deliberatively sound. While there must be an outcome in the case before them, there is no attempt to assume, in human rights cases, that there is clearly a right answer. At best, the answer must be deliberatively persuasive, even if not all individuals are persuaded. Ultimately, too, there must be the possibility of revision, if not in the dispute at hand, then in the overall principle. This means that there always remains the promise or possibility of new evidence, changing contexts, different sets of arguments and speakers continuing to have a voice.[155]

Given that the deliberative method depends on the power of reasoning, rather than the numerical strength of the majority on the bench, dissenting opinions should be regarded as a valuable part of the deliberative process, rather than as the losers in an interest-based battle. Dunnock and Pollack compared the Court of Justice of the EU (CJEU), where dissents are not permitted or practised, with the European Court of Human Rights (ECHR) and the International Court of Justice (ICJ), where dissents are common and often elaborate. They found that the presence of dissents had little impact on legitimacy.[156] Instead, there is broad agreement among scholars that dissenting opinions sharpen legal reasoning. Even if unanimity was not achieved, judges were open to refining their arguments in the light of the deliberation that occurred. By contrast, the absence of dissent in the CJEU frequently led to a degree of compromise rendering judgements vague and declaratory. In addition, the possibility and presence of dissents in the ICJ and ECHR facilitated discursive transparency of decision-making in a way not achieved by the CJEU.[157]

This demonstration of the value of deliberation is underscored by the account of dissents in the Canadian Supreme Court by Justice L'Heureux-Dubé. For her, dissents can be 'an invitation for dialogue' about the future direction of the law, creating a fruitful interchange among courts, academics, legislatures and future generations of lawyers.[158] Nor does she regard dissents as undermining legitimacy. 'The quality of its reasoning, rather than unanimity per se, provides the best safeguard of the judiciary's institutional legitimacy.…Where there is profound disagreement among judges, the law itself is the greatest beneficiary of dissenting opinions: instead of sacrificing lucidity to an overriding need to accommodate diverging views, judges may focus their efforts

[155] Fredman (n 5).

[156] Jeffrey Dunoff and Mark Pollack, 'The Road Not Taken: Comparative International Judicial Dissent' (2022) 16(2) *The American Journal of International Law* 340.

[157] Ibid.

[158] Claire L' Heureux-Dube, 'The Dissenting Opinion: Voice of the Future?' (2000) 38(3) *Osgoode Hall Law Journal* 495, 508-9.

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on the logical and persuasive justification of their own understanding…'[159] This is also reflected in the SACC.[160] Guinier takes this further, showing how dissents, particularly when delivered orally, enable judges to engage with ordinary people about the meaning of the law.[161] She uses the example of the equal pay case of *Ledbetter v Goodyear*,[162] where Justice Ginsburg's oral dissent amplified Ledbetter's voice and could be used by Ledbetter herself in evidence before Congress. In this sense, Guinier claims that oral dissents can be 'jurisgenerative'[163] in that they claim a space for citizens to advance alternative interpretations of the law.[164] The deliberative value of dissents, however, requires judgements to reflect the discipline of deliberative reasoning. US Supreme Court dissents are increasingly rancorous and disrespectful, lowering the quality of deliberation. As Justice Ginsburg emphasised, dissents pose a danger when immoderate language is used with respect to majority decisions.[165] It can thus be concluded that dissenting opinions should be regarded as a valuable part of the deliberative process, provided judges themselves respect the discipline of deliberative democracy.

Conclusion

This paper has confronted the criticism that human rights adjudication is anti-democratic, by suggesting a model for such adjudication which enhances rather than detracts from democracy. Drawing on the insights of deliberative democratic theories, I elaborate a model of bounded deliberative democracy as a basis for democracy-enhancing human rights adjudication and confront some of the major challenges. There is already judicial practice in some of the jurisdictions examined here which demonstrates the possibility of such a model. There is other practice which can be critiqued for falling short. There is clearly a long way to go. But ultimately, a commitment to democracy must include a role for human rights adjudication which supports and facilitates deliberative democracy. This should remain a central mission for human rights activists and lawyers.

[159] Ibid 514.

[160] H Botha, 'Judicial dissent and democratic deliberation' (2000) 15 *Southern African Public Law* 321.

[161] Lani Guinier, 'Justice Ginsburg: Demosprudence through Dissent' in Scott Dodson (ed), *The Legacy of Ruth Bader Ginsburg* (Cambridge University Press, 2015) 189.

[162] *Ledbetter v Goodyear Tire & Rubber Co Inc,* 127 S Ct 2162 (2007) (US Supreme Court).

[163] Cover (n 9).

[164] Guinier (n 161) 191.

[165] Ruth Bader Ginsburg, 'Speaking in a Judicial Voice' (1992) 67(6) *New York University Law Review* 1185, 1191.

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