A 'Defining' Moment for Forests?

The recent attempt by the ministry of environment and forests to arrive at a definition of "forests" has opened a Pandora's box with all stakeholders analysing the semantics threadbare. A deep appreciation of the complexities of the issues is required by all concerned to enable more locally specific, democratic and balanced structures of forest governance.

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On February 7, 2006, the ministry of environment and forests (MoEF) of the government of India invited "expressions of interest" for a study to establish the definition of "forests". This move immediately attracted controversy. Conservation-activists such as Bittu Sehgal decried this move to define forests as being a thinly veiled attempt to undermine the Supreme Court's far-reaching interpretations of the Forest Conservation Act 1980 [Anonymous 2006]. The MoEF, however, justified this move on the grounds that "a clear definition that will stand cultural, legal and international scrutiny" is required in light of the fact that the Indian Forest Act 1927 (IFA) does not define a forest and various court orders have defined it differently. After the consultancy contract was finally awarded[1] and the consultant in turn began widespread consultations from February 2007, a hot debate on semantics and their implications has sparked off. Ecologists weigh the unscientific use of the term against their wish to ensure forest conservation by whatever means possible. Social activists warn that sweeping definitions will antagonise local communities. Foresters seem to be interested in ensuring that their domain does not shrink. Other ministries probably want definitions that will enable easy setting up of development projects like dams and roads. The corporate sector would like definitions that will make the leasing-in of state land for commercial forestry free of legal hassles. In this situation, it may be worth asking whether the issue itself has really been tackled from the right perspective, or is it a case of missing the woods for the trees!

Genesis of the Problem

The genesis of this need to define a forest is a ruling by the Supreme Court in T N Godavarman Thirumulpad vs Union of India (Writ Petition 202 of 1995 – commonly known as the Godavarman case). The question being debated was the scope of the Forest Conservation Act 1980 (FCA). This Act, which itself is a watershed in forest governance in the country, requires that any conversion of forest land to non-forest uses (which are defined in the Act) must be approved by the central government (i e, MoEF). Conventionally, in the application of this act, "forest land" was assumed to be only that land which has been legally notified as forest as per the Indian Forest Act or state forest acts, i e, typically Reserve or Protected Forest (RF or PF).[2] Even this narrow interpretation of the Act had slowed down and often halted certain kinds of forest land conversions that state governments seemed to have mindlessly engaged in during the 1960s and 1970s.[3] But the Godavarman case highlighted the fact that significant tracts of lands that were physically forested had, due to some quirk of history or anomaly of administration, not been notified as RFs or PFs and hence were denied the "protection" of the FCA. The Supreme Court, in its landmark order of December 12, 1996, sought to rectify this anomaly by stating that the FCA applied to "all areas that are forests in the dictionary meaning of the term irrespective of the nature of ownership and classification thereof".

On the face of it, by going beyond administrative quirks and anomalies, this order furthers the spirit of the FCA. There certainly are significant areas of (currently or till recently) forested lands whose legal status for some reason was not that of RF, PF or village forests (VF). For instance, our studies in the Western Ghats districts of Karnataka have revealed that in as much as 11,000-odd sq km (~33 per cent) of the public land in these districts may fall under legal categories other than those defined in the Karnataka Forest Act [Srinidhi and Lélé 2001]. The physical status of these lands varies from close-canopy forest to open tree savannas to grasslands to barren lands. There are many cases where dense forest patches have been classified (surely mis-classified) as grazing land ('gomaal' in the Karnataka Land Revenue Act). It is also a fact that such lands were often seen as a vote bank by state politicians, and so encroachments were virtually encouraged and land grants eventually made (or regularised) to various categories of households in the decades preceding the FCA.[4] The post-FCA period therefore saw foresters in many states going all out to notify as many of these tracts as PF or RF, ostensibly to protect them from these arbitrary land grant policies. It is also a fact that the land records in most states are in a mess, resulting in many cases in the mis-reporting of the legal status of parcels of public lands.[5] The December 1996 order solves all these problems in one fell swoop, bypassing the need to re-notify any lands or even to refer

to their legal status by using a "dictionary meaning" approach.

Of course, pathbreaking judgments often need further clarification when they are operationalised. What land-use forms, other than the perhaps obvious ones, fall under the dictionary meaning of forest? Do, for instance, monocultural plantations of exotics such as Eucalyptus, Silver Oak or Acacia *auriculiformis* constitute forest?[6] If so, would private lands on which individual farmers took up eucalyptus planting during the heyday of farm forestry fall under the ambit of the FCA (and thereby require MoEF clearance over and above all other local clearances if the farmer wants to, say, sell it to a developer)? And when should a piece of land have been physically forested in order to come under the FCA? In 1980, in 1996, or some other year? And what happens to land that was (say) grazing land earlier but has been recently planted with trees (often monocultural plantations)? Does it now come under the FCA? What about the pure natural grasslands that surround the stunted evergreen shola forests in the Nilgiri hilltops – do they qualify as forests? It is these loose ends that, on the face of it, MoEF seems to be trying to tie up by trying to systematically define a forest.

Inadequacies

Focusing on the definition question assumes that moving away from a "legal forest" to a "physical forest" is the right approach. A detailed analysis, however, suggests this approach is inadequate in law and in concept. First of all, the Godavarman order is legally unsound because it seeks to replace due process by a single universal definition.[7] That the absence of a definition of a forest (or forest ecosystem types) leaves too much discretion to the state to notify any kinds of land has been a longstanding and valid criticism of the IFA [Singh 2000: 4]. But clarifying which kinds of lands can be notified as forests is not the same as declaring in one stroke that lands which are not currently notified but physically forested (in some manner) have to be treated on par with those that are notified. If the process of reservation carried out under the IFA has been arbitrary or inconsistent, this arbitrariness can be questioned and rectified by asking the states to re-examine their forest settlement[8] and bring about more consistency. Although tedious, this procedure would ensure that the specificities of each parcel are gone into before its legal status under FCA undergoes a change. Ultimately, governance based on zoning is much more practicable than governance based on physical conditions that may easily change over time. And zoning carried out with due process within some broad guidelines is much better than zoning based on single definitions.

Indeed, a re-settlement or re-drawing of forest boundaries is necessary from both directions. The Godavarman order is inadequate also because, while trying to fix one kind of anomaly in the demarcation of forest boundaries in India, it fails to recognise the existence of anomalies of the opposite kind of greater magnitude. There are large tracts of land, particularly the tribal areas of central India, that have been legally notified as forest land (typically RF

or PF), but have in fact been under either settled agriculture or shifting cultivation for decades, even centuries – not just post-1980.[9] These also include the several thousand "forest villages" of central India wherein settlements of forest labourers (typically tribals whose shifting cultivation had been suppressed) were created by the British forest department on forest land and then never given permanent rights. While trying to adopt a commonsensical position vis-à-vis physically forested lands, the court failed to adopt an equally commonsensical position on the issue of historically cultivated tribal lands. It is precisely because this anomaly was not addressed by the courts, and because certain orders of the Supreme Court in the Godavarman and other cases were in fact interpreted by the MoEF as licence to evict all encroachments, that the campaign for tribal forest rights was launched in 2002 and culminated in the recent enactment of the fairly radical Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 – an Act which explicitly keeps itself out of the purview of the FCA.

Paradigmatic Problems

A more fundamental problem with this approach is that it subscribes to the overly simplistic and centralised paradigm of forest governance perpetuated by the FCA. Two assumptions are central to this paradigm. First, that land-use falls into two simple categories – forest and non-forest – wherein lands used as forest generate systematically much greater environmental benefits than non-forest land-uses. Second, that the environmental benefits flowing from forest land uses are national-level or global public goods, and hence the central government (as a custodian of the welfare of the nation at large) has a legitimate veto power over state-level decisions about changes in land-use, whereas the environmental benefits from non-forest land-uses, if any, are local in nature and the state governments can therefore determine their fate. The debate over the definition of what is forest then becomes a debate over where to draw the line between state control and central control, and between the apparently environmental service role of forests and the apparently non-environmental role of non-forest land-uses.

Unfortunately, this simplified paradigm does not match with either the ecological or the social complexities of Indian forests. First, forests generate a range of benefits, some direct and tangible such as timber or firewood; some indirect but tangible such as hydrological regulation, soil conservation or carbon sequestration; and some intangible such as biodiversity conservation or aesthetic values. But certain so-called non-forest uses of land also generate many of these benefits to significant degrees. Coffee plantations, for instance, may harbour significant amounts of biodiversity [Badrinarayanan et al 2001; Elouard et al 2000; Shahabuddin 1997], sequester significant amounts of carbon and protect soils from erosion as well as many forests. On the other hand, monocultural timber plantations, although classified as forests under the FCA, provide much lower biodiversity and soil conservation or hydrological benefits [Kusumandari and Mitchell 1997; Sikka et al 2003] than coffee or cardamom plantations [Moench 1990] or even pure grasslands. But the annual rate of carbon sequestration (and hence climate change mitigation value) of timber plantations tends to be higher than that of climax natural forests. Thus, the dividing line between forests and non-forests in terms of the environmental benefits they generate is not just blurred but also contingent upon the type of benefit one is considering.

Second, from a governance perspective, it is not at all clear that the benefits generated by forest land uses are only public goods at the state or national scale and that these national beneficiaries must have veto power over the state government. On the one hand, while the direct tangible benefits from forest products flow to groups of households in individual hamlets or villages, the economic rent on many of the valuable tangible products (such as timber and certain non-timber forest products (NTFPs)) has been historically captured by the state government [Vasundhara and Vikalpa 1998]. On the other hand, soil and water conservation benefits extend to residents in the river basin downstream, not to the whole nation. Carbon sequestration and biodiversity benefits are global, not just national. Needless to say, the particularities of this relationship between forests and people vary dramatically across the country's landscape.

Imperfect Approach

In this situation, making the central government the representative of all non-local beneficiaries is highly imperfect at best. And giving it veto power over local users, or to be precise, over state governments in a supposedly federal system, while ignoring the question of lower-level rights and responsibilities, and further compounds the problem. This approach assumes that the tussle is only between national-level beneficiaries of the environmental services and state-level decision-makers who would prefer to use the forest for other purposes. This helps the state-level politicians use the FCA as a convenient whipping boy, generating an anti-environmentalist rhetoric in state-level politics. Whereas in fact the tussle is at multiple levels, including in many situations between local communities who want to use forests provided they can derive significant and reliable livelihood benefits from them, and the state apparatus that is on the one hand extracting surplus in the form of timber and NTFP royalties while on the other hand leaving the rest of the forest in an open-access condition, ensuring further degradation, or wanting to give it for mining or other short-term economic activities.[10]

In other words, what is required is not a sharpening of binary forest/non-forest thinking, but rather a deconstruction of a forest into its varied forms that perform complex environmental and economic roles and are the product of varied socio-ecological contexts. This should lead to the creation of more nuanced and locally-specific categories that allocate rights and responsibilities across the local, state and central levels in ways that better reflect the stakes and the abilities of these actors [see e g, Lélé 2004]. This will require not just

re-drawing the boundaries as mentioned above, but in fact replacing the existing major categories of reserve and protected forest – categories that were invented by the British to suit the purposes of colonial forestry and to which the British themselves created many exceptions that are not mentioned in the Indian Forest Act (IFA) but very much present on the ground. In the Karnataka Western Ghats region alone, there are some 30-odd legally recognised tenure regimes pertaining to public uncultivated lands [Srinidhi and Lélé 2001] – the result of inheriting forest and revenue land categories from five different administrations of the colonial period. Similar complexities exist in most other parts of the country [see, e g, Upadhyay and Jain 2004]. While the need for some form of rationalisation is clear, collapsing them into just two or three categories (RF/PF/non-forest) would be well nigh impossible. Some changes in rights and responsibilities and re-drawing of boundaries are envisaged under the above mentioned Forest Rights Act. It is essential to widen this process.

Such deconstruction will also require revisiting other components of the Godavarman orders, viz, the assumption that it is necessary and desirable to have a centrally approved "working plan" – a device instituted by the British to manage forests largely for commercial purposes – to ensure that a forest is being managed sustainably. Different categories of lands would have to be managed sustainably for different purposes or different mixtures of environmental benefits, and this will require more sophisticated levels and combinations of scientific and traditional knowledge on the one hand and local and non-local monitoring mechanisms on the other.

The Supreme Court has made a signal contribution to the cause of environmental conservation in India by using a simple postcard from a T N Godavarman Thirumulpad in Tamil Nadu to open up the whole question of inconsistencies in forest notification, management and conversion. The debate on the definition of forests is useful to the extent that it highlights the ecological and social complexities surrounding the condition and use of uncultivated lands in this country and the often arbitrary manner in which these lands got categorised and governed in the colonial and even post-colonial period. One hopes that the court and the policymakers will see the importance of embracing these complexities and pushing for more locally-specific, democratic and balanced structures of forest governance in the country. EPW

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Notes

1 The contract was awarded to the Ashoka Trust for Research in Ecology and the Environment (ATREE). The Terms of Reference (rather clumsily worded) are "(a) to evolve the definition(s) of forest in Indian context keeping international commitments and different orders of the apex court of the country into consideration, and (b) to develop ecologically sound and socially desirable definition of forest."

2 Note that the other two categories mentioned in the IFA, viz, village forest and private forest, cover very small land areas. Even the van panchayats of Uttarakhand, although very similar in their governing structure to village forests, have actually been notified under a different law.

3 That it also slowed down the process of recognition of legitimate historical non-forestry activities or legitimate small-scale demands for land conversion for local development, while not really halting the conversion in the case of big state-sponsored development projects, is the other side of the story of the FCA that we shall come to below.

4 Thus, Karnataka saw the repeated transfer of such "revenue" lands to and from the forest

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category during the Bangarappa and Moily governments. In village-level studies in the Karnataka Western Ghats, we found that large fractions of assessed waste lands and gomaal lands that had been originally forested, had been encroached for cultivation, which was later on regularised (see XXX).

5 For e g, serious anomalies have been shown to exist between the area of forest land as reported by the Forest Department and the Revenue Department. While the records of the latter show only 32 per cent of the land area of (erstwhile) Dakshina Kannada legally classified as forest land, the latter's records indicate this area to be 44 per cent [ISEC and NST 1998].

6 A recent order seems to suggest that such plantations, if raised on non-public lands, do not come under the FCA, which seems to negate the December 1996 order by bringing in the legal status again.

7 In fact, it compounds the problem by making both criteria applicable: either legally notified or physically forested.

8 In the archaic terminology inherited from the British, "settlement" refers to a procedure of finalising the rights over a particular piece of land.

9 This happened because of the same "fell swoop" approach: In Orissa, for e g, princely states notified large areas as state forests without going through the settlement process laid down in the law, and in the post-independence period the government simply "deemed" these forests as reserve forests, again without checking the situation on the ground. Such areas could be as large as several tens of thousands of sq km (Kundan Kumar personal communication).

10 Note that the kind of "conservation" achieved by the application of the FCA, even post-Godavarman, has been a limited and somewhat lop-sided one – major development projects such as the Lower Subansiri hydro-electric project in Assam are still being approved, and the conditions imposed in their approval are tilted towards "biodiversity conservation" while the concerns of downstream communities are not necessarily being addressed [Vagholikar 2007].This points to the inherent limitations of the FCA, which introduces more procedural requirements but not clear criteria under which forest conversion may be permitted.

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