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SEMANTICS OF THE FOREST: HOW LACK OF DEFINITIONAL CLARITY IS LEADING TO DEGRADATION

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ABSTRACT

The increasingly apparent effects of Climate Change and India's international environment protection and climate change mitigation commitments, make dedicated forest conservation the need of the hour. Yet, Indian forest policy today is the product of colonial era legislation and mindsets that prioritised economic benefit. Despite interventions by the Supreme Court, there still exists no statutory definition of the term 'forest' in India. Taking advantage of this lacuna, successive governments have created legal loopholes facilitating the diversion of forest land for non-forest purposes under the guise of development. Forest lands and the ecosystems they house are increasingly vulnerable to the threat of encroachment and diversion. Therefore, it is necessary to formulate an equitable and scientifically sound definition of "forest" that navigates successfully, the complicated web of laws and socio-economic factors involved. The authors also analyse the recently enacted Forest (Conservation) Amendment Act, 2023, holding that it further dilutes the protection accorded to forest lands by the Supreme Court.

Keywords: Forest, Conservation, Definition of Forest and Environment, environmental regulation.

I. INTRODUCTION

In a world increasingly threatened by climate change, the preservation of forests and oceans as both, vital ecosystems and carbon sinks is the great challenge of our times. With efforts to protect forest areas being particularly highlighted in recent years, the need for an adequate and all-

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encompassing definition of the word ‘forest’ is of particular importance. This is because, such definitions form the legal and scientific basis on which all forest-based activities (conservational and otherwise), are undertaken.¹ Such definitions have shifted over time to reflect the changing objectives of forest-based activities from the industrial era commercial & timber driven to conservation-centric.

Indian forests covering nearly 25% of the nation’s landscape are governed by a complicated network of laws. Yet, we have always struggled to sustainably manage and conserve our forests. Right from the colonial era, the Indian forest policy has been commercially driven and so too has been our understanding and treatment of the word ‘forest’. The fulfilment of international climate change obligations and preservation of existing forest cover is therefore impeded by the lack of a proper statutory definition of ‘forest’ and a policy still rooted in erstwhile colonial thinking and practice. Often, the courts, the people and the executive have been left flummoxed and at odds as to which areas constitute forest both for, conservation and development purposes.

In light of this, the authors here seek to throw light on the impact of the lack of a proper definition of ‘forest’ on conservation and management efforts. In doing this, we trace the history of forest legislation in India and also the stand of the Supreme Court which has been forced to step in and fill this legislative and policy gap. The present state of affairs due to such an unclear definition as well as the possible constituents of a proper definition are also discussed.

II. LEGISLATIVE HISTORY

A. British Era Laws and Policies

To understand the concept underlining Indian laws and policies governing forests, it is necessary for us to analyse the development of forest laws in the country beginning with the British Era.

It was under the British that the true degradation of Indian forests began. Having exhausted the majority of their forest resources by the early 1800s through unsustainable and unscientific forest management, the British turned their attention to India. It began with the extraction of teak in the Travancore and Malabar regions and eventually spread to other species such as rosewood, anjili, ebony and sandalwood, all of which were reserved exclusively for extraction by the colonial

¹ R.L. Chazdon et al., *When is a forest a forest? Forest concepts and definitions in the era of forest and landscape restoration*, 45 *AMBIO* 538–550 (2016).

government.² At the same time, the British focus on agriculture and the emphasis on the cultivation of cash crops such as indigo, cotton, opium etc., resulted in large tracts of forests being cleared. This along with other factors such as British demand for timber, the British ambition of establishing a country-wide rail network and the general British tendency of commoditising all uninhabited land, led to a wide-spread decimation of Indian forest resources and species.³

By the mid-19th century, British policymakers and government officials had begun to realise the true extent of the degradation of India's forest landscape. The concern with the issue arose not from the environmental effects of the degradation but the economic ramifications (supply of timber) of such an event. This is evidenced by the fact that forests at the time were under the exclusive control of the Revenue Department.⁴ This in a nutshell captures the attitude of Colonial and Indigenous governments vis-à-vis degradation of forest land.

In order to promote the preservation (or 'smart exploitation') of forests, the Imperial Forest Department was established and German conservationist Deitrich Brandis was appointed as Inspector General of Forests. He advocated for a reduction in logging and the restoration of traditional and community rights over forests. Subsequently, the first Indian legislation governing forests i.e., the Government Forests Act was enacted in 1865. The Act defined Government forests as "*land covered with trees, brushwood and jungle*".⁵ Further, Section 2 of the Act, allowed the Government to declare land falling under said definition as government land as Government Forest provided, the rights of local communities were not abridged.⁶ In other words, officials were allowed to manage and preserve forests in order to safeguard them for strategic and trade practices. Since the Act respected traditional rights to a certain degree, there was outcry, and it was repealed and replaced with the Indian Forest Act of 1878.

It is important to study the Act of 1878 because much of it remains applicable and unchanged today. It provided the government with the power to bring forests under its control and management. This was achieved by creating 3 categories as per which forest land was to be

² Ramachandra Guha, *Forestry in British and Post-British India: A Historical Analysis*, 18(44) ECONOMIC AND POLITICAL WEEKLY 1882, 1883-1884 (1983), <https://www.epw.in/journal/1983/44/special-articles/forestry-british-and-post-british-india-historical-analysis.html>.

³ Ramachandra Guha and Madhav Gadgil, *State Forestry and Social Conflict in British India*, 123 PAST & PRESENT 141, 144-145 (1989). (hereinafter "GUHA")

⁴ *Id.*

⁵ Indian Forest Act, 1865, § 1, No. 10, Acts of Parliament, 1865 (India). (hereinafter "IFA")

⁶ *Id.* at § 2.

classified. The *first* category was that of ‘Reserved Forests’.⁷ These were such forests that were already owned by the government and were integral in maintaining the commercial supply of timber. Classification into this category meant a wiping out of any pre-existing community rights and total control vested in the government.

The *second* category was that of ‘Protected Forests’.⁸ This consisted of such forests that would be designated as ‘Reserved forests’ in the future after the finalisation of commercial plans and demarcation of boundaries. These forests included any forest-land or waste-land that was government property or over which it had the proprietary right or was entitled to any part of the forest produce. Although the declaration of such lands as ‘Protected’ was to be preceded by a survey, the provision provides that the survey conducted by the government must be presumed to be correct unless proven otherwise. Further, in the event, that the conduction of such a survey endangered government rights, it may be declared as a ‘Protected Forest’ anyway with, the onus of the local government to protect the rights of local communities.

The *final* category was that of village forests wherein full control of the forest area was vested with village authorities.⁹ However, the catch here was that the designation of forests as reserved or village forests was in the hands of government settlement officers.¹⁰ They enjoyed great discretion in the adjudication of village claims and their main objective was to ensure that the forest land remained in government control. Even the majority of forests under the control of princely states were turned over to the British after the importance of these forests for the British was realised. Whenever uncertainty prevailed as to ownership over a particular parcel of forest land, the local government was quick to claim ownership.¹¹ The major political consideration behind the legislation was ensuring control over forest land for economic benefit and further bolstering nascent British control over the subcontinent. All in all, the years following the 1878 Act witnessed the vitiation of community rights over forests and strengthened government control and economic exploitation of forests.

The laws and policies that followed including the Forest Policy Resolution 1894 and the India Forest Act 1927, both furthered the quest to attain government control over forests. Although the

⁷ IFA, *supra* note 5 at § 3.

⁸ IFA, *supra* note 5 at § 28.

⁹ IFA, *supra* note 5 at § 27.

¹⁰ GUHA, *supra* note 3, at 143.

¹¹ Secretary of State for India v. Manjeshwar Krishnayya, 1905 SCC OnLine Mad 60.

British claimed to be undertaking a policy of conservation, they lacked a fundamental part of the process i.e., the presence of a comprehensive and settled definition of the term ‘forest’.

B. Post-Independence Law and Policies

Prominent policies that now regulate and control activity in India's forests include: The Indian Forest Act 1927, The Forest Conservation Act 1980, The National Forest Policy 1988, The Compensatory Afforestation Fund Act 2016, The Wildlife (Protection) Act 1972 and, Panchayats Extension to Scheduled Areas Act 1996.¹²

When India attained independence, forests were included in the State List. The Indian Forest Act of 1927, as put into effect by state laws, continued to be enforced by the forest departments of each state. In 1976, the 42nd Amendment was enacted, and forests were moved from the State List to the Concurrent List. The Union government now has the authority to manage forests alongside the state governments. When the Department of Environment and Forests, and later the Ministry, were established in the middle of the 1980s, the authority of the Union government increased exponentially.¹³

The policies of Independent India vis-à-vis forests continued much in the same vein as British policy with a stress on government control of forests. The National Forest Policy of 1952 followed the British pattern.¹⁴ The 1988 policy was a step forward and focused on the ecological role of forests and community rights over forests.¹⁵ However, both policies fail to provide a definition of the term ‘forest’.

As far as legislation is concerned, the Indian Forest Act of 1927 instituted by the British along with the classification of forests into Reserved, Protected and Village Forests remains in force today with only a few minor amendments. However, the act does not contain any definition of the term forest (not even the rudimentary definition first laid down in the 1865 Act).

In order to bolster conservation efforts, the Forest Conservation Act 1980 was passed. Section 2 prevents the use of forest land for non-forest purposes unless the permission of the central

¹² Aditi Tandon and S. Gopikrishna Warriar, *What is a forest?*, MONGABAY (Feb. 27, 2022, 9:29 PM), <https://india.mongabay.com/2020/02/explainer-what-is-a-forest/> <https://india.mongabay.com/2020/02/explainer-what-is-a-forest/>.

¹³ SHYAM DIVAN AND ARMIN ROSENCRANZ, ENVIRONMENTAL LAW AND POLICY IN INDIA, (2nd ed. 2001).

¹⁴ Richard Haeuber, *Indian Forestry Policy in Two Eras: Continuity or Change?*, 17 ENVIRONMENTAL HISTORY REVIEW 49, 61 (1993).

¹⁵ *Aim and Objectives under Forest Policy, 1988*, Press BUREAU OF INDIA (May 09, 2022, 8:30 PM), <https://pib.gov.in/newsite/erecontent.aspx?relid=57051>.

government is granted. The pre-requisites to invoke the said section are to identify the forest, and non-forest activity and prevent such activities. However, without a set definition, no true conservation can take place. Rather, it gives leeway to authorities and those with vested interests to forgo conservation obligations and paves the way for undue exploitation of forests through wilfully incorrect interpretations of what constitutes 'forest'.

There has been some progress as far as the conservation of forests and restitution of community and tribal rights over forests is concerned.¹⁶ Ultimately, however, we find our forests governed majorly by British-era legislation and policy which prioritised the commercial rather than ecological value of forests. It is also clear that there exists no set definition or scientific parameter to determine what constitutes a forest. As such, even new laws aimed at conservation and protection of community rights are bound to fall short.

This is precisely why the Supreme Court was forced to step in and lay down a definition of forest in *T.N. Godavarman Thirumulpad v. Union of India*.¹⁷ This has brought its own set of challenges which shall be discussed in the next section of this paper.

III. JUDICIAL HISTORY

A. The decision in *Godavarman* and Issues Arising

In *T.N. Godavarman Thirumulpad v. Union of India*,¹⁸ the Supreme Court found that there existed a misconception as to the scope of the Forest Conservation Act 1980 and the forest under it. As such, a definition of forest was formulated for the purposes of application of Section 2 of the Act. It reads as follows- "*The term forest land, occurring in Section 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership*". The ambit of the definition was held to be wide enough to include statutorily recognized forests and to have no embargo as far as the nature of ownership or classification of the forest is concerned. The court reasoned that the 1980 Act was formulated to prevent deforestation and should be given enough force to do so.

¹⁶ Several efforts have been undertaken the most important of which is the passage of several legislations including the Wildlife (Protection) Act of 1997, the Biodiversity Act of 2002 and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act of 2006.

¹⁷ *T.N. Godavarman Thirumulpad v. Union of India*, (1997) 2 SCC 267.

¹⁸ *Id.* at ¶ 9.

Furthermore, the court clarified that states need not seek prior approval from the Centre before undertaking activities in forest areas. However, since these activities are usually of a commercial nature and may vitiate the purpose of the Act, it *inter alia* directed that states should form expert committees to -

“(i) Identify areas which are "forests", irrespective of whether they are so notified, recognized, or classified under any law, and irrespective of the ownership of the land of such forest;

(ii) Identify areas which were earlier forests but stand degraded, denuded or cleared; and

(iii) Identify areas covered by plantation trees belonging to the Government and those belonging to private persons.”

Such lands identified as forest solely by the committee were to be termed as deemed forest.¹⁹

Although the Supreme Court acted with *bona fide* intention to prevent the massive deforestation all over the country, the result was not as expected. This is perhaps because the court not only interpreted and implemented laws but also acted as the lawmaker and administrator. Although there was some relief in terms of deforestation and a certain degree of awareness was created, these were short-term benefits. In the long run, the judgment has come to be highly unavailing.

The major reason behind the sad story of the judiciary's encounter with forest laws is trusting the state government with the precious green cover of India. For instance, the Government of Meghalaya circumvented the court's order by recognizing all unregistered forests belonging to the community, clan, or individuals as a plantation to prevent them from coming under the purview of the court's order. The Government of Maharashtra did not bother to find a loophole, it simply chose to ignore the court's order by violating a ban on sawmill industries, finally attracting contempt.²⁰

The definition provided by the Apex Court was therefore plagued by several shortcomings. *Firstly*, the definition of forest for the purpose of the said section lacked foresight. In holding that any land in government records named as forest was to be considered as forest for the purpose of

¹⁹ Ishan Kukreti, *More than two decades after SC order, deemed forests still undefined*, DOWN TO EARTH (June 15, 2022, 9:35 PM), <https://www.downtoearth.org.in/news/forests/more-than-two-decades-after-sc-order-deemed-forests-still-undefined-67253>.

²⁰ Armin Rosencranz and Sharachandra Lélé, *Supreme Court and India's Forests*, ECONOMIC & POLITICAL WEEKLY (Feb 02, 2008, 11:30 AM), <https://www.epw.in/journal/2008/05/commentary/supreme-court-and-indias-forests.html>.

Section 2, the court failed to recognize that government records were not well maintained. This dates back to the colonial period when the government kept pristine dense forests for commercial exploitation but named uncultivated land as forests via blanket notification. They killed two birds with one stone; they got easy access to forests and ownership of non-private lands in the name of the state-owned forests. In the post-independence era, the princely states were merged with the Union of India, and yet again all the non-private lands and those of Zamindars were declared as forest increasing the forest land to 26 million hectares.²¹ Not surprisingly, no survey was undertaken to determine the actual status of the land.²² Hence, the forest records of the government have been flawed right from their inception.

As per Indic practices, most forests were managed by hunter-gatherers, forest-based settled cultivators, shifting cultivators, pre-agricultural tribal communities, nomadic pastoralists, as well as other communities with diverse livelihoods. These pre-existing relationships between communities and forest lands were not given much heed in official records.²³ This continues to be the case today. It is also observed that in some states certain patches of land are classified differently by the Revenue and Forest departments. For instance, in the 1970s Orissa undertook revenue land settlements for which they carried out a survey but consciously left out hills steeper than 10 degrees due to the higher expense.²⁴ They declared all such land as wastelands or forests including villages and cultivated lands. Approximately 7 million Adivasis inhabited these hilly terrains. These lands directly fall under the jurisdiction of the revenue department but are not among the areas surveyed for revenue settlements. Ultimately forest area was only increased on paper, brought under the state control and dwellers were made encroachers. Such stories can be found in every state.²⁵ It is apparent, therefore, that the Supreme Court erred in placing reliance on records that have always been questionable in their accuracy and veracity.

Secondly, the widening of the ambit of the term forest led to the concentration of unfettered powers with forest bureaucracy. The Supreme Court's intent had been to ensure strict enforcement of the

²¹ NC Saxena, *Forest Policy in India: Policy That Works for Forests and People*, POLICY AND JOINT FOREST MANAGEMENT SERIES, IIED (Oct. 15, 2022, 9:35 PM), <https://pubs.iied.org/sites/default/files/pdfs/migrate/7554IIED.pdf>.

²² *Ibid.*

²³ IFA, *supra* note 6.

²⁴ Saxena, *supra* note 21.

²⁵ Ketan Mukhija and Yugank Goyal, *Disarticulation Of Indigenous People: Can The Judiciary Saviour Them?*, CENTER FOR CIVIL SOCIETY (Oct. 17, 2022, 9:10 PM), https://ccs.in/internship_papers/2005/1.%20DISARTICULATION%20OF%20INDIGENOUS%20PEOPLE_Ketan_Yugank.pdf.

Forest Conservation Act 1980 and to bring as much land as possible under the jurisdiction of the Act. So, this was an unenviable outcome that was bound to occur even, when the suit was filed against the mismanagement of the forest department. In the North-eastern states, many private forests were used to harvest timber, but after the court's order, the owners were compelled to seek permission from the forest department. Fearing the department, many of them cleared these lands in order to grow crops which did not attract the forest department's attention.²⁶

Thirdly, the court's decision of forming expert State-level committees to identify deemed forests did not work well for certain states. Identification of the deemed forest through setting up of criteria and inspection of the land was to be done in a month. In a Forest Advisory committee meeting dated 26 September 2016, it was brought to light that the status of deemed forests in many states is unclear.²⁷ In some cases, states did send affidavits to the Court or MoEFCC but no further action was taken. For some states, the method used for identifying the forest was alleged to be unscientific leading to a plethora of problems. Even today, cases pertaining to deemed forests remain unsettled. Instead of standardizing the forest identification process, it is increasing litigation.

B. *Judicial Approach Post Godavarman*

The variability of complications that arise in the absence of a proper definition can be understood through recent cases.

In **Birendra Singh v. Ministry of Environment, Forest and Climate Change & Ors**²⁸ the applicant pleaded before the NGT that impugned land 'forest', as defined by the Supreme Court in the Godavarman case. The applicant pleaded - "*that a lot of construction machinery including earthmovers have been used in the area and that substantial green cover has been removed and hillside rocks removed causing disturbance to the local villagers. Large tracts of forest areas have been denuded of natural vegetation in flagrant violations of the Orders of Hon'ble Supreme Court and hundreds of trees have been destroyed in an ecologically sensitive area situated at the height of more than 1500 meters above MSL with statutory authorities being mute spectators*". He invoked the Forest Conservation Act 1980, as no permission or environmental

²⁶ MADHU SARAIN, LAWS, LORE AND LOGJAMS: CRITICAL ISSUES IN INDIAN FOREST CONSERVATION, (International Institute for Environment and Development, 2005), <http://www.jstor.org/stable/resrep01818>, last accessed May 1, 2022.

²⁷ Ishan Kukreti, *More than two decades after SC order, deemed forests still undefined*, DOWN TO EARTH (Oct. 15, 2019), <https://www.downtoearth.org.in/news/forests/more-than-two-decades-after-sc-order-deemed-forests-still-undefined-67253>.

²⁸ Birendra Singh v. Ministry of Environment, 2018 SCC OnLine NGT 257.

clearance was taken. The Tribunal held that the application of the 1980 Act in this case would depend on whether the patches of impugned land that have a forest-like appearance fall under the ambit of 'deemed forest'.

However, when the tribunal referred to the committee's report and the criteria decided for the deemed forest, **it was observed that there was a lack of clarity as to what constitutes deemed forest for the State of Uttarakhand.** The forest department stated that although the draft criteria were prepared by the state in 2014 and sent to MoEFCC, the approval is pending. Finally, on 2nd April 2019 Supreme Court directed MoEFCC to brief the Court on the steps that have been taken to finalise the criteria and standards to determine the criteria of 'deemed forest' in the State of Uttarakhand. It begs the question, how can the Forest Conservation Act be applied when there is no clarity amongst the judiciary, the bureaucracy, and the government regarding what constitutes forest in a particular region?

In **The Tata Housing Development Co. v. The Goa Foundation And Ors.**²⁹, the court discredited the report presented by the expert committee for the State of Goa. Here, construction activity and felling of trees were challenged on the grounds that the land in question was a 'forest'. The High Court referred to the reports of the Sawant committee, constituted as per the Supreme Court's 1996 judgment.

In the first interim report, the committee identified government forest, thereafter it identified the private forest. However, it surveyed only 28 villages out of 109, and the impugned land was one of them, but it was not enumerated as a forest. After which it marked out the 'degraded, denuded or cleared forest', but the land was also not enumerated in this list.

In the second interim report the committee carved out the criteria for identifying forest, in addition to this, the Sawant Committee also rejected the use of satellite imagery for forest identification. The judgment reads as - "*Committee categorically rejected satellite imagery and toposheets as a correct indicia for identifying forest stating therein that satellite imagery would indicate nature green cover which would include most of the plantations/ seasonal crops, such as cashew, coconut, arecanut, etc., which, according to the Committee, could not be considered for the purpose of classifying a forest. It also rejected the Nature Green Cover Maps as they would include all types of vegetation and all density and class, including cashew crop which could not be fitted into the criteria taken for identification of forests*"

²⁹ The Tata Housing Development Co. v. The Goa Foundation and Ors., AIR 2003 SC 4238.

Owing to the case, the Bombay HC ordered the committee to inspect the land and report back to court. The committee then filed a third interim report and identified the impugned land as forest. The report was challenged in the Supreme Court which adhered to the contention and rejected the committee's verdict. This was because the committee used the method for identification which it had previously rejected. The criteria adopted by the committee were (i) Satellite Imagery and Toposheets of 1960; (ii) Slope Analysis Maps prepared in 1988; and (iii) Enumeration of the plants in a 50-meter-wide belt adjoining the boundaries of the said plot only on three sides, i.e., the North, East, and West, but excluding the South where there was a huge public structure measuring 1000 sq. meters. This was blatantly rejected as the correct method by the committee in the 2nd interim report.

On the other hand, for the state of Karnataka, the committee not only decided the criteria but identified 9.94 lakh hectares as deemed forest. Later in 2020, the Karnataka forest minister announced that they would declassify 6.64 Lakh hectares of land. This decision was based on a study undertaken by the Revenue, Forest, and Land Record Department of the state. With 67% of the deemed forest declassified and handed over to the revenue department. According to the government the expert committee did not use scientific, verifiable criteria for identification and it was a 'subjective classification' of the deemed forest. The government also reasoned that due to incorrect identification many cultivable and non-forest lands have also come under the ambit of forests leading to conflict between various departments, affecting farmers' rights, and preventing mining in the region. Fortunately, this was required to be done with the permission of Apex Court, in furtherance of which an affidavit was filed in 2019. It becomes very difficult to trace the true intention of the government. It is essential that the process is observed or else this will discredit the T.N. Godavarman judgment and the deemed forest will be diverted to non-forest uses.³⁰

The bottom line is that the expert committees (consisting of the Principal Chief Conservator of Forests and another Senior Officer) are the competent authority to identify the deemed forest, yet the judiciary, environmentalists, and organizations are handicapped in their quest to protect forests. This is because the definition given by the Supreme Court is open-ended, providing pro-development parties the chance to take advantage of this subjective definition. It is largely due to this that courts are still forced to adjudicate cases (such as those discussed above) similar to that

³⁰ Johnson T A, *Explained: What are deemed forests, and why Karnataka wants to declassify some*, INDIAN EXPRESS (Nov. 20, 2020, 8:11 AM), <https://indianexpress.com/article/explained/what-are-deemed-forests-and-why-karnataka-wants-to-declassify-some-7056577/>.

of *T. N Godavarman*, wherein they are compelled to use their limited scientific understanding to decide whether the impugned land is a forest or not. Thus, it is clear that a more objective and accommodating definition of forest must be formulated.

Since the states were given the freedom to come up with their definition to identify forests, the Uttarakhand government defined deemed forests as “*Only tracts 10 hectares and more, and having a canopy density of greater than 60%, would be considered as forests.*” Environmentalists feared that this new definition would dilute the Forest Conservation Act of 1980. The threshold of canopy density is hiked to 60 % which means even moderately dense forests will be declassified from the forest. The immediate effect will be that most parts of the state with 70% of land under forest will no longer remain forest. This will give easy access to the state government to use the forest land for non-forest purposes. This was rightly challenged in the Uttarakhand HC, where the court ruled that the order dated 19.02.2020 is in violation of the definition given by SC in 1996.³¹ The Court also clarified here that in defining ‘Forest’, states cannot reduce forest area. The Uttarakhand case is a cautionary tale and makes clear that the freedom given to states may render the conservation laws redundant.³²

In October 2019, the Forest Advisory Committee cleared the air by commenting that the state does not need the approval of the centre on its definition of forest. This emanates from the 1996 judgment and it also reasoned that “*... States, having well-established forest departments, are in a better position, rather than MoEF&CC, to understand their forests and needs, and should frame criteria for their forests... criteria so finalized by a state need not be subject to approval by MoEF&CC.*”³³ Shockingly, the matter was brought to the table as the Uttarakhand government finalized the criteria for identifying forests and asked the Union government for its opinion. The FAC cared to comment on the procedural aspects but not on the unscrupulous criteria set by the state.³⁴ In 1997, the Apex Court tried to give a definition of ‘forest’ to protect the Nilgiris from deforestation, and yet in 2019 a similar issue arose with the Aarey forest of Mumbai.³⁵ Aarey colony referred to as the ‘Lungs of Mumbai’, is

³¹ *Ajay Singh Rawat v. Union of India*, (1995) 3 SCC 226.

³² Vineet Upadhyay, *MoEF: State to decide what is forest; Activists, officials show apprehension*, INDIAN EXPRESS (Nov. 21, 2019, 9:44 PM), <https://www.newindianexpress.com/nation/2019/nov/21/moef-state-to-decide-what-is-forest-activists-officials-show-apprehension-2065147.html>.

³³ Government of India, Ministry of Forests, Environment and Climate Change, *Defining "Dictionary meaning of Forest" as contained in the order dated 12.12.1996 of Hon'ble Supreme Court*, PARIVESH (Nov. 14, 2019), [https://forestsclearance.nic.in/writereaddata/public_display/schemes/439586804\\$11-98-2019-FC%20letter1.PDF](https://forestsclearance.nic.in/writereaddata/public_display/schemes/439586804$11-98-2019-FC%20letter1.PDF).

³⁴ Jacob Koshy, *Centre clarifies on definition of land as forest*, THE HINDU (Oct. 19, 2019, 8:50 PM), <https://www.thehindu.com/news/national/centre-clarifies-on-definition-of-land-as-forest/article29745691.ece>.

³⁵ Krishnaiyya, *supra* note 11.

spread over 1800 acres housing leopards and 300 other species. Yet, it struggled to get recognised as a 'forest'. The colony not only nourishes 5 lakh trees but also wombs couple of lakes and rivers.³⁶

Devendra Fadnavis (the then Chief Minister of Maharashtra), in September 2019 had stated that the government is required to clear trees in Mumbai's Aarey forest region in order to construct a car shed. This was met with mass protests. Four petitions were also filed against the government's decision in the Bombay High Court. However, the petition was quashed by a division bench of the High Court on account of Aarey not being a forest. Following clashes between protesters and police in October, the Supreme Court stepped in and ordered a suspension on the tree felling in the area.³⁷

Finally, in 2020 the Uddhav Thackeray government declared the 800 acres of land in Aarey as a reserve forest.³⁸ If not for the political turmoil in the state and activists hitting the ground, the judiciary would have failed to protect the Aarey forest due to it not being classified as a reserved forest in government records or in deemed forest reports.

The process of identifying forests and thereafter undertaking activities has become bureaucratic due to the judiciary's focus on the procedural aspects and legal technicalities of the issue. As a result, reports are often being kept pending and forest records are not prepared on time. The true object of such adjudications i.e., conservation is therefore often side-lined.

IV. CENTRAL GOVERNMENT'S POSITION VIS-À-VIS A DEFINITION FOR 'FOREST'

The government is continuously altering its stand on whether a definition of forest is needed. Since 2014, the MoEF & CC have been considering the framing of a definition. Drafts were also prepared in 2016 but these never saw the light of day.³⁹ In 2018, the Parliamentary Standing Committee on Science, Technology, Environment, and Forests submitted a report quoting MoEF's reply on the issue, - "*Sir, actually, if we define 'forests', it could create many loopholes that may be exploited. So, right now, we are going by the definition given by the Supreme Court. As of now, 'forest' means any*

³⁶ *Why Aarey forest matters and why is it known as 'Lung of Mumbai'*, DNA (Aug. 3, 2022, 01:16 PM), <https://www.dnaindia.com/explainer/report-dna-explainer-why-aarey-forest-matters-and-why-is-it-known-as-lung-of-mumbai-biodiversity-uddhav-thackeray-2966370>.

³⁷ *Maharashtra's Controversial Aarey Forest Project, Why is it resurfacing time and again?*, OUTLOOK (Jul. 01, 2022, 1:41 PM), <https://www.outlookindia.com/national/maharashtra-s-controversial-aarey-forest-project-why-is-it-resurfacing-time-and-again--news-205977>.

³⁸ *Aarey Is Now Officially A Forest, Thanks To Mumbai Residents Who Fought All Odds To Save it*, INDIA TIMES (Jun. 08, 2021, 4:56 PM), <https://www.indiatimes.com/news/india/aarey-is-now-officially-a-forest-thanks-to-mumbai-residents-who-fought-all-odds-to-save-it-542199.html>.

³⁹ Krishnappa, *supra* note 11.

area that is recorded as forest in any governmental record irrespective of whether it is having forest growth or not". Despite the never-ending litigation caused by the lack of a definition, the Ministry's position was that they were not facing any issues.⁴⁰ Just a few months later, in October 2018 the ministry changed its stand and announced that it had started the process of "*comprehensively amending the backbone of forest governance in India—the Indian Forest Act, 1927 (IFA). The amendments will also include definitions of terms like forests, pollution, ecological services, etc*".⁴¹

However, the aforesaid committee in its 2019 report published the ministry's 2018 reply. In the same report, organisations such as the Bombay Natural History Society (BNHS) opined that "*definition of 'forest' needed to be broadened to include the natural areas i.e. ecosystems which don't always have forest-like attributes, which include wetlands, grasslands, alpine meadows, and underwater forests, like those of Sargassum species*". TERI also stated that they had been working on the definition of 'forests' in the forest policy of our country for the last 10-15 years. The report concluded that irrespective of the stand of the ministry the committee strongly recommends that a comprehensive, clear-cut and legally sustainable definition of forest must be formulated to dispel any kind of doubt in this regard. However, no such effort has as yet been undertaken by the Centre.⁴²

V. THE STATE OF INDIA FOREST REPORT 2021

The National Forest Policy of India 1988 has set a goal of 33% land under forest and tree cover.⁴³ In furtherance of this, the Forest Survey of India (FSI) assesses forests biennially to track the increase or decrease in forest area. Due to the lack of a statutory definition of 'Forest', the FSI has resorted to a definition provided by the FAO. It reads as follows "*all lands more than one hectare in an area with tree canopy density of more than 10 percent*". The forest cover is further divided into categories based on its density viz. 1) Very Dense Forest – All lands with tree canopy density of 70 per cent and above; 2) Moderately Dense Forest – All lands with tree canopy density of 40 per cent and more but less than 70 per cent; 3) Open Forest – All lands with tree canopy density of 10 per cent

⁴⁰ Richard Mahapatra, *Sir... if we define forests, it could create many loopholes*, DOWN TO EARTH (May. 07, 2022, 8:30 PM), <https://www.downtoearth.org.in/news/forests/-sir-if-we-define-forests-it-could-create-many-loopholes--63494>.

⁴¹ Ishan Kukreti, *Centre to give Indian Forest Act a facelift*, DOWN TO EARTH (Sept. 18, 2022, 7:30 PM), <https://www.downtoearth.org.in/news/forests/centre-to-give-indian-forest-act-a-facelift-62530>.

⁴² Forest Survey of India, *Three Hundred Twenty Fourth Report Status of Forests In India*, (Feb, 2019), <https://fsi.nic.in/forest-report-2019>.

⁴³ Mayank Aggarwal, *The state of India's forests: Losing forests, gaining plantations*, MONGABAY (Jan. 24, 2022), <https://india.mongabay.com/2022/01/the-state-of-indias-forests-losing-forests-gaining-plantations/>.

and more but less than 40 per cent; Scrub- Forest lands with canopy density less than 10 per cent. Further, Reserved forests and Protected forests as per the Indian Forest Act of 1927 and State Acts as well as any land recorded as forest in government records, revenue records or considered as forest under any local law is included under **Recorded Forest Cover (RFC)**. In states and union territories where the data for RFC is not available, the FSI uses **Greenwash** as a proxy. The greenwash area is an area that is coloured green in India's topographic sheets. The assessment is done both outside and inside the RFC/ Greenwash. So, trees with more than 10 per cent of canopy density and an area of one hectare or more outside the RFC/ Greenwash are also covered in the assessment.⁴⁴

According to the State of India's Forest Report 2021 (SoFR, 2021) by FSI, the current total forest cover is 21.71 % of the total geographical area.⁴⁵ However, a deep dive will tell us that total forest cover increase of 1540 square kilometres from 2019 to 2021 is majorly credited to an increase in open forest. The increase in very dense forests and open forests is offset by a decrease of 1582 sq km in moderately dense forests. Following is the breakup of forest cover in India:

- Very dense forest (pristine forest) – 3.4 % of total geographical area.
- Moderately dense forest- 9.33% of total geographical area – decreasing continuously.
- Open forest – 9.34 of total geographical area, which is increasing continuously and is the largest part of forest cover.⁴⁶

The problem with the open forests is that they may not fall within 'forest' as under the Forest Conservation Act, 1980. The method adopted by the FSI for the calculation of forest cover in its biennial assessments includes all trees having the requisite canopy cover irrespective of location, ownership or the nature of the area (natural forest or plantation) despite these not fitting the traditional statutory interpretation of forest land/ forest cover.⁴⁷ In the case of **Re: "Construction of Park at Noida" Near Okhla Bird Sanctuary v. Another**⁴⁸ the impugned land with 6000 trees was considered as forest by the FSI in its reports but was not forest for the purpose of section 2

⁴⁴ Forest Survey of India (Ministry of Environment Forest and Climate Change), *The State of India's Forest Report 2021*, Vol. 17, 19-20, <https://fsi.nic.in/forest-report-2021>.

⁴⁵ *Id.*

⁴⁶ *Supra* note 44, at 28.

⁴⁷ *Supra* note 44, at 20.

⁴⁸ In re, Construction of Park at Noida Near Okhla Bird Sanctuary Anand Arya & Others v. Union of India & Ors, (2011) 1 SCC 744.

of the Forest Conservation Act on account of it being a plantation and not a natural forest. This is because there are patches of land or standalone trees outside RFC or greenwash areas that are neither noted as forest in government records nor included in the dictionary meaning of forest as laid down by the Supreme Court but fit in the definition used by FSI.⁴⁹

In fact, India has lost 1600 sq km of natural forest from 2019 to 2021.⁵⁰ It is only in the 21st century that 'natural' could be used as an adjective for the forest. This is because of the increase in commercial plantations that fall under open forests. So, if the total forest cover has increased but the natural forest land has decreased, it would not be wrong to say that the increase in forest cover from 2019 to 2021 is actually an increase in plantations. Experts argue that plantations, orchards and monoculture can never match the ecosystem benefits of natural forests.⁵¹

These concerns were duly raised before the Union Minister of Environment, Forest, and Climate. Surprisingly, the minister accepted that the increase is not in forests but in plantations. He, however, went on to defend the assessment by stating that the cashew plantations in coastal areas prevent floods and mixed plantation of native species fulfil ecological needs similar to a forest.⁵²

Mixed plantations of native species are indeed beneficial for the environment, but they are not the main focus of the government. A financial outlay of Rs.11,040 crore has been made for the National Mission on Edible Oils – Oil Palm (NMEO-OP). The scheme proposes to cover an additional area of 6.5 lakh hectares (ha.) with oil palm by 2025-26 and ultimately reach a target of 10 lakh hectares.⁵³ Such plantations do not support ecosystems like that of forests as they are monocultures that replace natural tropical mixed forests. Additionally, oil palm plantations have been observed to release nitrous oxide into the atmosphere. Nitrous oxide is a long-lived and potent greenhouse gas with a global warming potential estimated at 265–298 times greater than

⁴⁹ Aggarwal, *supra* note 43.

⁵⁰ Shoma Bhattacharjee, *India's forest cover increased in 2019-21, but that may not be good news; here's why*, CNBC TV (Jan. 19, 2022, 7:21 AM), <https://www.cnbc18.com/environment/indias-forest-cover-increased-in-2019-21-but-that-may-not-be-good-news-heres-why-12163712.htm>.

⁵¹ Jeremy Hance, *Monoculture tree plantations are "green deserts" not forests, say activists*, MONGABAY (Sept. 19, 2008), <https://news.mongabay.com/2008/09/monoculture-tree-plantations-are-green-deserts-not-forests-say-activists/>.

⁵² Jayashree Nandi, *'Plantations meet ecological functions of natural forests': Bhupender Yadav*, HINDUSTAN TIMES (Jan. 24, 2022, 5:31 AM), <https://www.hindustantimes.com/environment/plantations-meet-ecological-functions-of-natural-forests-bhupender-yadav-101642975799614.html>.

⁵³ Press Information Bureau, *Cabinet approves implementation of National Mission on Edible Oils – Oil Palm*, (Aug. 18 2021), <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1746942>.

carbon dioxide and is estimated to be 19% more abundant in the atmosphere now than in pre-industrial times.⁵⁴

While the forest stores carbon for years together, plantations and infant forests lead to disturbance in soil and degradation of the existing ecosystem which in turn results in carbon dioxide emissions.⁵⁵ Such schemes of the government and the pattern change in the forest cover show that the increase in forest cover is a hollow statistic having little real-world impact.

The definition of forest cover used by the FSI is not suitable for assessing forest cover. It fails to distinguish for instance between roadside trees, a commercial plantation, and a forest. Correct assessment results are essential for making informed policy decisions. Therefore, it is imperative to have a statutory definition of forest that truly assesses actual forest cover.

The Forest (Conservation) Amendment Bill, 2023 as passed by the Lok Sabha in March 2023, further dilutes the protections granted by *Godavarnman*. In *Godavarnman*, the Apex Court categorically interpreted the FCA to include all forests irrespective of ownership or classification.⁵⁶ Bill nullifies this interpretation by excluding such land from the protection of the FCA which is not covered under the Indian Forest Act of 1927 but been recorded as forest prior to 1980 and also land which has been diverted to non-forest purposes before 1996.⁵⁷ It also exempts various categories of projects from requiring prior approval for diversion of forest including, land upto 10 hectares for strategic and security related projects.⁵⁸

While the high priority of such projects is acknowledged, they are often in extremely ecologically sensitive areas. As such, solutions to fast track their diversion rather than provide a blanket exemption must be arrived at. Lastly, the bill fails to mention any other legislation having an impact on forest protection including the Biodiversity Act of 2002 and the Scheduled Tribes and Other Traditional Dwellers (Recognition of Forest Rights) Act, 2006. FRA under section 2 (d), describes forest land as “land of any description”.⁵⁹ By restricting the scope of forest land only to areas which

⁵⁴ E. MEIJAARD et al., OIL PALM AND BIODIVERSITY. A SITUATION ANALYSIS BY THE IUCN OIL PALM TASK FORCE, (Switzerland: IUCN, 2018), <https://portals.iucn.org/library/sites/library/files/documents/2018-027-En.pdf>.

⁵⁵ Aarey, *supra* note 37.

⁵⁶ *Supra* note 17.

⁵⁷ Forest (Conservation) Amendment Bill, Act, 2023, § 4, No. 80 (India).

⁵⁸ Forest (Conservation) Amendment Bill, Act, 2023, § 4, No. 80 (India).

⁵⁹ Scheduled Tribes and Other Traditional Dwellers (Recognition of Forest Rights) Act, 2006, § 2, No. 2, Acts of Parliament, 2007 (India).

are legally notified areas and recorded forest after 1980, the rights of forest dwelling communities over traditionally occupied land will also be vitiated.

Therefore, we see that, the Forest (Conservation) Amendment Bill, 2023 violative of the decision in *Godavarman* and represents a further degradation rather than conservation of Indian forests.

VI. SUGGESTIONS: A GREEN OUTCOME OF LAW?

Forests serve a variety of purposes; they are carbon stores, sources of livelihood and even homes. Alternatively, they are also classified differently in line with the objective sought to be achieved by such classification. There also exists a complicated network of laws and policies that categorise forests differently. It is therefore very difficult to find a vantage point from where a workable definition of 'forest' can be formulated. The MoEFCC rightly said that an improperly formulated definition of 'forest' in India may either create loopholes that leave a large chunk of forest land unprotected or may be excessively lengthy and unworkable.⁶⁰ The following suggestions may be incorporated in order to overcome the aforementioned issues:

- 1) As was discussed in the first section of this paper, the British outlook on forests and their conservation was centred upon their need for timber. As such, most laws and policies governing forests, require the presence of 'trees' for it to be considered a forest. Inadvertently, forests having a lower density, shrubland, deserts etc., which are equally important from an ecological perspective are left unguarded. They become open to exploitation. **Therefore, any definition of 'forest' must encompass all habitats and must not be based solely on tree density.**
- 2) Each statute should have its customized definition in accordance with the objective of that statute and factors pertaining to forest management shall be given consideration in proportion to said objective. Factors here include properties such as dynamics, landscape settings and origins and their application will depend upon the aim of the policy, part of the forest is targeted, and recognition of aspects may impact its implementation.
- 3) In assessing forest cover, one must acknowledge the fact that a forest is dynamic; it is not a static entity and so are its features. Hence, the definition and the methodology must be sensitive

⁶⁰ Richard Mahapatra, *Sir... if we define forests, it could create many loopholes*, DOWN TO EARTH (Mar. 07, 2019), <https://www.downtoearth.org.in/news/forests/-sir-if-we-define-forests-it-could-create-many-loopholes--63494>.

to these changing paradigms of the forest.⁶¹ The definition used currently for assessing forest depends only on the structure of the tree, but the concept of the forest goes much beyond the accumulation of a certain number of trees. The State of Forest Reports by the Centre only show the difference between the forest loss and the forest gain in terms of tree canopy cover.⁶² However, forest loss is not an antithesis to forest gain, in fact, both are two different processes and cannot be weighed with one scale. The functional, structural, and compositional properties of new tree cover differ substantially from those of the forest or non-forest ecosystems they replace. Furthermore, the trajectory and the history of the land which are manifestations of social, economic, cultural, and political change should be given due consideration.

4) Participatory planning must also be a part of the definition formulation process. Local communities especially those dependent on the forest for livelihood have in-depth knowledge of the forest its properties and the changes it goes through. They can help in monitoring, assessing, and defining forests. This is the best and only source of knowing the land history and how the landscape interacts with other land uses. Information gathered can be corroborated with other technological tools to reach the final result.⁶³

5) Different tools sensitive to landscape features are now available. For instance, Google Earth developed by FAO uses satellite images for visual interpretations. The tool gathers information sensitive to the landscape features of the forest as well. Another such tool is Geo-Wiki, which uses a network of local citizen scientists and generates global maps for forests. There are also remote sensing tools that can now detect the type of forest, its species composition, biodiversity, whether it is logged or reforested etc. Therefore, in order to make an informed policy decision, the assessment shall not only be restricted to forest cover but should also account for various processes impacting the forest including afforestation, restoration, rehabilitation, deforestation or automatic degradation.⁶⁴

⁶¹ Arroyo-Rodríguez, Víctor, *Multiple successional pathways in human-modified tropical landscapes: new insights from forest succession, forest fragmentation and landscape ecology research*, 92(1) BIOLOGICAL REVIEWS 326 (2015), <https://onlinelibrary.wiley.com/doi/10.1111/brv.12231>.

⁶² *Supra* note 44, at 32.

⁶³ Vergara-Asenjo et.al, *Engaging Stakeholders: Assessing Accuracy of Participatory Mapping of Land Cover in Panama*. 8(6) CONVERSATION LETTERS 438 (2015), <https://repository.si.edu/handle/10088/https%3A%2F%2Frepository.si.edu%2Fhandle%2F10088%2F25036>.

⁶⁴ Dmitry Schepaschenko et. al, *Development of a global hybrid forest mask through the synergy of remote sensing, crowdsourcing and FAO statistics*. 162 REMOTE SENSING OF ENVIRONMENT 209 (2015), <http://pure.iiasa.ac.at/11491>.

6) It is equally important that definitions are not used for purposes other than those originally intended. For example, the definition used by the FSI could be used for timber assessment as it only measures the static features of the forest, but it would not provide a complete picture vis-a-vis forest cover assessment. This will not only make policies and laws more efficient but also pave the way for sustainable development.⁶⁵

VII. CONCLUSION

The term 'forest' is generally associated with the environmental benefits it provides. Amid the turmoil of the last two decades, this oversimplified equation has come under more and more scrutiny. The fact that a forest is a complex socio-ecological construct rather than a straightforward ecological entity is gradually coming to light. It is increasingly clear that different forest management systems (and non-forest systems) offer different benefits to stakeholders having varied interests.

Therefore, it is the need of the hour for the government to provide an exhaustive and all-encompassing statutory definition of the term 'forest'. To do this, the colonial mindset of viewing forests as economic entities must be discarded, and Indic and traditional views and practices must be reincorporated. It is only then that the judiciary, conservationists and other stakeholders will be able to invoke and fulfil the purpose of the Forest Conservation Act. If not, we may still manage to attain the goal of 33% of our land being covered by forests. However, these will not be real forests endowed with the ecological diversity and providing the ecosystem services that we so urgently require.

⁶⁵ Chazdon, *supra* note 1, at 539.