Bungle in the jungle

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ONE of the worst things about the Scheduled Tribes (Recognition of Forest Rights) Bill 2005 is the polarised and acrimonious debate it has generated. One of the best is that, finally, it signals seriousness on the part of government to pay attention to some of India's most disprivileged communities. A step that should have been half a century back is being taken now. But in the changed situations of the 21st century, is the step well thought out? Could it end up in destroying the very home that gives adivasis their distinct character, the forest? Are wildlife enthusiasts justifiably up in arms against the bill, or are they being unduly fussy?

Let me first deal with the process of drafting the bill, and the explosive discussion following it. Such a law has been in demand for decades. Adivasis have agitated for land and resource rights across the country, as witnessed in dozens of rallies and demonstrations, forcible occupation of land, letter petitions, lobbying and advocacy campaigns, and so on. One of the results of their actions was the Panchayat (Extension to Scheduled Areas) Act 1996, which provided for some degree of political and administrative decentralisation to adivasi communities. Unfortunately, this act did not decentralise authority over the most important habitat of the adivasis, the forests, which have remained in the hands of a bureaucracy created by the colonial British administration. Hence the demand for greater rights over forests continued, and appears to have been the main impetus behind the current bill.

This demand has met with 'expected' responses from conservationists concerned about its possible impact on forests and wildlife. The discussion has been especially heated in the case of national parks and wildlife sanctuaries (collectively called 'protected areas'), which are specially earmarked for wildlife conservation but are also the abode of many communities traditionally dwelling in or using the area. In a sense, therefore, there has been considerable public discussion on the issue for decades.

Nevertheless, the actual drafting of the bill being rather secretive, its entry into the public scene (through newspaper reports) was greeted with justified surprise. The debate that ensued has been

marked by misinformation and misinterpretation. Some of it was understandable, since people simply did not have the actual bill in front of them. Some of it, however, was also deliberate or at least sloppy misreporting.

A number of conservationists and media columnists, for instance, went on a major offensive stating that the bill would end up giving 60 to 75% of India's forests away to tribal families, painting a picture of ecological emergency, which did nothing for the cause of healthy and constructive debate. Even when corrected by a number of those who had carefully read versions of the bill, some conservationists and media persons continued to erect and gleefully knock down straw figures about the bill. Perhaps the last such example of such sustained misreporting was the debate regarding the Narmada project in the 1990s, mostly from those supporting the dams and trying to denigrate the dam-busters.

The lack of participation of some key sectors in the drafting of the bill, or the fact that no official version was available for a long time after the debate started, has been a serious problem. It goes against the basic requirement of transparent governance. It was also strategically shortsighted, since it did not help to build a buy-in from key sectors, including conservationists and forest officials. Of course it is also true that when conservationists and forest officials helped draft the Wild Life Amendment Bill or the National Wildlife Action Plan, they did not deem fit to consult communities or social activists!

The Ministry of Environment and Forests (MoEF) has oscillated so much on the issue that even looking at it makes me sea-sick. Over the last few years the MoEF has often, both in public and in court, espoused the cause of pre-1980 occupants of forest lands. It has drafted a National Environment Policy that talks about providing rights and stakes to forest-dwellers. In December 2004, it submitted affidavits to the Supreme Court in which it argued for rights to pre-1980 occupants of forest lands (in February 2004 it had actually argued for extension of this date to 1993). But when the current bill came up, it did a complete volte-face and vehemently opposed it for sacrificing the country's forests. It seems probable that more than forest conservation, it was the fear of losing power and authority to the Ministry of Tribal Affairs (MoTA) that motivated its turnabout.

The bill is relatively simple in its sections, the main ones dealing with the rights being granted to tribal people and their corresponding responsibilities and duties. The rights proposed to be accorded to *adivasis* include:

* regularisation of forest lands occupied by them before 1980, up to a maximum of 2.5 hectares. (This is the single provision that has attracted the maximum flak from wildlife enthusiasts, which is strange because there is nothing new in it; such regularisation has been a government policy since 1990 when MoEF issued a set of circulars on how to deal with encroachments.);

* *nistar* (usufruct) or ownership rights to forest resources;

* grazing rights, including seasonal ones, of nomadic communities;

* habitation rights (for those classified as Primitive Tribal Groups);

* conversion of forest villages into revenue villages (also a long-standing government policy);

* right to community intellectual property, traditional knowledge, and cultural diversity related to forests;

* right to protect traditionally conserved community forest resources;

* rights accepted under relevant state laws or as customary laws in north-eastern states.

The bill specifies that no tribal person is to be evicted from currently occupied land till the process of determining rights is completed.

For the first time in any legislation the *process* of determining rights has been clearly and elaborately laid out in the draft rules that accompanied the April 2005 draft of the bill. This in itself is a major strength of the bill, since previous acts dealing with the determination or extinguishment of rights, never specified the precise process for carrying this out. These draft rules have not been put up in the official draft on MoTA's website, but a pre-ambular text specifies that they will contain such provisions.

The proposed process is as follows. Claims to land and other rights are to be determined through a due process by the gram sabha, whose recommendations are to be examined by a sub-divisional committee consisting of forest/revenue officials and civil society representatives. This committee's recommendations are then to be examined by a district level committee, also consisting of relevant departments and independent citizens. It is finally only this committee that can accept or reject the claims, *not* the gram sabha. It is interesting that this process with built-in checks and balances has been ignored by critics of the bill who say that the gram sabha can easily be badgered into accepting all kinds of encroachments.

Earlier processes of determining pre-1980 occupations have been hampered by, amongst other things, a lack of clarity on what evidences to use, a reliance on single departments to do the job, and a total lack of transparency. Here too the bill marks a step forward. Draft rules accompanying the April 2005 draft specified multiple kinds of evidence: oral testimony, available government records, survey maps, satellite imagery, traditional physical structures, earlier gram sabha resolutions, and circumstantial evidence. It also specified steps to ensure that the process is transparent and open to public scrutiny, including through the use of local languages. In Maharashtra, such a process carried out by district collector Manisha Verma, involving forest and revenue officials, NGOs and local communities, has been successful in sorting out land rights that had not been resolved for decades. What is most interesting is that in this process close to 50% of the land claims were rejected at the gram sabha stage itself, suggesting that perhaps conservationists need to look at villagers with a little less suspicion.

Drawing on this experience, Maharashtra came out with clearly laid out process, possibly the only state to do so. Now if such a systematic and transparent process is laid out in a national law, there will be greater chance of resolving land disputes in many other parts of the country (though of course this is not a magic wand in itself). *I also firmly believe that a single, time-bound process that makes explicit the 1980 cut-off date, and involves all the evidences (including satellite imagery of 1980 and later) in a transparent process that can be challenged by anyone if it is being misused, would be a much more effective way of stemming further encroachments into forests.* This is contrary to the fear of some conservationists that the bill may fuel further encroachments. Indeed, in today's state of uncertainty, and in the absence of any long-term stake for communities to conserve forests around them, it is much easier for politicians and the land mafia to encourage further encroachments.

Also largely ignored by conservationists speaking against the bill are its provisions regarding conservation. Its statement of objectives states that the bill is intended to encourage the use of tribal conservation ethos and practices, and to provide a permanent stake for forest protection by removing the alienation caused by earlier policies. Within the bill's operative sections, the following are worth noting:

1. Hunting is explicitly excluded from the list of forest rights;

2. All rights are meant only for *bona fide* livelihood needs, and not for exclusive commercial purposes;

3. In no case would forest land beyond 2.5 hectares be allotted, even if someone is currently occupying more;

4. All rights are to be accompanied by the responsibility for protection, conservation, and regeneration of forests;

5. All right holders also have the duty to conserve forests and wildlife, protect catchment areas, water sources, and ecologically sensitive areas, and intimate the gram sabha as well as forest authorities of any activity that is ecologically destructive;

6. The gram sabha is vested with the responsibility and authority to stop any activity that adversely affects wildlife, forests, and biodiversity;

7. Penalties are to be imposed for destruction of wildlife, forests, or biodiversity (including felling trees for commercial purpose), and in the case of repeated offences, the forest rights of the offender can be derecognised.

8. At all levels of decision-making above the gram sabha, forest officials are to be involved (so the fear that the forest department is being divested of its authority seems misplaced).

As I will argue below, these responsibilities and duties are not adequate, but at least they suggest a sincere attempt at providing for conservation safeguards.

One issue raised by many critics is: How and who will stop villagers either from being exploited by vested interests, or from ignoring the above responsibilities as their own populations and needs increase? This is indeed a valid concern, given that significant destruction has taken place in many forest areas due to these reasons. But it is also true that where communities have mobilised themselves or been helped to mobilise (as in the case of many joint forest management sites or even some protected areas like Periyar Tiger Reserve), they have managed to tackle these problems. The key has been the creation of institutional structures to face the challenges of outside forces and internal change, changes in behaviour and management strategies, and enhancement of livelihood options to reduce excessive pressure on natural resources. There are literally thousands of such sites, some of them well-documented, if only we as conservationists cared to look.

Critics will say that these can happen in a few places where there are motivated officials or NGOs or charismatic leaders, but not otherwise. I would argue that the spread of success stories is slow

because the system just does not encourage its spread – laws relating to protected areas and forests are restrictive, economic incentives are available more for destructive than conservation-oriented activities, and so on. A bill that provides more long-term stake would be one change in the system, others would also be needed, including capacity-building amongst communities and officials. But in the absence of this, the alternative proposed by many conservationists is also a non-starter.

They say forest-dwelling communities could be relocated and provided alternative livelihoods ('bring them into the mainstream, give them a good package'). But where is the system that will ensure any kind of satisfactory rehabilitation? And where will so much land suddenly be freed up from? In India, it is hard to come by a single good case of large-scale relocation. Reports from independent agencies of recent relocation, e.g. from Kuno Sanctuary in Madhya Pradesh, point to the systemic failures in any large-scale relocation, though a tiny number of relocation attempts of much smaller populations such as at Melghat Tiger Reserve in Maharashtra, have seen a better level of success. Official agencies have repeatedly failed to provide even basic services to adivasis – how will a miracle take place that will ensure good rehabilitation to a few million families?

Amongst the least debated provisions of the bill, which I consider extremely important, is the one providing communities the right to protect and manage any traditionally conserved 'community forest resource', and to impose penalties on anyone violating traditional rules of conservation. Across India, a quietly growing phenomenon that many conservationists who only roam around in national parks and sanctuaries have been blind to, is that of community conserved areas (CCAs). Kalpavriksh has documentation on over 300 such sites, where tribal or other communities are conserving natural or semi-natural ecosystems, very many with significant wildlife or biodiversity value. We believe this is only the tip of the iceberg, as everywhere we have gone to investigate such sites, we have been told of dozens more.

In Nagaland alone, there are more than 100 villages that have declared wildlife reserves, banned hunting and timber felling, or taken other conservation steps. In Uttaranchal, several hundred (and possibly several thousand) square kilometres of forest are under van panchayat conservation, quite a bit of it (but by no means all) very effective. Many heronries in South India are protected by villages in whose midst they thrive. In the list of India's Important Bird Areas, recently brought out by the Bombay Natural History Society, several dozen are CCAs. A few hundred villages in Alwar district of Rajasthan are regenerating and protecting forests that form the

catchment of their water harvesting structures. And so on. In each of these cases, the community has set up relevant institutions vested with the responsibility of conservation, and established customary or new rules for dealing with violations.

The problem, however, is that in most such situations (barring ones like Nagaland), the lands/waters under community conservation do not actually belong to the community. Ownership or control still vests in government departments such as forest, revenue, irrigation, or fisheries. In such a situation, the community faces constant uncertainty on what the government might decide about the land; in many such cases it has had to fight against decisions to give over lands for mining, dams, industries, or other 'development' uses. With no legal stake, the community finds it difficult to control not only the timber mafia and hunters, but even its own powerful members or neighbours from violating the community rules.

The above-mentioned provision in the bill could be a powerful aid to hundreds of such communities across India. It is not, however, clear whether this right would extend to government owned forests, for the term 'community forest resources' is not defined anywhere.

Even otherwise, literature from across the world explicitly states that one of the most powerful incentives for communities to conserve their surrounds is a long-term stake in it, and that the most effective tool to provide such stake is legally vested rights combined with appropriate responsibility. Such an approach to conservation has simply not been given a chance in India, ignoring its success elsewhere. It is high time we explored this path.

The bill's proponents have repeatedly stated, as given in its Preamble and Statement of Objects and Reasons, that such a legislation aims to undo historical injustices done to adivasis. Let me cite a MoEF affidavit to the Supreme Court, filed in response to the court's staying of its February 2004 circular which extended the date for regularisation to 1993. Admitting that when forest records were consolidated 'the rural people, especially tribals who have been living in the forests since time immemorial, were deprived of their traditional rights and livelihood and consequently, these tribals have become encroachers in the eyes of law,' MoEF went further to state that 'it should be understood clearly that the lands occupied by the tribals in forest areas do not have any forest vegetation,' that the February circulars 'do not relate to encroachers, but to remedy a serious historical injustice,' and further that such a step 'will also significantly lead to better forest conservation.'

Some commentators like M.N. Buch have asserted that there has been no historical injustice to tribals; so the bill is not legitimately grounded. As evidence, he shows how in central India, forest ownership had always been with rulers, and that therefore it should remain with the state. What he and others omit to mention is that in pre-colonial times, and to some extent even in colonial times, communities did enjoy significant rights to forest lands and resources. It is these rights that were ignored or marginalised in the processes of 'consolidation' of forests (i.e. vesting them into the hands of the state, under relevant forest laws). It is interesting that of the 67 million hectares that are considered 'forest lands' vested with the forest department today, almost 60% are in 187 tribal districts. In many of these areas, declaration of the 'reserve forest' category was accompanied by significant reduction in customary rights to forest resources.

Not only were customary and traditional rights to forest resources ignored, but in many states lands under traditional occupation by adivasis and other forest dwellers (for settled or shifting cultivation), was erroneously entered into the record books as 'forests'. This was done *without* recording the existing occupations or uses, and hence these adivasis suddenly became 'encroachers'! In Madhya Pradesh, Chhattisgarh, Orissa, and some North East states, this might amount to several lakh hectares. *This is not to argue that all lands under so-called 'encroachment' are legitimately occupied, but that the category of 'encroached' lands is complex and mixed, containing both actual encroachments on previously declared lands, as also lands declared 'forests' where cultivation already existed.*

These anomalies were recognised by the MoEF in a series of circulars issued in 1990, directing states to identify and propose pre-1980 lands for regularisation. These circulars, probably the most progressive issued till date, were never implemented. Perhaps this was another reason for the demand to forest land and resource rights become a subject of a national legislation, rather than leave it to administrative circulars that are easy to ignore.

The flaws in the process of drafting the bill have reflected in some serious shortcomings in the text itself. Two contrasting sets of problems can be pointed out: first, the fact that the bill deals only with a subset of forest-dwelling communities, and second, that it does not provide adequate safeguards for conservation of forests and wildlife.

On the first, I will only briefly state that as far as I know, the original intent of the bill was to provide rights to all traditional

forest-dwelling communities. Somewhere down the line this got restricted to scheduled tribes, perhaps because the Ministry of Tribal Affairs was not competent to deal with others. But this is short-sighted and, as activists have pointed out, could lead to serious conflicts in areas where populations are mixed. Clearly, any such bill needs to extend to all communities that have traditionally stayed in or depended for traditional livelihoods on forests. (Actually, one can even ask why this should be restricted to forest dwellers; why not also communities traditionally dependent on wetlands, marine/coastal areas, grasslands – but as this will raise another hornets' nest which I don't have the space to deal with here, I will leave this for the moment).

On the second issue, there are a number of concerns, though to my mind they have been considerably overstated by most conservationists. A major change in the version made public by MoTA, over the earlier 'unofficial' versions that were floating around, is the clarification that the act is 'in addition to and not in derogation of the provisions of any other law for the time being in force.' This should set to rest apprehensions of conservationists that the Wild Life Act and the Forest Conservation Act are superseded by the bill – *they are not*.

However, some areas of confusion remain. The bill states that activities harmful to forests and biodiversity should not be carried out by any right-holder, 'save for those activities that are permitted under the terms of such rights.' So what happens if the rightfully granted activities are causing harm to biodiversity? For instance, if the collection of a medicinal plant that has now become threatened is considered a traditional right, would the act restrict it? Actually, it would be more logical to assess possible ecological impacts before granting rights, and simply remove the caveat quoted above.

In this bill the gram sabha has been given the responsibility to decide on the penalty for an offence. This means that all the offences, such as unsustainable use, illegal felling of trees, destruction of wildlife and so on will be dealt by the gram sabha. This is in potential conflict with the Wild Life (Protection) Act (WLPA), Forest Conservation Act (FCA), or other relevant acts which give such powers to the forest department. The intention here is good but needs to take into account the existing provisions of these acts. In situations where the gram sabha may not be very active, or where the species of wildlife involved have very high trade value, there need to be explicit provisions for checks and balances.

It is also not clear how penalties under the bill relate to the ones under FCA and WLPA. A maximum penalty of Rs 1000 is provided for any offence, including destruction of wildlife. But if a villager

hunts a species that is scheduled under the WLPA, the penalties under that act are much higher, including possible imprisonment. Will this mean that the offender has to be penalised under both laws?

Penalties are also specified for 'unsustainable' use. However, nowhere in the bill has unsustainability been defined. Who decides that the use is sustainable or not and on what basis?

The bill also needs to acknowledge the specially vulnerable situation of threatened species and habitats, and the special conservation focus of protected areas, with additional safeguards against misuse of rights for destructive purposes.

The involvement of wildlife and environment experts (non-community ones) is minimal. It needs to be ensured, e.g. through membership of the sub-divisional, district, and state level committees.

While the cut-off date for regularisation of 'encroached' lands is mentioned as October 1980, the bill also provides an opening: 'or such other date as the Central Government may, by notification in the Official Gazette, specify.' This is a dangerous opening which could allow the government to keep extending the date based on political considerations, without having to at least go back to the Parliament for approval. It is about time we set one firm date that would be extremely difficult to change, to ensure that actual encroachments are not further encouraged.

One final criticism. I believe the bill misses out on a historic opportunity to provide much greater power to forest-dwelling communities to stop destructive 'development' projects. There are Government of India circulars or instructions that consent from panchayats needs to be taken if their lands are being used for mining, dams, industries, roads, and so on but this does not seem to be a clear legal power. The bill could have provided for the right to 'prior informed consent', which makes it mandatory for project proponents to consult with and obtain consent from village communities before going ahead with a project.

To return briefly to the controversy generated by the bill. What I find most striking about the attack on the bill by some conservationists and some well-known journalists, is the hypocrisy involved in their messages. This is two-fold. One, mentioned in passing above, is that while justifiably decrying the secretive nature of the bill's drafting process, they conveniently omit to mention that they were themselves involved in pushing a similar process with regard to the Wild Life (Protection) Amendment Act just three years back. I did not see a single one of these conservationists asking for the act to be opened up for public debate before being enacted, or

supporting those of us who were making such a demand.

Second, far more serious, is the fact that conservationists pointing to the destructive potential of millions of adivasis getting forest rights, conveniently hide under the carpet their own destructive lifestyles. It is as if they (we!) already have a law (never enacted because it never needed to be), which gives us the right to access all natural ecosystems for our needs. Hundreds of thousands of hectares of forest lands are drowned, mined, logged and degraded to meet our demand for minerals, housing, food, power, transportation, communication, and so on. The millennium's biggest ecological threat, climate change, is caused by those of us who drive in our SUVs and fly around in ozone-depleting planes, or who consume copious amounts of electricity generated by thermal power plants, and yet we point fingers at forest dwellers who have to cut trees to eke out a living.

We bemoan the potential loss of India's forests due to the granting of adivasi rights, but are happy to carry on our own lifestyles that are the cause of far greater destruction than what forest dwellers could ever cause. On the listserve *nathistory-india,* at least a couple of dozen people wrote against the bill, while on average only one or two have written protesting against the activities of Vedanta mining corporation in Orissa, or the granting of common lands to industries in Gujarat, or other such blatant acts of ecological destruction. As a conservationist, I have to say I am truly ashamed at such blindness and hypocrisy.

Is there a way ahead? For all the acrimony of the debate on the bill, I am hopeful that there will be a resolution between conservationists and human rights activists (and amongst various strands within these sections). There are enough people on all sides of the spectrum who are convinced that both forest dwellers and wildlife have been given a raw deal, that the biggest problem is not one against the other but the juggernaut of industrial development versus both, and that therefore a unified approach is the only way to protect both environment and livelihoods.

Some of those involved in framing the bill are quite keen to dialogue with wildlifers to see how their basic concerns could be accommodated, and at least some of those championing the cause of wildlife would like to see a way of providing appropriate rights and powers to forest-dwelling communities. There will remain differences of opinion on matters of detail, but if the dialogue can start on the fundamental assumption of some critical common ground, we could yet come up with a bill that would be a powerful

force for conservation and justice.

To my mind, the essential elements of this bill should be:

1. A clear statement of rights relating to what has traditionally been the domain of forest dwellers (both tribal and non-tribal) including to lands traditionally occupied and resources traditionally used.

2. A clear process by which legitimate right-holders can be identified and recorded, and conversely, by which recent encroachers, and others who have been taking advantage of forest dwellers for vested interest, can be identified and alienated.

3. Explicit provisions to ensure conservation, including priority to provisions of wildlife/biodiversity/forest laws that are meant to ensure conservation, and special focus on protected areas and threatened species.

4. Strengthening of or changes in institutional structures that would enable more participatory processes of decision-making, including in the management of protected areas.

5. Explicit provisions that enable forest-dwelling communities to say 'no' to, or seek changes in, 'development' projects that are impinging on their lands and resources.

6. Provisions for regular and open processes of dialogue, consultation, sharing of information, etc, involving communities, NGOs, officials, and others.

7. Clear monitoring provisions that enable a constant check on whether the rights are being honoured or not, as also whether the exercise of rights is respecting conservation parameters.

I believe the current bill goes a certain distance in providing these elements, but needs changes to bring in the others. If this can happen through dialogue and consultation, mediated perhaps by a neutral entity, we could yet emerge with a legislation that unites conservationists, human rights activists, and marginalised communities. These sections of society desperately need to come together to fight a common enemy – unbridled commercial and industrial forces rather than waste energy fighting with each other.

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* This article is based on a reading of the June 2005 draft of the Scheduled Tribes (Recognition of Forest Rights) Bill 2005, put up by the Ministry of Tribal Affairs. It also refers in places to an April 2005 draft that was doing the rounds, but was never put up as an official draft.