Environmental Policy, Legislation and Construction of Social Nature

Attempts to trace the changes in environment policy-making and the way social concerns have been problematised have been very few in the academic debates on the draft National Environment Policy, 2004 and the Scheduled Tribes (Recognition of Forest Rights) Bill, 2005. But such an exercise is needed to understand the possibilities and limitations of policy pronouncements and legislative action, given the current politico-economic disposition. This is an attempt to fill that void and explores the changing nature of environment policy-making and the shifts in the manner in which social concerns are addressed.

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The recent debates and developments with regard to the draft National Environment Policy (NEP), 2004 and the Scheduled Tribes (Recognition of Forest Rights) Bill (STB), 2005 are illustrative in different ways of the manner in which social concerns are dealt with in environmental policy and legislation in India [Lele and Menon 2005; Sarin 2005; Upadhyay 2004b].[1] Yet, while the pros and cons of specific policies and legislations have been central to the academic debates on the environment,[2] very little attempt has been made to trace the changes in environmental policy-making[3] and the way social concerns have been problematised. Such an exercise is necessary to understand the possibilities and limits of policy pronouncements and legislative action given the current politico-economic disposition.

This paper is an attempt to fill that void. By exploring the changing nature of environmental policy-making (with specific attention to natural resource management issues) since the late 1980s, I attempt to illustrate the shifts in the manner in which social concerns are addressed. These shifts are not unilinear in nature nor very obvious at times. In fact, my contention is that developments with regard to different environmental leglislations and policies in particular sectors are often contradictory in nature, sending confused signals as to the future of environmental policy itself.[4] These different developments have been at least partly shaped by the legal character of the document, i e, bills, acts or national policies. Nonetheless, there has been a movement towards a more neo-liberal discourse of development that emphasises primarily good governance concerns.[5]

My specific focus with regard to social concerns is community rights to resources – a concern that is central to many of the debates on natural resource management. Three arguments are put forth: (1) that while the environment has at one level assumed a non-negotiable presence in policy, social concerns are only highlighted to the extent that they are deemed not to be environmentally destructive, (2) that the discursive terrain through which social concerns are deemed harmful is overly simplistic and in need of re-examination and (3) that the changing nature of environmental discourse can only be understood within the wider shifts in development policy. Although there are many who would claim that the environment itself receives an inadequate attention in development policy,[6] a contention that is at least partly true, I am concerned here with how emerging policies and legislations tackle social concerns given the socially constructed nature of the environment [Jeffery 1998]. This is necessarily central to imagining future possibilities linked to managing the environment for the poor instead of only imagining environmental management by the poor.

Prerogatives and Social Concerns

The environment assumed a central role in India, to a large extent, as a result of the first major international conference on the environment, namely, the United Nations Conference on the Human Environment (UNCHE) held in Stockholm in 1972. In preparation for this meeting, each member state was asked to prepare a report on the state of the environment. India set up a committee on the human environment under the chairmanship of Pitambar Pant, a Planning Commission member. The outcome was three reports, one on the state of the environment, one on the problems of human settlement and one on the possible strategies to manage resources. Environmental goals were subsequently incorporated in the Fifth Five-Year Plan onwards. Legislations such as Wildlife Protection Act, 1972 and the Water (Prevention and Control of Pollution) Act, 1974 were passed soon after as well [Divan and Rosencranz 2001: 33].

While the discursive thrust of much of environmental policy-making in the late 1970s and early 1980s was on incorporating environmental principles in sectoral planning, something that was matched with legislative intervention, the latter part of the 1980s saw the focus shift towards sustainable development. The importance of this shift was that the link between social and environmental concerns was more forcefully articulated. Again this was at least partly due to developments internationally. The World Commission on Environment and Development (WCED) published *Our Common Future* (the Brundtland Commission Report) in 1987, a report that highlighted the importance of both intergenerational and intra-generational equity with regard to environmental management. Equally important was the fact that the Brundtland Commission Report explicitly recognised the linkages between the rights of communities and the management of the environment [Lafferty 1998:267].

The 1988 National Forest Policy (NFP) was the first "environmental" policy document in India that explicitly recognised the linkages between environmental and social concerns in terms of community rights to natural resources [Ghate 1992: 54]. Unlike the previous forest acts that privileged revenue and commercial interests, the NFP was strikingly different. Section 4.6 of the policy highlighted the symbiotic relationship between tribals and forests and the need to involve tribal communities in the management of forests. It also emphasised that domestic requirements of firewood, fodder and minor forest produce should be the first priority of forest management, not commercial or industrial

needs. In that sense, it signalled a definite change of approach and was an indication of what was to possibly come.

While broad-based sectoral policies outline the normative parameters in which specific government programmes should be located, in practice more immediate politico-economic and managerial concerns often have a bigger influence. As Sunder et al (2001: 13) highlight, a number of other factors (besides the normative thrust of the NFP) influenced the actual nature of forestry programmes soon after the NFP. The 1990 government order on joint forest management (JFM), while giving communities adjacent to reserved forests usufruct rights, was also aimed at improving the protection of forests. As Kolavalli (1995) has argued, citing a number of state-level government orders, JFM was the forest department's way to involve communities in the management of forests as it was incapable of doing it on its own. While proponents of JFM [Poffenberger and McGean 1996] often argue that it is far better than what preceded it, a number of other limits to JFM lend substance to the claim that social concerns have been imagined only in the context of "improved" environmental management [Sunder et al 2001]. First, until recently, usufruct rights were assigned mostly to degraded forest areas and thus forest protection committees (FPCs) were essentially getting access to forest produce in "degraded" tracts of land. Second, usufruct rights were assigned only to FPCs recognised by state forest departments. Third, JFM has remained a policy and has not been incorporated into the forest act. Thus, while the NFP recognised the symbiocity of forest dependent (tribal) communities with forests, rights afforded to these communities have been limited and often no more (sometimes less) than existing settlement rights.

In the case of the water sector and participatory irrigation management (PIM), the trajectory of policy pronouncements and legislative action have been different. Although mention was made in the 1987 National Water Policy (NWP) about farmers' involvement in various aspects of irrigation management and then the need for stakeholders' involvement in project-related irrigation management in the 2002 NWP, neither policy had a clear-cut mention of the specific responsibilities to be given to local communities [Iyer 2002]. On the other hand, as water is a state subject some state governments have taken legislative action to promote participatory irrigation management (PIM). In Andhra Pradesh, the Farmers' Management of Irrigation Systems Act, 1997 was passed whereas in Gujarat a government resolution was taken in 1995 [Parthasarathy 2002]. In different ways, both these statutory developments promoted water user associations (WUAs) to take over the management of distributaries (including charging for water use) in return for promises of improved supply.

The story with regard to the limits of the community rights discourse, however, has been broadly similar to that of the forest sector. The PIM was meant essentially to improve irrigation efficiency and thereby decrease wastage of water by empowering the community through the formation of WUAs. The main criticism of PIM too has been that communities have not been given adequate powers in terms of involvement in the planning process and that the devolution of power to user associations has been primarily a means to an end, namely, efficient water use [Jairath 1999], and that too primarily for irrigation purposes. Little has been said about allocating rights for drinking water and other domestic purposes [Mollinga 2002: 276]. Water access for the landless furthermore is completely absent from the discourse though it has been central to the debates around water rights. Finally, as Iyer (2002) has highlighted, the fixation with irrigated agriculture has meant that the 2002 NWP has no mention about watershed development in dryland areas.

Community Rights

Biodiversity conservation offers a third interesting case in terms of how questions of decentralised community rights to natural resources have been dealt with. In 2000, the ministry of environment and forests (MoEF) actually gave an NGO Kalpavriksh, the coordinating role in preparing a national biodiversity strategy and action plan (NBSAP) in consort with a 15-member Technical and Policy Core Group [Kalpavriksh undated(a)]. The report which took three years to prepare and involved consultations with thousands of people was meant to serve as a blueprint for biodiversity conservation. The recommendations in terms of strategies and actions that emerged in 2003 were extensive and elaborate. A significant section of the report highlighted the importance of local community rights to biodiversity and the dangers of an intellectual property rights regime that privileges corporate knowledge and private ownership (patenting). In terms of strategies, the report specified that "empowered local community institutions" should be the implementers of the plan. It would have appeared, therefore, that a good opportunity for decentralised natural resource management where communities were given rights to resources was on the anvil [Kothari 2004].

However, before the NBSAP was completed in 2003, the National Biodiversity Act, 2002 was passed. Although one of the explicit objectives of the act was the recognition of local rights to biodiversity, critical no doubt in the context of developments around intellectual property rights (IPRs), the act has been justifiably criticised for vesting most power with national and state biodiversity boards as had been the case with the Biodiversity Bill 2000 [Srinivas 2000; Kalpravriksh undated(b)]. Moreover, as others have already pointed out, the act is aimed primarily at addressing the concerns of industry [Srinivas 2000]. Although the National Biodiversity Act, 2002, does recognise the need for local biodiversity committees (BMCs), the actual powers given to these committees again are mostly managerial in nature. Under Section 41, these committees are constituted for "promoting conservation, sustainable use and documentation of biological diversity including preservation of habitats, conservation of land races, folk varieties and cultivars, domesticated stocks and breeds of animals and micro-organisms and chronicling of knowledge relating to biological diversity" [NBA 2004: 20]. What remains missing is any serious consideration of what the entitlements and rights of these committees are.

These three cases have a number of things in common. First, different policies, programmes and laws within particular sectors are often not in consonance with each other in terms of their normative position vis-à-vis community rights. For example, while the NFP has made some headway by recognisng tribal rights to forest produce, JFM as a programme has actually given limited usufruct rights to only those who are part of FPCs. Moreover, the Forest Act has remained unamended with no room for community-based forest management except in the context of village forests. In the case of water, some states have enacted laws supporting PIM while the cntre's policy document says little about it except in the context of "projects" The most striking example, however, is that of biodiversity where the

state asks an NGO to coordinate a technical group meant to prepare a strategic action plan and then deems the report to be unscientific – largely no doubt because the NBSAP poses difficulties for the Biodiversity Act. Second, the nature of rights "given" to communities clearly privilege managerial concerns foremost. Whether it be usufruct right to forest produce to entice communities to manage forests better, WUAs to improve efficiency of water use or biodiversity committees to generate local knowledge about biodiversity, the main aim is to help manage, regenerate or make more efficient the use of natural resources. Rights are at best subsumed in that discourse. Third, rights to resources are not envisaged as part of a broader strategy of livelihood enhancement that addresses critical concerns that plague rural India, namely, that of unsustainable livelihoods and high levels of underemployment.

Ironically perhaps, when leglislative steps are taken to address these above-mentioned concerns, they are derailed. In 1996, the Panchayat (Extension to Scheduled Areas) Act (PESA) was passed [Mukul 1997]. This act effectively gave tribal communities and tribal gram sabhas the power to oversee development within their jurisdiction and to act as a watchdog over possible government projects. Not only were gram sabhas given the power to preserve local culture and traditions, but also the power to prevent land alienation, and most importantly, the ownership over certain natural resources such as minor water bodies and minor forest produce. The STB similarly would empower tribal households considerably by giving them the ownership rights over cultivated lands that jurisdictionally are under the forest department. Seen together, they would go someway at least to address the concerns of tribal communities. But while PESA has either not been passed by state governments or not implemented by others [Upadhyay 2004a], the STB is being opposed tooth and nail in the name of the environment.

With this background in mind, what is the future of community rights in terms of policy specifically? Developments with regard to the draft NEP gives us some indication. The draft NEP, India's first national environmental policy, which should set the vision for the future has decentralisation, equity in access and participation as central priniciples. Mention is also made of universalising JFM, people's participation in conservation and community reserves and the need to recognise traditional rights of forest-dwelling tribes. However, few details are given with regard to how these principles are going to be operationalised, criticisms of existing policies such as JFM have not been taken aboard and no mention is made to PESA at all. Given the current state of most decentralisation co-management initiatives and the dilly-dallying approach to more progressive legislations, the future does not appear overly optimistic. The resolution of the controversy over the STB will give some indication whether this pessimism is warranted or misplaced.

Ideologies of Environmental Policies

How do we make sense of the manner in which policy is being formulated, at times diluted, finally framed and acted

upon? It would be too simple to just argue that social concerns are completely marginalised. While it is true that some policies such as protected area policies are almost totally exclusionary to the extent that communities have been forced out or "rehabilitated" outside the protected areas, the above discussion suggests that a number of steps have been taken to seriously address community rights even if they are inadequate or remain unimplemented. Rather, a more nuanced analysis is required. First of all, how the social content of environmental policy is operationalised is partly at least linked to the "legality" of the policy, i e, whether it is a national policy, a bill or a law. While policies are meant to chart out a vision for the future, they are more prone to be watered down either at the stage of writing the policy or in the implementation of the policy, most likely because it is written by bureaucrats and does not enter the arena of "democratic politics". In that sense, policies are most likely to be affected by wider development discourses that nation states such as India find themselves embracing. Bills and acts, on the other hand, as they are debated in Parliament appear to be more inclusive as politicians representing different constituencies have a better chance to influence its shape. Even bills and acts, however, are no guarantee that the law will be enforced. The watering down of the Biodiversity Act 2002 (given its own limitations) in the biodiversity rules is an example of this [Kalpravriksh undated(b)]. Moreover, the PESA Act is illustrative of how individual states can sabotage well intended acts [Upadhyay 2004a]. Much more scholarship is required to disentangle the legal differences between policies, bills and acts and the manner in which the "legal character" of the policy influences its outcomes.

One cannot escape, however, from the fact that all policies are being written, passed and acted upon in the context of a climate of neo-liberal development. Whereas the NFP 1988, drafted before the main onset of neo-liberal ideology, shifted the terms of discourse towards people's rights and village needs, the NWP, 2002 and draft NEP, 2004, are clearly embedded in an ideology that sees a community-based management of resources as a means towards good governance and market-based economic instruments (valuation, tradeable permits, polluter pays principle) as a tool to internalise externalities and a means towards future sustainable growth.

In the process, the state has clearly positioned itself in favour of certain actors at the expense of others. Though there is a line of argument that suggests the state's positioning is based on the valid concern that giving full ownership rights to communities is a recipe for the large-scale environmental degradation, the alternatives remain unclear. At present, most co-management strategies have not been successful exactly because the questions of tenure and rights have not been adequately grappled with. A more substantive rights package (if not full ownership) would not be tantamount to open access degradation as existing legislation guarantees that such rights must not be at the expense of sustainable use of resources. Furthermore, it is somewhat ironic that while the state is reluctant to give substantial rights to communities, the corporate sector is playing an ever more important role in the management of degraded wastelands and land reform legislations reworked to enable such processes [Nair 1996; Pandian 1996]. Another example of this ideological bias is the Biodiversity Act, 2002, which is much more friendly to industry than it is to local communities [Kalpravriksh undated(b)]. The draft NEP explicitly states that environmental legislation should not be at the expense of investments.

There are a number of worrying dimensions to these developments. First, the "mainstreaming" of community-based natural resource management in the form of co-management partnerships has located the discourse of rights almost exclusively in the domain of good management and consequently marginalised other normative concerns of equity and justice that rights discourses should address. Although managerial questions are no doubt important given concerns, for example, of biodiversity conservation and efficient water use, these must be considered in the context of enhancing rural livelihoods. By tying rights to good management, the latter concern is likely to be inadequately addressed. As worrying is the fact that in the meantime legislations are being watered down and reworked to open up for investment from the private sector.

Second, the movement towards a market-based ideology of environmental management is filled with dangers. What is worrying about this ideology is not the use of market-based instruments per se nor necessarily addressing corporate concerns but the context in which these developments are happening. Market-based instruments are only a tool (replete with methodological challenges) to address environmental concerns – they need to be situated in a framework that prioritise (or rank) different group (or individual) interests. In other words, it is one thing to "value" water to reflect its "true" price but quite another thing as to who should have priority to that water. Such concerns need more attention but policy documents are relatively silent on these concerns or stated priorities are not followed up. To make things worse, reference to the increasing role of the private sector, etc, suggests what these priorities might be in the future [Lele and Menon 2005].

A third major concern linked to the above is with the analysis in many policy documents. By focusing so much on economic instruments, one gets the impression that solving what the draft NEP calls the "deeper" causes of environmental degradation will adequately internalise environmental priorities. However, institutional or market failures, are often the result of political economy prerogatives as much as they are about market or institutional failures. India's forests were degraded over time less because they did not have market values and more because development priorities privileged commercial and industrial concerns. Similarly, as important as creating WUAs for irrigation management is charting out the priorities for the water sector. One is increasingly witnessing cases where private sector companies are exploiting water resources while adjacent communities are water starved. This does not bode well for meeting the needs of rural communities.

Conclusion

The above narrative suggests at one level that however well-intended policies and laws are, they get diluted in course of time – largely because of other developmental priorities. These priorities themselves have changed in the last 15 years or so with a movement towards a neo-liberal regime. Policies and law, as a result, are envisaged much more as ways to create the conditions for better management than as a means through which to uphold particular claims to resources or particular normative goals of development. Moreover, talk about decentralised natural resource management and community-based management initiatives need to be taken with a pinch of salt as these are loaded terms that often lack substance in practice. As a result, while

no doubt necessary to engage with and fight for the recognition of community and individual rights to land and other resources, one should be aware of the obstacles that are likely to be in the way given the priorities of the time.

The moot point then is what does the future hold in terms of environmental policy. If the past is anything to go by, the likelihood is that social concerns will continue to play second fiddle to the management of the environment. Yet, legal and policy spaces will continue to emerge through which proponents of an alternative vision of environmental management and development will launch their struggles. Such struggles must engage more deliberately with existing neo-liberal discourses of good governance and the market instead of shy away from them. Communities are already enmeshed in the market and located in geographical spaces that will eventually come into the gamut of good governance strategies. Instead of being swallowed up by these discourses as is currently happening, communities and those who speak for them need to help shape them instead. The market and good governance rhetoric are after all as bad or good as the ideological context in which they are located. EPW

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Notes

1 While environmental policies provide broad normative guidelines and principles to guide future action vis-à-vis the environment, environmental legislations are laws and bills that are statutorily enforceable.

2 See Mukul (1997) for discussion on the Panchayat (Extension to Scheduled Areas) Act, 1996 and Sarin (2005) for a discussion on the Schedules Tribes (Recognition of Forest Rights) Bill, 2005. Kothari (2004) and Upadhyay (2004b) discuss the recent draft National Environment Policy, 2004. Iyer (2002) discusses the National Water Policy, 2002.

3 When I talk about environmental policy-making I refer to both policies and legislations (acts and bills).

4 Although I differentiate between a policy and a legislation in the context of national policies, bills and laws, I do at times use policies in a more generic form to include all. This is to avoid repetitive use of the phrase environmental policies and legislation.

5 Good governance, as used in this paper, refers to both managerial issues related to institutions and valuation/pricing of natural resources.

6 Both the recent draft National Environment Policy and the Scheduled Tribes (Recognition of Forest Rights) Bill, 2005 have been criticised for privileging social concerns over environmental concerns.

References

Bhatia, B, N Sundar and V Xaxa (2005): 'Scheduled Tribes Bill 2005', *Economic and Political Weekly*, 40(43), October 22, p 4566.

Divan, S and A Rosencranz (2001): *Environmental Law and Policy in India* (2nd edition), Oxford University Press, New Delhi.

Ghate, R S (1992): *Forest Policy and Tribal Development: A Study of Maharashtra*, Concept Publishing House, New Delhi.

Iyer, R (2002): 'The New National Water Policy', *Economic and Political Weekly*, 37(18), May 4, pp 1701-04.

Jairath, J (1999): 'Participatory Irrigation Management: Experiments in Andhra Pradesh', *Economic and Political Weekly*, 34(40), October 2.

Jeffery, R (1998): *The Social Construction of Indian Forests*, Manohar Publishers, Delhi.

Kalpavriksh (a) (undated): 'Highlights of the NBSAP Report', http://www.kalpavriksh.org.

– (b) (undated): 'The Biological Diversity Act 2002 and Rules 2004: Concerns and Issues', http://www.kalpavriksh.org.

Kolavalli, S (1995): 'Joint Forest Management: Superior Property Rights?', *Economic and Political Weekly*, 30(30), pp 1933-38.

Kothari, A (2004): 'Draft National Environment Policy 2004: A Critique', *Economic and Political Weekly*, 39(43), October 23, pp 4723-27.

Lafferty, W M (1998): 'The Politics of Sustainable Development: Global Norms for National Implementation' in J S Dyzek and D Scholsberg (eds), *Debating the Earth: The Environmental Politics Reader*, Oxford University Press, London.

Lele, S and A Menon (2005): 'Draft NEP 2004: A Flawed Vision', *Seminar*, 547, March, pp 55-62.

Mollinga, P (2002): 'Power in Motion: A Critical Assessment of Canal Irrigation Reforms in India' in R Hooja, G Pangare and K V Raju (eds), *Users in Water Management*, Rawat Publications, Jaipur.

Mukul (1997): 'Tribal Areas: Transition to Self-Governance', *Economic and Political Weekly*, 32(18), May 3, pp 928-29.

Nair, Janaki (1996): 'Predatory Capitalism and Legalised Landgrab: Karnataka Land Reforms', *Economic and Political Weekly*, 31(5), February 3, pp 251.52.

Pandian, Anand (1996): 'Land Alienation in Tirunelveli District', *Economic and Political Weekly*, 31(5), December 21, pp 3291-94.

Parthasarathy, R (2002): 'Comparing Gujarat with Andhra Pradesh: Reforms in Irrigation Management and People's Participation' in R Hooja, G Pangare and K V Raju (eds), *Users in Water Management*, Rawat Publications, Jaipur.

Poffenberger, M and B McGean (1996): *Village Voices, Forest Choices: Joint Forest Management in India*, Oxford University Press, New Delhi.

Sarin, M (2005): 'Scheduled Tribes Bill, 2005: A Comment', *Economic and Political Weekly*', 40(21), May 21, pp 2121-34.

Srinivas, K R (2000): 'Biodiversity Bill: Nice Words, No Vision', *Economic and Political Weekly*, November 4, pp 3916-19.

Sundar, N, R Jeffery and N Thin (2001): *Branching Out: Joint Forest Management in India*, Oxford University Press, New Delhi.

Upadhyay, V (2004a): 'Tribal Self-Rule Law and Common Property Resources in Scheduled Areas of India – A New Paradigm Shift or Another Ineffective Sop?' paper presented in the *The Commons in an Age of Global Transition: Challenges, Risks and Opportunities* organised by the International Association for the Study of Common Property (IASCP) at Oaxaca, Mexico, August 9-13.

– (2004b): 'National Environment Policy 2004: A Critique of the Draft', *Economic and Political Weekly*, 39(39), September 25, pp 4306-08.