'Reality and the Law Seldom Meet'

A Critique of the Supreme Court Judgement on the Narmada Dam

The law came to depopulate your sky
to seize your revered fields
to debate the river's water
to steal the kingdom of trees.
Your blood asks, how were the wealthy
and the law interwoven? With what
sulphurous iron fabric? How did the
poor keep falling into the tribunals?

– Pablo Neruda, Canto General

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In 1979 when the Narmada Water Disputes Tribunal settled what it thought was just a dispute between states, the people of the Narmada Valley have been trying to say that they have a dispute too. They dispute the right of the state to make decisions on their behalf without consulting them, to displace them without rehabilitating them, to ruin the river and kill the fish, to silt the land and submerge the forests. Some six years ago, they even disputed the idea that the courts were only for the rich and the powerful and thought they too were a part of the 'public', whose 'interest' mattered. They took their dispute with the government to the Supreme Court, hoping to be awarded, not just a share of the Narmada waters, but justice itself. The Court, in its infinite wisdom, said this was one dispute too many. Once the government had decided, there was nothing more to be said. And with that the justices went to bed.

The struggle against the Sardar Sarovar dam on the Narmada began in 1980 with the formation of the Nimad Bachao Andolan. Soon after, a Gujarat NGO, Arch-Vahini raised the issue of adequate rehabilitation for those being displaced ('oustees') and demanded land for them in exchange for the land they were losing. An environmental organisation, Kalpavriksh, prepared a report pointing to the adverse environmental impacts of the project in 1983. However, systematic struggle began only in 1986-87, with the Maharashtra oustees forming the Narmada Dharangrast Samiti, demanding full information about the likely displacement, the cost-benefit and the resettlement plan. Displaced people from Gujarat, Maharashtra and Madhya Pradesh came together, initially under different banners, but eventually under the Narmada Bachao Andolan (NBA). Since 1988, there have been a series of rallies, demonstrations, satyagrahas, attempts to talk with the Narmda Control Authority - the body responsible for implementing the project, politicians representing the area, governments at all levels, and the World Bank which sanctioned a huge loan for the project in 1985. Somewhere along the way, noting the experience of other dams, the unavailability of land and the seeming impossibility of rehabilitation, as well as the potentially huge environmental destruction, opposition also crystallised into an alternative model of development, which had no space for large dams.

In 1994, the Narmada Bachao Andolan filed a comprehensive writ petition in the Supreme Court, regarding the Sardar Sarovar dam on the Narmada. They estimated that several lakh people were going to be affected by the dam – while many would have their homes and lands submerged directly by the reservoir, others would lose their land to canals or to compensatory afforestation; and fishing communities, artisans and other non agriculturists within the submerged communities would lose their livelihoods. They pointed to gross violation of the terms for resettlement and rehabilitation that had been defined in the 1979 Tribunal award which had laid down that people must be rehabilitated at least a year before submergence. Equally importantly, they pointed to the fact that little or no studies had been conducted on the environmental impact of the proposed dams on the Narmada – the flora and fauna that would be submerged, the seismic effects, the impact on the catchment area and command area in terms of siltation and waterlogging, the health impacts etc. The NBA asked for a review of the project based on independent and transparent studies, and at the very least, for an independent authority to monitor whether people who were being displaced were in fact being properly rehabilitated.

When the judgement was finally delivered on October 18, 2000, it was a divided one. The majority judgement, by Justices Kirpal and Anand essentially argued that there was very little wrong with the project as conceived or implemented, and directed the Narmada Control Authority to oversee rehabilitation, a task which it was always meant to carry out but hadn't in the past. Justice Bharucha's minor-

ity judgement, on the other hand, noted that there had been a grave lapse in terms of environmental clearance. Yet, it is the majority judgement which stands and which has allowed construction to start immediately, raising the dam's height to 90m. The final height of the dam is expected to be 139 m.

This majority judgement is a remarkable document for several reasons. Not only will it stand out as one of the great anachronistic judgements of the 21st century in its approach to questions of governance, the environment and human rights, but it also sets new standards of legal acumen, in which facts and logic are at a premium.

This report is a critique of the judgement and its findings. The report extensively quotes from the judgement, both the majority and the minority. Citation from the majority judgement is indicated through page numbers only.

I
The Judgement's History of the Project

The judgement begins by laying out a history of the project; perhaps with the aim of showing the several stages through which it passed before it was finally cleared. The idea of developing the Narmada basin was first mooted by the Government of the Central Provinces and Berar (now Madhya Pradesh) and the Government of Bombay (now Maharashtra) in 1946. The studies for this were conducted in the 1950s. Even in 1963, however, Madhya Pradesh (M.P.) was proving reluctant and refusing to ratify an agreement, which fixed the height of the dam at the full reservoir level of 425 feet. A high level committee under A.N. Khosla (who had first recommended the project in 1948) was appointed to break the stalemate, but disputes continued. The Narmada Water Disputes Tribunal (NWDT or Tribunal) was appointed in 1969 and although M.P. initially challenged its jurisdiction, it finally compromised in 1972. The Tribunal gave its final award in 1979. A World Bank loan was sanctioned in 1985, and on 24 June 1987, the project was given environmental clearance. Construction started in 1987; in 1988 the Planning Commission sanctioned an investment of Rs. 6406 crores. In 1990, B.D. Sharma's report as Commissioner for Scheduled Castes and Scheduled Tribes was filed in the Court and treated as a writ petition on rehabilitation, after which the Court intervened by asking a five member group of experts to investigate. In 1994, the Narmada Bachao Andolan (NBA) filed its writ petition (W.P.(C) No. 319 of 1994).

While all histories are necessarily selective, the Supreme Court's account of the course of the project is particularly so. For instance, it neglects the presumably 'minor' fact that work on the project had begun from 1980 onwards, a huge loan had been taken from the World Bank (US $450 million), and people had been displaced, much before the project had been given environmental clearance. Most importantly, it ignores the long history of the NBA as a people's movement, the enormous amount of support it has gathered from a wide range of groups and classes, and reduces the entire struggle to a couple of lines on 'agitation by interested parties'. This makes the NBA sound like a contending contractor who has missed out on a good deal.

II
Back to the Beginning: The Definition of 'Independent'

When the Tribunal gave its award in 1979, it constituted an Inter State Administrative Authority, the Narmada Control Authority (NCA), 'to ensure compliance with and implementation of the decisions and directions of the Tribunal.' It also formed a Review Committee consisting of the Union Minister for Irrigation (now Ministry of Water Resources) as chair, and the Chief Ministers of Gujarat, M.P., Maharashtra and Rajasthan as members (see box *The Narmada Authorities*). Since the Tribunal was constituted in response to an inter-state water dispute, presumably it was thought that the chief ministers of the different states would balance and monitor each other. Presumably, it was also thought that the governments of each state would be sufficient to represent the people of that state, con-

trary to what governments the world over and organisations like the World Bank have now begun to accept at least in theory, and therefore there was no representation for affected people or 'stakeholders'.

In response to criticisms of its' functioning, both from within and outside the government, the NCA had been forced to set up different sub-groups. For instance, under a Supreme Court directive, in response to the writ petition by B.D. Sharma in 1990, the Rehabilitation sub-group of the NCA, under the Secretary, Ministry of Welfare, was directed to form a committee to monitor rehabilitation in the field. The Environment sub-group, chaired by the Secretary, Ministry of Environment and Forests, was formed as an essential condition of the environmental clearance given by the MoEF, to ensure that environmental safeguards would be implemented. In other words, the NCA on its own was not doing the job it was meant to do by the Tribunal.

Since even the sub-groups were not doing their work properly, the Supreme Court has been forced to order the setting up of Grievance Redressal Authorities (GRA) headed by retired justices to monitor rehabilitation in each of the three states. As the Minority judgement states:

> "The many interim orders that this Court made in the years in which this writ petition was pending show how very little had been done in regard to the relief and rehabilitation of those ousted. . . Having regard to the experience of the past, only the Grievance Redressal Authorities can be trusted by this Court to ensure that the States are in possession of vacant lands suitable for rehabilitation" (pg. 28)
>
> "Only by ensuring that relief and rehabilitation is so supervised by the Grievance Redressal Authorities can this Court be assured that the oustees will get their due." (pg. 29)

Evidently, if the NCA had been functioning properly, there would have been little need for the Court's intervention to set up sub-groups or alternate monitoring authorities like the GRAs, and there would have been no need for the NBA to file its petition. Despite this, the Majority judgement concludes, "There is no reason now to assume that these authorities will not function properly. In our opinion the Court should have no role to play" (pg 165) and in its directions entrusts all future monitoring of rehabilitation and the environment to the resettlement and rehabilitation (R&R) and environment sub-groups respectively. It is on their recommendation that further construction can be cleared. The GRAs are only to be consulted by the R&R sub-group, and

The Narmada Authorities

Review Committee

Composition: Union Minister for Water Resources (chairperson), Chief Ministers of M.P., Gujarat, Maharashtra and Rajasthan.

Jurisdiction: Review decisions of NCA.

Narmada Control Authority

Composition: Secretary, Ministry of Water Resources (chairperson), secretaries of the ministries of Environment and Forests, Water Resources and Welfare, and chief engineers.

Jurisdiction: Overall coordination and execution of the dam project. Has various sub-groups for specific operations.

R&R Sub-Group

Composition: Secretary, Ministry of Welfare (chairperson), officials and engineers from the state governments.

Jurisdiction: Monitoring of R&R and granting of clearance before further submergence.

Environment Sub-Group

Composition: Secretary, Ministry of Environment and Forests (chairperson) and officials and engineers from the state governments.

Jurisdiction: Monitoring of environmental impact and granting of clearance before further submergence.

Grievance Redressal Authorities

(one for each of the affected states)

Composition: Retired judge of the High Court (chairperson) and machinery provided by the state government.

Jurisdiction: Entertain and investigate complaints of oustees. Recommend to the NCA and Review Committee.

have no veto power. The NCA, which has failed to draw up an action plan for the last decade or more, is asked to draw up an action plan for further construction and simultaneous rehabilitation in the next four weeks (see Annexture, "Direction of the Majority Judgement, No.7). And finally, should there be disagreements in the Review Committee, i.e. for example, should M.P. refuse to co-operate despite having been reprimanded by the Court, the matter is to be referred to the Prime Minister, whose judgement is to be binding.

The above orders of the judgement raise serious questions. Firstly, by validating the role of the NCA as the final body, the Court has deliberately sought to disregard the criticisms regarding its functioning, which have resulted in serious violation of rights of the displaced people.

Secondly, it has refused to allow the oustees any legal right to question the building of the dam.

Thirdly, it has introduced a significant change from past practice in allowing the Prime Minister to have the final say in case of a serious disagreement within the Review Committee. Prime Ministers, as individuals, have no such power in the constitutional scheme. Further, Prime Ministers in our country have tended to be partisan to states where their party rules. The Home Minister, L.K. Advani, for instance, has gone on record as saying that the decision to construct the dam in favour of the Gujarat government has been one of the biggest victories of his government (the Union government). This decision alters the balance sought to be created between states through the NCA and the Review Committee that the Tribunal had envisaged. Now, under orders from the Court to co-operate with Gujarat, any countervailing power that M.P. might have had, has gone.

In addition, the judgement maintains that "There is no basis for contending that some outside agency or National Human Rights Commission should see to the compliance of the Tribunal Award" (pg. 131). This is because the court assumes the NCA and the GRAs are independent bodies. The Court's idea of an independent body, which can monitor rehabilitation or environmental issues, is hard to fathom, when it says, "it is not possible to accept that Narmada Control Authority is not to be regarded as an independent authority. Of course some of the members are government officials but apart from the Union of India, the other States are also represented in this authority." (pg. 130) The most charitable interpretation is that since it represents all the states and the Government of India, it is independent of any one state. However, given that the same body is also responsible for implementing the award including construction of the dam, there is a clear conflict of interest when it comes to monitoring its own lapses. In fact, even the GRAs in the three states are not 'independent', since they were not appointed by the Court but by the governments of the respective states. As retired justices, the chairmen of the GRAs do not have independent judicial power.

For some reason, the Court has gone much further to state that there is also no need for the National Human Rights Commission (NHRC) to monitor rehabilitation. Elsewhere in the judgement, the Justices argue that "Where there is a valid law requiring the government to act in a particular manner the Court ought not to, without striking down the law, give any direction which is not in accordance with law." (pg. 167-168) The NHRC was formed and obtains its mandate from the Protection of Human Rights Act, a valid law. It has not been struck down by the present judgement. Its provisions require the NHRC to take cognisance of, investigate, and issue recommendations in cases of violation of rights of citizens. The denial of proper rehabilitation to SSP oustees is one such violation. It is hard to see, therefore, any grounds on which the Court can fetter the NHRC's jurisdiction over such human rights violations in the future.

If the Court had no role to play and the NCA and its sub-groups were competent to begin with, *following its own logic when accusing the NBA of laches* (see next section), the Court has been guilty of significant delay in coming to this decision.

III
Duties of the Petitioner Role of the Court

The first issue here concerns the question of policy. The majority judgement starts with casting aspersions on the character of the petitioner organisation on the grounds that it is solely an anti-dam organisation. "As far as the petitioner is concerned, it is an anti-dam organisation and is opposed to the construction of the high dam" (pg. 32). Therefore the petitioner's intention in approaching the Court does not concern the well-being of people or the national interest, but some abstract politics of 'anti-dam'. The petition filed by it therefore is described as a "publicity interest litigation" or a "private inquisitiveness litigation". This suggestes that the Court unquestioningly accepts the respondent's views regarding the NBA, since there is no other basis in the judgement to justify such a view. In short, it helps the Court to dismiss the crucial points raised by NBA on the policy decision on account of NBA's imagined politics.

As for itself, the Court rules out any role in the matter. Policy decisions, the judgement states, fall wholly in the purview of the government. "In a democratic set up, it is for the elected Government to decide what project should be undertaken for the benefit of the people." (pg. 171) And the government is assumed to have taken such decisions "after due care and consideration" keeping in mind the "welfare of the people at large, and not merely a small section of the society" (pg. 168). Thus, the court concludes with several remarks on the need to trust government. The Court cannot be asked either to formulate policies or to review them.

If the Court is right and our government is always right, then presumably much of the work of the press, academic institutions or people's movements in suggesting new policies, or challenging existing ones is redundant. Never mind also that ideas about governance have altered significantly in the last two decades and that simply being elected no longer entitles any government to make policies entirely on its own without consulting the people who will be affected.

Therefore in the context of this petition the honourable Justices state: "it was only the concern of this Court for the protection of the fundamental rights of the oustees under Article 21 of the Constitution of India which led to the entertaining of this petition," (pg.35). The petition regarding all the other issues such as environmental clearance, hydrology etc. was "highly belated" (pg.35). However, the only Judge to have been on the bench since its inception, Justice Bharucha, disputes this and notes in his minority dissent that although rehabilitation was the main concern, the Bench always intended to look at other issues. (minority judgement, pg. 28). It may be noted that the 'non-intervention' in policy decisions is not a consistent position of the Court. Its judgements on removal of slums, decision to ban tree felling in the North East and in Madhya Pradesh, despite applications by the concerned states, not only direct policy implementation, but also formulate policy issues. It can only be inferred that the Court's stand on "policy matters" is one of convenience.

However, the Court permits its intervention to ensure that the "system works in the manner it was envisaged" (pg. 164) and the "protection of fundamental rights of the oustees under Article 21" (pg. 35). Even within this limited sphere, the Majority judgement fails to uphold its concern. Environmental clearance is one such area since right to a healthy environment has been deemed by the Court to be a part of the fundamental right to life. Notwithstanding this settled position, the judgement states that " the pleas relating to... environmental studies and clearance... cannot be permitted to be raised at this belated stage" (pg. 34). Also, environmental clearance is concerned with the government's violation of its own policies. As Justice Bharucha's Minority judgement makes evident, the Government of India had a policy on environmental clearance, which was not met (see next section).

A second issue concerns delay in filing the petition. NBA is criticised for approaching the

Court eight years after its existence.

> "It has been in existence since 1986 but has chosen to challenge the clearance given in 1987 by filing a writ petition in 1994... In our opinion the petitioner which had been agitating against the dam since 1986 is guilty of laches in not approaching the Court at an earlier point of time" (pg.33).

Here the Court loses sight of its own assertion that policy decisions are the sole purview of the government. Since NBA was disputing not just the lack of implementation of rehabilitation, but also the policy decision to build such a large dam given the potential costs, the NBA was right to take its protest to the government first and not to the court.

It was only when it became evident that the construction of the dam involved ongoing violation of human rights in terms of rehabilitation, and that the project itself was being executed without sufficient environmental data that NBA took the case to court, asking for an independent review. As mentioned before, these were by then as much questions of improper implementation of a given policy as questions regarding the policy itself. Given that knowledge about policy decisions is rarely available to the public and that the general public only gets to know about such projects when work on them begins, it is hard for them to challenge the decisions beforehand. If at all the idea that those affected by a project should be informed beforehand has gained any currency in planning, it is only because of organisations like NBA, which have fought for the right to information.

The role of the Court in this context of construction on the projects having started and costs incurred is summed up in the judgement:

> "The court, no doubt has the duty to see that in undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution. Even then any challenge to such a policy decision must be before the execution of the project is undertaken. Any delay in the execution of the project means over run in costs, and the decision to undertake a project, if challenged after its execution has commenced, should be thrown out *at the very threshold* on the grounds of laches if the petitioner had the knowledge of such a decision and could have approached the court at that time." (pg.166, italics ours)

The Court's role then is to ascertain if expenditures have been incurred, and if so to reject the petition at the outset. If this were the settled position, as the judgement seems to argue, then one must ask why it entertained the NBA petition at all. And having entertained it, why was the matter was allowed to hang in the court for six long years?

Closely connected to the above are uncalled for comments on the concept of the Public Interest Litigation which allows any citizen of our country to struggle against the denial of rights for any other citizen or group of citizens.

> "When such projects are undertaken and hundreds of crores of public money is spent, individuals or organisations in the garb of PIL cannot be permitted to challenge the policy decision after a lapse of time." (pg. 34).

The idea that Public Interest Litigation (PIL) cannot be filed after 'hundreds of crores of public money have been spent' places the onus of wasting money on those filing the PIL. In fact, however, it is clear that the responsibility for wasting public money lies entirely with the government, which even signed a loan agreement with the World Bank in 1985, before clearance had been given (in 1987). Tenders had been floated, contracts awarded, families displaced to build a dam colony - all this without environmental clearance.

In any case, if an issue is sufficiently important and can have a lasting adverse impact on the environment, the fact that money has already been spent should not be allowed to stand in the way of a fresh consideration. Indeed, as Justice Bharucha notes in his dissent:

> "When the writ petition was filed the process of relief and rehabilitation, such as it

was, was going on. The writ petitioners were not guilty of laches in that regard. In the writ petition they raised other issues, one among them being related to the environmental clearance of the Project. Given what has been held in respect of environmental clearance, when the public interest is so demonstrably involved, it would be against the public interest to decline relief only on the ground that the Court was approached belatedly." (Pg. 30)

However, at every stage, including when the Ministry of Water Resources pressed for environmental clearance in 1987 (minority judgement, pg. 9), the fact that bad money has been spent has been used to justify throwing good money after it.

IV
Environmental Clearance

NBA's plea was that construction on the Sardar Sarovar project had been started without the necessary environmental studies on project impact and mitigating measures being carried out. The decision to construct the dam was a political one and not a considered decision based on an appraisal of the facts. As the minority judgement makes clear, and a close reading of the majority judgement's timeline of events also reveals, this was substantially correct. The majority judgement however, through a remarkable sleight of hand, has chosen to translate a repeated concern over the *lack* of environmental data as evidence of 'deep concern with the environmental aspects of the Narmada Sagar and Sardar Sarovar projects", and from this conclude that "(h)ence it is not possible to consider the plea that environmental clearance was given without application of mind." (pg. 70-71). Evidently the concern was not deep enough to stop the project altogether. This is quite apart from the fact that it is hard to imagine an application of mind when there was little data to apply mind to.

Let us go merely by the Court's version of events: In January 1980, the Government of Gujarat (GOG) submitted a report in 14 volumes to the Central Water Commission (CWC) dealing with various engineering aspects. The CWC referred the project to the Department of Environment, which in turn sent the GOG a checklist of issues on which they needed information. GOG submitted a variety of studies from 1980 to 1983, but in 1984, a meeting convened by the Ministry of Water Resources (MoWR) and attended by a representative of the Department of Environment emphasised the need for more intensive studies. A Committee was set up in 1984 to assess catchment area treatment, which submitted its report in 1985.

In October 1986 the MoWR sent to the Ministry of Environment and Forests (MoEF) a note on the environmental aspects of the two projects noting "the urgency of the decision". It enumerated all that was still to be done, including: a detailed survey of the population to be affected in M.P. by Narmada Sagar (estimated to take three years), Maharashtra to prepare a detailed rehabilitation plan for 33 villages under Phase 1 of SSP (estimated to take three years), and M.P. to identify degraded forest lands twice the forest area to be submerged for compensatory afforestation. Studies of wildlife and flora were estimated to take two years each. More damning details on what the note said regarding environmental studies are revealed only in Justice Bharucha's minority judgement:

> "In respect of the flora and fauna, it said: 'Quantified data not yet available.' In respect of the possibility of soil erosion from the catchment leading to excessive siltation of the reservoirs, it said, 'Extent of critically degraded areas needing treatment to be identified . . . While some plans have been made, studies undertaken and action initiated, it will be clear from the preceding paragraphs that much still remains to be done. Indeed it is the view of the Ministry of Environment, Forests and Wildlife that what had been done so far whether by way of action or by way of studies does not amount to much, and that many matters are as yet in the early and preliminary stages.'" (minority judgement, pg. 7-8)

The Majority judgement conveniently omits some of the more revealing parts of the correspondence. According to the material in the Minority judgement, another note, a month later (November 1986) prepared by the same ministry (Water Resources) stated that:

> "considering the fact that the basic data on vital aspects was still not available there could be but one conclusion, that the project(s) are not ready for approval." (Min Judgement, pg. 12; see also pg. 16-17).

Despite this, however, postponement of the decision seemed to the MoWR, 'scarcely conceivable' given the work that had already been done, and the increase in costs that postponement would involve, (as mentioned before using bad money spent to justify good money). Therefore, the MoWR considered two options in its note:

> "one to postpone the clearance and the other was to clear it with certain conditions with appropriate monitoring authorities to ensure that the action is taken within the time bound programme." (Majority judgement, p. 61, Minority judgement, pg. 9)

A further month later (19 December 1986) another note was sent to the Prime Minister's office (PMO), this time by the MoEF,

> "taking note of the fact that the project formulation has been in progress for more than three decades and the active interaction of the project authorities with the Department of Environment has been going on for almost three years, the absence and inadequacy of data on some important environmental aspects still persists." (Min judgement, pg. 16)

So much for the Court's argument that since the project had been under consideration by high-powered bodies over the years, they must have been doing their job (pg. 92). Evidently at least one of these high-powered ministries felt that despite its sustained interaction with the project authorities, it had not been able to do its job and get the necessary data.

In its December 1986 note, the MoEF had suggested that if

> "despite the meagre availability of data and the state of readiness on NSP, the Government of India should decide to go ahead with the project, ...it should do so only on the basis of providing a Management Authority....with the hope that the public opposition not just by vested interests but by credible professional environmentalists, can be overcome.....The choice is difficult but a choice has to be made." (pg. 64)

It also said that it was not too late to modify some of the parameters of the SSP and NSP to reduce environmental damage. (minority judgement, pg. 16).

Since the two ministries could not agree, the matter was referred to the Prime Minister (PM). His office noted in the file that the project had been pending clearance for the last 7 years and clearance was keenly awaited by the Chief Ministers of Gujarat and M.P. The PM's response was to note that perhaps this would be "a good time to try for a River Valley Authority. Discuss" (pg. 67). The Chief Ministers of Gujarat, M.P. and Maharashtra were then invited to Delhi to discuss setting up a River Valley Authority, in order to expedite clearance. In language reminiscent of the colonial discourse on activists in the freedom movement, the PMO noted "interested parties are likely to start an agitation and it is better if clearance is communicated before mischief is done by the interested parties." (pg. 68) While a River Valley Authority was eventually not found feasible, evidently the chief ministers were able to persuade the PM, and in April 1987, a press release noted that **at the meeting of chief ministers and the PM, clearance had been granted**. (pg 67-70)

It should be clear from the above account that when clearance was ultimately given, it followed a political meeting, and was not based on the detailed opinion of the MoEF, which was responsible for granting clearance. Indeed, as Justice Bharucha points out, the MoEF abdicated in its responsibility, by passing the decision on to the PM (minority judgement, pg. 5).

The Right to Challenge the Tribunal

Indeed, not just the environmental clearance granted in 1987, but some of the initial assumptions of the project seem to have been finally determined only on political grounds rather than technical ones. The height of the dam at 455 ft has been fixed on the basis of 28 million acre feet (MAF) of water being available in the Narmada for 75% of the year. Madhya Pradesh had pleaded for a lower height as this would reduce the number of people displaced.

When the Narmada Water Disputes Tribunal was constituted in 1969, initially the Govt. of M.P. challenged its very existence. Fortunately for the Tribunal, in 1974, there was a formal agreement among the chief ministers of M.P., Maharashtra, Rajasthan and the Advisor to the Governor of Gujarat "on a number of issues which the Tribunal would otherwise have had to go into." (Maj. Judgement, pg. 13). One of these issues was the fixing of the available volume as 28 MAF in deciding allocation. The Tribunal gave its award in 1979, in which this aspect (28 MAF) was made non-reviewable. Closing it off to review would make sense only if the decision was essentially political, in response to an inter-states dispute, to prevent the dispute continuing. Other clauses can be reviewed after 45 years. One of NBA's contentions, as well as that of two members of the 4 member group (originally 5) constituted by the Supreme Court in 1993, is that the river only contains 23 MAF or less.

The Court has throughout proceeded on the assumption that the Narmada issue continues to be an inter-state water dispute.

> "Once the Award is binding on the States, it will not be open to a third party like the Petitioners to challenge the correctness thereof. ....We therefore, do not propose to deal with any contention which in fact seems to challenge the correctness of an issue decided by the Tribunal." (pg. 37)

However, ever since the public began questioning the project, the dispute is no longer just one between the states but between the government and the people. Since the affected people were never party to the decision, their right to challenge the decision cannot be taken away. If the determination of available quantity was made on political grounds, as appears from a reading of the above paragraph, any contemporary notion of justice requires that people be able to also challenge it on political grounds, such as the right to life.

On the other hand, if the determination of available water as 28 MAF had been arrived at on scientific grounds, there should have been no reason why it should not be open to review, as falsification and the incorporation of new data is intrinsic to science. The estimate of 28 MAF was done by correlating rainfall and runoff data over a limited number of years, and using rain gauges which are now obsolete. With more long term rainfall data and better instruments, the available quantity is no more than 23 MAF (M.P. Govt. suit in Supreme Court, 98.3.99, O.S. No. 1 of 1999).

Interpretation of the Conditions for Environmental Clearance

According to GOG, the conditions imposed by MoEF in the environmental clearance granted on 24 June 1987 were: (a) that the NCA would ensure that the environmental safeguard measures are planned and implemented *pari passu* (with equal speed or progress) with the progress of work on the project; (b) that detailed studies would be carried out as per schedule; and (c) that the catchment area treatment programmes and rehabilitation plans be so drawn so as to be completed ahead of reservoir filling. (pg. 72)

The first condition, according to the GOG would be met by the standard administrative solution, i.e. setting up a committee to oversee this. Accordingly, the environment subgroup of the NCA was set up. The second condition will be dealt with in a later section, "Attitude to Research". However, it is their understanding of the third condition, (the Court accepts the GOG's interpretation), which displays the most cynicism. They interpret it to

mean that only the drawing of the plans needed to be complete before reservoir filling, and that implementation could be done simultaneously (*pari passu*) with the construction of the dam (pg. 80-81). As Justice Bharucha points out, the wording of the clause was clearly designed to ensure that rehabilitation and catchment area treatment was *completed, before* impoundment (filling of the reservoir) began.(minority judgement, pg. 23-24).

It is important not to forget here that we're talking of the rehabilitation of real people, for whom *pari passu* rehabilitation would effectively mean being trucked out just shortly before the flood waters rise and drown their homes. This would also mean that they would then have little bargaining power. Perhaps, as Aswini Bhatt, the Gujarati writer has said, one should be grateful that the Court has allowed the oustees to drown *pari passu* with the construction of the dam, unlike Morarji Desai who is reputed to have told the oustees of Pong dam in the 1960s that: "It will be good if you move before construction begins. Otherwise we will construct the dam and drown you all."

In response to the NBA plea that environmental clearances had lapsed, the GOG clamed that since "(n)one of these conditions were linked to any concrete time frame", there was no question of the clearances lapsing (pg. 72-73). Never mind that the construction of the dam and the rising of the waters provide the concrete time frame. Once again, an exchange of letters between the NCA and the MoEF over the *lack* of safeguards, and promises of action to be taken, is read by the Supreme Court as evidence that MoEF was closely involved and therefore clearance had not lapsed. (pg. 73-81)

Cost-Benefit Analysis when Costs are Unknown

In December 1986 when the MoEF sent the PMO a note, it provided an estimate of the costs and benefits in which costs such as loss of forests, catchment area development, loss of minerals, diversion of railway line and even population affected by SSP – were all marked as unknown. (pg. 64-65). In the same note, the MoEF stated that it was not possible to estimate the costs of loss of habitat on the wildlife and the overall loss of biological diversity and genetic reserves, since no studies existed, and even if it were to be assumed that these forests had no genetic resources

> "the simple loss of these forests would have an environmental cost estimated at several thousand crores of rupees as per norms developed by FRI (Forest Research Institute). The environmental cost is thus colossal" (minority judgement, pg. 16).

Leave alone the cost to the country as a whole, the costs even to an individual family are not estimated when fixing compensation. Despite the known importance of common property resources like forests or grazing grounds to the survival strategies of villagers, especially in tribal areas, and despite the fact that economists like N.S. Jodha have been able to put quantitative figures to this since the 1980s, common property resources have not been calculated or provided for in the new resettlement sites. The cost to a country of a government which relies on non-existent or doctored figures in making its cost-benefit analysis is incalculable.

Administrative Formality or Statutory Requirement?

According to the Majority judgement, when the CWC referred the project to the Department of Environment in 1980, "At that point of time, environment clearance was only an

Humanitarian Need *OR* Human Fencing

It appears that the plan to extend water to Kutch and Saurashtra was initially designed not on humanitarian grounds but to create human fencing against Pakistan. The Khosla committee report, submitted in 1965 envisaged extending water "to the arid areas along the international border with Pakistan both in Gujarat and Rajasthan to encourage sturdy peasants to settle in these border areas (later events have confirmed the imperative need for this)." (quoted in majority judgement, p. 8).

administrative requirement." (pg. 53). Environmental clearance became a legal requirement only under Section 3 of the Environmental Protection Act (EPA) that was passed in 1994. (pg. 97)

In contrast the Minority judgement points out (pg. 2) that in 1985, MoEF had issued guidelines for environmental impact assessment of River Valley Projects. The guidelines contained the necessary data that was to be collected and a chart of the impact assessment procedure. In other words, it was not just an administrative requirement, and even if it was, the requirement was not met:

> "An environmental clearance based on next to no data in regard to the environmental impact of the Project was contrary to the terms of the then policy of Union of India in regard to environmental clearance and, therefore, no clearance at all." (minority judgement, pg. 22).

The claim that the EPA could not be applied retrospectively (Maj. Judgement, pg. 100) has not prevented the Court from treating environmental considerations as part of Art 21 or the right to life, in cases where the environment has been pitted *against* workers or forest dwellers. Thus Delhi industries were relocated on environmental considerations, causing unemployment of over a lakh of workers despite the fact that the industries had been established decades before the EPA. Similarly, villagers in national parks and sanctuaries are evicted despite the fact that they may have been there even before the parks were notified. The NBA counsel also pointed out decisions by other countries to apply environmental acts retrospectively (e.g. the Tennessee Valley Authority v. Hiram G. Hill where the US Supreme Court stopped dam construction in an advanced stage after it was shown that a small fish would be endangered, and this would violate the Endangered Species Act). However, rather than looking at the substantive issue this raised, the Justices responded with recourse to yet another technicality, that there was no such act in India on endangered species, and anyway, there were no endangered species in the area to be impounded. (pg. 99)

Onus of Proof and the 'Precautionary Principle'

NBA had contended (relying upon AP Pollution Control Board vs. Prof. M.V.Nayadu 1992 2 SCC 718) that the onus to prove that there would be no environmental damage lay with the person who wanted to change the status quo with respect to the environment - the NCA in this case (pg. 93). The logic for shifting the onus of proof derives from the 'precautionary principle'. The precautionary principle applies to implementation of projects for which the damage likely to be caused is not known or cannot be known, which is a common situation in questions related to environmental impact. It argues that in such situations, it cannot be assumed that the benefits accruing from the project would be able to undo or compensate for the the damage. In such circumstances, it is advisable to be cautious and to not implement the project. It's reflection in law is the change in the onus of proof.

However, according to the Court, since the 'precautionary principle', applies only where the adverse outcome is unknown, it does not apply to the Narmada dams. In this case implications are known, therefore the question is one of the mitigating steps needed to be taken to offset the damage. This is specious reasoning. Taking recourse to technical casuistry once again, the Court responded to the point on precautionary principles by noting that "the dam is neither a nuclear establishment nor a polluting industry" and that "experience does not show that construction of a large dam is not cost effective or leads to ecological or environmental degradation. On the contrary there has been ecological upgradation with the construction of large dams." (pg. 95). Instead the Court places the onus on the NBA in its conclusion: "The petitioner has not been able to point out a single instance where the construction of a Dam has, on the whole, had an adverse environmental impact. On the contrary, the environment has improved.". (pg. 174)

Given that NBA was disallowed from giving evidence about large dams in general, and

that **there was no evidence or discussion on large dams as a whole in the Court**, and the Court had not asked for any evaluations of large dams on its own, it is clear that the Court has allowed its personal prejudices and assertions to substitute for reasoned judgement.

In any case, NBA was not challenging the right of the government to make policy per se, or even insisting on framing policy itself, but merely asking that the policy be reviewed in the light of fresh data, and based on independent studies. There is by now a substantial body of evidence regarding the adverse environmental impacts of large dams, including that commissioned by the World Commission on Dams.

The onus on proving specific environmental damage lies on the government, which has resources at its command for this purpose, rather than on the people affected.

Attitude towards Research

An aspect that is particularly embarrassing for the scientific and academic community in India is the Court's and government's understanding of research. In a gem of a statement, the October 1986 note of the MoWR pressing for early clearance of the project states that,

> "With the project decision postponed for three years, and with no assurance at the end of that period the decision will be positive, it is difficult to believe that all these studies, surveys and plans relating to the environmental aspects will be pursued with energy and enthusiasm, and the necessary resources devoted to them" (minority judgement, pg. 10)

In short, it is pointless to conduct studies unless the results are known beforehand.

The MoEF requirement that the "detailed survey/studies assured will be carried out as per the schedule proposed and details made available to the Department for assessment" is interpreted by the GOG as not being time bound since,

> "The surveys related to various activities to undo any damage or threat to the environment not only by the execution of the project but in the long term. Therefore, any delay in the conduct of the surveys was not critical." (pg. 72)

In other words, since the damage will be long term, the studies can also be long term, or better still, need never take place at all, since once the project has started there would be little need for them. We should be grateful to our government and judiciary for providing a new model for scientific advance: do studies only of the short term and only on those issues whose answers can be predicted.

The Court's verdict against the need for independent assessment and peer review reveals a similarly absurd understanding of scientific research, and sanctifies a clear conflict of interest.

> "There is no reason whatsoever as to why independent experts should be required to examine the quality, accuracy, recommendations and implementation of the studies carried out." (pg. 79)

The whole idea of an independent assessment, is that studies undertaken by those executing a project or those hired by them, have a vested interest in the project going ahead, and an independent body is required to validate the studies in the national interest. Peer review is an accepted principle of scientific and academic research the world over. Coupled with its refusal to reconsider environmental clearance on the grounds that the EPA came later, this betrays a completely fossilised attitude towards developments in science, or development theory. Presumably, once decided, projects must be implemented even if they are based on obsolete science, technology and law.

The Court has been selective in its use of data from studies conducted by the Tata Institute of Social Sciences, Bombay; MS Gour University, Sagar, and the Centre for the Study of Social Sciences, Surat. Curiously, the only aspect of the TISS study, which is quoted, is it's finding that literacy in the resettlement villages in 97%, whereas TISS has in fact submitted detailed findings on problems with resettlement.

In 1991, in response to sustained agitation by the NBA challenging the World Bank's

data and analysis, the World Bank commissioned an independent review of the project. This was headed by Bradford Morse, the former chairman of the United Nations Development Program (UNDP), assisted by the well known Canadian lawyer and judge, Thomas Berger. The Morse Commission recommended a comprehensive review of the project. The World Bank, however, imposed some minimal conditions, such as assessing the total number of oustees, and even this the GOG was unable to meet, whereupon the GOI withdrew from the Bank loan in 1993. The Court rejects the Morse Commission's report on no other grounds except that the Government of India and the Bank had rejected it.(pg. 76-78, 91). Presumably then, by implication we should conclude that the Supreme Court has rejected the NBA petition on the grounds that the Government of India and the Government of Gujarat have rejected it. So much for the constitutional theory of checks and balances, by which the judiciary was meant to be independent of the government.

V
Rehabilitation

The question of proper resettlement and rehabilitation (R&R) was the major issue at the time when the petition was filed. The state of R&R was in a "distressing state" according to J. Bharucha, the only one among the final judges to be present on the bench at the time. The majority judgement, however, makes no mention of it, and quite to the contrary gives an impression that the R&R far exceeds the necessary stipulated. In the section of the majority judgement titled 'Relevant Details of the Sardar Sarovar Dam' (pg. 19), the fact that some people (merely a few lakhs) will have their homes and lands drowned is missing.

How many people in all are to be displaced and require to be resettled, rehabilitated, or compensated in money or in kind, also cannot be found in this voluminous judgement. The only figures available relate to those facing displacement due to submergence from the dam reservoir. Estimates of the number to be so affected have changed significantly over the years. The Narmada Water Disputes Tribunal (NWDT) published the figure of 7,000 families. In 1988, the Planning Commission while clearing the investment for the project estimated that 12,180 families would be displaced. In 1992 the three state governments estimated the figure to be 30,144. The 1993/1995 'Master Plan' drawn up by the NCA estimates the number at 40,727 families. If the petitioner's arguments are to be given any weight, the figure is likely to grow further.

Officially, the number is somewhat over 41,000 families in 245 villages. Of these 19 villages would face submergence in Gujarat, 33 in Maharashtra and 193 in Madhya Pradesh. Of them, 105 villages comprising all those in Gujarat and Maharashtra and 53 in Madhya Pradesh are wholly inhabited by Bhil and Bhilala tribal communities. The rest of the villages are situated in the Nimad area where a third of the population is tribal.

Submergence upto the reservoir level of 69 m. was allowed in 1994. Another raising of the height was permitted in 1994 to 80 m. In 1999, the height was raised to 85 m. with additional humps of 3 m. The present judgement has allowed an immediate rise to 90 m. However, it remains unclear whether this height includes the 3 metre high humps.

The Award of the NWDT provided for R&R for those to be ousted due to the reservoir submergence. All adult males in the submergence zone whose land or houses were to be submerged were designated as Project Affected Family (PAF). Each PAF losing more than 25% of their land was entitled to irrigable land of its choice, to the extent of land acquired subject to the ceiling law of the state with a minimum of 2 hectares, along with a house plot and resettlement and rehabilitation grant. According to the Award, "The three states by mutual consultation shall determine within two years of the decision of the Tribunal, the number and general location of rehabilitation villages required to be established by Gujarat in its own territory". These resettlement villages are supposed to have necessary amenities such as a primary school for every 100 families, a panchayat ghar, dispensary, seed

store, children's park, village pond, a religious place of worship, a drinking water well with trough for every 50 families, tree platform for every 50 families, approach road linking the colony to the main road, electrification, water supply, sanitary arrangement, etc.

The Award stated that the oustees had the choice to resettle in their own state or in Gujarat. The storage of water in the dam and the consequent submergence was made conditional on the prior rehabilitation of all residents of the submergence area, at least one year in advance. (Clause XI, Sub clause IV(2)(iv)). In a previous petition filed by B.D. Sharma (1201 of 1990) demanding proper rehabilitation, the Court had ordered that rehabilitation of potential oustees should be complete in all respects six months prior to submergence.

In this context the issues concerning rehabilitation can be grouped under three heads: lacunae in the rehabilitation policy; lacunae in the implementation; and the measures required for the future.

Policy Issues

The adverse impact from the project is not limited to those whose lands are getting submerged in the reservoir. Others affected include those displaced by the dam colony, by canal construction and drainage systems, those affected by the catchment area treatment, the expansion of the Shoolpaneshwar sanctuary and the Narmada Sagar dam as well as the fisher-folk downstream whose livelihood would be affected. The Tribunal in its award makes no mention of them. The Project authorities do not recognise them as PAFs and they are therefore not eligible for similar rehabilitation.

1380 acres of land in six villages was acquired for the dam colony for which a meagre cash compensation was paid to the oustees. The petitioners had questioned this unequal treatment of different sections displaced for the same project. To an ordinary small or marginal farmer, it makes little difference whether you lose your land to a reservoir, to a canal or a dam colony. The Court, on the other hand, seems to think that it does make a difference but does not state why. Some data from the respondents is reproduced which states that 381 of the colony oustees have obtained employment in the project works. For the others the NCA has provided a special package of Rs. 36,000 for purchase of land or other productive assets. (pg. 124).

There is, however, some attempt to provide reasons why those losing their lands to the canals cannot be treated at par with the oustees from the submergence. The canal affected are residents of the command area and therefore potential beneficiaries. The argument is that the lands remaining over and above those acquired would become more productive and offset the economic loss. But this understanding is not backed up by any data specifying the proportion of the landholding of any cultivator that would be acquired. In its absence, such a generalisation could prove disastrous for small and marginal farmers. For someone with 5 acres, whose 4 acres are being taken away, it matters little that the remaining one acre has become more productive.

The cultivators adversely affected in catchment area development or those whose lands are being acquired for the expansion of the sanctuary (both of these are an integral part of the SSP project) do not even lie in the command area. The fisher-folk similarly have only losses in livelihood from the dam project, and the reasoning that this is a long term impact is no argument for not looking into it. The judgement is silent on the issue of their rehabilitation and compensation for those affected by the catchment area development or the expansion of the sanctuary. Does one assume that the Court does not care about them, or more charitably, that the issue has somehow bypassed the application of judicial mind?

Equally callous is the manner in which the question of non-agriculturists among the oustees has been dealt with. Since the NWDT award had not specifically laid down guidelines for their rehabilitation (as in the case of agriculturists), the petition argued that they would lose their livelihood. The Court attempts

to first show that the number of such people is insignificant, 20 of 4600 oustees in Gujarat, none in Maharashtra and probably a couple of hundred in M.P. It then goes on to say:

> "It is neither possible nor necessary to decide regarding the number of people likely to be so affected because all those who are entitled to be so rehabilitated as per the award will be provided with benefits of the package offered and chosen." (pg. 123)

This is circular reasoning at its best – to assume that the award is capable of properly rehabilitating these oustees, then to argue that it is unnecessary to ascertain their number or other details, only to conclude that they will be properly rehabilitated. But if one does not know the number of non-agriculturists and one does not know their current means to a livelihood either, it is impossible to evaluate the impact of any R&R policy on their livelihood.

The petitioner has argued that surveys have not been conducted properly to gauge the extent of rehabilitation required and that a proper Master Plan is also lacking. In M.P., where even the land acquisition is incomplete, any estimate of the number of PAFs is subject to change since their number would be determined by the number of adult males a year before the notification under the Land Acquisition Act. Despite recording the changing numbers in the estimates of the oustees, the Court does not feel the need to conduct such a survey.

A Master Plan is a requirement when any project of such a scale is undertaken, which is why the NWDT award had asked the state governments to estimate the extent of displacement and set up rehabilitation villages within three years of the award. The creation of a Master Plan took off only when it became a condition for environmental clearance. Once this clearance was bypassed, the Master Plan was not formulated for another eight years. The current Master Plan has little by way of surveys to support it or to give it a holistic picture required for proper rehabilitation. But the Court has an even more specious reason to justify its absence for so long: The Master Plan is not necessary since "the Tribunal's award does not use the expression 'Master Plan'" (pg. 114).

The absence of such a Master Plan means that there is little knowledge of the resource base of the oustees in their original homes, and even where agencies like TISS or CSS have provided information, this is not incorporated into the rehabilitation plan. More importantly, not having a Master Plan means there is no data on what resources (money, land) are required for rehabilitation and where they are to come from. Take for example, the positions of the judges that displacement has certainly improved the standard of life of the oustees.

> "If one compares the living conditions of the PAFs in their submerging villages with the rehabilitation packages first provided by the Tribunal Award and then liberalised by the States, it is obvious that the PAFs had gained substantially after their re-settlement." (pg. 127)

If the oustees were so happy, one wonders why the 8565 families settled in Gujarat had 6500 grievances between them (pgs. 136, 141) or why it was necessary to set up grievance redressal authorities in all the states.

Implementation

While at the policy level the judgement displays such a strict adherence to the NWDT award that it refuses to acknowledge discrepancies and loopholes, judicial opinion becomes markedly flexible when it comes to interpreting lacunae in implementation.

One of these is the resettlement of submergence villages as existing units, should the oustees so desire, or what is termed 'community resettlement'. NBA had pointed out that oustees from one village were being resettled in several different sites, thus breaking up existing social units. For the adivasis of this area, their village community is not just a social entity but an economic resource, as people help each other out in agriculture or other activities like house building, weddings etc. This system is known as *laah*.

As stated in the last section, the award refers to the setting up of rehabilitation vil-

lages. However, in the Court' s opinion, the provision in the Award for rehabilitation villages "could not be interpreted to mean that the oustees families should be resettled as a homogeneous group in a village exclusively set up for each such group." (pg. 126). Instead, the Court interprets the Tribunal to have meant by 'community resettlement' or rehabilitation villages, that civic amenities should be available at the resettlement site. The units which form the basis of 'community resettlement', according to the Court, are units of 50, 100 or 500 families, since the Award correlated the civic amenities required to the number of families, (e.g. one primary school for a hundred families, one panchayat ghar for 500 families). Ultimately then, we presume, the fault for not possessing the 'right' numbers to form a proper unit lies with the oustees.

But not content with this, the argument proceeds to ridiculous lengths. The Master Plan of the NCA argues: "the Bhils, who are individualistic people building their houses away from one another, are getting socialised; they are learning to live together". (pg. 127). In other words, because they are individualistic, there is no need to settle them as a community. On the other hand, the GOG has done them a favour by making them part of a community. Either way you can't win.

Another issue concerns the problems faced in 35 resettlement sites in Gujarat. The oustees have either been provided land outside the command area of the dam, or the land is water-logged, or else amenities provided are inadequate. The judgement deals only with one question, that of resettlement sites outside the command, probably reasoning, but never stating that other issues fall in the realm of 'grievances'. The NWDT award clearly stipulates that the resettlement sites are to be located within the command area of the Sardar Sarovar dam. The judgement does not question the government why it had purchased lands outside the command area. The transgression of the Tribunal award is quietly glossed over since the government stated that the lands purchased were irrigated and where irrigation facilities were not functioning, the government had undertaken the task of digging tubewells. (pg. 129) So tubewell irrigation is accepted as being equivalent to canal irrigation without considering the costs to the oustees that can crop up at any stage. It was expressly to ensure assured irrigation that the Tribunal award specified the resettlement in the command area.

The difficulties faced by the displaced people in getting access to firewood and fodder, which was easily available in their previous homes, is dismissed on the grounds that grazing land and community property resources were not mandated in the award. (pg. 128). Presumably, a woman who is trying to light her hearth and feed her children will find all her troubles at an end once she is quoted the Tribunal award.

The NBA had contended that the dissimilar policies of rehabilitation being pursued in different states do not provide a fair choice to the oustees. Although many of them would prefer to stay on in their home state of M.P., they were being forced to go to Gujarat since it had a more liberal package. In the honourable Court's opinion,

> "The R&R packages in the different states were different due to different geographical, local and economic conditions and availability of land in the States", and the oustees were free to choose the package they liked best. (pg. 122-123).

The Court makes no attempt to get M.P. or Maharashtra to improve their packages. One fails to perceive the *geographical* differences from one part of the valley to another that would require that unmarried major daughters in Maharashtra get one ha of land while those across the river in M.P. don't. Given that the options for M.P. oustees concern basic issues like land, this amounts to a choice between migrating to Gujarat and getting land or staying in M.P. and having no land and starving. Since when did landlessness become such a wonderful option?

Measures for the Future

The Court has sanctioned immediate construction of the dam despite the fact that resettlement is clearly not adequate. The M.P.

government has gone on record as saying that the land acquisition process for six villages out of thirty three affected at 90 m was still to be carried out, and out of 10 resettlement sites necessary for the PAFs affected at 90m, only 5 were ready (pg. 158). As of May 2000, according to the GOMP, land for those affected at 85m was still being shown to them (affidavit cited in pg. 157). Going by the Tribunal's award they should have been fully rehabilitated at least two years ago.

The Court is fully aware that the rehabilitation scenario is dismal:

> "Affidavit on behalf of State of Madhya Pradesh draws a bleak picture of rehabilitation which is quite different from that of Gujarat. There seems to be no hurry in taking steps to effectively rehabilitate the Madhya Pradesh PAFs in their home states.....Even the interim report of Mr. Justice Soni (sic), the GRA for the State of Madhya Pradesh, indicates lack of commitment on the States part in looking to the welfare of its own people who are going to be under the threat of ouster and who have to be rehabilitated."(Page 159-160)

But rather than stopping construction till proper rehabilitation is carried out, which was its practice in the past, the Court now simply blames M.P. for not co-operating with Gujarat:

> "If there is any shortfall in carrying out the R&R measures, a time bound direction can and should be given in order to ensure the implementation of the Award. Putting the project on hold is no solution. It only encourages recalcitrant State to flout and not implement the award with impunity. This cannot be permitted. Nor is it desirable in the national interest that where fundamental right to life of the people who continue to suffer due to shortage of water to such an extent that even the drinking water becomes scarce, non-cooperation of a State results in the stagnation of the project" (pg. 175)

Never mind that the people who suffer are not the officials or politicians of M.P., but its ordinary citizens. The sins of the state government are conveniently transferred to its people, and the fact that their own state is denying them their human rights is made an excuse for the Court to do so as well.

The Civilising Mission

The Court evidently believes that the tribals of India live a life not worth living, and that the lack of education and health faculties in tribal areas has nothing to do with the government. If the Court is to be believed, they should all be queuing up to get displaced.

> "Residents of villages around Bhakra Nangal dam, Nagarjun Sagar dam, Tehri, Bhilai Steel Plant, Bokaro...and numerous other developmental sites are better off than people living in villages in whose vicinity no developmental project came in. It is not fair that tribals and the people in undeveloped villages should continue in the same condition without ever enjoying the fruits of science and technology for better health and have a higher quality of life style. Should they not be encouraged to seek greener pastures elsewhere, if they can have access to it, either through their own efforts due to information exchange or due to outside compulsions." (pg. 172-3).
>
> "At the rehabilitation sites they will have more and better amenities than which they enjoyed in their tribal hamlets. The gradual assimilation in the main stream of society will lead to betterment and progress." (pg. 48)

Never mind that Tehri has yet to be built, and it is hard to know whether the people are better off with it. Evidently our prescient judges can see into the future and base their judgements on it. Certainly they cannot have based their judgement on any evidence from the past or the present, given that they have not cited any survey or study of the effects of large dams. As mentioned before, there was no evidence or discussion in the Court that could have merited such a eulogy on large dams (conclusion of the majority judgement).

In the end, however, our honourable justices can find no better argument to fall back

on, than the civilising mission of the white man. To all such people, one can only reply in the words of the adivasi leader, Jaipal Singh, who said at the time of the Constituent Assembly debates (Vol 9, pg 993):

> "If, however, your mission of amelioration of the lot of the Adibasis is of the kind that the British professed to have, coming to India over all this distance of six thousand miles, I would ask you mercifully to leave us alone, and quit the Adibasi regions. I would remind such people of the adage, 'Physician, heal thyself..."

VI
Conclusion

We conclude by reiterating the various contradictions and anomalies in the judgement:

The Contradictions:

- The Court persists in continuing to see the Narmada dispute as one between states, rather than one between the government(s) and people.
- From this follows its refusal to allow any review of the 1979 Tribunal award despite fresh scientific evidence that the river does not contain 28 MAF of water and therefore a dam height of 455 feet or 139m is not justified. A lower dam height would reduce submergence.
- From this also follows the Court's idea of an 'independent' body – one that is independent of the three states to the dispute – M.P., Gujarat and Maharashtra, by containing representatives from each. It does not see a problem in the fact that the same body, which is responsible for implementing the project is also monitoring it.
- From this it also follows that despite the fact that M.P. government is not providing adequate rehabilitation to its people, this is no reason for stopping construction to ensure their rights are not violated. Instead M.P. is told to co-operate with Gujarat.
- Despite the fact that it has had to issue various orders regarding rehabilitation in the last six years while the case was pending, the Court has given a clean chit to the Narmada Control Authority and its R&R subgroup to monitor rehabilitation. But the fact that they were not doing their job was what made the Court entertain the petition in the first place.
- The Court sees it own role as limited to ensuring that rights are not violated, and that policies are properly implemented. It clearly states that it is not in the business of making policy. However, it accuses NBA of undue neglect and delay in coming to it with a policy issue.

The Evidence Court Neglects:

- As for the issue of improper implementation, despite all the evidence, the Majority judgement does not see this as a problem, and as mentioned before blames it all on M.P.'s reluctance to co-operate with Gujarat.
- The Court argues that since there was no legal requirement on environmental clearance at the time, violation of the procedures for clearance were not a problem. The dissenting judge, Bharucha disagrees.
- The Court cites the evidence that the Ministry of Environment and Forests was concerned about the lack of studies on environmental aspects to argue that when environmental clearance was granted it was based on enough consideration of the facts. But the main fact is that there were no facts.
- Evidence from the judgement shows that when the decision was taken to grant environmental clearance, it was based on a political meeting between the PM and the Chief Ministers of M.P., Gujarat and Maharashtra.
- Evidence from the judgement shows that significant costs such as the loss of forests are still unknown, making cost benefit analysis impossible.
- According to the well known 'precautionary principle' the person or organisation which wants to change the environment is required to prove that this will not cause harm. However, the Court has put the

onus on the NBA instead to prove that it will cause harm.

- While the Tribunal award and the MoEF guidelines say that rehabilitation plans should be drawn up and completed before the water is filled in the reservoir, the Gujarat Government and Court treat this to mean that only the plans for rehabilitation must be complete. Never mind about when implementation occurs. Justice Bharucha dissents.
- The Court thinks there is a significant difference between people who lose their land to canals and those who lose them to reservoirs. (People are presumably less dead if they are shot as against if they are hanged.)
- The Court argues there is no need to estimate the number of non-agriculturists who need to be rehabilitated because they are bound to be rehabilitated. Similarly there is no need to prepare a Master Plan because the Tribunal award does not use the term Master Plan.

Prejudices:

- The Court argues that oustees are better off when displaced because in this way they get access to schools, hospitals etc. Tribals are particularly backward, and large dams are good for them.
- Despite the fact that it disallowed NBA from making any submission on large dams, and there was no discussion of large dams in the Court, a large part of the Judgement's conclusion is a eulogy on large dams. One can only conclude that the Court has substituted personal prejudice for facts.
- The Court has throughout treated NBA as an anti-dam organisation which has wasted public money by its PIL rather than an organisation of affected people who are fighting for their constitutional rights.

The Court's overall attitude is statist and fossilised. Its notion of government right and prerogative is also wholly colonial and unsuited to the demands of a modern state and the right of citizens to participate in governance. Despite the fact that it is their governments that have failed them miserably, the Court pronounces that the people must trust these very governments. But most worrying of all is the feeling that the Court judgement could not have been any worse if it was scripted by the contractors hired by the Government of Gujarat to build the dam.

At the beginning of a new century, the highest court of India asserts that where a river can be dammed, the people by its banks must give way. Three weeks later, large advertisements are published in a national daily to tell the 'truth' about Medha Patkar and the Narmada Bachao Andolan. But the people know the truth - the truth of a river when it flows, the truth that food comes from the land and not from pieces of paper, the truth of a struggle which has lasted twenty years. But as the Uruguayan writer, Eduardo Galeano, tells us, 'reality and the law seldom meet'.

ANNEXURES

Directions of Majority Judgement (B.N.Kirpal, J. & A.S.Anand, CJI)

While issuing directions and disposing of this case, two conditions have to be kept in mind, (i) the completion of the project at the earliest and (ii) ensuring compliance with conditions on which clearance of the project was given including completion of relief and rehabilitation work and taking of ameliorative and compensatory measures for environmental protection in compliance with the scheme framed by the Government thereby protecting the rights under Article 21 of the Constitution. Keeping these principles in view, we issue the following directions.

1. Construction of the dam will continue as per the Award of the Tribunal.
2. As the Relief and Rehabilitation Sub-Group has cleared the construction up to 90 meters, the same can be undertaken immediately. Further raising of the height will be only *pari passu* with the implementation of the relief and rehabilitation and on the clearance by the Relief and Rehabilitation Sub-group. The Relief and Rehabilitation Sub-group will give clearance of further construction after consulting the three Grievances Redressal Authorities.
3. The Environment Sub-group under the Secretary, Ministry of Environment and Forests, Government of India will consider and give, at each stage of the construction of the dam, environment clearance before further construction beyond 90 meters can be undertaken.
4. The permission to raise the dam height beyond 90 meters will be given by the Narmada Control Authority, from time to time, after it obtains the above-mentioned clearances from the Relief and Rehabilitation Sub-group and the Environment Sub-group.
5. The reports of the Grievances Redressal Authorities, and of Madhya Pradesh in particular, shows that there is a considerable slackness in the work of identification of land, acquisition of suitable land and the consequent steps necessary to be taken to rehabilitate the project oustees. We direct the State of Madhya Pradesh, Maharashtra and Gujarat to implement the Award and given relief and rehabilitation to the oustees in terms of the packages offered by them and these States shall comply with any direction in this regard which is given either by the NCA or the Review Committee or the Grievances Redressal Authorities.
6. Even though there has been substantial compliance with the conditions imposed under the environment clearance the NCA and the Environment Sub-group will continue to monitor and ensure that all steps are taken not only to protect but to restore and improve the environment.
7. The NCA will within four weeks from today draw up an Action Plan in relation to further construction and the relief and rehabilitation work to be undertaken. Such as Action Plan will fix a time frame so as to ensure relief and rehabilitation pari passu with the increase in the height of the dam. Each State shall abide by the terms of the action plan so prepared by the NCA and in the event of any dispute or difficulty arising, representation may be made to the Review Committee. However, each State shall be bound to comply with the directions of the NCA with regard to the acquisition of land for the purpose of relief and rehabilitation to the extent and within the period specified by the NCA.
8. The Review Committee shall meet whenever required to do so in the event of there being any un-resolved dispute on an issue which is before the NCA. In any event the Review Committee shall meet at least once in three months so as to oversee the progress of construction of the dam and implementation of the R&R programmes.

If for any reason serious differences in implementation of the Award arise and the same cannot be resolved in the Review Committee, the Committee may refer the same to the Prime Minister whose decision, in respect thereof, shall be final and binding on all concerned.

9. The Grievances Redressal Authorities will be at liberty, in case the need arises, to issue appropriate directions to the respective States for due implementation of the R&R programmes and in case of non-implementation of its directions, the GRAs will be at liberty to approach the Review Committee for appropriate orders.
10. Every endeavour shall be made to see that the project is completed as expeditiously as possible.

This and connected petitions are disposed off in the aforesaid terms.

Directions of Minority Judgement (S.P. Bharucha, J.)

I should not be deemed to have agreed to anything stated in Brother Kirpal's judgement for the reason that I have not traversed it in the course of what I have stated.

In the premises,

1. The Environment Impact Agency of the Ministry of Environment and Forests of the Union of India shall forthwith appoint a Committee of Experts in the fields mentioned in Schedule III of the notification dated 27th January, 1994, called the Environmental Impact Assessment Notification, 1994.
2. The Committee of Experts shall gather all necessary data on the environmental impact of the Project. They shall be free to commission or carry out such surveys and studies and the like as they deem necessary. They shall also consider such surveys and studies as have already been carried out.
3. Upon such data, the Committee of Experts shall assess the environmental impact of the Project and decide if environmental clearance to the Project can be given and, if it can, what environmental safeguard measures must be adopted, and their cost.
4. In so doing, the Committee of Experts shall take into consideration the fact that the construction of the dam and other work on the Project has already commenced.
5. Until environmental clearance to the Project is accorded by the Committee of Experts as aforesaid, further construction work on the dam shall cease.
6. The Grievance Redressal Authorities of the States of Gujarat, Madhya Pradesh and Maharashtra shall ensure that those ousted by reason of the Project are given relief and rehabilitation in due measure.
7. When the Project obtains environmental clearance, assuming that it does, each of the Grievance Redressal Authorities of the States of Gujarat, Madhya Pradesh and Maharashtra shall, after such inspection, certify, before work on the further construction of the dam can begin, that all those ousted by reason of the increase in the height of the dam by 5 meters from its present level have already been satisfactorily rehabilitated and also that suitable vacant land for rehabilitating all those who will be ousted by the increase in the height of the dam by another 5 meters is already in the possession of the respective States.
8. This process shall be repeated for every successive proposed 5 meter increase in the dam height.
9. If for any reason the work on the Project, now or at any time in the future, cannot proceed and the Project is not completed, all oustees who have been rehabilitated shall have the option to continue to reside where they have been rehabilitated or to return to where they were ousted from, provided such place remains habitable, and they shall not be made at all liable in monetary or other terms on this account.

The writ petition is allowed in the aforementioned terms. The connected matters are disposed of in the same terms. No order as to costs.

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