People vs Verdict

Narmada Bachao Andolan

CONTENTS

GESTURES OF SOLIDARITY

I appeal to the judicial conscience of the highest court and the equity sense of the Gujarat, Madhya Pradesh and Maharashtra cabinets not to put one stone more on the dam until the last and the least human who is rendered homeless, consequence on Narmada Dam is given shelter in dignity. If a review of the judgement is necessary I am sure the judges on the High Bench will unhesitatingly do what the refugees of 'Dam Development' need as an aspect of Social Justice. Development is never at the expense of distress inflicted on the poor, as Mahatma Gandhi has taught us and the constitution in its vision cautions us

Jst Krishna Iyer
Retired Supreme Court Judge, Kochi, Kerala

The struggle of the people under your leadership will not do in vain. The Supreme Court's judgement dated 18.10.2000 can only be a temporary setback. Ultimately the cause of justice for the oustees and other deprived people for protection of right to life and social justice shall triumph.

Haroobhai Mehta
Advocate, Gujarat High Court, (Ex. M.P)
Ahmedabad, Gujarat

This must be a very difficult time for you and your comrades and colleagues. I know how hard you have struggled over many years...

Having been involved in a struggle of a different sort for more than 30 years I know that there are times when all seems to be lost, when one is inclined to give up. However, one finds the inner strength, based on the belief that what you are doing is right, to continue and fight another day. Every battle we lost during the dark days of Apartheid was met with the slogan: 'The struggle continues!'. I hope so with you as well.

Kader Asmal
Minster of Education, South Africa
Former Chairman, World Commission on Dams

The National Alliance of Peoples Movements (NAPM) expresses its shock and dismay at the Supreme Court Verdict on Sardar Sarovar case. We believe that justice has been denied to the tribal people and the farmers in the Narmada Valley. We had hope in the legal system of this country and that has been shaken and shattered with this verdict. We are dismayed by the callous attitude of the court towards to he sufferings of the displaced. We will fight shoulder to shoulder with the people of the valley in their fight against the Narmada Project.

Thomas Kocherry
National Alliance of Peoples Movements (NAPM)
National Fish Workers Forum

The Supreme Court verdict against the Narmada Bachao Andolan (NBA) came as a great shock and I feel especially sorry as this is, perhaps, the first time a movement awakened the world about the next to extinct flora, fauna and tribals on such a big scale. I can only say it has been a crushing blow.

Mahashveta Devi (Gyanpeth award recipient)
President of De-notified and Nomadic tribes Right Action Group)

The struggle will go on. The battle must be fought.

Aruna Roy
Winner of Ramon Magsaysay Award
Mazdoor Kisan Shakti Sangathan

...as shocked as you and every right thinking citizen must be.
Admiral Ramdas
Former Chief, Indian Navy

We are with you in solidarity.

Mohini Giri
Former Chairperson,
National Commission for Women

I totally share your distress... and your disgust. The Supreme Court has let the people down badly yet again. And the media has been obnoxious in the way it has reacted.

Praful Bidwai
Journalist, Columnist, Delhi

My heart goes out to... all the stalwart people struggling against this stupid, horrible, misguided project. I am so saddened by this unfounded decision against the will and voices of so many thousands (millions ?) of people in India.

Deborah Moore
Environment Defense Fund, USA
Member, World Commission on Dams

The Indian Supreme Court has dealt a deep blow to justice and proved once again that political power needs more urgently than ever before to be given back to the people whose lives it affects. The world supports Narmada Bachao Andolan.

Keith Hyams
Oxford University, United Kingdom

In this case, Narmada has been awarded 'Capital Punishment' by the majority judgment. We most humbly entreat you good self (President of India)... to order an immediate cessation of all construction work at Sardar Sarovar, pending a thorough review of all the Human Rights Aspects of Narmada Rehabilitation, as well the Environment Impacts of the Project

Kerala Sastra Sahitya Parishad (KSSP)

It is one of the saddest thing happened to this country in the recent history

Manish Varma
National Dairy Development Board, Anand, Gujarat.

THUS SPEAKETH THE LORDSHIPS....

IN THE SUPREME COURT OF INDIA CIVIL ORIGINAL JURISDICTION
WRIT PETITION © No 319 OF 1994.

NARMADA BACHAO ANDOLAN (PETITIONER)
VERSUS
UNION OF INDIA AND OTHERS (RESPONDENTS)

Excerpts from Judgment:

1) On peoples' i.e. public money:

(P 33) When such projects are undertaken and hundreds of crores of public money is spent, individual or organisations in the garb of PIL cannot be permitted to challenge the policy decision taken after a lapse of time. It is against national interest and contrary to the established principles of law that the decision to undertake developmental projects are permitted to be challenged after a number of years during which period public money has been spent in the execution of the project.

2) On people as third party

(P 36 –37) ....The question which arises is as to whether it is open to the petitioners to directly or indirectly challenge the correctness of the said decision (meaning award of the Narmada Water Disputes Tribunal) ... Any issue which has been decided by the Tribunal would, in law be binding on the respective states.. Once an award is binding on the states, it will not be open to a third party like the petitioners to challenge the correctness thereof.

3) On tribal rights

(P 47 –48) The displacement of the tribals and other persons would not per se result in the violation of their fundamental or other rights. The effect is to see that on their rehabilitation at new locations they are better off than what they were. At 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 the society will lead to betterment and progress.

(P 111) The tribals who are affected are in indigent circumstances and who have been deprived of modern fruits of development such as tap water, education, convenient medical facilities etc...

(P 172) It is a fact that people are displaced by projects from their ancestral homes. Displacement of these people would undoubtedly disconnect from their past, culture, customs and traditions, but then it becomes necessary to harvest a river for the larger good...

... A properly drafted R &R plan would improve living standards of displaced persons after displaced. For example residents of villages around Bakra Nangal dam, Nagarjun Sagar Dam, Tehri, Bhilai Steel plant, Bokaro and Bala Iron and Steel plant and numerous other development sites are better of then people living in villages in whose vicinity no developmental project came in. It is no 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 lifestyle. Should they not be encouraged to seek greener pastures else where if they can have access to it either through their own efforts due to information exchange or due to outside compulsions.

(P 97) Change in environment does not per se violate any right under Article 21 of the constitution of India.

4) On the role of the state and court:

(P 164 – 165) There are three stages with regard to the undertaking of an infra structural project. One is the conception or planning, second is the decision to undertake the project and third is the execution of the project. The conception and the decision to undertake a project is to be regarded as a policy decision. While there is always need for such projects not being unduly delayed, it is at the same time expected that as through a study as is possible will be undertaken before a decision is taken to start such a project. Once such a considered decision is taken, the proper execution of the same should be taken expeditiously. It is for the Government to decide how to do its job. When it has put a system in place for the execution of a project and such a system cannot be said to be arbitrary, then the only role, which a court may have to play is to see that the system works in a manner it was envisaged.

It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infra structural project or not and what is the type of the project to be undertaken and how it has to executed, are part of the policy making process and the courts are ill equipped to adjudicate on a policy decision so undertaken. The court no doubt has a duty to see that in the undertaking of a decision, no law is violated and peoples 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 a run over 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 ground of latches if the petitioner had the knowledge of such a decision and could have approached the court at that time. Just because a petition is termed as PIL does not mean that ordinary principles applicable to litigation will not apply. Latches is one of them.

(P 168) In respect of public projects and policies, which are initiated by the government, the courts should not become the approval authority. Normally such decisions are taken by the government after due care and consideration. In a democracy welfare of the people at large and, not merely of a small section of the society, has to be the concern of a responsible government. If a considered policy decision has been taken which is not in conflict with any law or is not malafide, it will not be public interest to require the court to go into and investigate those areas which are the function of the executive. For any project which is approved after due deliberation the court should refrain from being asked to review the decision just because the petitioner in filing an PIL alleges that such a decision should not be taken because an opposite view against the undertaking of the project, which view may have been considered by the Government, is possible. When two or more options or views are possible and after considering them the government takes a policy decision it is then not the function of the court to go into the matter afresh and in a way sit in appeal over such a policy decision.
(P 171) In the case of projects of national importance where union of India and / or more than one state(s) are involved and the project would benefit a large section of the society and there is evidence to

show that the said project has been contemplated and considered over a period of time at the highest levels of the states and the Union of India and more so when the project is evaluated and approval granted by the planning commission then there should be no occasion for any court carrying out any review of the same or directing its review by any outside or 'independent' agency or body. In a democratic set up it is for the elected government to decide what project should be undertaken for the benefit of the people. Once such a decision had been taken that unless and until, it can be proved or shown that there is a blatant illegality in the undertaking of the project or in its execution the court ought not to interfere with the execution of the project.

5) On Public Interest Litigation (PIL)

(P 166) PIL was an innovation essentially to safe guard and protect the human rights of those people who were unable to protect themselves. With the passage of time, the PIL jurisdiction has been ballooning so as to encompass with in its ambit subjects such as probity in public life, granting of largesse in the form of licenses, protecting the environment and the like . But the balloon should not be inflated to such much that it bursts. Public Interest Litigation should not be allowed to degenerated and become Publicity Interest Litigation.

6) Ode to Dams

(P 47) There is merit in the contention of the respondents that there would be a positive impact on preservation of ecology as the result of the project. The SSP would be making positive contribution for the preservation of the environment in several ways. The project by taking water to drought prone and arid parts of Gujarat and Rajasthan would effectively arrest ecological degradation which was returning to make this areas inhabitable due to salinity ingress, advancement of desert, ground water depletion, fluoride and nitrite affected water and vanishing green cover. The ecology of water scarcity areas is under stress and transfer of Narmada water to these areas will lead to sustainable agriculture and the spread of green cover. There will also be improvement of fodder availability which will reduce pressure on bio diversity and vegetation. The SSP by generating clean eco

friendly hydro power will save the air pollution which would otherwise take place by thermal generation power of similar capacity.

(P 169) While an area of land will submerge but he construction of the dam will result in multi fold improvements in the environment of the areas where the canal waters will reach. Apart from bringing drinking water with in easy reach the supply of water to Rajasthan will also help in checking the advancement of the Thar desert. Human habitation will increase there which, in turn will help in protecting the so far porous border with Pakistan.

There is and has been in the recent past protests and agitations not only against Hydel projects but also against the setting up of Nuclear or thermal power plants. In each case reasons are put forth against the execution of the proposed project either as being dangerous (in case of nuclear) or causing pollution and ecological degradation (in case of thermal) or rendering people homeless and posses adverse environment impacts as has been argued in the present case. But then electricity has to be generated and one or more of these options exercised. What option to exercise in our constitutional frame work, is for the government to decide keeping various factors in mind.

7) The Prime Minister above the Judiciary

(P 183) If for any reason serious differences in implementation of the award rise and the same cannot be resolved in the review committee the committee may refer the same to the Prime Minister whose decision in respect there of shall be final and binding on all concerned.

8) Dispensable People:

(P 179)... Perhaps the setting up of a thermal plant may not displace as may families as a hydel project may but at the same time the pollution caused by the Thermal plant and the adverse affect on the neighborhood could be for greater than the inconvenience caused in shifting and rehabilitating the oustees of a reservoir

DIRECTIONS OF MAJORITY JUDGMENT

Kirpal, J. Pages: 180-183

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.

Construction of the dam will continue as per the Award of the Tribunal.

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.

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.

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.

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.

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.

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.

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.

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.

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.

.....CJI
(A.S. ANAND)

.....J
(B.N.KIRPAL)

New Delhi,
October 18, 2000.

DIRECTIONS OF MINORITY JUDGMENT

Bharucha, J. Pages: 30-32

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

In the premises,

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.

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.

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.
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.

Until environmental clearance to the Project is accorded by the Committee of Experts as aforesaid, further construction work on the dam shall cease.

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.

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.

This process shall be repeated for every successive proposed 5 meter increase in the dam height.

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.

.....J

(S.P.Bharucha)

New Delhi,
October 18, 2000

HIGHLIGHTS, COMMENTS AND ANALYSIS OF MAJORITY AND MINORITY JUDGMENTS

Narmada Bachao Andolan

Part A: Introduction

After six full years of the case-proceedings, and five years of stay on the Sardar Sarovar Project, the Supreme Court of India has finally given its verdict in the case, Narmada Bachao Andolan Vs The Concerned Governments (1994). The comprehensive case challenging the social justifiability, environmental sustainability and mirage of benefits was disposed off on October 18, 2000.

The Order of Supreme Court is in two parts. The majority judgment, by Justice Kirpal and Justice Anand (Chief Justice) is the operative judgment and the one that will be followed. It is 183 pages long. The minority judgment, by Justice Bharucha, running into 32 pages, will not be operative. However, in spite of this, the judgment by Justice Bharucha is a very significant one.

The importance of Justice Bharucha's judgment is that it shows that the highest court of the land has not rejected the main issues and concerns raised by NBA. One judge, from the bench of three judges has taken cognisance of the arguments and has ordered a de facto review of the project by calling for the project to seek fresh environmental clearance.

However, the majority order, which will hold force is a shocking order. It overlooks critical facts, is illogical, places complete and unjustified faith in the Government's machinery and assurances, and takes on overly legalistic and technical view over human and environmental concerns. The judgment contains a clearly baseless view of Narmada Bachao Andolan, the petitioner, making allegations such as delay in approaching the Court, just as it ridicules the tribal people with a prejudiced view of their life and resources in the valley. There is no trace of the Court's concern for the basic issues and fundamental rights raised on behalf of the project-affected while undue faith is expressed in the 'official' machinery. The judgment, thus, is nothing short of an anti-people judgment and clearly the institution of the Apex Court has failed miserably in safeguarding the rights of the common people, especially the tribal and other

downtrodden, of this country. In this context, the Andolan feels responsible to analyse the verdict and the perspective behind it; to disseminate our views and involve people's organizations and people at large in responding, protesting and carrying the struggle forward.

Part B: Brief Comments and Analysis of Majority Judgment

A. Back To Square One

The most serious feature of the majority order is that it takes the whole issue back to where it was 6 years ago, when the case was filed. Except for the creation of the Grievance Redressal Authorities, the project has been cleared with virtually the same implementation and monitoring structure as was in place before the hearings. The only other change is that the Prime Minister has now been vested with the final authority to decide any inter-state dispute in the Narmada. The Court's order requires the Narmada Control Authority (NCA) to implement and monitor the project. In particular, the Resettlement and Rehabilitation Sub-group (R&R SG) and the Environmental Sub-group (ESG) of the NCA are to give clearance for further increase in height of dam after examining the R&R and environmental aspects respectively. The final clearance is to come from NCA. This is the very arrangement which was in place all the time, and this arrangement has clearly failed, and failed abysmally to ensure even proper R&R. This is clear from the fact that the Court itself had to stop the work of the dam for an unprecedented 5 years. It is also obvious from the fact that Court had to ask the States to appoint independent GRAs headed by retired judges in all three States.

Yet, the Court places the responsibility to ensure and monitor the R&R (and Environment) work on the same very R&R Sub-group (and Environment Sub-group)! Even the independent GRAs are only to be "consulted". Both the Sub-groups, as also the NCA consist essentially of Government officials and other officials connected with the project, with a few "independent" members who are mostly toe the Government line, or are rendered ineffective.

Time and again, the R&R and Environmental Sub-groups have both shown themselves to be susceptible to manipulation by the project authorities (see the role R&R Sub-group has played in "clearing" the dam for 90m);

in cases, the R&R Sub-group's recommendation to stop construction has been blatantly overruled by the main NCA and the Sardar Sarovar Construction Advisory Committee.

It is clearly in recognition of all this that the minority judgment states: (Page 28)

"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..."

"Only after 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)

Yet, majority order has placed full responsibility in the hands of these sub-groups again. Not only that, but it also makes the astounding statement that (Page 166):
"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."

It is difficult to accept this faith in the machinery whose repeated failure to function properly was one of the reasons that led to the failure of rehabilitation and the 5 year stoppage of work on the dam.

Independence of the Sub-groups

NBA has asked that the R&R and Environmental aspects of the project should be monitored by totally independent bodies- bodies independent of the project authorities. Amazingly the majority order has declared that the NCA and its subgroups are independent! It says (Page 130):
"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 Union of India, the other States are also represented in this Authority"

Thus, the Court places the implementation and monitoring of the R&R and Environmental works in the hands of the very same authorities whose basic mindset and purpose is to push the construction ahead and this is clearly a conflict of interest and function. This can only push the R&R and Environmental concerns to a low priority. The abysmal failure of these agencies so far is a clear evidence of this.

B. Peer Review/Independent Review

Indeed, the Court has also rejected one of the basic tenets of Environmental assessment - that of peer and independent review. They state (Page 79):
"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."

The studies and environmental assessments are undertaken by the project authorities themselves or by consultants paid by them. Thus, there is a clear conflict of interest since project authorities would not want studies to delay the project or call for major modifications. This conflict of interest necessitates that the environmental studies are reviewed by peers, public and independent experts. Even the notification of MoEF of May 1994 under the EPA requires MoEF to constitute an independent expert committee to examine studies carried out by the project authorities. Justice Bharucha's minority order requires the constitution precisely of such a committee. But the majority order virtually sanctions this clear conflict of interest.

C. Construction and Submergence without Rehabilitation:

Another shocking part of the majority order is the sanctioning of immediate construction of the dam to 90m. The order notes that since the R&R Sub-group has cleared the construction to 90m they are allowing this. Yet, the Court has itself noted in the order that R&R Sub-group only said that _'arrangements' for rehabilitation upto 90m were complete. There was no explicit clearance recorded by the R&R Sub Group, nor any recording that the resettlement had been completed satisfactorily. However, even this statement of the R&R Sub-group regarding "arrangements" was faulty.

The Court itself has noted in its order (Page 158) the submission of GoMP on affidavit that:

In 6 villages affected at 90m the land acquisition process for submergence villages still needs to be done.

Out of 10 resettlement sites necessary for the PAFs at 90m, only 5 are ready.

Court has also noted the report of Grievance Redressal Authority, particularly of that of M.P.
"... shows that there is a considerable slackness in the identification of land, acquisition of suitable land and consequent steps necessary to be taken to rehabilitate the project oustees." (Page 181)

What the Court has not noted in the order, but what GoMP has stated on affidavit to the Court is that it has virtually not a single hectare of land for rehabilitation. It has also stated that it has identified some land but that this land is uncultivable.

GoMP has also stated on affidavit dated July 2000 that, at 90m, there remain 1034 PAFs yet to be resettled. Out of them, 599 to be resettled in Gujarat and 435 in M.P..

Court Order notes (Page 158):
"It has not been categorically stated [by GoMP] whether the PAFs who are so affected [at 85 m and 90 m dam height] have been properly resettled or not."

It is very surprising that if GoMP has not provided this critical information, why did the Court not ask for it?

Given this blatant situation, it is clear that:

a. There is no arrangement to resettle the oustees till 90m in M.P.. Land Acquisition Awards are not passed in 6 villages, 5 out of 10 resettlement sites are not ready, and not a single hectare of land is available.

b. The GRA too has reported slackness in identification and acquisition of land.

c. The R&R Sub-group's statement that _'arrangements' are in place is totally incorrect.

d. R&R Subgroup has nowhere recorded any categorical finding that R&R upto 90 m is complete and / or clearance is given to go up to 90 m.

After noting all the facts as elaborated above, the Court notes the overall finding for M.P. that (Page 159):
"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. It is indeed surprising that even awards in respect of six villages. likely to be affected at 90 mtr. dam height have not been passed."

"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 after the welfare of its own people who are under the threat of ouster and who have to be rehabilitated."(Page 160)

It is shocking that the Court, instead of hauling up M.P. and the R&R Sub-group, and not allowing the work to proceed further till all arrangements are made and people resettled, has instead, allowed construction to resume immediately! The impact of this will be clearly of flushing the people out on the streets with no place to go and a gross violation of the Tribunal Award (**see also** separate, longer note on the situation of 90 mts)

Rationale of Court in Allowing Construction

It is difficult to fathom how the Court could have allowed further construction at this point when the situation was so serious. One possible explanation is the Court's statement, noted in the Order (Page 175):
"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"

This is astounding logic! First of all, the only way that the Court has ensured some improvement in the rehabilitation performance is precisely by putting the project on hold for 5 years! Further, contrary to its own statement, no time bound direction has been given for the R&R of PAFs affected at 90 m. Thirdly, the Court makes an unjustified assumption that only this project will solve the drinking water problem of the people of Gujarat; it further makes the assumption that Government of M.P. is not co-operating in R&R and so the project is stagnating. It then says that it is not desirable that this happens (i.e. project stagnates). The conclusion is appalling: Let the PAFs suffer for the "non-cooperation" of the State.

D. Overall Status of Resettlement

The Court had asked the State Governments to file affidavits by 1 July 2000 giving the full details of the status and arrangements of resettlement for ALL the PAFs to be affected by the project to its full height. This was after the hearing was over. The GRAs in all the three states were asked to undertake ground surveys and verify the reality about the land availability and also the other arrangements. They too were to submit the reports by 1 July 2000.

The three state Governments filed their affidavits. Some of the affidavits themselves revealed that serious problems were there in the R&R arrangements. NBA had filed detailed replies to these affidavits. The Court has drawn and noted extensively from the affidavit of Gujarat in its Majority order (some 15 pages of the order Pages 141-154) as also from M.P. and Maharashtra affidavit; but it has completely omitted to mention the details set out by NBA in its affidavit which pointed out the serious problems with land and other arrangements in all the three states. Even if one assumes that the Court did not accept NBA's submissions, they should have been there on record.

More importantly, the GRAs were to verify the ground realities of the situation. However, the report of the GRAs have not been made public or available to the parties to the case. At least the main conclusions should have been quoted in the Order. Right now, we only have two references

in the majority order. One, at page 181, which says:
"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." And on Page 160:

"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 after the welfare of its own people who are under the threat of ouster and who have to be rehabilitated."

These are the only reference to the GRAs reports, and are certainly a cause for concern. This is especially more so since the earlier reports of the Gujarat GRA state that it has received over 15,000 complaints from the PAFs, out of which large number are land related. Of course, GRA report states that 8179 out of these 15,493 had been redressed in favour of oustees, but NBA has submitted based on ground surveys, that many of the grievances claimed as "redressed" by the Government are not really redressed. Whatever be the case, the very fact that so many grievances have come shows the serious situation of the resettlement even in Gujarat and hence it is important that the reports of the GRA be made public from time to time.

Ground realities show that while M.P. and Maharashtra have no land whatsoever to give to the oustees, in Gujarat even though some land is available, it has many serious issues and problems - it is not suitable for community based resettlement, and much of newer land seems to be districts far away, doubts about quality of land persist based on past experience and so on. Further, large number of oustees are yet to be resettled even at today's height of the dam. Government says that this is because even though they have all readiness for resettlement, the oustees are refusing to move. However, this is not correct. Many of these "balance" oustees are those who want to move and not opposing the dam; but the Government has no land to offer to them. Even those who are opposing the project on larger issues, have time and again asked the Government to show them land for resettlement but the Government has not been able to do so. (Latest case is of the oustees of Maharashtra villages who went to see land on 3 Oct. 2000 at the behest of notice issued by Government of Maharashtra but came back as the Government could not show them any land). In reality, Government has

no arrangements to resettle even those who are affected at today's height of the dam.

Given all this, it was important for the oustees to know what the GRAs had submitted to the Court in July 2000.

E. Other Categories of Oustees

The Court has completely rejected any sort of consideration of resettlement package for the other categories of oustees like canal, colony affected, downstream affected people and so on. The reasons given for these are also specious. This is a very serious and gross denial of the fundamental rights of the people who will lose their very livelihoods due to the project.

About the people losing lands to the canal, NBA had pointed out that there are over 24,000 families losing more than 25% of their land to canals (as per GoG itself!) and there is no rehabilitation policy for them. The Court has said that: (Page 124)
"..most of people falling under command area were in fact beneficiaries of the project and their remaining land would now get relocated with the construction of the canal leading to greater agricultural output".

NBA has pointed out that many families lose all their lands; many have remaining lands that are out of the command. Yet, Court has refused to consider this.

Another example: NBA had pointed out that large number of persons living in submergence area would lose their livelihood due to loss of community and/or loss of river. For example, fisher people, shop keepers, carpenters, etc. would lose their livelihoods but were not being rehabilitated. NBA had pointed out that while no surveys were done, its estimates of these were several thousand families, mostly in M.P. NBA called for an immediate survey of the same and development of rehabilitation package.

The Court order quotes Gujarat in saying that number of such families in M.P. was "not more than couple of hundred" (page 123) and then (Page 123):

"In our opinion, it is neither possible nor necessary to decide regarding the number of people likely to be so affected because all of those who are entitled to be rehabilitated as per the Award will be provided with benefits..."

But the very argument was that the Tribunal Award leaves out these people. Also, why is it not possible to decide number of people so affected? A simple survey would suffice. Even if one supposes that these are not more than a couple of hundred families - does that mean that their right to life to life can be violated?

In fact, lakhs of people are going to be affected by this project in ways other than submergence. The Five Member Group in both its reports to the Court has called for a "complete census of all categories...affected in any manner whatsoever, including canal affected persons, persons affected downstream of the dam, groups and individuals providing supplies and services to others...a number of category-specific rehabilitation package should be worked out"

All over the world, this is now being recognised as the basic norm for assessing impact and developing rehabilitation plans. Yet, it is shocking that the highest Court of the land has rejected this basic fundamental right of the people.

F. Environmental Clearance

On the environmental clearance of the project, Justice Bharucha in his minority judgment has pointed out that all the officials notes prepared prior to clearance and even the order of conditional clearance itself brought out the fact that even the basic environmental impact studies had not been done by that time. It was noted by the Ministry of Environment, "Indeed it is view of the Ministry of Environment, forest and wild life that what has been done so far whether by way of action or by any of studies does not amount too much and that many matters are yet in the early and preliminary stages". The Ministry of Water Resources in its note put up to the Prime Minister has stated that "considering the magnitude of rehabilitation, involving a large percentage of tribals, loss of extensive forest area rich in biodiversity, enormous cost of the project and considering the fact that the basic data on these vital aspects was still not The

available there could be but one conclusion that the projects are not ready for approval". However, despite this state of affairs, conditional environmental clearance was given to the project in June 1987. As pointed out by Justice Bharucha, though those conditions were also violated and no comprehensive environmental impact assessment of the project has been done till date, the project is still being allowed to go ahead. That is why he has directed a comprehensive environmental impact assessment of the project and has restrained further construction till such assessment is done and clearance given.

However the majority judgment, even after noting the above, states that (Page 71):
"[It] is not possible.... for this Court to accept the contention of the Petitioner that the environmental clearance was given without application of mind. It is evident, ...that the environmental clearance of the project was unduly delayed."

What is amazing is that the Court accepts that "application of mind" can take place even when there is nothing to apply mind to. Because the very next statement in the judgment says:
"The Government was aware of the fact that number of studies and data had to be collected related to environment. Keeping this in mind a conscious decision was taken to grant environmental clearance..."

G. Specific Environmental Impacts

While the majority judgment accepts as valid the clearance given without studies it exhibits a similar approach while addressing the specific environmental impacts. A few examples are given below.

Compensatory Afforestation: The Court notes the arguments of NBA that compensatory afforestation was being carried out outside the project impact area as also that wasteland or lesser quality land was being used for compensatory afforestation. It ignores these arguments by simply stating: (Page 82)
"According to State of Gujarat it has fully complied with the condition by raising afforestation in 4650 hectares of non-forest area and 9300 hectares in degraded areas... against the impoundment area of 19%. The pari passu achievement of afforestation in Gujarat was stated to be 99.62%.".

The Court has not only accepted Gujarat's claims at face value but has not mentioned anything about other States or that the afforestation was carried out outside the impact area. It also states,(Page 82)
"If afforestation was taking place on wasteland or lesser quality land, it did not necessarily follow.....that the forests would be of lesser quantity or quality."

Downstream impacts: The serious impacts downstream of large dams are now recognised the world over. However, the downstream impacts of SSP are dismissed by this Court by stating that: (Page 83)
"Again, all these contentions [of serious downstream impacts] were based on the Morse Committee Report which the World Bank and the union of India had already rejected."

The Court also mentioned a study by a British Agency which says that there "are no down stream impacts whose magnitude and effect are such as to raise doubts to be cast over the wisdom of proceeding with the Sardar Sarovar ... It is thought unlikely that any significant negative environmental impacts [downstream] would occur over the next 30 years

The Court ends by saying (Page 85):
"It is also evident that until all the dams are constructed upstream and the entire flow of river is harnessed, which is not likely in the foreseeable future, there is no question of adverse impact including fishing activity and the petitioner's assertions in this regard are ill-conceived."

How can apprehensions of downstream impacts be "ill-conceived" just because they will take place after many years? After all, the major environmental impacts like waterlogging, siltation, downstream impacts etc. all are essentially long-term impacts. Further, the bias of the Court is seen from the fact that Petitioner's apprehensions of downstream impacts are being called "assertions" even though they are based on official reports and studies.

The Gujarat Government itself has stated in its submissions to the Court (Vol. 164 of Court, Page 27, dated April 2000):
"The effect on downstream will not be felt in the first and second states of development of the valley i.e. in the next 25 years. As per the study of CICFRI, the number of families who would be affected in the downstream and who are only partially dependent on fisheries is only 4644 [families]"

It may be noted that the Morse Committee was an independent committee and it cautioned about very serious downstream impacts. The study by the above mentioned British Agency was commissioned just after the Morse report came out, with a clear (albeit unstated) purpose of countering the findings of the Morse report. They were paid for by a grant from the British Government given to the Sardar Sarovar. Not surprisingly, these studies gave a virtual clean chit to the project. It is indeed in such situations that a public and peer review of the studies becomes critical. The need for such a review itself has been rejected by the Court. Meanwhile, the serious downstream impacts of Sardar Sarovar are acknowledged even by the first study of the environmental impacts done by the MS University of Baroda, by NCA and so on.

Archaeological Heritage: The Narmada valley has a rich archaeological heritage and evidence of earliest human and humanoid civilisations has been found here. Petitioners had shown, among other things, specific instances of important archaeological sites that need to be investigated, excavated, and /or protected. This was based on the official list produced by the Environment Sub Group of the NCA submitted to the Court. Among these are several sites which would be submerged if the height of the dam was raised even to 90 m. One such site was a site where indications of a Harrappan contemporary civilisation has been found. All these sites are in M.P. NBA had pointed out to the Court that it is necessary to at least examine and document what is being lost before permission is given for submerging these sites.

In dealing with this submission, the Court has noted this submission of NBA at page 85 of the order. Amazingly, in the discussion on this issue on the subsequent 3 pages, it does not refer to this submission at all. Instead, there is a general discussion on Archaeology, reference is made only to some studies, and action plan in the state of Gujarat only, that's the end of the matter! M.P. situation is not referred to at all! The most serious issue and specific instances raised by NBA is mentioned, and then simply bypassed and ignored.

H. Community Resettlement

Every agency right from the NWDT Award to the NCA to state policies have professed the need for community based resettlement. Thus oustees from one village were entitled to be resettled together if they so desired.

The rehabilitation master plan of Narmada Control Authority itself stated that " Oustees shall, promptly after their displacement.... be relocated as village units, village sections or families in accordance with the oustees preference." The problem was that it was not possible for the Governments to carry this out as they are not having land in large enough chunks. Therefore, they have tried to argue that the oustees themselves have chosen to go in dispersed groups. They made this contention without ever showing that the oustees were offered chance to settle together but they refused.

However, the Court has accepted this contention without any evidence, and has stated in addition that (Page 126):
"While resettlement as a group in accordance with the oustees preference was an important principle / objective, the other objective were that the oustees should have improved or regained the standard of living that they were enjoying prior to displacement and that they should have been fully integrated in the community in which they were re-settled"

The implication is that these two objectives were somehow mutually exclusive. With this, the Court has virtually absolved the states from the responsibility of the implementation of community based resettlement, while professing that it is an important principle/objective.

I. Biased Picture of Tribal Area

The Court has accepted the picture presented by the Government of the tribal areas as being very bleak, and very poor, of a resource poor area, people somehow eking out a living. This is then used to state that therefore the tribals find the resettlement package very attractive. (Pages 41-43). This has completely ignored the submissions made by the Petitioners about the reality of the tribal areas, which may seem poor to outsiders but have their own rich resource base, skills, culture, systems and so on. This is also backed by the findings of the Tata Institute of Social Sciences. But the Court has ignored this.

J. Selective Picking from the Evidence of Monitoring Agencies

The Court's Order has noted the findings of the Monitoring Agencies in the three states namely Centre For Social Studies for Gujarat oustees,

H.S. Gaur University for M.P. and Tata Institute of Social Sciences for Maharashtra. It notes the findings of HSG University that M.P. are happy in Gujarat, but as far as TISS is concerned, it only says that TISS has reported 97% overall literacy while illiteracy was rampant in the submergence villages. (Page 139-140) It has left out the detailed findings of TISS submitted to the Court which talked about serious problems with resettlement, the rich resource base of the tribals, the need for community resettlement and so on.

K. Morse Committee Report Dismissed

The Morse Committee was set up by the World Bank, consisted of eminent and qualified members, and was assisted by best consultants from the World over. It undertook an extensive review of the rehabilitation and environmental aspects over 10 months, much of them in the field. It was the only agency that had access to all the documents related to the project from World Bank, Governments, NGOs, NBA etc. It produced a meticulous report.

Yet, the Court dismisses this report by stating (Pages 76-78):
"Apart from criticism of this report from other quarters, the World Bank itself did not accept this report..."

"The Government of India vide its letter dated 7th August 1992 from Secretary, Ministry of Environment and Forests did not accept the report and commented adversely on it."

"In view of the above, we do not propose, while considering the petitioner's contentions, to place any reliance on the report of the Morse Committee".

A more strange reason to reject the report would be difficult to find. Since the report was heavily critical of the project and the World Bank, it was obvious that the Bank and the Government of India would reject the report. But for the Court to reject the report because the Bank and Government has rejected it is inexplicable.

L. Latches (Delay)

The majority order has found NBA guilty of latches. It states that (Page

32-34):
"It [NBA] has been in existence since 1986 but has chosen to challenge the clearance given in 1987 by filing a writ petition in 1994."

"Even though complete data with regard to the environmental was not available, the Government did in 1987 finally give environmental clearance. It is thereafter that the construction of the dam was undertaken and hundreds of crores have been invested before petitioner chose to file a writ.. In our opinion... Petitioner is guilty of latches."

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

And on Page 166:
"...any challenge to such a policy decision must be before the execution of the project is undertaken...the decision to undertake a project, if challenged after its execution has commenced, should be thrown out at the very threshold on the ground of latches if the petitioner had the knowledge of such a decision and could have approached the Court at that time."

It is amazing that the Court has ignored the basic fact that most information about such projects is secret and classified, and very rarely available to the public. In most cases, people are never involved or informed at project formulation or initiation stage. People only come to know when the work begins. Even an organised struggle like the NBA takes years in which it can get access to the inside information. Even when information about lapses and problem is known, it is very difficult to get written proof. How can the Court except people to move the court at the time the decisions are taken?

Further, NBA had resorted to step by step approach. It believed that rather than rush to the Supreme Court, it would be more important to raise the issue with the Government. Only when the Government ignored the persistent pleas of the movement and mounting evidence did it decide to move the Court.

Indeed, rather than find NBA guilty of latches, it would have been more appropriate for the Court to have reprimanded the Government for undue hurry. Even before the project had secured environment clearance, a few

hundred crore rupees had been spent. Loan Agreements had been signed with the World Bank. Even the tenders had been floated, opened and contracts awarded before the clearance was given! Many families had been displaced. All this was in front of the Court in writing, and had been pointed out to it during the hearings.

The order of Jst. Bharucha states that: (Page 30)
"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 latches 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."

This is precisely the approach that one would expect from the highest Court of the land which is expected to protect the common person's fundamental rights. Unfortunately, the majority order has taken a very narrow view of the matter.

M. Tribunal Not Open to Challenge

The majority order observes that (Page 37):
"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."

This is a very legalistic interpretation of the Inter State Water Disputes Act and the Article 262 of the Constitution, especially when the Tribunal Award is challenged face to face against fundamental rights including right to life. This raises a lot of queries. The Tribunal is a creation of the Inter State Water Disputes Act. However, in the case of the Narmada, the dispute is not between the states but between the state and the people. The arena of this dispute is that of the fundamental rights of the people. Hence, to say that a third party cannot challenge the tribunal is not only a narrow view but also an incorrect application of the ISWDA. The unjust nature of this limitation is further accentuated by the fact that the people were not given a hearing in front of the Tribunal. Thus, they

are bound by an Order which has been passed without hearing them. The assumption of course, is that the Governments represent the people. In this case, however, the Governments represent to the Tribunal on behalf of the "beneficiaries" as also "affected". This is a clear conflict of interest and hence there should be the provision for meaningful representation of affected people being heard; else, they should have a right to challenge the Tribunal. This is especially so when the issue is of the right to life itself.

Further, what about the case when the basic facts and assumptions on which the Tribunal based its Order are found to have been incorrect, or have changed? This is precisely the case in the Sardar Sarovar. How can the right to challenge the Tribunal be taken away then?

Last but not the least, in case where the implementation of (one part) of the Tribunal Award becomes impossible, what would happen? In the case of Sardar Sarovar, this is precisely what is happening. The implementation of rehabilitation is in shambles, and the Tribunal Order is being violated time and again. Would it not be open to for a person to challenge the Tribunal Order on the grounds that one part of it, especially the part dealing with the very right to life of the people, is not implementable?

N. Public Interest Litigation

One of the most objectionable parts of the Court's noting are the remarks regarding Public Interest Litigation. (PIL) The Order States (Page 166):
"With the passage of time, PIL jurisdiction has been ballooning so as to encompass within its ambit subjects such as probity in public life... But, the balloon should not be allowed to degenerate to becoming Publicity Interest Litigation or Private Inquisitiveness Litigation."

This is a completely uncalled for statement. If the Court wanted to say that NBA's PIL was frivolous or filed to gain publicity, it should have stated this in so many words. If not, then such a sentence has no place in the Order. It should be obvious that NBA's Petition brought out issues that were serious enough for the work to be stopped for 5 years. To quote the minority order, "when the public interest is so demonstrably involved", how can the PIL be frivolous?

Indeed, by making such remarks, the Court indicates an approach to PIL that does not augur well for the future of PILs. PIL is a unique contribution of the Indian judiciary and needs to be strengthened further, rather than weakened, even if there are the exceptional cases of frivolous litigation. Indeed, the cases of frivolous and mala-fide litigation are probably far more in the normal litigation than in PILs.

Part C: Overall Approach of the Court in the Majority Judgment
Apart from the specific parts of the order related to the Sardar Sarovar, there is also the overall approach within which this whole judgment is framed. It is important to understand this approach.

Court's Approach to Environment
An astounding aspect of the majority judgment is the approach and understanding of the Court regarding the vital issue of environment. The whole approach and understanding is completely against the emerging knowledge, understanding and practices - nationally and internationally. It is statist and status-quoist. World over, the serious environmental impacts of dams have been recognised and extensively documented. Yet, the majority notes that (Page 174) :
"So far number of such river valley projects have been undertaken in all parts of India. The Petitioner has not been able to point out a single instance where the construction of a dam, on the whole, had an adverse environmental impact. On the contrary the environment has improved".

This is an amazing assertion; first of all, the case was about SSP and not large dams in general. Petitioners were not expected to, and indeed discouraged from making submissions regarding broader issues like environmental impacts of other dams in the country. Still, the Petitioners had submitted to the Court a list of 10 dams in the country that had been stopped or not granted clearance due to serious environmental problems including the famous Silent Valley Project.

Secondly one wonders on what evidence this assertion of Court is based; for it had no such evidence, presentations, discussions, regarding the environmental impacts of large dams all over the country. However, recently, a inter-disciplinary team of experts did a "India Case Study" on large dams. This study was commissioned for the World Commissions on Dams, a body of internationally eminent people from all sides of large dams debate. The unanimous findings of this study, given in Chapter

"Some Agreed Conclusions - A final summing up" are:

1. Large dams have made important contributions to the development of irrigated agriculture..

2. However, they have also had significant adverse impacts, including social and environmental impacts..

3. Some of the adverse impacts of large dams are of such a nature that they can be neither prevented nor mitigated.

4. Most of the adverse impacts and some of the incidental benefits of large dams have not been recognised and assessed in the past.

5. The computation of the financial and economic costs of preventing or mitigating the adverse impacts of large dams would undoubtedly have an impact on their financial and economic viability.

6. This is borne out by a retrospective assessment of the economic and financial aspects of some large dams. This showed that when the costs of preventing and mitigation even a few of these adverse impacts were included in the overall costs of the large dam projects of the 1990s, they seemed to become by and large economically non-viable.

9. Further, if the costs of residual environmental and social impacts that cannot be prevented or mitigated are brought on board, there would be an additional impact on the financial and economic viability of large dams.

This is the finding of a expert group study.

Precautionary Principle

NBA cited certain judgments of the Supreme Court which rule that the precautionary principle must be followed and that burden of proof (that adverse impact will not be there) is on the agency that wants to change the status quo.

The Precautionary Principle is being recognised all over the world and is enshrined in Agenda 21 of Rio Earth Summit also.
Yet, the court's majority order has dismissed its application here by stating that it applies only in cases of "polluting or other industry where

the extent of damage likely to be inflicted is not known". Of course, they miss the point that full impacts even in case of a dam are not known or cannot be fully anticipated.

The order further states (Page 95-96):
"In present case, we are not concerned with polluting industry...what is being constructed is a large dam. The dam is neither a nuclear establishment or polluting industry. The construction of a dam undoubtedly would result in the change of environment but it will not be correct to presume that the construction of a large dam like Sardar Sarovar will result in ecological disaster. ....The experience does not show that construction of a dam ... leads to ecological or environmental degradation."

Apart from the false dichotomy between polluting industry and dams, this assertion also flies in the face of findings of studies like India Study quoted above.

No need for independent Assessment
The Court says that there is no need for any independent agencies to look at the studies and surveys done. This is already discussed in detail earlier in this note.

Court's Approach to Large Dams
A substantial part of the Court Order is nothing but an eulogy of large dams. Again, this eulogy is based on personal opinions, since this was not the subject matter of the litigation and was not discussed or presented during the hearings or in the submissions. As Prashant Bhushan, Advocate points out:
"Every person in the country including judges are entitled to have views on these matters. What is disturbing is when such personal views are delivered as judgments of a court. This is because a judge is required to decide issues on the basis of evidence before him, not on the basis of his personal biases. In this case, these pronouncements have been made in a case where the viability or desirability of large dams in general was not in issue and where the court had repeatedly told the petitioners that they must not make any submissions on this issue. Equally distressing is the fact that such pronouncements have been made without any evidence of these facts before the judges."
Indeed, a host of extensive documentation including the India Country Study mentioned above shows ample evidence of the serious problems of large dams not only with respect to the social and environmental

impacts, but also with respect to the benefits that they have been able to provide. Certainly, such an unqualified eulogy of large dams is factually incorrect and essentially consisting of a large number of assertions, which are not based on any evidence before the Court, and flies in the face of the vast evidence the world over which has raised serious doubts over the very benefits and viability of large dams.

The Order also contains a number of similarly unfounded statements like hydropower is cheap, or that hydropower is necessary to combat the global greenhouse gas effects. One question is whether we in India need to pay for ameliorating the problem of green house gases, since it mainly the creation of the affluent and profligate and wasteful consumption of the North/ West. More important is that the studies undertaken by the World Commission on Dams show that large dams themselves can have serious Greenhouse gas emissions.

Role of Court

The Court takes a general stand that it cannot intervene in policy matter as long as decisions are taken with application of mind and consideration of all facts. It also takes a position that the Tribunal cannot be challenged and has to remain binding. Certainly, there is no doubt whatsoever that policy making is the preserve of the Government. Yet, it cannot be that the Court will not have any role in the matter. To the extent that the policies, and the process of making these policies and implementing them tramples on the fundamental rights, the Court not only has a right, but also a duty to intervene. Given the serious nature of issues raised by infrastructure projects vis-à-vis the right to life of the affected people, it is expected that the Courts would take a liberal and broad rather than a narrow view of its own role. This is all the more important since the Government has historically exhibited unbridled use of might rather than a responsible exercise of powers.

These issues have already been commented upon earlier in the note. It is clear that the above approach and thinking of the Court has profoundly influenced the judgment.

Part D: Brief Comments on the Minority Judgment

The minority judgment is a one of the very significant judgments of the Supreme Court. There are a few contentions of the Petitioners that it has not accepted. In particular, it has said that (Page 2):

"..the Sardar Sarovar Project does not require to be re-examined, having regard to its cost effectiveness or otherwise, and that the seismicity aspect of the Project has been sufficiently examined and no further consideration thereof is called for. I do not accept the submission on behalf of the petitioner that those ousted by reason of the canals emanating from the reservoir in the Project must have the same relief and rehabilitation benefits as those ousted on account of the reservoir itself; this is for the reason that the two fall in different classes."

Detailed reasons are not given. Note that it rejects a "same relief" for the canal affected people, but does not reject relief for them. The demand of NBA was for an "appropriate package" for each category of oustees. The minority order clearly states that the clearance given to the project was not a valid clearance and orders the project to seek a fresh clearance. For doing this, it also orders the constitution of an expert committee to examine the environmental studies and surveys done so far, as also to undertake any further studies required. It also requires the cost of the environmental measures to be considered. It indicates that the environmental clearance process will not be a post facto process to justify a decision already taken in as much as it explicitly expresses the possibility that such a clearance may not be granted.

Regarding the resettlement aspect, it lays down very strictly the concept of linkage between full and proper resettlement and the dam construction, an idea clearly envisaged by the Tribunal but repeatedly violated. It also makes it amply clear that only the GRAs can be trusted to effectively monitor the R&R activities, indicating also that the state machinery cannot be.

It states that when matters of grave public importance are involved, a mere delay in moving the Court cannot be used to deny relief/justice.

In sum, the judgment accepts many of the very important contentions of the Petitioners and goes significantly in addressing the basic concerns of the fundamental rights of the affected people. It is a important example of how the highest court of this land can, by taking a broad and liberal interpretation of its role, and through a judicious exercise of its power, play a significant role in safeguarding the rights of the ordinary citizens against the untrammeled exercise of the powers by the Government and other interests.

THE PEOPLE VS THE GOD OF BIG DAMS

Arundhati Roy

On the morning of the 18th of October the three judge bench of the Supreme Court delivered its verdict on the PIL filed by the Narmada Bachao Andolan against the Union of India and the state governments of Gujarat, Maharashtra and Madhya Pradesh. After six-and-a-half years of litigation, the primary imperative of what has come to be called 'the majority judgment' by Chief Justice Anand and Justice Kirpal is that the construction of the (currently 88 meter high) Sardar Sarovar Dam be completed as 'expeditiously' as possible. Further, it says that the court ought to have no role in deciding such matters. (Ought it to take a six year legal injunction and three Supreme Court judges to come to this profound conclusion?) Justice Bharucha, the only one of the three judges on the Bench to have heard the case through from the time it was filed, wrote a dissenting judgment, detailing the reasons why he could not bring himself to agree with his brother judges.

In an earlier essay on the Narmada valley, The Greater Common Good, (for which I was rapped on the knuckles by the Supreme Court), I described how successfully the Indian State has used all the institutions at its command - the army, the police, the bureaucracy, the courts - to achieve what it set out to achieve. To appropriate India's resources - including its land, its forests, its rivers - and redistribute them to a favoured few. The Indian State is superbly accomplished in the art of protecting the cadres of its paid-up elite and pulverising those who inconvenience its intentions. Its finest feat of all is the way it achieves all this and emerges smelling sweet. (After all, we're not Burma, or Indonesia, or Rwanda or even Pakistan. We're the proud citizens of the world's biggest democracy.) If you want a quick fix on how the smell is sweetened, a sort of Lazy Person's Guide to The Way India Works, read the two Supreme Court judgments side by side. Had Justice Bharucha chosen not to place his dissent on record, we would never have known the unimaginable process by which the Sardar Sarovar project insinuated itself into the world. For this, I doff my cap to Mr Bharucha. Thank you sir.

In 1961 Nehru laid the foundation stone for a 49.8 metre high dam - the midget progenitor of the Sardar Sarovar. In 1979, after the Narmada Water Disputes Tribunal announced its award, the Sardar Sarovar was redesigned to be a massive, 138.68 metre high dam, which, though located

in Gujarat, would submerge villages in Madhya Pradesh and Maharashtra. In 1985, before any detailed studies had been done, before any costs were computed, before anybody had any idea what the human cost or environmental impact of the dam would be, even before the Union ministry of environment cleared the project, the World Bank sanctioned a 450 million dollar loan. (Eight years later, in March 1993, after commissioning an Independent Review, which said that the project was inherently flawed and that rehabilitation would be impossible, the World Bank withdrew from the project. This does not absolve it from the sin of setting the ball in play.)

As soon as the World Bank load was in place, the state governments set up an unseemly clamouring for the project to be approved by the Ministry of Environment and Forests regardless of the fact that no proper studies had been done. In his judgment, Justice Bharucha documents this process in detail, quoting note after incriminating note.

In October 1986, a Note was prepared by the Ministry of Water Resources on the environmental aspects of the Sardar Sarovar project. It said that the clearance of the projects from the environmental angle and under the Forest Conservation Act 1980 had become a matter of urgency for the governments of Gujarat and Madhya Pradesh (that luscious loan was waiting). The Ministry of Environment and Forests said that it was doing its best "but have been finding the material submitted inadequate and unsatisfactory." Under a sub-heading "Should the project be taken up at all?", the Note said that abandoning the project was not advisable even though critical information (which would take at least three years to collect) was not available.

There is a remarkable, Kafkaesque section in the Note: "with the project postponed for three years and with no assurance at the end of that period that 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. In other words, the postponement of the decision in the interest of collecting information...may in fact prove to be a self defeating exercise."

In other words, the government sees no point in doing studies unless it already knows the outcome will be favourable to the project. (And, axiom-

atically, if it already knows the outcome, why bother with the studies?) On November 20, 1986, another Note was prepared by the Ministry of Water Resources and forwarded to the Additional Secretary to the Prime Minister. Considering the fact that basic data on vital aspects of the project was still not available the Note says "there could be but one conclusion, that the project(s) are not ready for approval." Yet on January 15, 1987 a note was put up to the Prime Minister by his Secretary, seeking his approval for conditional joint clearance of the Sardar Sarovar and Narmada Sagar projects. The Department of Environment and Forests said that the rehabilitation plan was not ready, that land had not been surveyed, that areas of land use capability and water availability had not been identified and the land being suggested for rehabilitation, prima facie appeared to be infertile. The PM's Secretary, however, said that the project had been waiting for clearance for over seven years (what were they doing all that time?) and that the chief ministers of MP and Gujarat were "keenly awaiting" it. On January 19, 1987 the Prime Minister (Rajiv Gandhi) jotted a hand-written comment on the note: "Perhaps this is a good time to try for a River Valley Authority, discuss."

This is the only thing on record that constitutes the 'Prime Minister's clearance'. This single throwaway sentence is then used to announce to the press that the projects have been cleared. The file is judiciously fattened with various notes and letters from the state governments hailing the clearance.

On June 24, 1987, based on what the Ministry itself called inadequate information, the Ministry of Environment and Forests gave a clearance to the projects subject to several conditions including a Catchment Area Treatment Scheme, Command Area Development Plan and the submission of a Rehabilitation Master Plan. In his dissenting 'minority' judgment, Justice Bharucha says "An environment 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 the Union of India in regard to environmental clearances and, therefore, no clearance at all." His judgment goes on to say that it was mandatory under the conditions of clearance that catchment area treatment and the full rehabilitation of all displaced people be completed before any water is impounded in the reservoir. According to Justice Bharucha, the fact that this has not happened constitutes a clear violation of the conditions of clearance. He

says that in the 13 years that have passed since the conditional clearance, no comprehensive environmental impact assessment has been done. For all these reasons the dissenting judgment says that the project must be sent back to the Ministry of Environment for fresh clearance after proper studies have been done.

The 'majority judgment' however, sweeps this aside calling environmental clearance "only an administrative requirement." Only an administrative requirement? Environmental clearance for two dams whose reservoirs will, between them, hold more water than any other reservoir in the Indian subcontinent is only an administrative requirement? What sort of precedent does this set for the planners of the 695 big dams that are being planned and constructed in India right now? Should they throw darts at a map where they want to build a dam and then go ahead and build it? Will the Supreme Court support them pari pasu?

The 'majority judgment' actually goes on to blame the NBA for filing the petition so late. "For any project which is approved after due deliberation (notice how in the course of 13 years a Prime Minister's casual one-liner becomes 'due deliberation') the Court should refrain from being asked to review the decision...Pleas relating to height of the dam and the extent of submergence, environment studies and clearance, hydrology, seismicity and other issues except implementation of relief and rehabilitation, cannot be raised at this belated stage."

What this means is that the government sees no point in doing studies before the project starts, and that citizens have no right to question it once construction begins. The message from the highest court in the land is pretty clear: Poor? Adivasi? Dalit? Happen to live in the submergence zone of a big dam? Tough luck. Go away, and go quietly.

The 'majority judgment' decrees that the project should be completed according to the guidelines of the Narmada Water Disputes Tribunal Award under the supervision of the Narmada Control Authority (NCA), supposedly an independent authority. The Chairman of the NCA Review Committee is the Minister of Water Resources. The Chairman of the NCA itself is Secretary, Ministry of Water Resources. (Round and round the apple tree. Little partner dance with me...) Never mind that for 13 years the NCA has consistently violated the Award of the Tribunal, which is what led to the filing of the petition in the first place. Despite this shocking record, their lordships see no reason to "assume that the au-

thorities will not function properly." In October 2000, 13 years after the so-called "environmental clearance" and commencement of construction, the court asks the NCA to produce within four weeks a Rehabilitation Master Plan which they haven't managed to produce in 13 years. Mind you, we're still talking of a plan —not of actual rehabilitation.

In 1979, the number of families that were to be 'officially' displaced by the SSP was 6,000. In 1987, it was 12,000. In 1991, it surged to 27,000. In 1994, when the petition was filed it was 41,500. That's more than 200,000 people. Today God knows what the real figure is. The court has it on affidavit from the government of Madhya Pradesh (the state to which 80 per cent of the displaced people belong) that it has no land for rehabilitation. In the last 13 years, since construction began, MP has not provided a single hectare of agricultural land for rehabilitation. What's more, the governments of MP and Maharashtra have said under oath on legal affidavits that 368 families who have been displaced by the present height of the dam (88 metres) have not been given land. (Of course the MP government doesn't mention the 114,000 oustees from the Bargi Dam and the 30,000 oustees from the Maheshwar Dam and the indeterminate number of oustees from all the other dams it has planned, who have also not been given land). And yet, the Supreme Court of India clears the immediate raising of the dam height up to 90 metres.

In other words, it orders the violation of the Tribunal Award. For the BJP government in Gujarat this comes as a life-raft. Having suffered a severe setback in the local panchayat elections, the judgment couldn't have been better-timed for the Gujarat government had drafted it itself. The perfect Diwali gift for a perfect government. Honestly, some people have all the luck.

After having repeatedly prevented the NBA from making any submissions in court on the merits and demerits of Big Dams, the last few pages of the 'majority' judgment launch into a badly written eulogy to big dams based on no evidence whatsoever. Two quotes, two points:

(a) The petitioner has not been able to point out a single instance where construction of a large dam has, on the whole had an adverse environmental impact. On the contrary the environment has improved. Maybe their lordships don't travel very much. They could go to Punjab and have a water-logged weekend in the command area of the famous Bhakra Nangal Dam. Or stay at home and read the study of 300 projects

by the Expert Committee on River Valley projects which found that 89 per cent of them violated the guidelines laid down by the Ministry of Environment. Or just keep in mind that despite India's 3,600 Big Dams, drought-prone and flood-prone areas have actually increased since 1947, that 200 million Indian citizens have no access to safe drinking water, that not a single river in the plains has potable water, and that 10 million hectares of irrigated agricultural land are currently saline and water-logged.

(b) At the time of Independence foodgrain was being imported to India but with the passage of time and the construction of more dams the position has been reversed. The large-scale river valley projects per se all over the country have made India more than self-sufficient in food.

I thought so too, your lordships. Until I began to look for some official, government facts to back that thesis up and found that there weren't any. Until now no studies have been done to determine what percentage of India's foodgrain is produced by big dams. To believe that Big Dams are the key to India's food security is to have faith without facts because facts don't exist. At least they didn't until recently. This year, a chapter in the India Country Study done for the World Commission on Dams (whose report will be released in London by Nelson Mandela on November 16) says that 10 per cent of India's foodgrain is produced by big dams. That's 20 million tonnes. The Ministry of Food and Civil Supplies says that 10 per cent of India's foodgrain is eaten every year by rats. And that's 20 million tonnes. We must be the only country in the world that builds dams, uproots millions of people (56 million people in the last 50 years according to the India Country Study), submerges forests and destroys the environment in order to feed rats. Clearly we need better warehouses more than we need Big Dams.

[An ardent campaigner of the Narmada Bachao Andolan, Arundhati Roy is a writer and activist]

PEOPLE BE DAMNED

Prashant Bhushan

At last we have it on excellent authority. The Chief Justice A.S. Anand and Justice B.N. Kripal of the Supreme Court have decreed that large dams do not cause environmental damage, they lead to improvement in the conditions of the oustees and are in fact essential for the economic prosperity of the country.

In the words of their lordships contained in the majority judgment on the Sardar Sarovar project, "The experience does not show that the 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." They say: "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."

They go on to say that in most cases of involuntary displacement, the oustees have in fact been left better off after their displacement. "A properly drafted R&R plan would improve living standards of displaced persons after displacement. For example, residents of villages around Bhakra Nangal Dam, Nagarjun Sagar Dam, Tehri, Bhilai Steel Plant, Bokaro and Bala Iron and Steel Plant and numerous other developmental sites are better off than people living in villages in whose vicinity no development project came in." So now we have a resounding endorsement of the virtues of large dams from the highest judicial authority in the country.

Every person in the country including judges are entitled to have views on these matters. What is disturbing is when such personal views are delivered as judgments of a court. This is because a judge is required to decide issues on the basis of evidence before him, not on the basis of his personal biases. In this case, these pronouncements have been made in a case where the viability or desirability of large dams was not an issue and where the court had repeatedly told the petitioners that they must not make any submissions on this issue. Equally distressing is the fact that such pronouncements have been made without any evidence of these facts before the judges.

The issue of large dams has become controversial with increased understanding of the problems of those who are involuntarily displaced and long- term damage to the ecology of the area. Most developed countries

some of them. Recently, the World Bank has sponsored an international commission to review the performance of large dams. This World Commission on Dams (WCD) has representatives from all major stake holders including the dam industry. The recently released India Study of the WCD presents a dismal picture.

The report concludes that major and medium irrigation projects are largely unviable. On hydropower the report concludes that, "Given the high capital cost, long-term gestation period and environmental and social costs, hydro power development is not the preferred option for power generation compared to other options". Contrast this with the sweeping statement of the judges (without any evidence): "The cost of generation of electricity in hydel projects is significantly less".

The WCD India study goes on to estimate that 56 million persons, of whom 62 per cent are SC and ST, have been involuntarily displaced due to large dams, and over 5 million hectares of forests have been submerged. The dams have consumed Rs. 1,56,000 crore which represents more than two-third of the water resource budget in the country for the last 50 years, while contributing less than 10 per cent to the agricultural production. The report says that even the electricity and irrigation benefits routinely bypass the affected and poor communities and are consumed by landed farmers, urban consumers and well to do people. "The distribution of most of the costs and benefits of large dam seem to accentuate social-economic inequities."

On the Sardar Sarovar project, the World Bank had commissioned a high powered review (the Morse Committee) which submitted its report in June 1992. The report concluded that, "Environmental and social tradeoff have been made, and continue to be made, without a full understanding of the consequences. As a result, benefits tend to be overstated, while social and environmental costs are frequently understated...

"We think that the Sardar Sarovar Projects as they stand are flawed, that resettlement and rehabilitation of all those displaced by the projects is not possible under the prevailing circumstances, and that the environmental impacts of the projects have not been properly considered or adequately addressed."

This high powered committee's report has been rubbished in the judgment of Justice Kirpal by saying that it was not accepted by the World

ment of Justice Kirpal by saying that it was not accepted by the World Bank or the Government of India. The court routinely appoints experts committees on its own when it is dissatisfied with Government committees, and acts on the reports of such committees. But curiously, the court refuses to even look at a report which is not endorsed by the World Bank or the Government. Virtually the same short shrift has been given to the two reports of the high powered Five Member Group (FMG) constituted by the Centre to look at certain aspects of the projects.

The FMG, virtually all official agencies and the Narmada Tribunal Award have emphasised the need for community rehabilitation of the oustees. Thus oustees from one village were entitled to be resettled 'together' if they so desired. Yet the court goes on to hold that community rehabilitation of these mostly tribal oustees was not required.

Justice Bharucha in his minority judgment has pointed out that all the official notes prepared prior to clearance and even the order of conditional clearance brought out the fact that the basic environmental impact studies had not been done by that time. It was noted by the Ministry of Environment. "Indeed, it is the view of the Ministry of Environment, Forests and Wild Life that what has been done so far whether by way of action or by way of studies does not amount to much and that many matters are yet in the early and preliminary stages."

The Ministry of Water Resources in its note put up to the Prime Minister has stated that "considering the magnitude of rehabilitation, involving a large percentage of tribals, loss of extensive forest area rich in biodiversity, enormous cost of the project and considering the fact the basic data on vital aspects was still not available, there could be but one conclusion that the projects are not ready for approval".

However, despite this, conditional environmental clearance was given to the project in June 1987. As pointed out by Justice Bharucha, though those conditions were also violated and no comprehensive environmental impact assessment of the project has been done, the project is still being allowed to go ahead. That is why he has directed a comprehensive environmental impact assessment of the project and has restrained further construction till such assessment is done and clearance given. The majority judgment of Justice Kirpal holds that "the pleas relating to height of the dam and the extent of submergence environmental studies

mentation of relief and rehabilitation cannot be permitted to be raised at this belated stage." It is surprising that this comes from judges who have acquired the reputation of 'Green judges', having issued tough directions in matters relating to deforestation and pollution.

Distressingly, the court has also allowed immediate construction of the dam till 90 meters on the basis of a clearance given by the NCA in early 1999. This is despite the admission of Madhya Pradesh that it had not been able to provide agricultural land to at least 156 families. The court notes that in six villages of MP affected at 90 meters, even land acquisition awards had not been passed. This means that this construction up to 90 metres would violate the Narmada Tribunal Award itself which mandates that under no circumstances can the land of an oustee be submerged till he has been rehabilitated.

The Narmada Bachao Andolan had been reluctant to approach the court since many in the NBA viewed the court as an instrument of the haves, the powerful and the influential. I persuaded them to come to court since I had more faith. I must admit that I have been proved wrong. This judgment is bound to shake the confidence of the people in the ability of the judiciary to protect the rights of the weak from onslaughts by the State and powerful vested interests.

[Prashant Bhushan is a senior advocate in the Supreme Court of India and has represented Narmada Bachao Andolan, along with Adv. Shanti Bhushan]

A JUDGMENT OF GRAVE IMPORT

Ramaswamy Iyer

This article is about the nature and implications of the Supreme Court's judgment on the Narmada (Sardar Sarovar) case, and not about the merits of the project or about the question of large dams in general. 'Judgment' here refers to the majority judgment by Justices Kirpal and Anand. While the minority judgment by Justice Bharucha is not without importance, it is the majority judgment that prevails and constitutes the judgment in this case; and being the judgment of the highest court in the land, it represents finality from a legal point of view. The petitioners have no legal recourse against it, other than a review petition to the Supreme Court itself. It follows that criticisms of the judgment may have no practical consequences. Nevertheless, they may still serve a useful purpose, and it is in that belief that this article is being written.

It is written with a heavy heart. During the last decade or two, the Supreme Court has been blazing a trail. While there has been some criticism of what has come to be known as 'judicial activism', it has on the whole won national approval. Most of us (this writer included) have been grateful to the judiciary for trying to rescue the country from the egregious failures of the executive and the legislature. Unfortunately, all that good work has been nullified at one stroke by this single judgment, which blazes a trail in the wrong direction. The complaint of the present writer is not that the judgment allows the project to proceed further. It was never his expectation that the court would stop the project. However, he had hoped that approval to further construction would be severely conditional and that justice would be done to project-affected persons (PAPs). Those hopes have been belied. The judgment can only be described, with deep regret, as a most unfortunate and disquieting one. Such a statement cannot be made lightly; the following paragraphs will provide the necessary justification.

First, the judgment, delivered after six long years of proceedings, fails to deal with the very issue that was brought before it, namely, a situation of lapse and failure in relation to certain aspects. The judgment allows the dam to go up to 90 metres, and stipulates that further construction would be conditional on a clearance (in stages of 5 m) by the Environmental and Rehabilitation Sub-Groups of the Narmada Control Authority (NCA) from their respective points of view and with reference to the conditions of clearance with which they are concerned. Those sub-groups are in

any case charged with that responsibility, and the judgment has said nothing new; this article will return to that question. However, the point that needs to be noted here is that if a check with reference to the environmental and rehabilitation aspects is warranted after 90 metres, it is equally warranted before that height is reached. Rehabilitation has not been completed fully even in relation to a height of 85m. This must have been clear enough from the material before the court. It has also been clearly stated that land for resettlement is not available in Maharashtra and Madhya Pradesh. The judgment itself faults the MP government for its failures in this regard. There are deficiencies in relation to the environmental conditions too. It is beyond doubt that the pari passu clause has not been complied with. Thus, there is an existing situation of failure of compliance with the conditions prescribed by the ministry of environment and forests and the Planning Commission while according approval to the project in 1987. That failure also constitutes a violation of the Tribunal's directions as well as those given by the Supreme Court itself in the past. The minority judgment of Justice Bharucha does not specifically refer to this, but in a sense it goes further: it says that the very clearance given to the project in 1987 was wrong because it was not based on a proper examination; on that ground it calls for a halt to the project until it is put through a fresh scrutiny and clearance. There is thus room for some concern (to put it mildly) on the environmental and rehabilitation fronts. Justices Kirpal and Anand may not agree with Justice Bharucha that there is need for a fresh examination and clearance, but should they not at least have made further progress from 85m to 90m conditional on the existing deficiencies being remedied and compliance completed? Overlooking present non-compliance and asking for compliance to be checked at some future time amounts to a condonation of violations – a kind of 'amnesty' scheme for the project authorities and the governments concerned. (It might be argued that the Rehabilitation Sub-Group of the NCA had found that the conditions had been fulfilled for a height of 90m. They said nothing of the kind; they merely noted that "arrangements were in place", not that conditions had been fully complied with. Nothing that they said can be construed as warranting further construction up to 90m.)

Secondly, the judgment muddies the waters by making sweeping pronouncements about the desirability of dams. The learned judges strongly argue the case for judicial restraint and chastise the petitioners for bringing before the court matters that belong to the executive sphere. They seem to have forgotten that they themselves, or their predecessors on the

bench, had raised some issues of this kind (hydrology, height of the dam, etc) and asked for a second report from the Five- Member Group (FMG), and that the Further Report of the FMG was submitted in April 1995 not to the government but to the Supreme Court as directed by it. Leaving that aside, and accepting the stress on judicial restraint as valid, one must ask why the learned judges then proceeded to write an essay on the virtues of dams. The petitioners, so far as one knows, were not asking for an injunction against dams in general; they were in fact, instructed by the court at an early stage of the case, not to raise general issues regarding dams but to confine themselves to the particular project in question. They were not even asking for an immediate abandonment of the Sardar Sarovar Project (whatever their views on dams in general and this dam in particular might have been) but making submissions on what they considered to be the adverse environmental, social, human and economic consequences of the project, and asking for a stoppage of work on the project pending a comprehensive independent review. Conceivably, such a review could lead to either a negative or a positive conclusion. Speaking subject to correction, nothing in the petitioners' submissions called for an Ode to Dams by Their Lordships.

Apart from that inconsistency, the advocacy of dams in the judgment is undistinguished, to say the least. The judgment puts forward the familiar arguments for dams (variability of rainfall over time and space, need for storages and transfers, the 'clean' nature of hydro-electric power, etc); dismisses the advocacy of alternatives such as watershed development and local water harvesting; avers that dams are necessary for development (with no hint of an awareness of the debate regarding the notion of 'development'); makes light of the adverse impacts of dams; goes to the extent of saying that dams are actually good for the environment, seems to accept the doctrine that some people must 'sacrifice' (be sacrificed?) for the good of others; and observes that no instance of a dam having done any harm has been brought to notice. One keeps rubbing one's eyes in disbelief that the learned judges could really have made themselves responsible for such rash and ill-considered statements. If this had been a presentation made in a seminar or conference, it would have received short shrift. The case for dams could have been much better argued; and the case against dams can be argued with even greater force. There is a major unresolved controversy and a vast literature on this subject. There are books on large dams by Goldsmith and Hildyard, Patrick McCully, B D Dhawan, Enakshi Thukral Ganguly, Jean Dreze et al, Satyajit Singh, and many others. The latest addition to this literature

is the India Country Report (*Large Dams: Indian Experience)* submitted by a team of five to the World Commission on Dams (WCD). WCD's own report (likely to be path-breaking) is expected shortly. Against that background, one wishes that the judgment had not rushed headlong into this dangerous terrain. In any case, the mere fact that these observations about dams have been made by judges in a judgment does not give them any greater legal force than the views of others – engineers, economists, sociologists, environmentalists, or even ordinary people. They remain mere unsupported personal opinions that have no place in a judgment.

Thirdly, apart from a naive belief in the virtues of dams (and an undercurrent of disapproval of those who argue against them), another force driving this judgment is a strong disapproval of the NBA. Consider some of the remarks made by the learned judges: "an anti-dam organisation"; "Publicity Interest Litigation"; Private Inquisitiveness Litigation"; and so on. With respect, these dismissive remarks do not reflect a judicious frame of mind. The petitioners managed to persuade at least one judge that there was something in what they were saying; this was therefore hardly a case of frivolous or trivial public interest litigation (PIL). Besides, the submissions made and documentation presented could have been accepted or rejected by the court, but nothing in them could have warranted the kind of remarks cited above. The animus that is evident in the judgment is very similar to the anger that marred the judgment in the famous Election Commission (T N Seshan) case some years ago.

Incidentally, the very use of the expression "anti-dam" with an undertone of disapproval is revealing. Why should that term carry a pejorative connotation? Both 'pro-dam' and 'anti-dam' positions are surely mixtures of valid and invalid arguments?

The animus against the petitioners is particularly evident in the section entitled 'Laches' in which strictures have been passed on NBA for delay in bringing the case to the court. The point made is that the clearance to the project was given in 1987 whereas NBA came to the court as late as 1994, on which ground alone, according to the learned judges, the petition could have been rejected. With respect, one wishes that they had done so; much time would have been saved, and NBA would have been left free to explore other channels or forums. The answer to the charge of delay is evident and was available in the material before the court. NBA started by trying to improve the rehabilitation policies and packages and

their implementation. Over a period of time it gradually came to the conclusion that the project was badly flawed and needed a major review. It was only at that stage that NBA began to think of going to the Supreme Court, partly encouraged by the new receptivity of the court. Meanwhile, NBA's campaign produced some results: the World Bank appointed an Independent Review, and some time later, the government of India set up the Five-Member Group. Unfortunately, the Gujarat government boycotted the FMG and questioned its constitutionality, and someone filed a case in the Gujarat High Court against the establishment of the FMG. It was because of a growing sense of despair at the failure of its efforts to find an adequate response from the executive machinery that NBA thought that it should move the Supreme Court. That is an understandable development and one fails to see any occasion for a reprimand. It must be noted that Justice Bharucha finds no merit in the 'laches' argument.

It may not be out of place here for the writer to share with the readers a piece of relevant history. When NBA filed a copy of the FMG's report of April 1994 before the SC, the judges wanted a supplementary report on certain aspects and wanted to know how much time the FMG would need. This was in March 1995. The FMG said that it would give a report by May 31. Their Lordships were furious. They asked the solicitor general whether the members of the FMG did not realise the urgency of the matter, and said that they wanted a report by April 16 as they were anxious to pass an early judgment on the case. Some members of the FMG were unhappy at the tone of the judges' remarks in court, but out of deference to the apex court the group agreed to do whatever it could; and its report was submitted to the court on April 16, 1995 as required. The court has delivered judgment in October 2000. Presumably it would be improper to ask why the SC took so long to give a judgment in this case, but against that background the learned judges could at least have refrained from talking about the petitioner's putative delay.

Fourthly, in allowing construction to proceed and asking for checks to be made at intervals of 5m after the height of 90m has been reached, the judgment has introduced no new safeguards to ensure compliance but has advanced the doctrine that the existing institutions must be presumed to be working. That doctrine is not corroborated by actual experience. The judgment refers to the NCA, its Environment and Rehabilitation Sub-Groups, and the minister-level Review Committee. All this exists already. The pari passu clause implied a continuous check to see

that construction did not proceed ahead of measures on the environmental and rehabilitation fronts, but it broke down. The Environment and Rehabilitation Sub-Groups have not been very effective. In this context, this writer (who was a member of the FMG) would like to state the following. During the course of a session that the FMG had with a former secretary of the environment ministry and chairman of the Environment Sub-Group, that functionary expressed his anguish at the difficulties that he had experienced in discharging his responsibilities, the inadequate response that he had received from his colleagues on the Sub-Group, and the force of the peer-pressure on him to be 'positive' and not stand in the way of construction, and wanted the FMG to take note of this. There is a veiled reference to this in the FMG's report. That very passage has been cited in the judgment but without an appreciation of its significance.

The failure of the existing machinery was in fact what led to the PIL. NBA must be presumed to have established some kind of a prima facie case, because the court itself suspended construction for several years, and even now at least one judge finds enough ground for ordering a fresh scrutiny and clearance. What then is the point in recapitulating the existing arrangements as if new orders were being passed? Even the prescription of a reference to the Prime Minister (as if he were a judicial authority) is nothing new. The Review Committee is a minister-level committee. A disagreement at that level is bound to lead to a reference to the cabinet or to the PM; this has happened before. The judgment offers nothing new. It is in fact a denial of relief and of justice.

The court has not in the past presumed that the existing machinery is working. One of the innovations of the Indian judiciary has been the assumption of the right to ask public authorities why they have not been discharging their statutory responsibilities. The court has given directions to the CBI in certain cases, and asked for periodical reports; it has gone into garbage clearance by municipalities; questioned public health authorities on measures to prevent the outbreak of dengue; directed the shifting of industries; laid down schemes for admissions to educational institutions in the private sector; expressed displeasure with pollution control measures; concerned itself with the state of the Yamuna, with the saving of the Taj Mahal from the effects of pollution, and with emission norms for automobiles; and ordered the establishment of the Central Groundwater Authority. Some of this was undoubtedly excessive activism, but the presumption in the present judgment that existing ar-

rangements are working is a complete *volte-face*. The steady widening of the scope of judicial review during the last several years (sometimes carried too far) now yields place to the doctrine of 'government knows best' and the abdication of judicial responsibility for protecting the rights of the people; the earlier encouragement of PIL (again, sometimes carried too far) now changes to the deprecation of PIL in sarcastic language; and the enthusiasm for environmental causes (not always well thought out) has been succeeded by faith in government committees and the proposition that these are not matters for the courts. This is indeed full-scale retreat on a wide front. Assuming that some degree of correction had to be applied to the excesses of judicial activism, the learned judges need not have gone quite so far; and it is ironic that for the purpose of cutting PIL down to size they should have chosen the one case where, more than in any other, PIL was appropriate and called for.

This cannot even be regarded as 'passivism' as opposed to the earlier 'activism'; it is in fact, activism of the wrong kind – on behalf of the state. In future, if the existing machinery fails and if the state uses the police as an instrument of enforcement of its policies for what it considers 'development', what recourse does the citizen have? In effect the present judgment throws the affected people to the tender mercies of the governmental machinery. The people who approached the Supreme Court for justice have been given a dusty answer. (This invites comparison with the judgment that upheld the suspension of fundamental rights during the Emergency period.) This is a severe setback not merely to NBA and Medha Patkar but to all movements for the empowerment of the people vis-a-vis the state and the cause of environmental protection.

Finally, something needs to be said on the 'non-reviewability' of certain portions of the Tribunal's award, as the judgment seems to set much store by that argument of the Gujarat government. A Tribunal is essentially a conflict-resolution mechanism. Its award (including the 'non- reviewability' of parts of it) is indeed binding on the parties to the dispute in the sense that no party can unilaterally resile from it. However, if all the parties to the dispute reach an agreement, surely they can not only make changes but even set aside the award and sign a new accord. Further, in the context of the Inter-State Water Disputes (ISWD) Act 1956 an 'inter-state dispute' means essentially an *inter-governmental* dispute: if it has been resolved without consulting the people whose interests are affected, can they be asked to accept the consequences, say, a project involving displacement on a large scale, without demur? Is

an award under the ISWD Act also an adjudication between the state and the people (who were not parties before the Tribunal)? Are questions of human rights overridden by an award on the inter-state sharing of waters?

In Shakespeare's *The Merchant of Venice*, Portia said that in terms of the contract Antonio could have his pound of Shylock's flesh, but without shedding a drop of blood. In the present case, she might have argued that the Gujarat government could go ahead and raise the dam to 455', but not displace more than 7,000 families (which was the number mentioned by the Tribunal). That number is evidently regarded as flexible: it has gone to upwards of 40,000 now; but the dam height of 455' is considered inflexible. In other words, the dam must be built to 455', regardless of whether 7,000 or 40,000 or 1,00,000 families are displaced, and regardless of whether land for resettlement is available or not. Is that what 'non-reviewability' means?

The Madhya Pradesh government had developed serious apprehensions about the feasibility of resettling and rehabilitating the large numbers involved and proposed a reduction in the height of the dam to 436' to minimise displacement and make the task of rehabilitation more manageable. Others (scholars and analysts) had proposed alternatives that might have envisaged still lower heights and reduced displacement dramatically. Those propositions may or may not have survived a careful scrutiny. However, they have been ruled out of consideration by the simple argument of the sanctity of the Tribunal's Award, and that argument has been accepted and endorsed in the judgment. Let us suppose for a moment that MP had proposed an increase in the height of the dam for enhancing power generation: what would have been Gujarat's reaction? Again, in the hypothetical event of a generous MP government offering to reduce its share of Narmada waters and let Gujarat have 2 MAF more, would Gujarat have refused such an offer on the ground of the sanctity of the Tribunal's Award?

The details mentioned in the Tribunal's Report have not in fact been treated as immutable. The power-house configuration has been completely changed. Changes (liberalisations) have been made from time to time in the R and R policies and packages. The Supreme Court itself has modified the time limit laid down by the Tribunal for the completion of rehabilitation arrangements (in relation to submergence of land). If all these changes were considered acceptable, then why should the sug-

gestion of changes in the physical features of the project to minimise human suffering be considered improper and unacceptable?

Besides, the fact that the project was mandated by a Tribunal was not held to exempt it from the usual procedures of techno-economic examination and approval. The need for approval implies the possibility of non-approval. If the examination had resulted in a negative finding, or in an approval subject to some modifications, would that have constituted a violation of the Tribunal's Award? If new facts come to notice that show that a dam of the prescribed height at the stated place might be dangerous, would it be nevertheless obligatory to build it? This is not a hypothetical question. The recurring tremors in the Koyna area and the occurrence of the Latur earthquake seem to call into question our earlier understanding of the nature of seismic activity in central and southern India. Does this call for a review of the safety aspects of the Sardar Sarovar Project, or should we take the view (as Justice Bharucha does) that those aspects have already been studied adequately? If in fact the hydrological assumptions of the Tribunal were wrong, would that call for a review of project design or would the specifications laid down by the Tribunal preclude such a review? What absurdities we are driven to by the 'non-reviewability' argument of the Gujarat government which has been upheld in the judgment!

In conclusion, the judgment is a negative answer to those who sought relief, and a severe blow to people's movements. Armed with this judgment the Gujarat government will now press forward with construction, and they will be in no mood to listen to anyone other than ardent advocates of dams in general and of SSP in particular. There will be even greater intolerance towards dissenting opinion than before. The fragile facade of politeness maintained with difficulty earlier will now disappear. As for water resources planning in general, there will be even less receptivity than before to pleas for a reorientation and for a consideration of alternatives to big dams. What can one say except "Cry, the Beloved Country"?

[Ramaswamy Iyer was the member secretary of the Five Member Group constituted by Govt. of India in 1994 to review Sardar Sarovar Project. He was also the Secretary, Ministry of Water Resources, Govt. of India]

NEED FOR AN ALTERNATIVE POLITICAL MOVEMENT

Yogender Yadav

Medha behan,

The sight of tears in your eyes on the television the night of the judgment prompted this letter. Reacting to the Supreme Court judgment with a clearly broken heart and in a broken voice, you were saying "andolan ko marne nahin dena hai" (the movement must not be allowed to die/be killed). The tears did not convey any helplessness; that drop reflected both the anguish of Narmada and the resolve of a true satyagrahi. The tremendous dignity with which you have stood up to such heavy odds is an ennobling and enhancing sight for those millions who would have watched you that night. But there was also something unsaid there and in your statements since then, that causes alarm. It is as if you are taking on the moral responsibility of the 'defeat' and planning a major step with a sense of finality. Hence this letter. And it is addressed to you, as the one who stands for the hundreds of activists of Narmada Bachao Andolan [NBA] whose dedication has turned this movement into one of the legends of post-independent India.

It might well seem as if the establishment in Gujarat has won the case. But for how long can the powers that be cloud the truth?. The fifteen year old satyagraha for Narmada has challenged the established notions of 'victory' and 'defeat'. Your clip on television was followed by the reactions of the Gujarat CM and a minister. While they mouthed something about the decision having given a hope to the dry regions of Saurashtra and Kuchch, their eyes betrayed the truth. The Supreme Court decision has given a ray of hope to the BJP government in Gujarat, up against the wall of popular unrest. How else does one view the official celebrations, crackers and all, but as a ploy for political encashment? How else does anyone interpret the public holiday except as a decision of an ecstatic state to release the people from its subjugation for a day? Lakhs of viewers must have seen how ridiculous and obscene power can be. Those who did not, will surely see that in days to come. An honest audit of who 'won' on the 18th October can only be done 25 years from now. It might show that the true victors of this verdict were the contractors, engineers and the middlemen.

You did not lose on the 18th. The Supreme Court did. When the NBA decided to approach the Supreme Court, fresh winds were blowing in the corridors of courts. PILs had opened the doors of the Supreme and the High Courts for the ordinary citizens. There was a hope that the highest court of the land may not remain the battleground for the legal-technical contestations between the well-to-do and instead occasionally be a site for meaningful social struggles. These hopes did not quite materialise. There has been a lurking suspicion in the minds of many for some time that while the judges are deeply concerned about pollution in the big cities, the life of its labouring classes doesn't touch them in the same way; while they worry about the tigers in jungles, the adivasis that share the same space do not matter in the same way. October 18th will lend credence to these suspicions. Legal minds will debate the rationale and the logic behind the majority judgment. They are already surprised that the same court that did not permit arguments on the general merits or otherwise of the big dams has deemed fit to make statements on this issue in their judgment. Civil rights activist and NBA lawyer Prashant Bhushan has already expressed his concern that the learned judges may have allowed their private biases to affect their judgment. He regrets having persuaded a reluctant NBA to repose its trust in the Supreme Court. His regret will resonate far and wide. In future no grassroots movement will make the mistake of knocking on the doors of the Supreme Court. That surely is a defeat for the Supreme Court and for all those who hope to use the judicial process for common citizens.

You did not lose. Your satyagraha is not merely against a single dam, it never was merely a legal battle. You said in one of your letters three months ago "The struggle for the last 15 years on the banks of Narmada is not an opposition to one big dam; it is a struggle for the right water and development policy....We have moved forward in a quest to find people-centred and participatory ways to ensure the utilisation of water, land and forest products ... It is necessary today for the entire society, not just the powers that be, to listen to the story of the common people ... you have to be a moral adjudicator." And you have won that adjudication in that difficult court, ever so long ago! Your unparalleled movement has shaken the conscience of our nation sensitive citizens arrived at the valley to see the truth for themselves and went away convinced of the disaster in the name of development. The letter Baba Maharia, the unlettered son of his mother 'Motli Bai' Narmada, wrote to 'Diggi Raja', the Chief Minister of Madhya Pradesh, will survive as one of the most mov-

ing testimonies of our time. The NBA has done much more than simply oppose the SSP. It has exposed the big lie that all the big dams in our country have been so far. You had won the day the Gujarat government had to expand the official definition of 'damages' that qualify for compensation to the victims. Actually, if even a drop of Narmada water ever reaches the parched lands of Kutch or Saurashtra, it will again be a victory for you. The NBA's real victory will become evident only in the coming century. No new Sardar Sarovars will be dreamed up. SSP or no SSP, the inheritors will live to tell the tales of this extraordinary struggle of the valley and the flag of the NBA will fly higher than a ninety or a hundred and thirty eight meters.

All this is not to soothe your anguished heart, nor to bolster the spirit of the rest of the satyagrahis but merely to recall a fundamental lesson of history. No great movement can be measured by its immediate consequences. Just think of it, Gandhiji failed to realise the immediate demands of any of the movements he led with the exception of Champaran. Institutionalised racism continued long after he left South Africa. The main demands of the workers in the Ahmedabad mills remained unfulfilled when the agitation was called off. Neither the Non-cooperation, the Civil Disobedience nor the Quit India movements were successful in bringing to an immediate end the British rule in India. But each of these movements irretrievably altered the equations of the exploiter and the exploited. That is the mark of a great movement. That is what distinguishes a satyagraha from any other ordinary movement.

Gandhiji was also heart broken by each of these 'failures', he too shed many a tear. But on each such occasion, he determinedly created new sites while expanding the scope of the struggle, rather than trying to take the immediate struggle to its logical and fatal conclusion. And this is where the worry lies reading your press statements and your face on the television, it seems that you are thinking of taking the struggle of the valley to its logical conclusion. Perhaps Gandhiji would have thought otherwise. The model of 'development' that your satyagraha has sought to oppose has its roots in politics. If the state implements such policies in a cavalier fashion, it is only because the entire mainstream politics shares this model. Governments and ruling parties change but the policies don't. In the last instance colossal political follies and vested interests underwrite the established model of development of which SSP is but an instance. That is why a movement for an alternative model of

development must be a part of a movement for an alternative politics. This is the time when your carefully forged alliance of the victims of 'development' in the form of the National Alliance for People's Movements needs to be suffused with a new political energy. It is only when you take this challenge that this satyagraha of the Narmada will be the creative force of a new yuga-dharma. And who else but you, Medha behan, will take up this challenge?

Yours,

Yogendra Yadav

[Yogendra Yadav is a psephologist working with CSDS. This letter was originally written and published in Hindi in Hindustan and Dainik Bhaskar. Translated into English by the author and Madhulika Banerjee.]

THE NARMADA DECISION

Rajeev Dhavan

The Narmada is not just a river. It is a living heritage that defies comparison. In and around the Narmada rests a veritable civilisation of cultures, wedded to the soil with a simplicity that has hitherto brooked no opposition from history. From time to time, modern projects such as dams have been conceived to displace people and the environment, to drown composite cultures into oblivion. Legal regimes have been created to facilitate such annihilation - more often than not with insensitive cruelty. The people who suffer displacement are usually poor, and - but for their own courageous struggles - easily forgotten. Once neglected, they suffer continuous and multiple displacement.

India inherited the imperial regime of land acquisition whereby Governments declared a 'public purpose' to acquire land and offered compensation only to land owners at market rates, with a solatium of 15, now 30 per cent. Over the years, successive Governments have used this imperial model of 1894 ruthlessly. Confronted with these imperial and post-imperial acquisitions, judges have tended to submissively accept what the Government has declared to be a public purpose in the public interest; and, interfered within narrow limits on the quantum of compensation. This is the colonial doctrine of eminent domain which remains a mindset with the judges of 21st century India, even when dealing with projects that subsume social and natural topography.

Neither the Constitution nor humanitarian law applicable to India permits this imperial model of 'land acquisition' or its executive variations to apply to huge projects which are designed to irreversibly mal-affect the environment, displace lakhs of people and then offer them Government largesse instead of a genuine rehabilitation. Even the World Bank which funds many such projects has underlined the need for (i) a viable public purpose in the public interest, (ii) insistence on strict scrutiny of the environment impact and (iii) total social justice to oustees. These three are now regarded as essential condition precedents to every large project even if repeatedly ignored by the Indian Government.

The crucial issue in the Narmada case was whether the Union and State Governments can be allowed to get away with violating these universal and human rights considerations which are enshrined in, and by, law? The Supreme Court has virtually decided that in dealing with such

projects, the Governments concerned can be a law unto themselves and seriously violate the legal conditions circumscribing such projects.

First, the issue of 'public policy' and the 'public interest'. After the composite substantive due process created by the Supreme Court in the Bank Nationalisation Case (1978 and the Maneka Gandhi Case (1978), it has a constitutional duty to examine whether any infringement of fundamental rights is a reasonable restriction in the public interest. There is no dispute that the rights to environment and to re-settlement are fundamental rights. Equally, the public interest demands that far-reaching policies which irreversibly alter not just the lives of people but nature and history itself must be properly arrived at. It may well be that the original decision on Narmada was taken in 1949; and, there was an Inter- State Water Award on this in 1979. But, that cannot foreclose a constitutional examination of the issue. The period 1950-2000 has witnessed the most fantastic technological reassessments of all time. In 1980, a Government department may have been committed to buy a million typewriters. In 2000 AD, such a commitment would be laughable. In 1993, the World Bank's Morse Report indicated that the proposed Narmada dam was not in the public interest. Mr. Justice Kirpal's judgment that the Government of India did not accept the World Bank Report can hardly conclude the issue. The question is why and on what basis? Peremptory rejections cannot obviate examinations in the public interest. The foundation of Mr. Justice Kirpal's judgment is the Tribunal Award of 1979 between various State Governments is binding. But, against whom? How can a Water Tribunal prevent the Supreme Court from examining a public policy issue which affects millions in the public interest? While courts do not normally interfere in policy matters, in cases of such magnitude, the Chief Justice, Mr. A. S. Anand and Mr. Justice Kirpal (who form the majority in the Narmada case) have never hesitated to force policy changes in the Vehicular Pollution and Forest cases even at the cost of ensuing social and economic havoc. The Supreme Court has a duty to invoke the doctrine of proportionality against unreasonable Government decisions which are against the public interest. Mr. Justice Kirpal's judgment that the Water Tribunal's judgment is 1979 prevents the Supreme Court from examining the public interest in a fundamental rights case abdicates the Court's jurisdiction to a lesser fora.

Second, is the issue of environment. Mr. Justice Bharucha is surely right in his dissent when he refers to Article 21 and the irreversibility of environmental damage. He rightly points out that the Supreme Court As

not place its seal of approval on so vast an undertaking without first assuring that those best fitted to do so have had the opportunity of gathering all the data on the environmental impact of the Project and of assessing it". All the relevant data has never been available. In 1986-87 and later, there was a mighty conflict between the Ministry of Environment and Forests (MOEF) and that of Water Resources on environmental clearance. In recent years, out of some 330-odd projects some 70 to 90 per cent have escaped environmental scrutiny. If the right to environment requires strict constitutional scrutiny, why was such scrutiny abandoned by the Court? It is difficult to accept Mr. Justice Kirpal casual distinguishing of the Tennessee Valley Tellico Dam Project and the Wallisville Project cases where American courts stopped the projects on environment grounds even though considerable costs were incurred. If the Supreme Court is serious about the environment, it cannot abandon the jurisprudence it has built over the years just for the Narmada case.

The third issue is that of oustees. There is little dispute that the rehabilitation process is grossly incomplete. Some 41,000 families are affected. It is splitting hairs to distinguish between 'submergence' and 'canal' affected people or non- cultivators. Government surveys do not include amongst beneficiaries all those whose right to livelihood is affected. The Chief Minister of Madhya Pradesh openly states he cannot find land for land.

In the meanwhile, what are the poor to do? Would such a policy have been acceptable if the affected area were Lutyens' Delhi? Or any urban area where the rich and well-off were suddenly pushed into a nomadic existence? The policy has to be clear: no risk of ouster until rehabilitation. The Court seems to assume that it is constitutionally permissible for a few lakh people to live in limbo for sometime in the name of progress and inter-generational equity. In 1970, the Supreme Court punished E.M.S. Namboodripad because he claimed the courts were class biased. Here is reason to doubt whether that judgment was correct.

The Narmada cases confronted the Supreme Court with the issue of constitutional courage. After agriculture, building is always the second largest economic activity in India. Contractors and middlemen are the driving force of large projects. The Supreme Court should review its refusal to strictly examine the public interest, social justice and environment issues. Not to do so would shortchange the Court's own enviable public interest and social justice jurisprudence.

[Rajeev Dhavan is a senior advocate in the Supreme Court of India]

UNQUIET FLOWS THE NARMADA

Ramachandra Guha

In the demonology of market fundamentalism the slim, slight figure of Medha Patkar looms large. It is she who seeks to stop the dams that will power the modern mills, and it is she who opposes the highways that will carry goods and commodities from the producer to the consumer. To the liberalizing Indian, Patkar is a backward-looking reactionary who enjoys an uncomfortably high level of support. Every summer, when the mercury touches 48 degrees Celsius in northern India and the air-conditioners break down, prominent columnists in New Delhi blame it all on Medha Patkar.

Back in the old days, when they opposed commercial forestry and nuclear power plants, environmentalists used to be spoken of as "CIA agents", sent by or at least paid by the West to keep India underdeveloped. Since 1991, however, that line of argument has become anachronistic. The bureaucrats and politicians, once paranoid about foreign investment, have rolled out the red carpet. The greens, and the greens alone, stand in the way of the new factories and the dams and thermal plants that must power them.

Hence the regularly vicious attacks on the environmentalists and their most famous leader. Were a visiting foreigner only to read columnists like Tavleen Singh of *India Today,* he might conclude that Medha Patkar is the single most important impediment to the successful Singaporeization of Indian society. Would he believe that this Enemy of Progress, this Anti-National Element, has no job, no bank balance, and no party?

What precisely do Patkar and her movement stand for? They stand, first of all, for the rights of the people whose lands and homes are acquired by new projects. Though this is not commonly known, forced displacement is a subject on which the apostle of truth had himself spoken. In 1942, at the height of World War II, Mohandas Karamchand Gandhi had been alerted by his follower Mira Behn to the moving out of villages in Orissa to make way for a landing strip. As he put it to the journalist, Louis Fischer: "When the British come and say, we must remove these peasants to build an aerodrome here, and the peasants must go today, I say, 'Why did you not think of that yesterday and give the poor people time to go, and why don't you find places for them to go?' "

As in many other areas, the government of free India followed and furthered colonial precedent. Steel mills, universities, roads, barracks, above all, dams: to allow for the building of these artefacts of modernity countless villagers were made to leave their homes. In 1988, Walter Fernandes and his colleagues at the Indian Social Institute estimated that 18 million people had been forcibly displaced by officially sponsored projects in independent India. Scholars now claim that this was an underestimate, and that the true figure is closer to 30 million.

The statistics shall be disputed, but three facts are clear. First, that the displaced peasants were given no time to go, and no places to go either. Second, that they were paid monetary compensation that was a fraction of the cost of the lands they were dispossessed of. (No allowance was made, of course, for the emotional costs of relocation, for the loss of landscape and cultural memory.) Third, that an overwhelming proportion of those displaced were of *adivasi* or low caste origin.

This last truth is the most telling. It appears that the First Commandment of planned economic development is: The Rich Shall not be Displaced. What, for the sake of argument, would happen if the home of the present writer came in the way of a new highway? I would first contact my old college friends in the administration, suggesting discreetly that the road be re-routed. Were that to fail, I would ask a lawyer-friend who belongs to the same club to file an anticipatory petition in the court. With luck, the judge might also be a club member. In any case, one could skillfully delay proceedings for years, even decades (that is how the Calcutta Metro was stalled by middle-class home owners). If the road came up anyway, I would depart my home only after extracting a proper monetary compensation for it.

To displace the rich is costly, time-consuming and (most important) against the canons of class solidarity. Far easier to build factories and dams at the expense of the unlettered peasant. It was this game that the Narmada Bachao Andolan sought to bring a halt to. In this respect, the struggle led by Medha Patkar against the Sardar Sarovar project is principally a struggle for self-respect and social justice. It asks the Indian dam-builders the question Gandhi asked the British makers of aerodromes: where will these people go?

The defense of elementary human rights was the basic issue. A subsidiary question, however, related to environmental sustainability. Would

not the building of large dams lead to a serious loss of forests and biodiversity? Would not a series of small dams, run-of-the-river schemes, be a less damaging alternative?

There were also questions of empirical economics. In the past, dam-builders have tended to exaggerate the benefits and underestimate the costs. But materials have been more expensive than anticipated. Siltation rates have been higher than predicted, thus reducing the life of the dam. The power generated by past projects has been erratic and unreliable. The benefits of flood control have stayed "on paper".

To these ecological and economic arguments some would add an ethical one. The peasants threatened with displacement have cultivated a deep relationship with the land, as manifest in their art, their music, their shrines, their myths, legends and poetry. To drown this all out in the name of progress or development is to commit a crime against aesthetic beauty and collective cultural memory. To this planned act of violent forgetting the anthropologists have given a name: "Ethnocide".

The case against large dams has recently received a setback in the form of the Supreme Court judgment allowing the construction of the Sardar Sarovar project to its full, projected height of 140 metres. The dam has reached an elevation of 80 metres already, and perhaps the court thought it unwise to abandon the project after so many thousand crores had been sunk into it.

The Narmada Bachao Andolan appears to have lost the battle, but it might yet win the war. The injustice of forced displacement is now widely acknowledged. The search for sustainable and cost-effective systems of energy generation and water management is continuing. Meanwhile, the government must declare a moratorium on large dams, pending a thorough inquiry into their past performance by a team of acknowledged experts.

[Ramachandra Guha is a writer, historian and environmental journalist]

A MESSAGE FOR THE JUDGES

Kalpana Sharma

Perhaps our Supreme Court Justices should have waited a couple of weeks before passing their final orders in the Narmada case. For if they had, they would have been privy to the important perspectives contained in the report of the World Commission on Dams, released in London on November 16. The WCD report might not be the last word on dams. But it is important for a number of reasons. It is the first comprehensive survey of large dams. It presents a balance-sheet of the benefits and adverse impacts of these capital-intensive infrastructure projects. And it sets out criteria that could govern future decisions on large dams.

Even if one were to dismiss some of the suggestions of the WCD as being unworkable within the political context that governs so many developmental decisions in many countries, including India, as a document that assesses the record of large dams it is invaluable. This is particularly so because of the composition of the WCD. This is not a bunch of anti-dam NGOs who are picking faults with existing dams and those still under construction. This is a Commission made up of people in Government, such as the Chair, Prof. Kader Asmal, South Africa's Education Minister, Mr. Goran Lindahl, President and CEO of Asea Brown Boveri (ABB), one of the largest private sector infrastructure developers, and Mr. Jan Veltrop, a former president of the pro-large dam body, the International Commission on Large Dams (ICOLD). The Commission also had its share of critics of large dams, pre-eminently Ms. Medha Patkar of the Narmada Bachao Andolan but also Ms. Joji Corino representing the issues concerning indigenous peoples and Ms. Deborah Moore, until recently senior scientist with the U.S.- based NGO, Environment Defense Fund (EDF).

In balance, what emerges from the report is not a happy picture. The 45,000 large dams worldwide have displaced 40 million to 80 million people, affected 60 per cent of all rivers, have fallen short of their irrigation targets, have failed to recover costs, have had extensive negative impacts on rivers, watersheds and aquatic systems, many of them irreversible. Further, mitigation measures, where they have been taken, have usually proved ineffective. In other words, even if one argues that large dams are necessary and that the damage that they do can be minimised by taking adequate measures, the record suggests that this is not al-

ways possible. At the same time, large dams have contributed to the spread of irrigation, generated hydro power, have been useful for flood management and have been very useful for urban water supply. The question that always arises then is: is the cost worth the ostensible benefits?

The WCD has argued that a cost-benefit calculation is insufficient in the context of large dams because of the nature of the costs. It suggests instead a rights and risks approach that accommodates the rights of those who will be adversely affected and takes into account the risks to the environment and to future generations. Such an approach necessarily requires an open and transparent decision-making system, a process that is based on full consultation with the affected groups.

This, of course, does not mean that countries should not build large capital-intensive infrastructure such as large dams. What it does mean is that the process should allow the voiceless to have a voice, that there should be fairness and justice in the way the affected communities are treated, and that if giving them the best possible compensation is not possible, the project is reviewed. In other words, the cost to the people who get no benefits from projects should not be so high that a project cannot pay it.

If one were to apply these criteria to existing projects, including those such as the Sardar Sarovar which are still under construction, they would fail miserably. There is too much evidence to suggest that in the initial design of the project, these human and environmental costs were not accommodated. And today, it is more than evident that the project cannot mitigate them in its present design. The tragedy is that despite innumerable committees - and Madhya Pradesh's recorded admission that it has no land to accommodate all those who will be affected by the SSP - there has been no serious attempt to rework the project to minimise the damage. Instead, the Supreme Court has virtually closed the door on any further discussion.

In fact, a section in the WCD report makes a point of acknowledging that "dams in the pipeline" constitute a special case. It suggests that evidence from its survey, which covered almost 1,000 large dams worldwide, demonstrates that "it is never too late to improve outcomes. On this basis, the Commission proposes an open and participatory review

of ongoing and planned projects to ascertain the extent to which project formulation can be adapted to accommodate the principles outlined in this report". The SSP authorities should take note of this.

Further, it suggests to Governments that they use the opportunity of reviewing such dams that are already under way to assess the plans they have for water and energy options. "This can serve to launch a process of internal review and modification of existing policies and legislation, and reinforcement of appropriate capacity that will facilitate implementation of the Commission's recommendations in the future."Is that too tall an order? Considering the enormous cost over- runs of projects such as the SSP because there was resistance to any suggestion that environmental and social costs had not been covered, and given that now few projects can hope to get international finance without accounting for these costs, it makes eminent sense to stop and think before proceeding further.

Unfortunately, neither common sense nor open-ness and transparency are the hallmarks of Governments in this country, at the Centre or in the States. Large dams involve a $ 2 trillion investment worldwide. Everyday, somewhere in the world, a new dam is being commissioned. Most of these are in developing countries. Yet despite conventions on the environment, on human rights, and the international movement for the rights of people affected by large infrastructure projects, most Governments proceed with an outdated set of values and criteria that try and sneak past any need to listen to the voices of those who will be affected. The result, repeatedly, has been resistance from people, and delay in an already costly project. This alone should make Governments such as ours consider alternative approaches. It would be cost- effective, apart from being the only decent and humane way of conducting business.

The real stumbling block, however, is not just absence of logic and a refusal to face the evidence, but the benefits that accrue to a few from such large projects. As the WCD aptly points out in its report, "As a development choice, the selection of large dams often served as a focal point for the interests and aspirations of politicians, centralised Government agencies, international aid donors and the dam-building industry and did not provide a comprehensive evaluation of available alternatives". This statement comes from people who know how the system works.

So, to come back to the beginning, would our Supreme Court judges have paused if they had read the WCD report before they ruled in the Narmada case? The report makes a compelling case for a different approach to decision-making about large dams, and about developmental infrastructure as a whole. Its arguments are reasonable, placed within the context of internationally-endorsed environmental and human rights conventions. It argues not that no dams should be built, but that such a step should only be taken if the criteria that include social and environmental costs are fully met. If we accept even some of the criteria set out in the report, the SSP would need to be drastically modified even if it cannot be abandoned altogether. At the very least, our apex court could have thrown the project back on the drawing board. However, even if it thinks the case is over, in fact it remains wide open. The controversy over large dams will not die that easily.

[Kalpana Sharma is a senior journalist with The Hindu]

COURT MUST ADHERE TO THE CONSTITUTION

The majority verdict of the Supreme Court about the Sardar Sarovar dam is beyond the rule of law and only reinforces the government's oppressive ways against the people.

It has been observed that the judiciary, at times, wearing the cloak of priesthood, suffocates the human rights of the poor. Corruption and Capital are given legitimacy instead of adhering to the rule of law. But, we have different expectations from Indian Judiciary. The Constitution of India, created basically for the protection of the rights of the poor and depressed, inspired by the values that Mahatma Gandhi cherished and drafted with the egalitarian passion by Dr. Babasaheb Ambedkar, lies sacrificed at the altar of the corporate interests and their crafty plans. Our constitution makers envisaged the equality, democracy and the protection of the fundamental rights of the depressed classes, as the utmost values, which the judges should have heeded.

The dissenting judgment by Jst. Barucha is a face-saver for Indian Judiciary and it does vindicate the issues raised in the court. He has asked for stopping the dam and having a new environmental clearance for the dam. It is unfortunate that his judgment is considered as minority judgment. The majority – minority issue should not have been allowed to be used against the rights of the have-nots in India.

The judgment against the people in the Narmada Valley heralds a new battle ahead for the poor and the dispossessed of this country. When on sees the death procession of the human rights of the marginalised people, it is imperative that the President of India must intervene as his Constitutional duty. It is a time that we strengthen another Freedom struggle for a sane, just, non – violent and sustainable society.

From my sick bed, remembering the pristine flow of Narmada and the warmth of life around it, I still hope that the judiciary recognises its commitment to the values in the Constitution as given by Ambedkar and Gandhi. Do not sacrifice the life of the last person of India for the sake of corporate powers. The protectors should not become the connivers of the crime against the depressed classes.

- Baba Amte

After six full years of the case-proceedings, and five years of stay on the Sardar Sarovar Project, the Supreme Court of India has finally given its verdict in the comprehensive case filed by Narmada Bachao Andolan Vs the Concerned Governments (1994), challenging the social justifiability, environmental sustainability and mirage of benefits, on October 18 2000.

The Order of Supreme Court is in two parts. The majority judgment, by Justice Kirpal and Justice Anand (Chief Justice) is the operative judgment. The minority judgment was given by Justice Bharucha.

"The court has missed an important moment in its evolutionary history when it could have extended the reach of the justice system. It could have paved the way to establishing necessary structures and mechanisms through which public opinion may be sought and taken into cognisance at the planning stage of large infrastructure projects rather than have protest movements gather momentum over the years and stall projects. But led by its particular vision of development, it has now established the ground for confrontationist actions which can only delay, not enhance, development."

[EPW Editorial October 28, 2000]

This is a collection of analytical articles on the judgment, written by people from different walks of lives.