

**Limits of Law in  
Counter-Hegemonic  
Globalization  
The Indian  
Supreme Court  
and the Narmada  
Valley Struggle**

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Centre for the Study of Law and Governance  
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LIMITS OF LAW IN COUNTER-HEGEMONIC  
GLOBALIZATION

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INTRODUCTION

Popular struggles have an ambivalent relationship with the law. At one level, they tend to see law as a force for status quo, which must either be contested as part of a larger political struggle or largely ignored as irrelevant. Law is also a tool deployed by the powerful for dominating the masses and controlling their resistance, especially through its monopoly over the use of force. The key actors in the enactment and enforcement of law—legislators, administrators and judges—are usually drawn from elite sections of society and are traditionally not part of popular struggles even if they sympathize with their goals. In most Third World societies, the divisions between the worlds of the popular movements of the powerless and the law are stark.

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Yet, even as law is a tool of domination, it also provides space for resistance. In that sense, law contains the impulse to dominate and self-destruct within itself. In the context of globalization, this has emerged as a fundamental sensibility.<sup>1</sup> Of course, much depends on the legal terrain on which resistance takes place and the particularities of national or international legal/political culture in question. But there is an increasing sensibility that law is a terrain of contestation between different actors including social movements and states, and that a theory of law or adjudication that ignores this fact, is inadequate. There are several reasons why this is so, under conditions of globalization. First, law operates at multiple scales under globalization, simultaneously at international, national and local levels. As such, it provides much greater opportunity to use law as a tool of contestation by social movements who can deploy legal tools at one level against another (Santos 2002: chapter 9; Klug 2000: chapters 3 and 6). Second, the forces that social movements are up against in their counter hegemonic struggles are often a combination of local and global elites, and that in turn defines the space for a politics of resistance that is neither purely local nor global (Klug 2000: 50–51; Esteva and Prakash 1998). This is particularly so in the case of contestations over development (Khagram, Riker and Sikkink 2002: chapter 1) and especially over large dams (World Commission on Dams 2000). Third, there is a great deal of hybridization of law, not simply in the mode of *lex mercatoria* (Dezalay and Garth 1997), but through such means as judicial globalization (Slaughter 2000), world constitutionalism (Ackerman 1997) and global rule of law programs (Carothers 1998). Fourthly, there is an increasingly vertical and horizontal growth of international legal norms in areas such as

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<sup>1</sup> Of course, there is an emerging idea that globalization is itself a phenomenon that is slowly tapering off, not possessing the kind of vigor it had in the 1990s. I don't engage with this larger theoretical and empirical issue here. For discussion, see Dirlik (2000).

human rights, indigenous peoples' rights, environment and sustainable development, and a proliferation of international judicial and political arenas where domestic decisions could be contested. This in turn creates political opportunities for making claims that derive their force from comparative and international legal developments.

Despite this encouraging pluralization of normative opportunities for contestation, the outcomes of social movements' engagements with the law are highly uncertain in terms of their impact either on law or on the movements themselves. Put differently, the pluralization of the normative space and the ability to contest seem to offer neither a guarantee of success for social movements that choose to engage law as part of their political mobilization nor propel law in the direction that is most helpful to movement goals. The outcomes of the dialectic between law and social movements seem to depend on a number of scripts that are both internal and external to law, and seem to depend on particular *local and national* contexts. These scripts need to be unearthed and examined to properly appreciate the role of law in counter hegemonic globalization.

Furthermore, it is unclear how to judge the success of the outcomes of social movements' deployment of law and courts in their struggle. Both in law and social sciences, much debate surrounds this issue. Legal scholarship tends to celebrate the heroic role played by judges and lawyers, especially in 'constitutional moments' when fundamental conflicts exist in society over the terms of political and social life. This tendency, no doubt more pronounced in common law jurisdictions, tends to reduce historical evolution of law to episodic interventions by charismatic judges, divorced from the social context in which such judges act.<sup>2</sup> In social sciences, it is hard to know how to evaluate the role played by law and courts in popular movements. Does one judge by the change in outcomes and if so, should one focus on changes in public policy or private conduct? Should the

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<sup>2</sup> For a recent example in American legal scholarship, see Strauss (1996).

focus be on the change in processes of decision making and if so, at what level? Or should the focus be on something more fundamental, on the changes in social and ethical values that are being contested? At the bottom of this debate is the question of to what extent law is separate from the social and the cultural.

In this paper, I offer an analysis of the role of law in the Narmada valley struggle, especially that which was waged by one of India's most prominent social movements in recent years, Narmada Bachao Andolan or NBA (Save the Narmada), with a specific focus on India's Supreme Court. The NBA rose in reaction to the Indian government's plan to construct a large number of dams along the Narmada river, contesting the relief and rehabilitation provided for displaced families at first, and subsequently challenging the dams themselves as being destructive. While the NBA is not the only social movement of the displaced people in the Narmada valley, it is easily the most prominent and perhaps the largest, but I do focus on the struggle as a whole where it is appropriate. The focus in this chapter on the role played by law at multiple scales and by the Indian Supreme Court in the struggle waged by the NBA is particularly useful for understanding the role of law and courts in counter hegemonic globalization for several reasons. First, the resistance in the Narmada valley is well known for its transnational character, both in the composition of the actors and in the terms with which the resistance in the valley was conducted. The resistance movement consisted not only of the displaced people in valley, consisting of farmers, women, tribals, and local NGOs but also western NGOs, transnational social movements as well as other overseas actors including individuals from the Indian Diaspora who were concerned about the social and environmental aspects of the dam projects. The protagonists of the dams included western dam building multinational corporations, the World Bank, local Indian corporations, several western governments, Indian state and federal governments, a plethora local and foreign analysts and consultants and sections of the Indian Diaspora. The actors were thus a mix of local, national and global actors. The resistance was framed

not simply in terms of local laws and the Indian constitution, but also in terms of international law and global public policy. Second, the normative and institutional framework for the Narmada dam projects operated at many scales, from the global scale (international institutions, global norms and foreign investment), national scale (constitutional norms, statutes and administrative mechanisms) to the local scale (local criminal law, tribal rules, customary norms and informal property rules). At any given moment, the NBA was simultaneously engaged with norms and institutions at multiple levels. Third, the Indian Supreme Court played a major role in the political struggle of the NBA, by allowing it to contest the raising of the height of a dam on the river at first as part of a series of victories that the NBA was notching up globally in the early 1990s, and then dealing it a major blow in 2000 by allowing the height of the dam to be increased and the construction to proceed with some conditions. As such, understanding the role played by the Indian Supreme Court in the struggle waged by the NBA may offer valuable lessons in understanding the relationship between law, resistance and courts in the context of globalization. Fourthly, the Narmada valley struggle may also offer some sobering lessons in just how difficult it is to judge the role played by law and courts in counter hegemonic globalization. This is partly due to the vast time frame within which the resistance evolved, at least over a period of more than two decades and the episodic interaction between the law and the actions of the NBA. It is also due to the difficulty of deciding at just which point one must judge whether law has been operating in either the hegemonic or the counter hegemonic mode. While this does not eliminate the need to understand the important role played by courts and law in counter hegemonic globalization, it does compel what I would term a *longue duree* on the law and globalization linkage.

In the light of these issues, I probe answers to several questions in this paper. They include: what levels of law (international, national, local) did the NBA engage and where and when was it able to have an impact on the legal terrain? Conversely, how did law shape the

NBA's strategies and goals? Did its resort to law produce a hegemonic or counter hegemonic outcome? (Santos 2000: 467). The paper is divided into four main parts. In Part II, I analyze the relationship between law, globalization and counter hegemonic globalization and try to identify some key theoretical issues which are relevant to the NBA struggle. In Part III, I discuss the evolution of the NBA's struggle and provide background to the litigation before the Indian Supreme Court. In Part IV, I discuss the judgment of the Indian Supreme Court and critique what I call the dominant scripts that reveal the limits of law in counter hegemonic globalization and more broadly in the use of law in social movement struggles. In Part V, I discuss three possible modes of assessing the relationship between the NBA struggle and the law, and find that while the relationship between the NBA struggle and the law was more positive at the international level, at the national and local levels it was much more oppositional. In Part VI, I draw the overall conclusions on the role of law in counter hegemonic globalization in the light of the NBA's experience.

### **LAW, SOCIAL MOVEMENTS AND COUNTER HEGEMONIC GLOBALIZATION: SOME THEORETICAL ISSUES**

There are several theoretical issues in thinking about the relationship between law and social movements in the context of counter hegemonic globalization that are of relevance to the NBA's struggle. First, the distinction between international and domestic spheres that is so central to the self-constitution of law, with its disciplinary boundaries around the doctrine of sovereignty, makes little sense when we consider what social movements do. Social movements are increasingly organized to engage in political struggles at multiple levels from the local to the global (Khagram, Riker and Sikkink 2002) whereas law structures social relations at multiple levels as well. As such, social movements use norms and institutions at multiple levels in framing their demands and engaging in action (Rajagopal 2003a).

On the other hand, state sovereignty and the power it provides for groups who are in charge of the state continue to be dominant in determining the outcomes of social struggles. In particular, the outcomes of social movements' engagements with the law depend on the extent to which they can frame their demands and engage in struggles that avoid a direct confrontation with state sovereignty and its ideological foundation of developmental nationalism.<sup>3</sup> This confrontation cannot be avoided by social movements by taking recourse to law because law and courts share this ideology of developmental nationalism. The tension between the increasing ability of social movements to operate at multiple levels beyond state borders and the continuing importance of state sovereignty needs to lead to a critique of the ideological foundations of state sovereignty.

Second, the distinction between law and policy or between the domains of adjudication and administration continues to influence whether, how and to what extent social movements will use law in their struggles and to what extent law will prove to be emancipatory. The self-image of law and adjudication as apolitical provides an ideological cover for the pursuit of private, partisan ends which are often dressed up as public interest.<sup>4</sup> This operates in two ways. First, it operates to remove certain facts from the domain of public policy—and therefore of social movement pressure—on the ground that the 'law' governs it. An example would be the way the Constitution of India makes the adjudication of inter-state water disputes subject to the exclusive jurisdiction of specialized water disputes tribunals and in that process, seeks to exclude both public participation in settlement of water disputes and even judicial review by higher courts.<sup>5</sup> Making water disputes an exclusive domain of

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<sup>3</sup> The idea that developmental nationalism is a foundation for state sovereignty is not new. See e.g., Rajagopal (2003: chapter 2); Nandy (1992).

<sup>4</sup> For an influential argument about the politics of law and adjudication from which I have learned much, see Kennedy (1998).

<sup>5</sup> Article 262, Constitution of India.

bargaining and adjudication between states takes popular politics out of it. It also provides little incentives for social movements to try to influence the law that applies to water disputes as they are not given the right to do so. A second way in which the law-politics distinction works in determining whether law will be emancipatory is in drawing a sharp line between adjudication and administration. When faced with specific issues that raise questions of distribution of resources—such as most questions involved in development projects—the courts often take the view that their institutional role prevents them from acting on those issues. This may be due to a combination of factors including the institutional boundary between the courts and the executive, the lack of necessary expertise by judges to adjudicate complex policy questions, a concern over whether judicial orders will be enforced by the Executive, the need for democratic accountability in decision-making processes that involve distribution of resources and the very self-image of what judging is all about.<sup>6</sup> Nevertheless, the consequence of this boundary drawing is that social movements are often prevented from successfully using law and courts in challenging administrative or policy processes that do not operate in the public interest.

Third, there are significant tensions between the internal logic of the law—its language, method and sources of legitimacy—and the logic of social movement struggles (Rajagopal 2003a). The language of the law is specialized, measured, and in postcolonial countries, often in a western language. The language of social movements is explicitly oriented towards communicative action, and is therefore popular and local. These languages can often collide, producing moments of incompatibility that cannot be easily resolved. Social movements use methods of contestation that include the media, for instance. Once social movements juridicalize their struggle by going to the court, they run into problems when they attempt to ‘speak’ publicly on

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<sup>6</sup> For a discussion of many of these issues, see Rosenberg (1991: 9–36, 336–343).

issues that are considered by the court to be *sub-judice*.<sup>7</sup> The courts may find it offensive and even contemptuous that social movements do not accept the finality of recourse to judiciary and abandon their agitational strategies, but instead treat legal recourse as part of their agitations. This tension between the logic of the law and the logic of social movements is relevant to the NBA's engagement with the law, as I discuss below.

The source of law's legitimacy is also different from that of social movements. Law depends traditionally on sovereignty and by extension, its normative and institutional expressions through the Constitution and formal democratic institutions. In the post World War II era, the State—and therefore law—has also depended, for its legitimacy, on the idea of development, a substantive moral vision for the transformation of traditional societies into more modern ones in order to achieve better living standards (Nandy 1992). Social movements are often in tension with these sources of legitimacy. They may contest the Constitution itself as morally and politically inadequate, as when they attempt to change approved constitutional doctrines and structures as enunciated by the judiciary and the legal elite (Siegel 2002). These interpretive acts by ordinary people, while non-authorized and even illegal, are in fact ubiquitous and a central part of the legal systems of most countries, taken in their totality. This argument is not novel but has been a staple of law and society scholarship<sup>8</sup> as well as constitutional law scholarship.<sup>9</sup> They may find that formal democratic institutions fail them and therefore contest the meaning of democracy itself (Mamdani et al 1993). Social movements also often contest the ideology of development that is

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<sup>7</sup> There are differences between US law and British-influenced commonwealth jurisdictions on this matter.

<sup>8</sup> See e.g., Fernandes and Varley (1998: chapter 1); Santos (1977).

<sup>9</sup> For that argument in US constitutional scholarship, see Siegel (2002). In Indian constitutional scholarship, see Baxi (2003); Baxi (1987). In African constitutional scholarship, see Shivji (1995).

sought to be promoted by the State, when they find that such an ideology violates their rights. Indeed, as we will see, this was the case with the NBA. As such, the logic of law and the logic of social movements have certain basic tensions which influence the outcome of social movements' engagement with the law.

Fourth, the role of the domestic judiciary in a social movement campaign with transnational dimensions, such as that of the NBA, needs to be understood better. Currently, the dominant theoretical framework for understanding transnational social movement networks and their domestic impact on norm-creation and implementation, is to be found in the field of international relations (IR) theory (Risse, Ropp and Sikkink 1999; Keck and Sikkink 1998). That framework usefully explains how domestic and transnational movements combine to bring pressure from 'above' and 'below' to compel governments to abide by human rights standards. Domestic NGOs, social movements and national opposition groups ally with members of transnational networks consisting of NGOs, Churches etc and convince powerful external actors such as international organizations, foreign donor institutions and other states to put pressure on the domestic government to alter its norm-violating behavior (Risse 2000:189). Models about how this dynamic between transnational and domestic social movements has an impact on enforcement of international human rights law are useful (Risse, Ropp and Sikkink 2000: introduction). But this model pays insufficient attention to the impact of domestic law on the dynamic, especially that of the domestic judiciary, and remains overwhelmingly focused on international law. Domestic judiciaries are embedded in their legal cultures and have distinctive traditions for incorporating international norms into domestic law which may impede the movement dynamics that IR theorists model. For example, a country such as South Africa, whose Constitution explicitly asks its judiciary to interpret domestic laws in the light of applicable international law, is likely to be easier for the sort of transnational-local social movement linkages posited

by IR theory. On the other hand, in countries such as the US, whose courts are notoriously unwilling to pay attention to international law while interpreting domestic law, or in India, where courts are unpredictable in reading international law into domestic law, domestic social movements often find it more difficult to link with transnational networks to enforce human rights. Domestic judiciaries may intervene in movement dynamics in ways that reframe the issues, shift crucial resources available to social movements (such as moral capital) and generally depoliticize domestic social movements that in turn weakens its link with transnational social movement networks. Domestic judiciaries may do so, even when they adopt ostensibly progressive rulings using counter hegemonic discourses such as human rights. IR theory does not pay sufficient attention to these issues. As will become clear during the discussion of the Indian Supreme Court's role in the NBA struggle, linkages between transnational and local social movements alone cannot explain why movements fail or succeed. After all, in the case of the Narmada valley struggle, a vigorous dynamic continued to exist between transnational and local social movements, putting pressure on the governments from above and below, and yet, it did not succeed in enforcing human rights and environmental norms partly because of the role played by India's Supreme Court and its legal framework. Domestic laws and institutions matter, and the constitutional texts—the literal and the social—matter too, in determining when counter hegemonic globalization would be successful locally.

### **THE EVOLUTION OF THE NARMADA VALLEY STRUGGLE**

In this section, I shall describe the evolution of the struggle in the Narmada valley from 1979 until now and the ways in which the Narmada struggle engaged with the law at multiple levels from the local to the international. It is not my intention here to provide an exhaustive factual background to the struggle but only to focus on

the general outline and those specific facts which are relevant to the role of law in the struggle.<sup>10</sup>

### **Background**

The Narmada river is India's fifth longest river and one of the last major rivers to be dammed. The desire to build dams across the Narmada river, a west flowing river in the middle of India that crosses three state boundaries (Madhya Pradesh, Maharashtra and Gujarat), in order to harness its water for drinking, irrigation and power, had existed at least since the 1940s though proposals to this effect had been made as early as 1863 (Jayal 2001: 153–154). The reason for this interest was simple: the leaders of India's Congress Party, which led the movement for independence from British colonial rule, had been committed to an industrialized, western-style economic development model and saw the building of dams as a crucial component of that strategy. To Prime Minister Jawaharlal Nehru, who called dams the 'temples of modern India', dams appealed to his sense of scale and grandeur. He called the statute for setting up an authority to develop the Damodar valley, the first river development scheme in India, "the most notable piece of legislation that has ever been passed in this country" (Gopal 1989: 192). Indeed, in 1949, when an economic crisis necessitated curtailment of public expenditure, Nehru ordered retrenchment of even the defense services but would not allow a scaling down of river valley projects (Gopal 1989: 193). As such, the idea that dams are a fundamentally important part of development was firmly anchored in nationalist narrative.

Asked by the states of Bombay, the Central provinces and Berar (which were later reorganized and renamed in the 1960s)

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<sup>10</sup> Several book length studies and exhaustively researched chapters exist on the Narmada valley struggle, which is perhaps one of the best studied. See e.g., Fisher (1995); Baviskar (1995); Sangvai (2000); Jayal (2001: chapter 4); Khagram (2002). See also Rajagopal (2003:122–127).

in 1946, India's Central Waterways, Irrigation and Navigation Commission constituted the A.N.Khosla Committee to study the feasibility of constructing dams in the Narmada river basin. That Committee submitted its report in 1959. However, in 1960, the state of Bombay was bifurcated into the states of Maharashtra and Gujarat and the project was inaugurated by Prime Minister Nehru in 1961. Disputes arose between the states of Gujarat, Maharashtra and Madhya Pradesh over the sharing of costs and benefits of the project and the Government of India again constituted a committee led by Dr. A.N.Khosla. The report of this committee, submitted in 1965, recommended that the water be shared with another state, Rajasthan, and that the height of the dam in Gujarat that had been originally proposed by it in 1959, be raised. This was welcomed by Gujarat, which stood to benefit from the dam, but rejected by the governments of Maharashtra and Madhya Pradesh which wanted the height of the dam to be lower to reduce the submergence area and to save potential sites for building their own dams along the river (Fisher 1995:12; Jayal 2001:155).

To resolve the differences between the riparian states, the Government of India constituted the Narmada Water Disputes Tribunal (hereinafter the Tribunal) in 1969 under India's Interstate Water Disputes Act of 1956. The Tribunal was chaired by Justice V.Ramaswami, a sitting judge of the Supreme Court and two High Court judges and was assisted by five technical experts in the fields of hydrology, agriculture, civil engineering and power engineering.<sup>11</sup> It did not have any sociologists, anthropologists or environmental engineers. The deliberations of the Tribunal were halted when Rajasthan and Madhya Pradesh moved the Supreme Court in 1972, thus involving the court in a long and difficult relationship with the river valley projects that lasts even today (Jayal 2001:155). After a political deal was made between the states on the availability and

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<sup>11</sup> See <http://www.sardarSarvardam.org/history4.htm>.

allocation of the water between the states, the height of the dam and the level of the canal from the dam, Madhya Pradesh and Rajasthan withdrew their petitions from the Supreme Court. Thereafter, the Tribunal recommenced its work in 1974 and gave its final award in 1978, which came into effect in December 1979.

Thus the Tribunal was itself a creature of politics that was incapable, *ab initio*, of delivering justice for several reasons. First, the very conceptualization of the dispute as an inter-state one between riparian states excluded any possibility that the people who would be adversely affected by the construction of the project, would be sufficiently taken into account. Put differently, it was assumed that the institutions of representative democracy would work well enough to be able to truly represent the diverse interests of the people. This proved to be unrealistic, especially as most of the project-affected people turned out to be tribals, who had and have little voice through representative democracy (Kothari 1995: 439–440). Indeed, this lack of voice is evident from the fact that in India, 40–50% of those displaced by development projects—a total estimated at more than 33 million since 1947—are tribal people, who account for just 8% of the country's 1 billion population (World Commission on Dams 2000). Though the Constitution has special provisions in favor of tribals, these are poorly enforced and not taken seriously.<sup>12</sup>

Second, the terms of reference of the Tribunal were constrained by the political deal that was made between the states and therefore the Tribunal could not inquire into a range of basic issues. It could not inquire into whether there were any alternatives to the achievement of the objectives behind the project, as the decision to commence had already been taken by political leaders. The political deal made between the states in the mid-1970s had also decided that the total amount of water to be shared between them

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<sup>12</sup> This is perhaps why reviews by scholars and practitioners rarely discuss tribal rights. See Dhavan and Nariman (2000).

was 28 MAF (million acre per foot) whereas by the Tribunal's own calculations, the amount of water available to be shared was only 22.6 MAF, assuming a 75% run-off yield (i.e, rainfall in three out of every four years) (Jayal 2001: 156). As a result, it had to work on the basis of faulty factual assumptions.

Third, the statute under which the Tribunal had been established was adopted in 1956, when international legal norms relating to human rights, indigenous peoples' rights and the environment had been in their infancy, provided no appeal from the Tribunal's decision to an ordinary court which could then examine its conformity to evolving standards of law and justice.<sup>13</sup> While this did not prevent the Supreme Court from admitting petitions from the NBA challenging displacement of the tribal people, it constituted a significant structural barrier to overcome during the proceedings.

Fourth, the award of the Tribunal regarding resettlement and rehabilitation (R&R) was progressive at that time, because it provided a land-for-land policy, which was a clean break from the provisions of India's Land Acquisition Act, 1894, a colonial era legislation which provides only cash compensation for those whose lands are acquired (Patel 1995: 180). The final order of the tribunal provided that each 'oustee'<sup>14</sup> family from whom more than 25% of its land holding is acquired shall be entitled to and be allotted irrigable land to the extent of the land acquired from it, with a minimum of 5 acres per family. It also provided that of the price to be paid for the land a sum equal to 50% of the compensation payable to the oustee family for the land acquired from it will be set off as an initial installment

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<sup>13</sup> Article 262, Constitution of India; Interstate Water Disputes Act, section 11.

<sup>14</sup>The final order of the Tribunal defined an 'oustee' in this manner: "An 'oustee' shall mean any person who since at least one year prior to the date of publication of the notification under Section 4 of the Act, has been ordinarily residing or cultivating land or carrying on any trade, occupation, or calling or working for gain in the area likely to be submerged permanently or temporarily." See Clause XI, sub-clause 1(2), Report of the Narmada Water Disputes Tribunal, 1978.

of payment. The balance cost of the allotted land shall be recovered from the allottee in 20 yearly installments free of interest (sub clause IV(7), Report of the Narmada Water Disputes Tribunal, 1978).

But crucially, it neglected the fact that most of the people slated for displacement would be tribals who did not have formal ownership rights under Indian law. Colonial-era legislation, the Indian Forest Act, 1927, had extinguished the rights of tribal people over their land, and rendered them in the position of encroachers, with few legal entitlements (Patel 1995:180). Thus, the most progressive aspect of the Tribunal's award was not of much use for the most vulnerable segment of the population which would be affected by the construction of the river valley project.

As it finally stood, the river valley project was conceived in grand terms which would make it the world's largest, with 30 major, 135 medium and around 3000 small dams across the Narmada river valley, stretching across three states (Fisher 1995:13). The Sardar Sarovar dam was conceived as the terminal dam of the river basin, located in Gujarat (all the other dams were to be located in Madhya Pradesh). The Sardar Sarovar dam project alone—which was only one in the entire river valley scheme—was enormous, consisting of a dam, a riverside powerhouse and transmission lines, a main canal, a canal powerhouse and an irrigation network (Fisher 1995:13). The costs and benefits of the whole project were projected in proportions that were almost biblical, but have been changing over the years, as a result of the *ad hoc* and contested nature of the planning parameters themselves. The governments concerned claimed that the project as a whole would provide drinking water to almost 40 million people including in water-starved areas such as Kutch and Saurashtra in Gujarat and parts of Rajasthan; that it would irrigate over 6 million hectares of land and generate 3000 megawatts of power.<sup>15</sup> It was

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<sup>15</sup> See *Written Submission on behalf of Union of India on The Award, the Project and the Authorities*, Supreme Court of India, 2000 (copy on file with the author), p.5B; Fisher 1995: 15.

claimed that the Sardar Sarovar dam alone would irrigate 1.79 million hectares of land in Gujarat and 73,000 hectares in Rajasthan (much of which is dry), provide drinking water to 8215 villages and 135 urban centers in Gujarat, generate 1450 megawatts of power, have an employment potential of 1.3 million man-years, provide protection against floods and advancement of the desert and multiple other beneficial impacts on flora, fauna and fisheries.<sup>16</sup>

On the side of costs, the Sardar Sarovar project alone is estimated, according to official figures, to affect over 41,000 families in the 3 states spread over 245 villages.<sup>17</sup> This estimate is sharply upward from that of the Tribunal—about 7000 families in Madhya Pradesh and Maharashtra. Even 41,000 families are seen as a complete underestimation, as it includes only those agriculturists who produce evidence of ownership of land. It does not include various other categories of people who are adversely affected by the project such as those who pursue non-agricultural occupations (fishermen, petty traders, shop keepers etc), the ‘colony-affected’<sup>18</sup> people whose lands were taken in the 1960s to build project housing and warehouses, the people who are displaced due to the construction of the extensive canal network, the people who would be affected by the acquisition of lands for drainage, the fishing families whose livelihoods would be affected downstream, the tribal people whose lands are taken for catchment area treatment (as part of environmental protection measures), and the expansion of a wildlife sanctuary into tribal areas (again as part of environmental protection measures). Environmental impact of the projects are also estimated to be gigantic, flooding

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<sup>16</sup> See *Written Submission on behalf of Union of India on The Award, the Project and the Authorities*, Supreme Court of India (copy on file with the author), pp.14–15.

<sup>17</sup> See *Written Submissions on behalf of the Petitioners, February 2000: Displacement, Resettlement and Rehabilitation*, Supreme Court of India (copy on file with the author), p.1.

<sup>18</sup> In India, many urban settlements as well as ‘modern’ housing in rural areas, are often referred to as colonies.

hundreds of miles of rich forest and cultivable land, and with adverse environmental impacts in the areas of catchment area treatment, compensatory afforestation, command area development (including drainage network), and on flora, fauna and fisheries including downstream from the dams.<sup>19</sup>

### **Struggle in and around the Law: 1979–1994**

There were three stages in the evolution of the struggle in the Narmada valley between 1979 to 1994 which have a major bearing on their relationship to law. The first stage was between 1979 to 1988 when the key issue was the content of the resettlement and rehabilitation package for the people who would be displaced. The second stage, 1988 to 1991, saw a stalemate and hardening of the positions between the protagonists and antagonists, an increasing focus on environmental issues and mass action and more state repression and confrontation. During these two stages, the forces in favor of the dam projects as well as the resistance against the projects were operating at multiple levels, from the local to the global but the domestic courts played a minor role in the struggle. During the third stage between 1991 and 1994, the Narmada valley struggle became both less internationalized as the World Bank funding stopped in 1993, as well as more judicialized due to the involvement of the Indian Supreme Court. Local and international legal norms as well as local and international institutions including courts, were significantly influential in determining the direction and pace of the struggle in the valley but the degrees of influence varied across the three stages.

The dam projects were already embedded in a maze of local laws that determined the outer limits of what claims the struggle against

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<sup>19</sup> See *Written Submission of Narmada Bachao Andolan*, Supreme Court of India, 2000 (copy on file with the author), pp. 55–68.

dams could make. Applicable land law was governed by a range of instruments including the Indian Forest Act 1927, the Forest Conservation Act (from 1980), the Land Acquisition Act 1894, the Transfer of Property Act and the Indian constitutional provisions concerning right to property and special provisions concerning the right of tribal people over their land. As I have noted already, many of these colonial-era laws provided no rights at all, and in particular, assumed the tribal inhabitants of forests to be mere encroachers without any land rights. Land owners were afforded only cash compensation in case of acquisition, under the Land Acquisition Act. This, in any case, did not apply to those who had no formal title of ownership, such as the tribals in the Narmada valley. Private law doctrines that may have provided a modicum of protection to the forest areas where the tribals lived, such as the public trust doctrine, were not available under Indian law. Also, tribals did not acquire any land rights under codified and uncodified religious laws that often have a major influence on property ownership and title, because they were so low in the caste hierarchy that Hindu laws did not apply to them. In addition, the right to property clause in the Indian Constitution had been withdrawn through a constitutional amendment in 1976 and the state of constitutional protection of property rights was in great flux in the late 1970s.<sup>20</sup> Indeed, it is because of these reasons perhaps that India never had (and still doesn't have) a national policy on resettlement and rehabilitation. The colonial era bias against tribals, the non-applicability of religious laws, and the lack of any land rights afforded by the Constitution, meant that the people affected by the dams had an uphill struggle.

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<sup>20</sup> Right to property was guaranteed under Article 19 of India's Constitution but had been the subject of a major confrontation between the courts and the legislatures since the early 1950s, especially over the question of compensation and agrarian land reform. Finally, during the Emergency in 1975–78, imposed by Prime Minister Indira Gandhi, when fundamental rights were suspended, Article 19 and Article 31 were amended to delete right to property as a fundamental right. See Austin (1999).

It is in that light that one must understand the claim that the award of the Tribunal in 1979 was a watershed in offering land for land as compensation. It was progressive considering the state of the law in India then which afforded no protection for land rights, but was fundamentally flawed in that it left the tribals and other affected people out of its ambit.

In addition to the land laws and the Tribunal's award, the struggle against the dams was also embedded in other local laws, such as local criminal laws that enabled state repression including section 144 of India's Criminal Procedure Code (which imposes a curfew and prevents the assembly of more than four persons) and the Official Secrets Act. Within the limits of these laws, the people affected by the dams were severely restricted in not only *making* certain claims but also in *using* certain methods to claim their rights. Their land rights were not recognized; they could not get information about the projects; and they could not assemble to protest or stage peaceful demonstrations without inviting state violence. As such, the political opportunity structures for the struggle against the dams were severely constrained.<sup>21</sup>

The projects were transnationalized from their conception. The World Bank sent its first mission in late 1979 to Gujarat and helped to get \$10 million from UNDP for the basic planning of the projects (Khagram 2002: 210). From that time onwards, the Bank was deeply involved in planning and began funding the projects in 1985 until it stopped funding in 1993. The involvement of the Bank transnationalized the projects at three levels.<sup>22</sup> First, it functioned as

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<sup>21</sup> In both the literature on social movements and on transnational networks, the impact of law—especially private law—as a background phenomenon that affects political opportunities available for contestation, is not well recognized. In the legal literature as well, the impact of private law on the operation of public law (such as that of land law on human rights) is not typically focused on. My study partly aims to redress this.

<sup>22</sup> I borrow this framing from Fisher (1995: 19).

a seal of approval that brought in several other foreign actors into the projects such as the Japanese OECD (to fund turbines to be provided by Sumitomo and Hitachi corporations), KfW of Germany (for fisheries development), CIDA of Canada (for environmental impact studies) and ODA of the UK (for downstream impact studies and environmental plans) (Patkar 1995:175). Second, the Bank's involvement opened the door for a transnationalization of the political arena and normative contestation. In particular, the Bank's involvement led to the involvement of transnational NGOs who used international legal norms relating to human rights and environment to hold the Bank and the borrower country accountable. Third, the Bank was under an internal constitutional obligation to ensure that the projects it funded conformed to its own internal policies, known as Operational Manual Statements. These policies provided a set of soft law standards at the international level that became relevant to judging the performance of the projects on the ground in areas such as involuntary resettlement.<sup>23</sup>

The popular resistance against the Narmada projects began barely a week after the Tribunal had given its award in 1979 (Khagram 2002: 209) though in some parts of Madhya Pradesh, agitations had begun as early as 1978 (Jayal 2001: 162). The initial agitation had been organized by the Nimar Bachao Andolan (Save Nimar Committee) in Madhya Pradesh, led by Arjun Singh, a politician from the Congress party, but that collapsed when he became Chief Minister of Madhya Pradesh and began supporting the projects. Nimar was a fertile plain inhabited by many wealthy farmers in Madhya Pradesh which was due to be submerged by the construction of Sardar Sarovar dam. When the foundation work for the dam was begun in early 1980, grassroots groups began organizing resistance. But it would take

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<sup>23</sup> See e.g., Operational Manual Statement 2.33, February 1980 on involuntary resettlement (since superceded by OMS 4.30, June 1990); OMS 2.34, 1982 on tribals in Bank projects; OMS 2.36, 1984 on environmental guidelines.

another 3 years for the first act of mass resistance, in the form of a protest and a demonstration, to occur in the river valley. In March 1983, local NGOs assisted villagers in Gujarat, who had been displaced without compensation or land in violation of the orders of the Tribunal, to document their landholdings, publicize their plight in the press and lobby domestic and World bank officials to better their conditions (Khagram 2002: 211). A transnational coalition focused on resettlement issues emerged in the early 1980s as well, built on the links between Arch Vahini, a local NGO in Gujarat, and Oxfam UK which was funding it.

But by 1983, the first group of villagers in Gujarat had accepted the resettlement and rehabilitation package and the unrest centered only on whether the government was living up to its word. In what is perhaps the first encounter between the popular resistance and the courts, a group of tribals moved the Gujarat High Court in early 1984 with the assistance of Arch-Vahini to enforce promises made by the government regarding resettlement and rehabilitation (Patel 1995:183). The government was forced to compromise. Nevertheless, disagreements continued between the tribals and NGOs on the one hand and the government of Gujarat on the other. The key disagreement was over the entitlement of encroachers in the areas to be submerged (Patel 1995:186). Given that most of the tribals to be displaced did not have formal property rights to their land, they were all considered encroachers on the land with no rights to resettlement and rehabilitation. This issue emerged as the main one in the negotiations between the government of Gujarat and the World Bank over the loan agreement, which was signed in 1985. After a futile wait for a new policy from the government of Gujarat on this issue, and for the release of the World Bank loan document which had been signed, Arch-Vahini and other NGOs moved the Supreme Court for the first time in 1985. Though the government of Gujarat stated in the proceedings that encroachers had no rights (Khagram 2002:214), the court issued an interim injunction against displacement (Patel 1995:187). Independent of this, another group,

the Narmada Dharangrasta Samiti, had filed legal challenges to land acquisition at the local courts in Maharashtra, but without success (Sangvai 2000: 154). Despite this brief involvement of the courts in the struggle against displacement, they remained marginal. The injunctions had not been against construction of the dam per se, and the courts never grappled with the question of what rights the so-called encroachers actually had under Indian law (Patel 1995: 188). As a result, the construction of the dams continued even as Arch—Vahini and other groups managed to extract a progressive policy on resettlement and rehabilitation from the government of Gujarat in 1987.<sup>24</sup> However, this policy was constantly breached. Thus until 1988, the focus of domestic mobilization remained largely focused on obtaining better terms of resettlement and rehabilitation for the displaced people in the valley, and the access to courts was a notable but not terribly significant part of this mobilization.

The groups working on resettlement and rehabilitation had better success at the international level. In 1983, Dr. Anil Patel of Arch—Vahini sent a letter to the World Bank detailing the problems with resettlement on the ground, leading the World Bank to send a mission, led by Prof. Thayer Scudder, an anthropologist, to India in 1983. His report proved to be highly critical and confirmed much of what Dr. Patel's letter had maintained (Khagram 2002:211). Scudder returned to India in 1984 and his work had a major impact on the World Bank internally especially in revising the terms of the resettlement and rehabilitation policy guidelines in 1990. The World Bank also came under pressure from NGOs like Survival International, which charged that India was violating the rights of tribal people under ILO Convention 107, to which it was a party, due to the dam construction. In 1986, NGOs petitioned ILO's Committee of

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<sup>24</sup> Due to the pressure from the World Bank and the local groups, the Gujarat government made its package for resettlement and rehabilitation more generous, including a minimum of 5 acres of land for those who owned land and extending its package to encroachers as well.

Experts to investigate possible violations of Convention 107 relating to the rights of indigenous peoples. That led to a warning from the Committee of Experts to the World Bank and the Indian government which acknowledged their duty to comply with the Convention. The linkages between Arch-Vahini and Oxfam UK helped to build a transnational coalition, especially with those NGOs that were focusing on the record of international development agencies such as the World Bank in ensuring resettlement and rehabilitation. For that coalition, the World Bank's involvement in the Narmada valley projects became the next *cause celebre*. But, despite a positive impact of this transnational coalition and local groups in the Narmada valley on the policies relating to resettlement and rehabilitation, the impact on the people who were ultimately affected by the dam construction was not significant. Though the World Bank pressured the Gujarat government to improve its package for the displaced people, in the end it signed the loan agreement in 1985 with the government, giving more priority to project approval than to its policy on resettlement, revealing, as the Morse Commission said, "its readiness to accept whatever India offered, and to disregard the World Bank's own requirements and expertise" (Morse and Berger 1992: 47). Put differently, the Narmada valley struggle had some limited impact on the international legal rules concerning resettlement and on the World Bank, but not on domestic law and institutions. Domestic policy on resettlement in Gujarat was formally changed due to the struggle but implementation on the ground remained very poor.

On the environmental front, there were major encounters between the Narmada valley struggle and the law. When the Tribunal made its award in 1979, environmental law was in its infancy. The 1972 UN Conference on the Environment in Stockholm had led to the expansion of the environmental agenda at the World Bank during the 1970s, the worldwide growth of environmental NGOs and the creation of agencies on environment within states. At the World Bank, an office of environmental affairs was established in the mid 1970s,

and environmental project guidelines were issued in 1984.<sup>25</sup> In India, the regulatory authority over forests was transferred from the State list to the Concurrent list in the Constitution in 1976, allowing shared federal and state authority. The Prime Minister issued a directive in 1980 mandating environmental impact assessments by federal agencies for medium and major irrigation projects including dams. Indian Parliament passed the Forest Conservation Act in 1980 and the federal environmental department was upgraded to the Ministry of Environment and Forests in 1985.<sup>26</sup> Several Indian environmental NGOs were also established in the 1970s including the Center for Science and Environment and Kalpavriksh, while environmental movements had been witnessed in parts of the country such as the Silent valley agitation and the Chipko movement. The growth of environmental norms and institutions had a major impact on the struggle in the valley while the struggle itself contributed to the growth of these norms and institutions. The Forest Conservation Act restricted the diversion of forest land to the displaced people as land-for-land compensation, thus making it more difficult for those who were struggling to obtain better terms of resettlement and rehabilitation (Patel 1995). The federal Ministry of Environment refused to grant permission to the construction of the dam to go ahead until 1987 though the World Bank had signed the loan agreement in 1985 itself. Finally, due to a great deal of political pressure, a conditional environmental clearance was given after a Prime Ministerial intervention (Jayal 2001: 160). A report produced by Kalpavriksh on the environmental aspects of the project in 1983 had had a major impact on state policy and influenced the stand taken by the federal Ministry of Environment in 1987 (Khagram 2002: 220) while the political atmosphere favored the rise of social movements in the aftermath of the Emergency. The World Bank's

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<sup>25</sup> Operational Manual Statement 2.36, 1984.

<sup>26</sup> For a discussion of these developments, see Khagram (2002: 218–219).

1984 guidelines remained without much effect until late 1980s when a new transnational coalition focused on the environmental damage caused by the dam projects in the Narmada valley emerged and used the political opportunities provided by the World Bank's own guidelines as well as emerging norms of international environmental law, for struggle in the valley. At the core of this coalition was a domestic social movement, the NBA.

The leader of NBA, Medha Patkar, was a social worker who became an activist in the valley. She and others had become involved in mobilizing affected people in the valley from the mid 1980s. Their initial focus was on verifying the factual accuracy of the claims and counterclaims in the project relating to costs and benefits and in securing access to government and World Bank documents to ensure that the process remained transparent (Patkar 1995). For this more radical wing of the Narmada valley struggle, the issue was not getting the right resettlement package or even environmental damage; rather, it was the lack of any trust in the very process of designing and building large dams and the role of the state elites in that process. This was not due to any philosophical commitment but rested on a deep suspicion earned through experience in dealing with government bureaucrats mouthing platitudes about development. This wing of the Narmada valley struggle retained an anti-state, antielite flavor which would later create tensions with the Supreme Court itself. As a result, there was a perceptible hardening of the mobilization in the valley beginning in 1986. For example, on February 16, 1986, the Narmada Dharangrast Samiti was formed which decided that they would not move out and would not accept any compensation package from the government until they got answers to all their questions relating to costs and benefits and other parameters of the project itself (Patkar 1995: 160–161). Thus the issue became trust in the very process of governance. From mid 1988 onwards, a wave of mass actions was launched in the valley. In 1989, the NBA was formed, as a social movement of affected communities, domestic NGOs and individuals drawn from all over India but consisting mainly of

the Narmada Dharangrast Samiti from Maharashtra, the Narmada Ghati Navnirman Samiti from Madhya Pradesh and the Narmada Asargrastha Sangharsh Samiti from Gujarat (Jayal 2001: 163).

With the establishment of the federal Ministry of Environment and growing NGO activism on the environmental issue, the NBA began focusing on it for its struggle. Bruce Rich from Environmental Defense Fund had met Medha Patkar in 1986 and in 1987, Patkar traveled to Washington DC to meet World Bank officials and ask them how they could sign the loan agreement in 1985 when the Ministry of Environment and Forests had not granted environmental clearance as mandated by domestic Indian law.<sup>27</sup> Medha Patkar also testified in US Congressional hearings in 1989 about the environmental and social impact of the dams which led to more pressure on the World Bank. A Narmada International Action Committee was also established consisting of NGOs drawn from India, US, Canada, Europe, Australia and Japan and this helped in lobbying in several countries against investment in the project. In April 1990, the Friends of the Earth (Japan) hosted the first International Narmada Symposium in Tokyo, after their own field visit to the valley. It received major press attention in Japan and within a month, the Overseas Economic Cooperation Fund (OECF) of Japan announced its withdrawal from the Narmada project. In June 1990, over twenty Japanese Diet members wrote to the World Bank President, calling on the Bank to stop funding the Sardar Sarovar dam project (Udall 1995: 212). Mainly as a result of these pressures, the World Bank commissioned an unprecedented independent review of the dam projects in 1991 which found that the World Bank had failed to comply with its own guidelines (Morse and Berger 1992).

Meanwhile, domestic agitations in the valley intensified and confrontations with the state increased as the state pursued more

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<sup>27</sup> The World Bank's Legal Advisor, Mohan Gopal, was from India and he professed ignorance about such a requirement under Indian law. Patkar (1995: 174).

and more aggressive tactics to counter the successes of the Narmada valley movement. The construction of the Sardar Sarovar dam had continued as there had been no injunction against it. The Gujarat state in particular, began treating the dam construction as part of an ideology of cultural nationalism, and branding all opponents as ‘enemies of Gujarat’ (Jayal 2001: 164). In 1989, Gujarat politicians from across various party lines, criticized dam-critics as antinational agents of foreign interests and adopted a resolution in the state assembly supporting the project.<sup>28</sup> A sophisticated media campaign was launched by the proponents of the dam, led by the Sardar Sarovar Nigam Limited.<sup>29</sup> Even mainstream newspapers published editorials criticizing the foreign lobbying of the NBA, saying that “their effort to instigate international interference in India’s affairs has to be deplored. It demonstrates their lack of faith in the sense of the people of India”.<sup>30</sup> Meanwhile, the NBA had intensified mass resistance through direct action in the valley. A massive rally was

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<sup>28</sup> A big provocation for this resolution was the NBA’s lobbying at the World Bank in Washington DC. This did not however mean that the World Bank funding was unwelcome or that the state elites themselves would avoid foreign lobbying for the project. Thus, in 1990, the Gujarat Chief Minister traveled to the US and UK to counter the adverse publicity given to the project and to raise funds from non-resident Indians. Jayal (2001: 168).

<sup>29</sup> The Sardar Sarovar Nigam Limited (SSNL) was established in April 1988 in Gujarat as an autonomous corporation responsible for the implementation of the Sardar Sarovar dam project. The Narmada Valley Development Authority (NVDA), based upstream in Madhya Pradesh, is responsible for the Narmada Sagar dam project which was planned with Sardar Sarovar project but received no clearances or financing. Both of these bodies report to the Narmada Control Authority (NCA), based in Madhya Pradesh, headed by the Secretary of the Ministry of Water Resources. The NCA has two Subgroups, one on environment, headed by the Secretary of the Ministry of Environment and Forests; and another on rehabilitation, headed by the Secretary of the Ministry of Social Welfare. The Review Committee of the NCA is the final decision-making authority and consists of the Union Minister for Water Resources as the chair and the Chief Ministers of Gujarat, Maharashtra, Madhya Pradesh and Rajasthan as members.

<sup>30</sup> The Times of India, Editorial, November 01, 1989.

held at Harsud in September 1989, at which the NBA and its allies resolved, *Vikas Chahiye, vinash nahin!* (“we want development, not destruction”). This was followed by several marches, demonstrations, rallies, fasts, letter writing campaigns, appeals and a ‘long march’ that ended up blocking of the Bombay—Agra Highway in 1990. The goal of the struggle had changed at this stage to demand a comprehensive reevaluation of the whole project, not just better terms of resettlement and rehabilitation. The progressive hardening of the movement in the valley was revealed in its new slogan, *Koi nahi hatega, bandh nahi banega!* (no one will move, the dam will not be built). The struggle in the valley was at one of its most intense, when the World Bank appointed the independent review in mid-1991 led by former UNDP—head Bradford Morse and the Canadian human rights lawyer, Thomas Berger.

Thus, the goal of the struggle in the valley had shifted from a focus on resettlement to a comprehensive questioning of the whole project during 1988 to 1991. The focus of the struggle changed from petitioning government authorities to more confrontational, direct, mass action. The role of the courts continued to remain marginal during this period also. For example, a petition against land acquisition was filed in Dhule district court in Maharashtra in 1990, but it led nowhere (Sangvai 2000: 154). The lower courts were simply overawed by the political challenge of adjudicating the legal issues arising from the massive development project and openly pleaded helplessness (Sangvai 2000:154).

Between 1991 and 1994, the Narmada valley struggle became even more internationalized as well as more judicialized. The independent review team, appointed by the World Bank concluded in its report in June 1992 that the project was “flawed” and that the World Bank should “step back” from the project. Citing hostility in the valley and local opposition to the project, the report also stated that “progress will be impossible except as a result of unacceptable practices” (Morse and Berger 1992: 356). Meanwhile, the American human rights NGO, Asia Watch, issued a report in June 1992

condemning the repressive measures in the valley, which had sharply increased. This followed the government announcement in 1991 that the rising waters from the dam would begin submerging the villages, leading to greater confrontation between the government and the affected people. The new phase of confrontation was reflected in the new slogan of the struggle, *Doobenge par hatenge nahin!* (we will drown but we will not move). Two major US-based NGOs, the Environmental Defense Fund and the Bank Information Center, also led the constitution of the Narmada International Human Rights Panel, endorsed by forty-two environmental and human rights organizations from sixteen countries (Udall 1995: 208). That panel issued an interim report in October 1992 detailing human rights violations. The focus on human rights violations in the valley continued, as the US-based Lawyers Committee on Human Rights issued a critical report in April 1993. As a result of this intensifying condemnation, the World Bank worked out a face-saving formula with the Indian government whereby the Indian government would announce that it was asking the World Bank to cancel the remaining \$170 million out of the \$450 million loan and that it would complete the project on its own.<sup>31</sup> This was announced in March 1993.

Despite the successes at the international level, the situation in the valley was grim and the NBA and its allies were taking recourse to courts in desperation. A flurry of legal action followed. As early as 1990, the villages that were scheduled to be submerged were beginning to be cleared in Maharashtra. The submergence and the displacement were challenged in the Bombay High Court in 1990, which restrained the government from forcible evictions which it had, in an earlier case<sup>32</sup>, eloquently declared as unconstitutional (Sangvai 2000:154). Despite this, the construction of the Sardar Sarovar dam

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<sup>31</sup> Though the Indian government said that the funds for the project would come out of its own revenue, some think that the Indian government merely ended up diverting World Bank funds from other sectoral loans to India. Udall (1995: 220).

<sup>32</sup> See *Olga Tellis and others v. Bombay Municipal Corporation*, AIR 1986 SC 180.

proceeded apace, even as forced evictions and agitations continued. In 1991, Dr. B.D.Sharma, the Commissioner of Scheduled Castes and Tribes, a statutory authority in India, filed an interlocutory appeal in a case concerning tribal rights in the Supreme Court. In its order<sup>33</sup>, the court laid down some provisions concerning resettlement including the provision that resettlement should be completed at least six months before submergence (Sangvai 2000: 154) and directed the three state governments to ensure that rehabilitation would be consistent with Article 21 (right to life) of the Constitution. However, the Court also declared that it would like the work on the dam to be expeditiously completed, even though it had not been asked to pronounce on the viability of the dam itself (Jayal 2001: 185). For the movement in the valley, it would be a foretaste of things to come, as the Court had already taken sides in the more fundamental debate over the viability of the project, that the movement had put on the agenda since 1988. Several legal challenges were also leveled in local courts and the Bombay High Court in Maharashtra in 1992 and 1993, against forced evictions, deforestation and police atrocities, but these cases got nowhere as the courts either avoided cases emerging from the valley or were awed into silence by the specter of confrontation with the forces behind India's largest development project (Sangvai 2000: 155).

Meanwhile, direct confrontation was escalating in the valley. In Maharashtra, a satyagraha (a form of non violent Gandhian mass action) launched at Manibeli was met by use of force by the state in 1992. The NBA was also engaging in more forceful, if non violent action, by banning the entry of government officials into the villages in the valley. Between October 1992 and March 1993, there were a number of instances of arrests, beatings and detentions in Maharashtra and Madhya Pradesh. The people in the valley were declaring that they were ready for *jal samarpan* (sacrifice of life in

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<sup>33</sup> B.D. Sharma v. Union of India, 1992 Supp (3) SCC 93.

the water). As waters rose and began submerging the lower hamlets of Manibeli, the affected people stood knee-deep in the water, refusing to move (Sangvai 2000: 63). A new satyagraha at Manibeli, launched by the NBA during the monsoon in 1993, forced the federal government to announce that there would be a review of the project. A five-member expert review panel was appointed by the government to review the project<sup>34</sup>, though without the power to revisit the viability of the project itself. Despite this somewhat favorable outcome for the NBA, repression by state police forces continued in the villages in Maharashtra and Gujarat. A petition filed by the Lok Adhikar Sangh, an oustees' rights group in Gujarat in 1991, resulted in a judgment by the Gujarat High Court in April 1993 (Sangvai 2000: 155). That court ruled that the submergence of the first six villages without resettlement was illegal and in February 1994, ruled that no further work on the dam which would cause further submergence proceed. Despite this, the Gujarat government and the Sardar Sarovar Nigam Limited (SSNL) continued their work on the dam and in February 1994, closed the sluice gates of the dam, causing the waters to rise and leading to permanent submergence (Sangvai 2000: 155). The struggle in the valley was in a desperate situation as a result, and the NBA decided to approach the Supreme Court for relief.

### **Struggle through the Law? 1994–2000**

The NBA filed a petition before the Supreme Court in May 1994, challenging the Sardar Sarovar project on many grounds, calling for a comprehensive review of the project and prayed for a court order stopping all construction and displacement until such a review was done. This petition was admitted by the court as a public interest

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<sup>34</sup> The members of this panel were Dr. Jayant Patil (as chair), Dr. Vasant Gowariker, Mr. L.C. Jain, Professor V.C. Kulandaiswamy and Dr. Ramaswamy R. Iyer.

litigation<sup>35</sup> by a bench which had a pro-human rights, liberal character.<sup>36</sup> The decision to approach the court had been taken after much internal deliberation and disagreement within the NBA as there were many who felt that the courts were elitist and not favorably disposed towards the struggle in the valley (Patkar 1995; Sangvai 2000: 152). As the counsel for the NBA said, at first the NBA was reluctant to approach the court as it was felt that the courts were “protectors of the powerful”.<sup>37</sup> Nevertheless, the NBA had to approach the Supreme Court because of the desperate situation in the valley and its inability to obtain relief through either the lower judiciary or governmental mechanisms.<sup>38</sup> Water was rising in the valley as a result of the decision of the SSNL to close the sluice gates of the dam in February 1994, and the lower judiciary was being openly defied by the Gujarat government. It was a classic example of the lack of any legal remedy for gross violations of law and human rights. It was in that spirit that the Supreme Court admitted the petition in 1994 though there were serious constitutional barriers to overcome: for example, the question of whether the court had jurisdiction over water disputes which had been referred under the Inter-State Water Disputes Act to a tribunal.

The first significant act of the court was to order the report of the five-member expert panel which had been released in July 1994, to be made public. That report was accordingly made

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<sup>35</sup> The jurisdiction of the Indian Supreme Court has been extended in novel directions through public interest litigation or social action litigation. For a description of the procedural and substantive innovations and an evaluation, see Baxi (1987); Desai and Muralidhar (2000).

<sup>36</sup> The bench that accepted the petition consisted of Chief Justice M.N. Venkatchalliah, Justice J.S. Verma and Justice S.P. Barucha. At least the first two justices had a pro-human rights, liberal reputation by that time. The importance of having friendly justices on the bench would become more and more obvious in the coming years.

<sup>37</sup> Interview with Prashant Bhushan, counsel to NBA, 17 February 2004.

<sup>38</sup> *Id.*

public in late 1994, and it confirmed the findings of the World Bank's Independent Review. It concluded that the hydrology of the river was not known, and it passed strictures on the poor record of resettlement and rehabilitation. The Supreme Court also ordered the federal and state governments to make submissions on all aspects of the dam and to discuss all the issues arising out of the five-member panel report in an NCA meeting (Sangvai 2000: 70). Meanwhile, in early 1994 the new Chief Minister of Madhya Pradesh, Mr. Digvijay Singh, had openly begun campaigning for reducing the height of the dam from 455 feet to 436 feet.<sup>39</sup> This move was intended to save 30,000 people and 6500 hectares of land in Madhya Pradesh from submergence (Jayal 2001:188). Taken together, the release of the five-member panel report and the decision of the Chief Minister of Madhya Pradesh, effectively operated to reopen the Narmada water dispute which had purportedly been finally settled by the tribunal's award in 1979. Indeed, in the Chief Minister's own words before the state assembly on December 16, 1994, "the Supreme Court has virtually reopened the whole issue and now we are no longer bound by the Narmada tribunal award ... no further construction on the SSP would be allowed if the oustees were not rehabilitated at least six months before the submergence".<sup>40</sup> On a practical level, the new stand taken by the Chief Minister would also make the inter-state NCA impossible to function. Combined with two negative Madhya Pradesh state assembly reports on the dam project in 1994 (Jayal 2001:190), the inter-state dimension of the dispute reared its head once again. Protests in the valley continued in late 1994, with the affected people engaging in various forms of direct political action such as dharnas and indefinite fasts. In the light of these

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<sup>39</sup> He had sent a letter to that effect to the Prime Minister in March 1994. Sangvai (2000:67).

<sup>40</sup> Quoted in Sangvai (2000:68).

developments, and in view of the Supreme Court proceedings, the NCA decided to suspend the river bed construction of the dam in December 1994. In May 1995, the Supreme Court confirmed this decision through a stay order on further construction of the dam.<sup>41</sup> The NBA's struggle in the valley seemed to have achieved victory, but it would prove to be fleeting. The hope that the suspension of construction would lead to a halt of the project itself as well as a rethinking of the whole approach towards large projects,—as had been demanded by the NBA—proved to be unfounded.

Even as the river bed construction of the dam was suspended formally by the NCA and the Supreme Court, the construction continued on the ground in violation of these orders. To contest this, the NBA took out a massive march on Delhi in late 1995 which actually resulted in the stoppage of the construction work (Sangvai 2000:70–71). The construction of the dam remained suspended for four more years until 1999. During this time, aspects of the dam dispute were returned to the political arena while the NBA focused on consolidating its work in the villages. But the locus of the dispute remained centered on the Supreme Court which conducted numerous hearings on the case during 1996–1998. Indisputably, the struggle in the valley had become much more dependent on and intertwined with the law and the court. This was to have its own downside as the momentum behind the struggle slowly waned. Even as the NBA itself recognized that the victory at the court was fragile, by approaching the Supreme Court, the NBA had deprived itself of its traditional repertoires of more direct political action (Jayal 2001:194) and more crucially, agreed to have the Court act as the final arbiter of a complex dispute spanning decades.

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<sup>41</sup> Of course, there is an emerging idea that globalization is itself a phenomenon that is slowly tapering off, not possessing the kind of vigor it had in the 1990s. I don't engage with this larger theoretical and empirical issue here. For discussion, see Dirlik (2000).

In July 1996, the Court ordered the states to resolve their differences before appearing before it, as the matter had revived dimensions of an inter-state dispute, especially between Madhya Pradesh and Gujarat. Following this, a meeting of the Chief Ministers of Gujarat, Madhya Pradesh, Maharashtra and Rajasthan was convened by the Prime Minister in the summer of 1996 and an agreement was purportedly reached to raise the dam to a height of 436 feet and following a hydrological review, to build it up to its planned height of 455 feet (Sangvai 2000:71; Jayal 2001:191). This agreement came undone when it was revealed that Madhya Pradesh and Rajasthan had not accepted the agreement and that it was basically a political decision of the Prime Minister (Jayal 2001: 191–192). The NBA took out a protest march against this decision to Delhi in early August 1996.

Meanwhile, the Supreme Court refused to lift the stay order against the construction of the dam in a hearing in August 1996 and expressed its concern over human rights violations, especially relating to resettlement and rehabilitation.<sup>42</sup> This ruling was confirmed by the Court in March 1997 and again in a final ruling in April 1997, when it decided to constitute a five-member Constitution bench to decide the issues relating to its jurisdiction. The latter decision resulted from the fact that the federal government and the Gujarat government had consistently opposed the court's jurisdiction to reopen the Narmada dispute which they argued, had been finally settled under section 11 of the Inter-State Water Disputes Act read with Article 262 of the Constitution. The court's July 1996 order to the states to resolve their differences before appearing in front of it so that it could confine its focus to the issues arising from the constitutionality of resettlement and rehabilitation, had not been implemented. The reality of political differences between states over

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<sup>42</sup> During the course of the hearing, Justice Verma said, "we have to rise above the law for the protection of human rights". Quoted in Sangvai 2000: 153.

the allocation of costs and benefits between them, as well as the complex intertwining of the costs and benefits with resettlement and rehabilitation, made this impossible.

During 1996, the struggle in the valley also began to transform itself. As the construction of the dam had stopped, the NBA began to focus on positive reconstruction rather than confrontation and it began to branch off into national and global political action. Thus, the NBA launched the *Nav Nirman* program, which saw the planting of trees, housing, biogas, soil and water conservation, small irrigation schemes, schools called *jeevanshalas* (school of life) and libraries (Jayal 2001:193). While *jeevanshalas* had been established by the NBA as early as 1991 in the tribal areas of Maharashtra, the new areas of positive work were many more. Also, in 1996 the NBA took the lead in establishing the National Alliance of Peoples' Movements (NAPM) an umbrella of like-minded peoples' movements and trade unions from all over India such as the National Fish workers Forum, Sarva Seva Sangha, Samajwadi Jan Parishad, Hind Mazdoor Sabha, Shoshit Jan Andolan and the BHEL Employees Union (Sangvai 2000:136; Jayal 2001:194). The NAPM took up issues like struggles against multinational companies (like Enron in India), and anti—WTO and anti-globalization struggles from 1997. The World Bank's pull-out from the project in 1993 had effectively removed the transnational components of the struggle, which the NBA has sought to reclaim through the NAPM. The NBA was also involved in the first international conference against big dams, held in March 1997 at Curitiba, Brazil. At the end of 1997, the NBA took part in a meeting of peoples' movements, NGOs, dam building companies and bilaterals, in Gland, Switzerland, organized by the World Conservation Union and the World Bank. That meeting led to the formation of the World Commission on Dams in 1998, an unprecedented and unique multi-stakeholder global governance experiment consisting of civil society actors and dam building companies. It released its report in 2000, consisting of comprehensive guidelines for planning, building and assessing dams (World Commission on Dams, 2000).

The NBA's influence on the Commission was strong as Medha Patkar was one of the commissioners.

Even as the NBA was notching up victories abroad, it was facing trouble back home. For reasons that can only be guessed at<sup>43</sup>, from 1998, the Supreme Court began to dispense with the need to decide the jurisdictional question which it had assigned to a constitution bench in 1997 (Sangvai 2000:72, 153). It also limited itself to the resettlement and rehabilitation question, though it had indicated during numerous previous hearings that a comprehensive review of the whole dam project was preferable. In fact, previously it had asked the counsel for the states and the federal government to be prepared to argue all aspects relating to the project. Thus, NBA's hope that the court would order a comprehensive review of the whole project, and that the constitution bench would set important legal precedent for settling disputes over large projects and peoples' rights, had been dashed. Also, the struggle in the valley had been witnessing lower levels of participation and energy after the Supreme Court stayed the construction of the dam in May 1995 (Jayal 2001:193). It was in this context that the Gujarat government wanted the stay order to be lifted so that construction could proceed beyond 80.3 meters where it had remained since May 1995. That government was also interested in sending a signal to international investors that India was open for business, especially in crucial sectors like power which were beginning to be disinvested. As its counsel argued before the court in a hearing in February 1999, "a strong signal should go from this court to the outside world, that the work on the dam is on ... only then the foreign aid would come ... only then the people would move out from their villages" (quoted in Sangvai 2000:72).

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<sup>43</sup> The most plausible reason is that Chief Justice Venkatchalliah and Justice Verma, who had been friendlier to the NBA's cause, retired, and the new bench consisted of Chief Justice Anand, and Justices Barucha and Kirpal. Prashant Bhushan, the counsel for the NBA feels that the jurisdictional issues were 'implicitly decided' in the 2000 judgment. Interview, 17 February 2004.

The Bharatiya Janata Party (BJP), a Hindu-nationalist party, had also come to power in Gujarat and at the federal level, whose leaders had been strong supporters of the dam project. It was in this climate that the Supreme Court gave an interim order on February 18, 1999, allowing the construction of the dam to go ahead by another 5 meters (Sangvai 2000:72). In a further order on May 7, it allowed further construction of the dam by another 3 meters of humps over 85 meters, and approved an in-house Grievance Redressal Authority appointed by the Gujarat government which was to submit reports to the Supreme Court on the rehabilitation of oustees in Gujarat (Sangvai 2000:72–73).

While this decision was celebrated by the pro-dam elements in Gujarat, the NBA had been dealt a severe setback. The NBA responded by organizing direct political action in the valley and by examining tracts of land which had purportedly been allocated to the oustees and reveal them to be barren, uncultivable or not available at all (Sangvai 2000: 75). In April 1999, a *Manav Adhikar Yatra* (Human Rights March) was launched in Madhya Pradesh and Maharashtra. In June 1999, hundreds of villagers and activists from all over India launched a satyagraha against displacement and submergence in Madhya Pradesh and Maharashtra. Squads of *samarpit dal* (groups prepared to die by drowning) stood in waistdeep water as it entered Domkhedi in Maharashtra in August 1999 (Sangvai 2000:76). Police broke up this resistance and carried away those standing in the water.

Despite this continuing resistance, the construction of the dam continued as permitted by the court. It was clear that the forces in favor of the dam were too hegemonic and could not be stopped by counter-hegemonic action. The political winds were beginning to transform the legal landscape against the struggle in the valley. A clear indication of where the Supreme Court itself was heading came during June 1999, when it objected to the media advocacy tactics and direct political action (such as satyagraha) launched by the NBA, as well to the writings of Booker-prize winner, Arundhati Roy,

who had begun to publicly criticize the project (Sangvai 2000:74). Acting on a report filed by a senior advocate, K.K.Venugopal in his capacity as *amicus curiae*<sup>44</sup>, the court contemplated action against the NBA for contempt of court though it did not, at that time, impose any penalties. The NBA maintained that its activities did not constitute contempt, and that it was the state governments who were in contempt by violating judicial orders with impunity. It filed contempt petitions against three state governments and the federal government for filing false information before the court regarding compliance with conditions relating to land procurement, rehabilitation and resettlement, though it is unclear what came out of these petitions (Sangvai 2000:74).

After the hearings were concluded, the final order of the Supreme Court came on 18 October 2000, landing like a bombshell on the NBA.<sup>45</sup> In its order<sup>46</sup>, the court allowed the construction of the dam to proceed up to 90 meters (which the Relief and Rehabilitation Sub-group of the NCA had already allowed) and announced that the priority was to complete the construction of the dam as soon as possible. The court also ordered that further raising of the height of the dam will be *pari passu* with the implementation of rehabilitation and environmental measures and after clearance by the Relief and Rehabilitation Sub-group and the Environmental Sub-group of the NCA at every additional 5 meters. The court also ordered the states concerned to comply with the decisions of the NCA, particularly relating to land acquisition and rehabilitation, and asked the NCA to prepare an action plan in this regard. The decision of the court left no doubt that the final decision-making authority belonged to the political arena, and declared that in case the Review Committee of

<sup>44</sup> *Statement by K.K.Venugopal*, Supreme Court of India, 1999 (on file with the author). He had been appointed by the court.

<sup>45</sup> *Narmada Bachao Andolan vs. Union of India & Others*, 10 SCC 664.

<sup>46</sup> *Id.* pp. 768–770.

the NCA could not decide any issue, it shall be referred to the Prime Minister, whose decision shall be final. It was clear that completing the construction of the dam was more important to the court than the social and environmental costs it imposed. The court also extolled the virtues of large dams.

Thus the decision by the NBA to approach the Supreme Court had backfired, as many within NBA itself had feared. The court's decision was welcomed by the pro-dam elements in Gujarat, and the Deputy Prime Minister, L.K. Advani, declared that those who oppose development projects such as the Sardar Sarovar dam, were working at the behest of some 'foreign nations' and added that these were the same people who criticized India's nuclear tests in Pokhran in 1998 and listed the court decision as one of the three major achievements of the BJP government then—the other two being the Pokhran blasts and the victory over Pakistan-supported forces in Kargil in 1999.<sup>47</sup> Critics of the judgment were many, in the Indian media<sup>48</sup> and elsewhere<sup>49</sup>, but it was clear that the struggle in the valley had reached a dead-end and had to necessarily explore newer forms of political action to continue. The Supreme Court's Delphic pronouncements carry almost mythical power in India and its seal of approval for the project as well as its criticisms of the NBA, dealt major blows to the NBA's legitimacy and moral capital. The struggle from 1994 to 2000 had been waged in and through the Supreme Court and it had proved to be very costly.

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<sup>47</sup> The Hindustan Times, November 1, 2000.

<sup>48</sup> Too numerous to list here. See e.g., Rajagopal (2000).

<sup>49</sup> The most recent book-length critique of the judgment is Jain (2001). See also the detailed analysis and critique of the judgment available as "The Order of the Supreme Court in the Narmada Case: Highlights, Comments and Analysis" at [www.narmada.org](http://www.narmada.org); Ramaswamy R. Iyer, "A Judgment of Grave Import", available at [www.narmada.org](http://www.narmada.org).

## THE POLITICS OF THE COURT AND BEYOND

### The Narmada Judgment and Its Scripts

Why did the Supreme Court decide as it did in 2000? Answering this question is important in order to appreciate what role, if any, courts and law play in counter-hegemonic globalization, a classic instance of which is the struggle in the Narmada valley. It would also help us understand the important role played by domestic legal institutions, especially courts, in globalized struggles such as the Narmada one. The court's decision could be attributed, at first glance, to the change in the composition of the bench that decided the case. Of Justices Anand, Kirpal and Barucha, only Barucha had been on the bench since the commencement of the case in 1994. The other two judges who had been on the bench earlier, Justices Venkatchalliah and Verma, had retired. Given that Barucha dissented, one could say that the decision basically depended upon the involvement as well as the ideology of individual judges. This explanation is lent credence by the fact that the earlier bench was more sympathetic to the NBA's arguments and had in fact indicated its willingness to order a comprehensive review of the whole project and had constituted a constitution bench to decide the jurisdictional issues in 1997. This explanation is believed to lie behind the judgment by NBA's counsel.<sup>50</sup> There may be much to commend this explanation. Indeed, it is well recognized by observers of the Indian judiciary that especially in the area of public interest litigation, outcomes of cases often depend on the ideology of individual judges<sup>51</sup>, despite cautionary notes from within the judiciary itself about the importance of treating the Court as a single institution with one voice rather than an assemblage of individual judges.<sup>52</sup>

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<sup>50</sup> Interview with Prashant Bhushan, New Delhi, 17 February 2004. Shanti Bhushan, Prashant's father and a senior counsel, had appeared for the NBA in earlier hearings.

<sup>51</sup> See Desai and Muralidhar (2000:180).

<sup>52</sup> See the remarks of R.S. Pathak, J. (as he then was) in *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161.

An entirely different set of explanations emerge, however, when the judgment itself is examined closely. These explanations suggest, I shall argue, that there are several dominant scripts in the legal reasoning itself, which are responsible for the conclusions that the court reached. Strictly speaking, these scripts come from outside the law itself, but are so ingrained in legal reasoning and judicial craft as to be able to influence the very process of framing and perceiving the ‘facts’ of the dispute. In other words, the court examined the facts of the dispute through lenses which were themselves biased in ways that approved only one version of facts. That the court was not only deciding the ‘law’ on the basis of settled ‘facts’, should be settled in advance. Indeed, the estimate of the costs and benefits of the project was itself contested by the governments and the NBA before the Supreme Court in 2000. As such, the court’s role was not simply to decide the law on the basis of settled facts, but it was required to decide which version of facts trumped the others. The law was simply one more terrain on which the NBA struggled over the social recognition and political legitimation of human suffering, and was not independent of or prior to the establishment of social facts. By recognizing one version of facts presented by the governments as valid, the Supreme Court delegitimized the human suffering that the NBA was trying to draw attention to.

The techniques through which the court performed this task will be evident when the dominant scripts of the judgment are examined closely. A first script could be termed *evolutionary*, in that the court subscribes to a view of human progress in which the modern is always epistemologically superior to the traditional. It is also a view in which the direction of change is always from the traditional to the modern and the occurrence of change is inevitable. This is evident in the way the court deals with the displacement of tribal people due to the construction of the dam. As the court says, “the displacement of the tribals and other persons would not per se result in the violations 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 the rehabilitation sites they will have more and better amenities than which they enjoyed in their tribal hamlets. The gradual assimilation in the mainstream of the society will lead to betterment and progress” (pp.702–3). This evolutionary ideology enables to court to rationalize the displacement, even though its position is factually tenuous. Almost 140 out of a total of 193 villages in Madhya Pradesh that are slated for submergence consist of a mixed population in the plains of Nimar, with a well developed economy. For the people of this region—where the resistance to the dam has been fierce—displacement is unlikely to lead to “betterment and progress”. Even in the case of the rest of the people to be displaced who are tribals, the idea that their displacement would lead to betterment depends on an ideological position that a forest-based, river-based economy is backward when compared to a modern one. Further, it also depends on a belief that rehabilitation packages would in fact be implemented and land would be made available. This was, to say the least, highly dubious. From the World Bank to the Five-Member expert panel to Madhya Pradesh (where maximum displacement was to occur), most had concurred that the rehabilitation measures had not been implemented on the ground, leading hundreds of displaced families to return to their villages after 1994. In fact the judgment itself recognizes that rehabilitation has been unsatisfactory; as it says in its order, “the reports of the Grievance Redressal Authorities, and of Madhya Pradesh in particular, show 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” (p.769). In this light of all this, the belief of the Supreme Court in betterment and progress of the tribals can only be described as an act of blind faith.

A second script of the judgment could be called *nationalist*, in the way in which it extols the importance of the dam for securing India’s border with Pakistan as well as for ensuring national development including through better infrastructure, food security and electricity.

While discussing the benefits of the Sardar Sarovar dam, the court says, “apart from bringing drinking water within 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” (p.764). The discourse about the dam had, over the years, pointed out that the border between Gujarat and Pakistan was porous, partly due to poor human habitation, and expressed the hope that bringing drinking water to the dry regions of Kutch, Saurashtra and North Gujarat would improve India’s own security. Indeed, discourses of Gujarati nationalism and Indian nationalism tended to overlap a lot in calling attention to the security dimensions of the dam project. It is because of this that any criticism of the dam project was attacked by pro-dam elements as anti-national<sup>53</sup>, and mobviolence against the dam-critics has been orchestrated by all political parties in Gujarat over the years (Sangvai 2000: 140–143; Jayal 2001:196). The workers at the dam site have also been charged with sedition for demanding better wages (Jayal 2001:195). Even as the court affirms the viability of the project and therefore a key demand of Gujarati nationalism at the sub-state level, it also wraps the justification around Indian nationalism by linking it to border security with Pakistan. By doing this, the court enables Indian nationalism to overcome or trump Gujarati chauvinism. By joining this nationalist chorus, the court casts all criticism of the dam project as inherently suspicious. A nationalist framing also suppresses any rational evaluation of the costs and benefits by the jingoistic fervor that immediately accompanies the discourse of nationalism. In addition, the court also praises the value of river valley projects in increasing India’s self-sufficiency in food (p.764, 766) and water, providing which is seen as a primary duty of the government (p.761). Once the project was seen in this

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<sup>53</sup> See, for example, the remarks of the Deputy Prime Minister cited above at n. 47 and the accompanying text.

manner, it placed an impossibly heavy burden on the NBA, which it could not easily discharge.

A third script of the judgment could be termed *developmentalist* in that it emphasizes the value of dams per se as tools of development, and casts the overall utilitarian argument in terms of public welfare that justifies the sacrifice of some for many. The court also understands development in a particular way that makes the building of dams almost compulsory. To begin with, the court extols the value of dams per se, though it had not been asked to decide the viability of dams as tools of development, including their costs and benefits. Indeed, the court's characterization of the NBA as an "anti-dam organization" (p.695)—rather than as a 'human rights organization' or 'environmental NGO'—gives some sense of the court's disapproval of anyone critical of dams per se. In addition to the "vital role" dams play in "providing irrigation for food security, domestic and industrial water supply, hydroelectric power and keeping flood waters back" (p.701), dams are seen by the court to contribute positively to the living standards of the displaced persons as well as to environment. Thus, the court declares that "the tribals who are affected are in indigent circumstances and who have been deprived of the modern fruits of development such as tap water, education, road, electricity, convenient medical facilities, etc." (p.735). It further states that "a properly drafted R&R plan would improve the living standards of displaced persons after displacement.... It is not fair that tribals and 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" (p.765). Besides the fact that the court's assertion is factually very dubious<sup>54</sup>, the court is trying here to appeal to different dimensions of development from traditional aspects relating to food production

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<sup>54</sup> The evidence so far is just the opposite, and shows that displaced people in general and tribals in particular, are much worse off after displacement. See World Commission on Dams (2000); Jain (2001:18–25).

and industrial growth to a definition that pays more attention to human development. The court also sees dams and hydroelectric power as contributing positively to environment and thus completes its appeal to yet another aspect of development. It says that dams are “instruments for improving the environment” (p.765) and that “hydel power’s contribution to the greenhouse effect is negligible and it can be termed ecology-friendly” (p.768). These bald assertions, unsupported by facts (Jain 2001), serve an ideological role in leading the court to justify the project as a whole.

The court sees the sacrifice of some in the interest of the many as being inherent in the public welfare argument that lies behind the construction of the dam. As it says, “displacement of these people would undoubtedly disconnect them from their past, culture, custom and traditions, but then it becomes necessary to harvest a river for the larger good. A natural river is not only meant for the people close by but it should be for the benefit of those who can make use of it, being away from it or near it” (p.765). This argument, recalling American jurisprudence on property rights in the 19th century when developmental and utilitarian arguments dominated (Horowitz 1977: chapter 2), enables the court to provide the ideological justification for displacement and therefore, for the project. Also, the court understands development in a particular manner which makes the building of dams compulsory for its realization. Taking per capita consumption of electricity as one of the indicators of living standards (p.767) for example, makes dams important for ensuring energy consumption even though the court ignores the internal tension that this approach creates with its own commitment to the environment.

A fourth script of the judgment is *statist* and it puts the emphasis on the efficiency and equity of the system that is responsible for designing and executing the project as well as in taking ameliorative measures. Put differently, faced with substantive critiques in the areas of rehabilitation or environment, the court puts its faith in the setting up of state agencies and the fulfillment of procedures, rather than

coming up with answers to the critiques. For example, faced with the question of whether environmental clearance by the Ministry of Environment and Forests in 1987 was given without proper data and planning and was therefore contrary to law, the majority puts much emphasis on the process through which the decision was arrived at, including the fact that it was finally cleared by the Prime Minister himself. As the court says, “care for the environment is an ongoing process and the system in place would ensure that ameliorative steps are taken to counter the adverse effect, if any, on the environment with the construction of the dam” (p.729). This could be contrasted to the view of Justice Barucha, the dissenting judge, who says that the environmental clearance was based on “next to no data ... and was therefore, contrary to the terms of the then policy of the Union of India in regard to environmental clearances and, therefore, no clearance at all” (pp.775, 776, 781). Similarly, with regard to displacement, the majority of the court says that “with the establishment of the R&R Sub-group and the constitution of the grievance redressal authorities by the states of Gujarat, Maharashtra and Madhya Pradesh, there is a system in force which will ensure satisfactory resettlement and rehabilitation of the oustees” (p.745). This reasoning of the court is in direct conflict with the struggle in the valley, which has had a long history of confrontation with state officials, who, instead of doing their duty under the law, have violated the law at every level. The court overlooks the fact that the state agencies have had no intention of either ensuring rehabilitation and resettlement as per the award of the tribunal, or ensuring that environmental protection measures are taken. The multiplication of state agencies is, in this view of the court, a substantive response to the failure to ensure rehabilitation or to protect the environment. The NBA’s plea for an independent agency to evaluate and monitor the project is rejected.

A fifth script of the judgment could be termed *legalist/dominant* in that it sees the dispute as something that has been settled by law which the Supreme Court has little power to change. In this

view, the role of the Court is to dispense justice in accordance with the law and if the law clearly favors the work on the dam to go ahead, there is little that the court can do. As the court says, "... the court has not forsaken its duty and role as a court of law dispensing justice in accordance with the law.... No directions are issued which are in conflict with any legal provisions" (p.762). This could be contrasted with previous views expressed by the court, including in previous proceedings of the same case<sup>55</sup>, that when the law is in conflict with fundamental rights, the law must give way. The law that the court refers to here, against which it is purportedly helpless, is of two kinds. First, the law governing the settlement of inter-state water disputes, contained in Article 262 of the Constitution and the Inter—State Water Disputes Act, prevents the jurisdiction of the Supreme Court over water disputes and provides no right of appeal. Though the court had opened the dispute again by admitting the petition and by suspending the work on the dam for four years, it now takes the position that its only job is to ensure that the award of the tribunal is enforced (p.768, 769). Further, it is not so clear that the jurisdiction of the court is ousted when the matter concerns interpretation and enforcement of constitutional rights. In fact, it is for that reason that the court admitted the petition by the NBA in 1994. Indeed, it is in the very essence of judicial review of legislation that the law must give way to rights, as interpreted by the court. Further, if the court felt that its jurisdiction was truly ousted, it could have dismissed the case only on that ground. This it did not do. The court's decision in this seems to have been prompted by its desire to assert the dominance of the Constitution and the power of the federal government over the procedure for deciding inter-state water disputes. At several places, the court notes that the award of the tribunal is binding on states (p.696, 697,766). The court cites a recent decision, *State*

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<sup>55</sup> See the remarks of Justice Verma, *supra* n. 42.

of *Karnataka v. State of A.P.*<sup>56</sup>, as controlling precedent for the proposition that any issue which is decided by a tribunal that is duly constituted under the Inter-State Water Disputes Act, is, by law, binding on the respective states that are parties to the dispute. While this may be legally correct, the Supreme Court had cast this into doubt by admitting the NBA's petition in 1994 and granting a stay order against construction in May 1995 though it was clearly contrary to the award of the tribunal in 1979. The reason for this was the court's concern over the conflict between the award's implementation and constitutional rights of the displaced people. It appears that the court was led, in the final analysis, to decide as it did by its concern that the federal constitutional scheme for settling water disputes between states was coming unstuck because Madhya Pradesh was trying to reopen the whole dispute, taking some political cover under the NBA's agitation for the rights of the displaced people. While this is a legitimate concern, the court's duty, especially in a public interest litigation alleging violation of constitutional rights, is to first safeguard rights if there is evidence. This the court failed to do.

A second legalist reason for the court's decision has to do with the doctrine of laches<sup>57</sup>, which the majority held, prevents the NBA from prevailing in the case. According to the court's reasoning, since the NBA did not approach the court until 1994 even though the construction of the dam began in 1987 after obtaining environmental clearance, it is guilty of laches. Besides the fact that the Supreme Court is rarely solicitous to traditional procedural issues in public

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<sup>56</sup> *State of Karnataka v. State of A.P.*, (2000) 9 SCC 572.

<sup>57</sup> The doctrine of laches, containing an element of the private law doctrine of equitable estoppel, is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as "neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity." (Black's Law Dictionary, 6th Edition). Its applicability in a case such as the NBA's, involving public law rights, especially constitutional rights, is legally dubious.

interest litigation<sup>58</sup>, this decision of the court is also factually inaccurate and in bad faith. The court was approached in 1991 as noted<sup>59</sup> and the NBA had approached a number of lower courts quite successfully over the years even though it could not get the judicial orders enforced. It is only after knocking on the doors of virtually every governmental and judicial authority and failing that the NBA approached the Supreme Court. Therefore, the court's decision seems hard to understand.

A sixth script that runs through the judgment may be termed *adjudicatory* and it seeks to rest its reasoning on the institutional role of the court (as opposed to the Executive). It also seeks to rest its reasoning on the distinction between law and policy, the former being all that the court is concerned with. According to this script, it is not appropriate for the court to intervene in a dispute such as the Narmada valley dam project either because the court lacks the expertise to evaluate the competing policy options, or because it is not the province of the judiciary to decide such matters but only that of an elected government. As the court says, “the conception and the decision to undertake a project are to be regarded as a policy decision ... The courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken” (p.761, 762). Again, the court says “the courts cannot run the government nor can the administration indulge in abuse or non-use of power and get away with it. The essence of judicial review is a constitutional fundamental.... When there is a valid law requiring the Government to act in a particular

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<sup>58</sup> The Indian Supreme Court is famous for innovating new procedural rules in the domain of public interest litigation. For a review, see Desai and Muralidhar (2000).

<sup>59</sup> See *supra* n.33 and the accompanying text.

manner the court ought not to, without striking down the law, give any direction which is not in accordance with the law. In other words, the court itself is not above the law” (p.763). Imposing this interpretive framework on itself gives the court enough wiggle room to avoid difficult legal questions, such as the conflict between individual rights and state rights or the role of the Supreme Court in inter-state water disputes when important constitutional questions other than riparian rights of states are at stake. The adjudicatory script also helps to mask the ideological hand-me-down of the court behind the façade of democratic accountability. This is doubly ironic because of the well known record of the Indian Supreme Court in actively making policy decisions through public interest litigation. Indeed, perhaps no other country’s highest court has intervened in so many areas of public policy in fields ranging from criminal justice, environment, human rights, women’s rights or public accountability. Yet, when it comes to development projects such as dams, the court suddenly discovers the virtues of judicial self-restraint.<sup>60</sup>

The seventh script that is evident in the judgment may be called *selective cosmopolitanism* and through it the court justifies its reasoning by appeal to either a universal human interest or to global sources of law but does it in a manner that is highly selective. In this, the court shows its desire to root its judgment in a moral and political

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<sup>60</sup> It is not only in the NBA’s case that the court has been so solicitous to development projects but also in other cases in which displaced people have challenged projects before courts. In those cases too the court has often taken refuge behind either the law-policy distinction or purported lack of expertise while denying relief to victims even when they raise fundamental questions concerning the safety of the dam due to, for example, seismic factors. For example, in *Tehri Bandh Virodhi Sangarsh Samiti v. State of U.P.* (1992) Supp. 1 SCC 44, the court declared that it did “not possess the requisite expertise to render any final opinion on the rival contentions of the experts. In our opinion, the court can only investigate and adjudicate the question as to whether the Government was conscious to the inherent danger as pointed out by the petitioners and applied its mind to the safety of the dam.”

narrative that is larger than the one dictated by the nationstate, unlike some decades ago when the court may have simply said that the national laws provide the only moral universe within which grievances must be articulated before the court. To some it may be evidence of judicial globalization<sup>61</sup>, but what must not be overlooked is how malleable this cosmopolitanism is, enabling the court to deploy segments of it to reach conclusions that are hegemonic in effect. The current case provides a good example of this. In this, the court was faced with the legal question by the counsel to the NBA, whether “the forcible displacement of tribals and other marginal farmers from their land and other sources of livelihood for a project which was not in the national or public interest was a violation of their fundamental rights under Article 21 of the Constitution of India read with ILO Convention No.107 to which India is a signatory” (p.697). ILO Convention No.107 provides that tribal populations in states parties shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations relating to national security, or in the interest of national economic development or of the health of the said population. It also provides that when the removal of the tribal population is necessary as an exceptional measure, they shall be provided with land of quality at least equal to that of the land previously occupied by them and they shall be fully compensated for any resulting loss or injury. The counsel for NBA contended that ILO Convention No.107 read into Article 21 of the Constitution makes the displacement illegal as there was no free consent and the project itself is not in the national or public interest due to its unacceptable social, economic and environmental costs (p.697, 698). The court rejects this argument by taking a strict constructionist view of Convention No.107 and concludes that the exception clause in the Convention allows displacement

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<sup>61</sup> Slaughter (2000).

because land-for-land has been assured by the states as compensation (p.701). This overlooks two factors. First, land-for-land had not been guaranteed in practice, as the court itself acknowledged. Second, the ILO itself had written letters of concern to the Indian government about the violation of Convention No.107 during earlier years.<sup>62</sup> More importantly, the court's positivistic refusal to engage in a liberal reading of Convention No.107 is notably in tension with the court's overall record in reading international law into domestic law<sup>63</sup>. Later, the court's refusal to recognize the relevance of the 'precautionary principle' for assessing environmental compliance<sup>64</sup> also shows a selective approach, as it neither comports with the court's recent activism in environmental law<sup>65</sup>, nor with the current

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<sup>62</sup> See supra. p.26.

<sup>63</sup> The Supreme Court has, in a number of cases, read international law into domestic law, even when the Convention concerned had not been ratified by India. See e.g., *Vishaka v. State of Rajasthan*, (1997) 6 SCC 247 (reading provisions on sexual harassment from the Convention on the Elimination of Discrimination Against Women into Indian law); *Vellore Citizen's Welfare Forum v. Union of India*, (1996) 5 SCC 647 (reading precautionary principle into Indian law, relying upon a report of the International Law Commission). See also the remarks of former Chief Justice, P.N.Bhagwati, cited in Desai and Muralidhar (2000) at p.224: "even if the judiciary finds that a particular human rights instrument has not been ratified by its country, it must have regard to the human rights embodied in such instrument because these human rights represent norms accepted by the entire international community".

<sup>64</sup> The court declared the precautionary principle inapplicable and instead relied on the principle of 'sustainable development'. See p.727. The court's focus on environmental issues began only during the proceedings in 1999 whereas resettlement and rehabilitation had always been the main issues of contention. Interview with Prashant Bhushan, counsel to NBA, 17 February 2004.

<sup>65</sup> In a recent case, the court had declared that the precautionary principle and the polluter pays principle are essential features of sustainable development, and read them into Indian law. The court further declared that rules of customary international law which are not contrary to the municipal law shall also be deemed to have been incorporated into domestic law. See *Center for Environmental Law WWF-I v. Union of India*, (1999) 1 SCC 263 cited in Salve (2000). See also *Vellore Citizen's Welfare Forum v. Union of India*, (1996) 5 SCC 647.

state of international environmental law.<sup>66</sup> But, while the court freely departs from current international legal norms relating to environment relating to the precautionary principle, it is ready to praise the importance of water as a human right though the status of that norm under international law is, at best, that of a soft law norm. The court says that “water is the basic need for the survival of human beings and is part of the right to life and human rights as enshrined in Article 21 of the Constitution of India” (p.767) and cites a UN resolution as the legal basis for this conclusion while justifying the dam project as one that will fulfill this need. In a remarkable example of the hegemonic use of counter hegemonic discourse, the state of Gujarat had argued<sup>67</sup> that it had a responsibility to guarantee the human right to water to its population and that the dam was needed for this purpose among others. The court’s readiness to accept this and its remarkable activism in conjuring law out of politics is sorely missing when it focuses on the issues that seem to favor the NBA.

### **Contest over Contempt: The Court and Its Critics**

The court’s decision evoked a storm of protest as already noted. The court has taken the criticism poorly. In a series of proceedings stretching from its *suo motu* action against the NBA and writer Arundhati Roy for contempt of court in 1999, the court has been on a vindictive course against critics, especially Medha Patkar and Arundhati Roy. In legal proceedings launched against Patkar, Roy and Prashant Bhushan (the counsel for NBA) by

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<sup>66</sup> The current state of international environmental law relating to the principles of sustainable development and the precautionary principle may be gleaned from a recent decision of the International Court of Justice, *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports, Judgment of 27 September 1997 (Merits) (see especially the concurring opinion of Justice C.G. Weeramantry).

<sup>67</sup> Interview with Prashant Bhushan, counsel to NBA, 17 February 2004.

certain advocates, the court passed strictures against Patkar and jailed Roy for contempt for one day and fined her Rs.2000.<sup>68</sup> The circumstances of the proceedings left no doubt in the minds of anyone watching them, that the court felt very much on the defensive about its judgment in 2000 and wanted to suppress any criticism through the device of contempt. This move by the court is ironic given that the court has used contempt powers in the past to order legal action against officials in the Narmada valley who failed to comply with its directions on prevention of handcuffing of under trial prisoners and police brutality. In a 1993 writ petition filed by an NGO from Madhya Pradesh, Khedut Mazdoor Chetna Sangath, a trade union of tribal people who were opposed to the Sardar Sarovar dam, the Supreme Court had criticized the non-compliance with previous court orders on handcuffing of under trial prisoners by the police and ordered a CBI enquiry.<sup>69</sup> The police had abused the tribal people who were agitating against the dam. In a subsequent *suo motu* contempt action by the court in 1996 as a follow up to this case, the court criticized non-compliance with its orders and ordered administrative action against judicial and police officers.<sup>70</sup> However, the court's attitude started changing in 1998 and it has since then adopted an injudicious approach towards critics of its judgment. It is clear that the judges have an exalted view of themselves and tend to be at loggerheads with social movements that typically use media criticism as part of their repertoire of political activity. This factor must be taken into account while assessing the role of law and courts in counter-hegemonic globalization.

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<sup>68</sup> J.Venkatesan, 'Arundhati Roy jailed for contempt of court', The Hindu, March 07, 2002.

<sup>69</sup> *Khedat Mazdoor Chetna Sangath v. State of M.P.*, 1994 SCC (6) 260.

<sup>70</sup> *Suo Motu Contempt Petition No.10 of 1996* in Writ Petition (civ) (Judgment dated 08/01/1996, by Agrawal, J.), 1996 SCC (1) 718.

### Post-Judgment Woes: Towards Electoral Politics?

Since the judgment of the court in 2000, the NBA has been on the defensive and searching for new political vistas. There has been no proper resettlement and rehabilitation, despite the directions of the court in 2000.<sup>71</sup> Therefore, the judgment has not ended the role of the court itself.<sup>72</sup> The NBA filed a fresh review petition before the court in May 2002, which was dismissed.<sup>73</sup> The state of Madhya Pradesh has also filed a petition in the court very recently, challenging aspects of the 2000 judgment.<sup>74</sup> Thus, the role of law in the Narmada valley struggle has not formally ended. But, the dam's height has been gradually increased and has now been approved to be raised to almost 110 meters, despite opposition from the NBA and the Madhya Pradesh government.<sup>75</sup> For the Gujarat government, the Sardar Sarovar dam's height has become one of the key barometers of its own political success. The NBA has not been left with any more political options, and as such, has decided to enter into electoral politics.<sup>76</sup> The struggle in the valley has had a long history of relationship with electoral politics (Sangvai 2000:129–132; Jayal 2001), but the NBA itself has not actively entered politics so far. That the NBA is contemplating this is because of two factors: first, the failure to obtain lasting results through any other means and second, the internal differences within the NBA itself in which the wealthy landowning farmers of Nimar region in Madhya Pradesh are more

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<sup>71</sup> Interview with Prashant Bhushan, counsel for NBA, 17 February 2004.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* The petition came before a bench consisting of Justices Variava, Santosh Hegde and Kirpal. *Id.*

<sup>74</sup> This was filed just a few months ago. *Id.*

<sup>75</sup> 'Gujarat given permission to raise Narmada dam height', *The Hindu*, March 17, 2004.

<sup>76</sup> Kalpana Sharma, 'Medha Patkar forms political front', *The Hindu*, March 18, 2004.

likely to pressure NBA to enter formal politics, while the tribals appear less likely to do so due to their calculations of how effective they would be in electoral politics.<sup>77</sup> Whatever be the reason behind the new winds of change, it is a factor that must be taken into account when assessing the limits of law and institutions concerned with formal political participation, in processes of counter-hegemonic globalization.

### ASSESSING THE ROLE OF LAW IN THE NBA STRUGGLE

What can one make of the role of law in the Narmada valley struggle? What was the impact of the struggle on law itself? The difficulties in answering these questions must be evident. Not only has the struggle in the valley been both local and transnational at the same time, it has extended over a long time. As such, it is hard to come to any snap judgments about the relationship between law and the Narmada valley struggle. To begin with, one could start by debunking many common suppositions about the relationship between law and social movements. First, it is clear that law is very relevant to social movement struggles both in shaping the political opportunity structures that movements have at specific moments and also in sanctifying and legitimating the identities and strategies that movements deploy. This conclusion should be seen against the common social science predilection to either take law for granted or to dismiss it as irrelevant to social struggles (Fernandes and Varley 1998: Introduction). In the Narmada valley struggle law was always very relevant. From private law relating to land acquisition to constitutional rights to international human rights law, the struggle in the valley was profoundly affected. The political opportunities for the struggle were severely constrained by private law, for instance,

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<sup>77</sup> For a discussion of the internal tensions within the NBA's constituencies, see Baviskar (1995); Jayal (2001) 216.

in the kind of claims that the movement could advance legitimately within the system. While private law and regulatory law relating to environment were more relevant during the initial years of the struggle, international law became more relevant afterwards and constitutional law was crucial in more recent years.

Second, the meaning of 'law' has changed irrevocably from a normative order within territorial states to a global normative order. As such one should have a broad framework that is capable of appreciating the local and global engagements between law and social movements. This could be contrasted to traditional assessments of the role of law in social movement struggles which remain centered on national law. In the case of the Narmada valley struggle, law operated at virtually all conceivable levels and the role of international law was crucial. Third, the 'law' that social movements engage with includes not only state law, but inter-state, sub-state and non-state law as well. Therefore, the question of whether law can be emancipatory (Santos 2002: chapter 9) cannot be answered easily but depends on the dynamics between various levels of law. In the case of the struggle in the Narmada valley, operative tensions between law at different levels were resolved differently at different times, largely due to the impact of the struggle on the law. For example, the relationship between international law and national law was resolved in favor of the former when the World Bank was still involved with the project until 1993, but the dynamics sharply changed after the struggle in the valley succeeded in compelling the World Bank to pull out. Fourth, the role of domestic institutions, especially that of the judiciary, cannot be taken for granted. This must be seen against the background of intense debates about whether domestic courts help or hinder social movements (Rosenberg 1991; Epp 1998; Siegel 2002) in which opinions tend to be cast in an either/or fashion. This seems problematic and what is more likely is that domestic courts could both help and hinder a movement. While national legal cultures within which the judiciaries function are important, the assessment of the role of judiciary in social movement struggles

becomes more difficult due to the longevity of social movement struggles. Another crucial issue is the tension between the logic of judicial decision-making and movement politics. In both their finality and their temporal aspects, judicial decisions work against the logic of movements which do not easily accept finality while the courts find the duration and continuity of social movements hard to fit into their adversarial mode of resolving disputes. In the Narmada valley struggle, all these propositions were proved to be true.

Looking at the relationship between law and the Narmada valley struggle through these issues, one could begin to come to some conclusions. In order to make sense, however, these conclusions will have to rest on a framework that is broader than simply the question: did the movement achieve a change in *outcome* by its engagement with the law? One also has to take two other dimensions of evaluation, namely, whether the movement led to any change in the *process* of decision-making, and whether the movement was able to change the *values* that underlie the dispute.<sup>78</sup> Using this triangular framework of outcome change, process change and value change, one could come to the following conclusions.

The struggle did lead to *outcome change* but this was more evident at the international level. The NBA's involvement led to the pull out of the World Bank from the project, and the establishment of the World Commission on dams which has significantly contributed to the global public policy discourse on development. At the domestic level, the major successes of the struggle included winning a better resettlement and rehabilitation policy from Gujarat in 1988 and the stay order of the Supreme Court in May 1995 but judging by the overall outcome, the struggle failed. The juggernaut of construction of the dam and the displacement could not be stopped. The struggle had a moderate impact on decision-making *process*, both at the international and domestic levels. The struggle led to the

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<sup>78</sup> I borrow this framework from Rochon and Mazmanian (1993).

establishment of the Complaints panel at the World Bank in 1993, a new information policy at the World Bank to improve transparency and the support of the World Bank for the World Commission on Dams. At the domestic level, the struggle led to the establishment of the environmental and rehabilitation sub-groups of the NCA as well as the Grievance Redressal Authorities in the three states concerned. The decision-making process relating to large projects had been somewhat democratized at the international and domestic levels, but not as much as the NBA hoped. In terms of *value change*, the struggle in the valley has perhaps had better success in general, and more so at the international level. The norms relating to sustainable development have been significantly affected by the struggle in the valley (Khagram 2002) because the cultural dimensions of counter-hegemonic globalization in this area have been shaped by the struggle. Human rights norms relating to internal displacement are beginning to be changed to include development-induced displacement (Robinson 2002), while foreign investors shy away from large projects which have significant social and environmental costs. At the domestic level, the struggle has led to much polarization between groups who have diametrically different moral compasses on issues relating to development and its costs, but has not been able to have its values prevail. However, it cannot be denied that the struggle has had a counter-hegemonic effect at the domestic level in India.

## CONCLUSION

This paper has analyzed the role of law and courts in counter hegemonic globalization by examining the relationship between law and the struggle against displacement in the Narmada valley in India, especially that of the role played by NBA. The struggle began in the early 1980s against a massive river valley development scheme along India's Narmada river consisting of hundreds of dams, which planned to flood the lands of both tribals and prosperous farmers across three states, Gujarat, Maharashtra and Madhya Pradesh. A

transnational coalition was formed to fight the displacement and environmental destruction and it led to major successes including the pull out of the World Bank from the project. The success of the movement continued when it obtained a stay order from the Supreme Court against further construction of the dam in 1995. However, a major blow was struck when the Supreme Court cancelled the stay order in 1999 and passed an adverse ruling against the movement in 2000. The struggle in the valley is now focusing on formal electoral politics as a major avenue of action.

The role of law in the struggle was complex. It was conducted at multiple levels, using different alliances and tactics, over two decades. While the movement succeeded in having a significant impact on the values that underlie the development discourse, especially at the international level, the movement was unable to have much success domestically. The role played by the domestic judiciary in this outcome was crucial. My conclusions challenge conventional debates about the role of law in social movement struggles, as well as the impact of social movements on the making and enforcement of law itself.

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