HUMAN RIGHTS AND DISPLACEMENT: THE INDIAN SUPREME COURT DECISION ON SARDAR SAROVAR IN INTERNATIONAL PERSPECTIVE

I. INTRODUCTION*

The human and environmental consequences of big development projects such as large dams have been a focus of increasing attention in many countries. Large-scale involuntary resettlement caused by such projects has become particularly contentious in a number of situations. In India where many large dams have been and are being built, the Sardar Sarovar dam on the Narmada river has been at the centre of a storm for over a decade. The latest development in the history of this project is the judgment given by the Supreme Court of India on 18 October 2000 adjudicating a public interest litigation petition filed by the Narmada Bachao Andolan (NBA—Save the Narmada Movement). This decision is of great significance not only for the project itself but also from a broader perspective.

This article focuses on the human rights dimension of the judgment from a local and international perspective. It first gives a brief background to the project and outlines the arguments given by the judges, including the dissenting judgment. Second, it examines the legal and policy framework which informs this judgment and analyses the broader context within which it falls. The third part focuses on some human rights related issues.

A. The Supreme Court Judgment in Context

1. The Sardar Sarovar Project and the 1994 Petition

The Sardar Sarovar Project (SSP) is part of a gigantic scheme seeking to build more than 3000 dams, including 30 big dams, on the river Narmada in western India. SSP is a multipurpose dam and canal system whose primary rationale is to provide irrigation and drinking water. It should also produce electrical power. It is the second biggest of the projected dams on the Narmada and its canal network will be one of the largest in the world. The dam is situated in the state of Gujarat which will derive most of the benefits of the project but the submergence will primarily affect the state of Madhya Pradesh and to a much lesser extent the state of Maharashtra.

The late Prime Minister Jawaharlal Nehru first inaugurated SSP in 1961. Construction did not, however, start immediately because the three states involved disagreed on the allocation of the river's waters. Gujarat complained to the central government in 1968 against the other two states under the Inter-State Water Disputes Act. The Centre constituted a Narmada Water Disputes Tribunal (NWDT) whose final order was gazetted in December 1979.[1] The NWDT Award constitutes the basis on

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1. Narmada Water Disputes Tribunal, Final Order and Decision of the Tribunal, *Gazette of India*, 12 Dec. 1979.

which work has been carried out on the dam until today. It decided that the height of the full reservoir level would be 455 feet (138.68 metres), determined the shares of Narmada water that each state was entitled to use and allocated among the three states the shares of power to be produced by the dam. It also set up an inter-state administrative authority known as the Narmada Control Authority (NCA) which was given the task of generally facilitating the implementation of the Award of the Tribunal. The Award dealt with the problem of displacement and resettlement. It acknowledged that all lands under private ownership below 455 feet should be acquired by the states and that all people living on these lands should be rehabilitated. The Award was progressive insofar as it provided that land should in principle be given in exchange for land compulsorily acquired.[2] While the number of project affected families was estimated to be 6,147 in 1979, the official estimate of the three state governments is now 41,000 (or 205,000 people), neither including at least 157,000 people displaced by the canals nor people displaced because of compensatory afforestation and people displaced by the project construction colony.

Before work started in earnest, the World Bank agreed in 1985 to provide $450 million to finance the construction of the dam and canal network.[3] Since the mid-1980s, the fate of SSP has been influenced not only by the decisions of governmental agencies but also by the people of the valley. While their participation was not secured in the earlier phase of the decision-making process, the people of the valley to be ousted by SSP progressively came together under the banner of the NBA.[4] Increasing protests, first concerning rehabilitation and resettlement and then concerning the project itself eventually led the World Bank to commission an independent review of the project. The resulting assessment—the Morse Report—was blunt in its assessment of the situation. The two authors concluded that:

> We think the Sardar Sarovar Projects as they stand are flawed, that resettlement and rehabilitation of all those displaced by the Projects is not possible under prevailing circumstances and that the environmental impacts of the Projects have not been properly considered or adequately addressed. Moreover, we believe that the Bank shares responsibility with the borrower for the situation that has developed.[5]

The Morse Report was not well received at first but it constituted an essential catalyst for the World Bank's eventual withdrawal from the project. Formally, it is the Government of India which asked for the loan to be cancelled, thus making it clear that both the Bank and the Government fully accepted the significance and accuracy of the report.

2. *Cf*. Anil Patel, 'Resettlement Politics and Tribal Interests', *in* Jean Drèze *et al*. (eds), *The Dam and the Nation—Displacement and Resettlement in the Narmada Valley* (New Delhi: Oxford University Press, 1997), p. 66.

3. Various agreements were signed with India and the states. See, e.g., Development Credit Agreement (Narmada River Development (Gujarat) Sardar Sarovar Dam and Power Project) between India and International Development Association, Credit No. 1552 IN, 10 May 1985 and Loan Agreement (Narmada River Development (Gujarat) Sardar Sarovar Dam and Power Project) between India and International Bank for Reconstruction and Development, Loan No. 2497 IN, 10 May 1985.

4. See, e.g., S. Parasuraman, 'The Anti-Dam Movement and Rehabilitation Policy', in Jean Drèze *et al*. (eds), *The Dam and the Nation—Displacement and Resettlement in the Narmada Valley* (New Delhi: Oxford University Press, 1997), p. 26.

5. Bradford Morse & Thomas R. Berger, *Sardar Sarovar—Report of the Independent Review* (Ottawa: Resource Futures International, 1992), p. xii.

The World Bank's withdrawal constituted a significant milestone in the history of the project. As the Government decided to pursue the project on its own, the struggle was carried on at the domestic level and eventually led to the filing in 1994 of a petition with the Supreme Court of India.[6] It is this petition which has given rise to the judgment of 18 October 2000. The NBA petition argued among other things that the assumptions on which the NWDT Award had been given in 1979 had significantly changed in the meantime. Further, it asserted that the NWDT had not considered all relevant issues and in particular that it had not given project affected people an opportunity to make representations before it. The petition intimated that these omissions had led to a flawed project with grossly underestimated social and environmental costs which could not be implemented as per the NWDT Award without serious violations of human rights and damage to the environment. In conclusion, it considered that a review of the project was urgently needed. More specifically, it asked the Court to either order a stoppage of the project and implement proposed alternatives or direct the Union of India to set a new tribunal to review the project which would include participation of project affected people or that the Court should set up an independent team to review the whole project.[7]

In the six years that elapsed between the filing of the petition and last October's judgment, two significant developments took place. First, work on the project was suspended in 1995.[8] Subsequently, the Court ordered in early 1999 that the Government of Gujarat could raise the dam from 80 to 88 metres.[9]

2. THE JUDGMENT[10]

Justice Kirpal, who was also speaking for Chief Justice Anand, delivered the majority judgment.[11] The Court first deals with the scope of the NBA petition and decides to restrict it to relief and rehabilitation issues. It observes that a conditional environmental clearance given in 1987 was challenged only in 1994 and states that

> [t]he pleas relating to height of the dam and the extent of submergence, environment studies and clearance, hydrology, seismicity and other issues, except implementation of relief and rehabilitation, cannot be permitted to be raised at this belated stage.[12]

The Court further explains that it is dealing with the petition exclusively because it wants to satisfy itself that the rights of the oustees under Article 21 of the Constitution

6. Supreme Court of India, *Narmada Bachao Andolan v. Union of India and Others*, Writ Petition (Civil) No. 319 of 1994, Written Submissions on Behalf of the Petitioners, Jan. 1999 [hereafter NBA Petition]

7. NBA Petition, *supra* note at pp. 84–5.

8. Writ Petition No. 319 of 1994, *Narmada Bachao Andolan v. Union of India & Others*, Order of 5 May 1995.

9. Writ Petition No. 319 of 1994, *Narmada Bachao Andolan v. Union of India & Others*, Order of 18 Feb. 1999. The Order of 18 Feb. 1999 authorised construction up to 85. A later order of May 1999 allowed the construction of humps up to 88 metres.

10. Thanks to Shreyas Jayasimha for his help with research on this part of the article.

11. Supreme Court of India, *Narmada Bachao Andolan v. Union of India and Others*, Writ Petition (Civil) No. 319 of 1994, Judgment of 18 Oct. 2000, *reprinted in* 2000 (7) SCALE 16–22 Oct. 2000, p. 34 (hereafter Majority Judgment, page references are to the original judgment).

12. Majority Judgment, above n. 11 at p. 34.

protecting the right to life are not being infringed.[13] It further insists that the NWDT Award is final and cannot be challenged.

On the merits, the Court notes the petitioners' contentions that the involuntary displacement of tribal people violates Article 21 of the Constitution read with ILO Convention 107,[14] and that there are alternatives which could assist in the restructuring of the project so as to minimise displacement. After examining the need for water in drought prone areas, the Court concludes that dams play a 'vital role in providing irrigation for food security, domestic and industrial water supply, hydroelectric power and keeping flood waters back'.[15] It also asserts that the displacement of persons need not '*per se* result in the violation of their fundamental or other rights'.[17] In the Court's view, this is so as long as the oustees are better off after their rehabilitation. To determine the quality of life of oustees before and after relocation, the Court focuses on the situation of tribal people even though they do not constitute the totality of the oustees. It takes the view that, by definition, amenities in rehabilitation sites will be better than in the 'tribal hamlets' and that the gradual assimilation of tribal people into mainstream society will necessarily benefit them.[17]

Concerning the conditional environmental clearance granted in 1987, the Court rejects the contention that there was a lack of application of mind in the grant of the clearance or that the studies preceding clearance were inadequate. The Court quotes extensively from the affidavit of the Gujarat Government to conclude that the environment assessment was satisfactory. It also rejects the petitioners' contention that the conditional clearance has lapsed. Further, the Court specifically attacks the Morse Report on which the petitioners had relied several times in the course of their submissions. The judges take the view that they do not need to consider this report because the World Bank and the Union of India both rejected it.[18]

In relation to other environmental aspects, the Court generally disagrees with the petitioner's argument that the Environment Sub-group of the Narmada Control Authority was negligent in the performance of its duties, and that the precautionary principle would cast the onus of proof on the respondents. It finds that the precautionary principle applies only in cases of polluting industries and that it would be inapplicable to dams.[19] The Court also rejects specific claims relating to environmental protection. The petitioners' argument that the flora and fauna of the valley would be adversely affected is, for instance, dismissed by the Court as having been covered by the conditions expressed by the Ministry of Environment in granting clearance. Similarly, the claim of the petitioners that afforestation on wasteland would result in lesser quality forests is not accepted. The Court also expresses satisfaction with the measures taken by the Archaeological and Anthropological surveys of India with regard to archaeological monuments that are to be submerged.

After focusing on the environmental aspects of the project, the Court addresses in

13. Constitution of India, 26 Jan. 1950.
14. International Labour Organisation, Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, Geneva, 26 June 1957 [hereafter Convention 107].
15. Majority Judgment, above n. 11 at p. 46.
16. Majority Judgment, above n. 11 at p. 47.
17. Majority Judgment, above n. 11 at p. 48.
18. Majority Judgment, above n. 11 at p. 77–78.
19. Majority Judgment, above n. 11 at pp. 95–6.

the second substantive part of the judgment the issue of relief and rehabilitation of oustees. It first focuses on the different categories of oustees that have been recognised, namely people displaced by the reservoir, the canal or the construction colony. It refuses to recognise canal-affected persons as being entitled to the benefits provided to persons displaced by the reservoir because the former are considered to be beneficiaries of the project.[20] With regard to the issue of resettlement, the Court refuses to acknowledge the importance of community resettlement in preserving the social fabric and community relations amongst the oustees. It holds that the NWDT Award made no reference to this form of rehabilitation and that oustees therefore cannot claim community resettlement as a right.[21] Generally, the Court rejects the argument that a Master Plan for rehabilitation including all categories of oustees should have been in place before commencing construction because the NWDT Award does not mention it specifically.[22]

With regard to the necessity for an independent review of the project, the Court expresses its satisfaction with the 'quality, accuracy, recommendations and implementation of the studies carried out'.[23] It clearly states that independent experts are not required and that there is no reason to believe the Narmada Control Authority and the Environmental sub-group could not handle problems that might arise with regard to these studies. The Court enumerates in detail the administrative arrangements for monitoring, rehabilitation, grievance redressal, and independent evaluation and expresses its satisfaction with current arrangements.

In his conclusion, Justice Kirpal makes a strong case for large dams in general and argues that their contribution to the welfare of the country at large has been significant. The Court therefore directs that the dam should be built as per the NWDT Award. Within this framework, the judges highlight two principles that must guide the implementation of the judgment. First, the project should be completed at the earliest possible time. Second, compliance with the conditions on which the clearance was given, including the completion of the relief and rehabilitation work, should be ensured. Construction work on the dam was resumed shortly after the decision was announced.[24]

Apart from the majority judgment, Justice Bharucha delivered a dissenting judgment.[25] He generally takes the view that a review of the project in general is not warranted. However, upon reviewing the documents concerning the environmental clearance, he finds that the process was not successfully carried out at the time and directs the Environment Impact Agency of the Ministry of Environment and Forests to appoint a Committee of Experts as provided for in the Environmental Impact Assessment Notification of 1994.[26] The Committee is directed to conduct the requisite studies and assess whether environmental clearance may be granted. Justice Bharucha

20. Majority Judgment, above n. 11 at p. 124–5.
21. Majority Judgment, above n. 11 at p. 126.
22. Majority Judgment, above n. 11 at p. 114.
23. Majority Judgment, above n.11 at p. 79.
24. See, eg, Lyla Bavadam, 'Going Beyond the Narmada Valley', 17/23 *Frontline*, 24 Nov. 2000, p. 40.
25. Supreme Court of India, *Narmada Bachao Andolan v. Union of India and Others*, Writ Petition (Civil) No. 319 of 1994, Judgment of 18 Oct. 2000, *reprinted in* 2000 (7) SCALE 16–22 Oct. 2000, p. 34 (hereafter Minority Judgment, page references are to the original judgement).
26. See Notification on Environmental Impact Assessment of Development Projects, New Delhi, 27 Jan. 1994.

further directs that until such time as the Committee accords environmental clearance, construction should cease. In case clearance is granted, the three states will have to certify before work can begin that all persons ousted by reason of the increase of the height by 5 metres from the present level have been satisfactorily rehabilitated and that suitable vacant land for rehabilitating all those who will be ousted by the increase in the height of the dam by another 5 metres is already in the possession of the respective states. Similar measures will have to be taken for each incremental increase in height of the dam.

B. Legal and Policy Framework Governing the Rights of Oustees

The legal and policy framework considered and applied by the Court is worth examining in more detail. The most striking element is the narrow scope of the legal and policy framework on which the judgment is based. In other words, a superficial reading of the decision may lead one to think that this case required the elaboration of new concepts and criteria because of a lack of clear guidance in domestic and international law. In fact, substantial guidance would have been available to help the judges in arriving at their decision.

1. THE DOMESTIC FRAMEWORK

At the domestic level, the Court insists on the fact that it is only concerned with Article 21 of the Constitution and the inviolability of the NWDT Award. However, the Court cannot escape a fundamental tension in its application of the law. While insisting on the permanent character of the Award, the Court reads Article 21 as it is interpreted today. In itself, Article 21 of the Constitution guarantees the right to life stating that '[n]o person shall be deprived of his life or personal liberty except according to procedure established by law' and is thus mostly an obligation on the state not to take away lives. It is only comparatively recently that the Court has read into Article 21 a right to a clean environment which includes duties for the state to take adequate measures to promote, protect and improve the man-made and the natural environment.[27] By stating that it is considering the petition under Article 21, the Court clearly acknowledges that the law has evolved dramatically in the environmental field in recent decades and that its current status is relevant to the case at issue.[28]

While there is a definite difficulty in determining the legal and policy framework applicable to a project which has been in the making for nearly forty years, it is clear even from the majority judgment's account that today's legal principles and laws are not inapplicable or irrelevant in the present case. It is widely acknowledged that circumstances leading to the planning permission for a given project can change with time, necessitating a new assessment. This is why the Environmental Impact

27. See, eg, *Subhash Kumar v. Bihar*, AIR 1991 SC 420 and *Virender Gaur v. Haryana*, (1995) 2 SCC 577.

28. The court states, for instance, in *Virender Gaur v. Haryana*, (1995) 2 SCC 577, 580 that the '[e]njoyment of life and its attainment including their right to life with human dignity encompasses within its ambit the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed.'

Assessment Notification clearly states that for a site-specific project, the site clearance which may be granted is valid only for five years.[29]

Despite the difficulties encountered in the case of projects delayed to such an extent, there is substantial guidance to show that the strengthening of environmental laws and of fundamental rights should be taken into account. It is noteworthy that the US Court of Appeals gave a very clear ruling as early as 1972 on the applicability of the National Environmental Policy Act (NEPA) in the case of a project that had been started before the enactment of the Act but was ongoing after its effective date. It stated that applying the provision requiring an environmental impact assessment to this case would not violate the principle of non-retroactivity.[30] Among the documents dealing specifically with SSP, it is apparent that even in 1987, the Ministry of Environment and Forests took it for granted that approval was necessary under the Forest Act of 1980 adopted after the Award.[31] Further, according to the dissenting judgment, even though the dam is already partly built the Environmental Impact Assessment Notification of 1994 is indeed relevant and should be applied to this case.[32]

This brief review clearly shows that there are a number of existing legal principles that the Court could have applied in disposing of the NBA petition. Further, it is significant that the majority judgment itself recognises in several places that the NWDT Award has already been modified. The judges state, for instance, that the NWDT Award provisions for civic amenities 'were further liberalised by the State Governments during implementation'.[33] The case of the notification for land acquisition issued by the Government of Gujarat (GoG) in 1981–82 is even more telling. While the GoG would have been entitled by the NWDT Award to recognise as oustees only people covered under the notification, it chose subsequently to relax its conditions so as to cover all major sons[34] up to 1 January 1987. The Court indirectly acknowledges that this constitutes a substantive modification of the Award by stating that the GoG had no obligation to do so. However, on compassionate grounds for the oustees so protected, the Court decides that the GoG should not be 'faulted or criticised' for having changed the cut-off date allowing major sons to qualify as oustees.[35] More generally, the Court acknowledges that resettlement has emerged and developed alongside the development of the project itself, thereby recognising that the evolution of the legal framework has been a material consideration all along.[36]

2. THE INTERNATIONAL FRAMEWORK

Dam building does not fall in a legal or policy vacuum at the international level either.

29. Notification on Environmental Impact Assessment, above n. 26 .

30. *Arlington Coalition on Transportation v. John A. Volpe, Secretary of Transportation*, 4 Apr. 1972, 458 F.2d 1323.

31. See Ministry of Environment and Forests, Office Memorandum—Approval of Narmada Sagar Project, Madhya Pradesh and Sardar Sarovar Project, Gujarat from Environmental Angle, 24 June 1987, reprinted in Majority Judgment, *supra* n. 11.

32. See above at p. 9916.

33. Majority Judgment, *supra* n. 11 at p. 119.

34. Major sons are sons above 18 years of age who are treated as a separate family whatever their marital situation. See Narmada Water Disputes Tribunal, *supra* n. 1 at XI.I(3) and Majority Judgment *supra* n. 11 at pp. 129–130.

35. Majority Judgment, *supra* n. 11 at p. 130.

36. *See* Majority Judgment, *supra* n. 11 at p. 113.

Indeed, numerous treaties, guidelines and policy recommendations are there to guide all actors involved in dam building in realising projects which fulfil their economic goals without jeopardising oustees' human rights or the environment. The relevant international legal framework includes, for instance, a number of human rights treaties such as the two UN human rights covenants[37] or the ILO Convention 107[38] and environmental treaties, principles and customary norms. Human rights treaties recognise various rights such as the right to life, freedom of movement and the freedom to choose one's residence and the right to an adequate standard of living which includes adequate food, clothing and housing.

The specific relationship between involuntary displacement and human rights has been given more substance in the context of the application of existing human rights treaties and the further development of human rights norms. The Committee on economic, social and cultural rights has, for instance, indicated in its authoritative interpretation of the right to housing that forced evictions which are incompatible with this right occur, for instance, if procedural guarantees are not offered.[39] Required procedural guarantees include the necessity for governments to provide genuine consultation with project affected people, to give adequate notice to all affected persons prior to the date of eviction and to provide for legal remedies and legal aid where applicable. The UN human rights commission has also defined non-binding principles concerning internal displacement.[40] These shed light on the obligations of States with regard to their citizens. They highlight, for instance, that governments should firstly examine all feasible alternatives which could avoid displacement altogether. They also indicate that the process of displacement itself should not violate the rights to life, dignity, liberty and security of those affected.

Apart from norms arising in the human rights context, the position expressed by the World Commission on Dams (WCD) in its report released just a month after the judgment is of interest.[41] While the Commission did not have a mandate to define binding policies for States or international organisations, its conclusions reflect a consensus reached among all the main actors involved in the process of dam building and as such cannot be ignored. The report also constitutes one of the most specific statements on ways to implement large dam projects without jeopardising human rights and environmental quality.

Among the findings of direct relevance in the case of SSP, the following stand out. The WCD determines that large dams designed to deliver irrigation services have typically fallen short of physical targets, have failed to recover their costs and have been less profitable in economic terms than expected. The commissioners also observe a systematic failure to assess a range of potential negative impacts and to implement adequate mitigation resettlement and development programmes for the displaced. They also note that since environmental and social costs are often not fully accounted for in economic terms, the true profitability of these schemes remains uncertain.

37. International Covenant on Economic, Social and Cultural Rights, New York, 16 Dec. 1966, reprinted in 6 I.L.M. 360 (1967) and International Covenant on Civil and Political Rights, 16 Dec. 1966, reprinted in 6 I.L.M. 368 (1967).

38. Convention 107, above n. 14.

39. See Committee on Economic, Social and Cultural Rights, *General Comment 7—The right to adequate housing (art. 11.1 of the Covenant): Forced Evictions*, UN Doc. E/C.12/1997/4 (1997).

40. See United Nations Commission on Human Rights, *Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2 (1998).

The WCD also makes very important suggestions concerning the decision-making process leading to the building of dams. It suggests that decisions should be based on a series of fundamental criteria: equity, efficiency, participatory decision-making, sustainability and accountability. It goes further to suggest that according to the case studies accumulated, it is never too late to improve outcomes, even when the project is already under development. Finally, in the set of guidelines for good practice that are developed at the end of the report, the WCD proposes the establishment of independent review panels for all dam projects to review the assessment of impacts and the planning, design and implementation of social and environmental mitigation plans.

Apart from laws and policies, decisions by international judicial or quasi-judicial bodies are of great relevance. The International Court of Justice (ICJ) has, for instance, recently adjudicated a dispute between Hungary and Slovakia concerning a dam on the Danube.[42] In the course of its discussion, the Court mentions that if development projects are not a new phenomenon, environmental law has developed rather recently on the basis of new scientific insights and a growing awareness of the risks to humankind.[43] It then specifically indicates that new environmental norms have to be taken into account also in the case of continuing activities begun in the past.[44] Judge Weeramantry in his separate opinion goes further and determines that in the case of large projects, there should be continuous environmental impact assessment. He further states that a greater size and scope of the project implies a greater need for continuous monitoring since an environmental impact assessment before the scheme is implemented can never anticipate all environmental problems.[45]

Besides the ICJ, the Inspection Panel of the World Bank is also of specific interest. The Panel was set up to provide a remedy to project affected people in cases where the Bank is not satisfactorily applying its own operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank.[46] Even though the Bank does not currently fund SSP, the Inspection Panel is of direct relevance for two reasons. First, several of the cases that have been submitted concerned dams and the recommendations and reports of the Panel in these cases give useful guidance for assessing the SSP situation. Indeed, the World Bank policies on resettlement and environment which are considered by the Inspection Panel incorporate principles which are fundamentally in accordance with international human rights law. Further, even though the Bank does not directly apply international human rights treaties, it has acknowledged that its economic actions aim at promoting and protecting economic and social rights and that it generally seeks to make the Universal Declaration of Human Rights a reality on the ground.[47] Second, following the Supreme Court decision, it was hinted by the Gujarat Government that it would apply for fresh

41. World Commission on Dams, *Dams and Development—A New Framework for Decision-Making* (London: Earthscan, 2000).

42. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 7.

43. *Gabčíkovo-Nagymaros*, above note at § 140.

44. Ibid.

45. Separate Opinion of Vice-President Weeramantry, Judgment, *I.C.J. Reports 1997*, p. 7 at 111.

46. See International Bank for Reconstruction and Development, Resolution No. 9310—International Development Association, Resolution No. IDA 936, 'The World Bank Inspection Panel', 22 Sept. 1993, 34 I.L.M. 503, 520 (1995).

47. World Conference on Human Rights, *The World Bank and the Promotion of Human Rights*, UN Doc. A/CONF.157/PC/61/Add.19 (1993).

funding from the World Bank for the completion of the canal network.[48] In this case, the Inspection Panel will be directly relevant.

Of the several dam cases that have been examined by the Inspection Panel the Yacyretá Hydroelectric Project, a binational undertaking on the border of Argentina and Paraguay, is of special importance because of its significant similarities with SSP.[49] The project is meant to produce electric energy, reduce the effects of periodic flooding, and build potential for irrigation in both countries. If built to its design level, the project will flood over 107,000 hectares and affect over 13,000 families. A significant parallel with SSP is the fact that the project has been under construction for over 20 years. As noted by the Panel, because of this delay many standards have changed in both the environment and resettlement areas. Indeed, with regard to World Bank operational policies, both the environmental assessment and involuntary resettlement policies were adopted after the first Bank loans were agreed. The Panel's report brings out clearly that over time, the Bank strengthened its requirements in these two fields and even imposed important changes in the design of the project. This is clearly to ensure compliance with the new requirements imposed by the new or revised operational policies. The report of the Panel found that after 15 years of construction, the project remained riddled with problems. In particular, the Panel was concerned by the imbalance between the execution of the civil and electromechanical works and the resettlement and environmental actions which lagged far behind.

This brief review of the domestic and international legal and policy framework brings out two fundamental elements. First, there is a vast corpus of norms, policies and human rights which are either binding or constitute generally agreed statements that should at least be considered before being set aside. Indeed, in recent years the Supreme Court has itself been very liberal in its incorporation of international environmental law principles in domestic law.[50] Second, as the Arlington and Yacyretá cases clearly indicate, the delays in the completion of the project cannot provide an excuse for not applying the law as it stands today to the unfinished project. This is also borne by the fact that since the NWDT Award, ground realities have significantly changed, in particular with regard to the number of oustees.

C. Human Rights' Perspectives on the Judgment

The majority judgment statement that the oustees' fundamental rights are its main preoccupation is significant since it highlights the importance of human rights in this context. However, while the majority judgment accepts in theory the importance of the fundamental rights of the oustees and indicates that it should not deal with any other issue but the problems arising from the displacement of human beings by the dam, the actual reasoning gives a completely different picture. Indeed, it focuses largely on administrative procedures and arrangements but does not analyse the fundamental

48. See, eg, 'State Seeks $317 Million WB Loan for SSP-Based Scheme', *Ahmedabad Age*, 9 Nov. 2000.

49. *See* Inspection Panel, Argentina/Paraguay: Yacyretá Hydroelectric Project (Lns. 3520/2854-AR)—Report and Recommendation, 26 Nov. 1996, in Alvaro Umaña ed., *The World Bank Inspection Panel: The First Four Years (1994–1998)* (Washington, DC: The World Bank, 1998), p. 141.

50. See, eg, Michael Anderson, 'International Environmental Law in Indian Courts', 7 *Rev. Eur. Community & Int'l Envtl. L.* 21 (1998).

rights of the oustees. This is reinforced by the fact that the judgment tends to quote extensively from government affidavits.[51]

One of the dimensions highlighted in the petition which is not fully addressed in the judgments is that of project affected people's participation in decision-making. Significantly, even the old ILO Convention 107 does not stop at requiring countries not to displace tribal people unless it is in the interest of national economic development. It also requires governments to involve tribal people or their representatives in taking decisions concerning them.[52] Since then, there have been sweeping changes in the perception of participation as a human right.[53] This covers a number of dimensions from political participation recognised, for instance, under the UN Covenant on Civil and Political Rights to participation in environmental decision-making. The latter is, for instance, embodied in Principle 10 of the Rio Declaration which states that '[e]nvironmental issues are best handled with the participation of all concerned citizens.'[54]

While disposing of the NBA petition, the majority judgment notes that a challenge should have been brought before the project was started.[55] It notes earlier in the same paragraph that the Court has 'a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution.'[56] The judgment indirectly implies that a decision which cannot be challenged after a certain point has been taken with the full participation and knowledge of the people from whom a sacrifice is demanded for the good of the country at large. In the present case, the NWDT never attempted to foster the participation of oustees in its proceedings. Merely reiterating that the NWDT Award is final and binding does not answer the central question of the oustees' right to participate in the proceeding.

Participation in decision-making is more than a formal requirement meant to give an opportunity to hear the views of the people who are not promoters of the project. It constitutes one of the avenues for making sure that displaced people share in the benefits of the project. Indeed, everybody seems to agree that displaced people should not be worse off following their displacement. There are, however, widely divergent views concerning the rationale and process for relief and rehabilitation. On the one hand, the majority judgment takes the view that tribal people are in indigent circumstances and

51. See also, Shiv Visvanathan, 'Supreme Court Constructs a Dam', 35/48 *Economic & Political Weekly* 4176 (2000).

52. Article 5 of Convention 107, above n. 14.

53. International Labour Organisation, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, 27 June 1989, *reprinted in* 28 ILM 1382 (1989) [hereafter Convention 169] is of specific interest here. Generally, it notes that the need for a revision of Convention 107 stems from developments in international law having taken place since 1957. More specifically, its Article 6 concerning participation is much more developed than Article 5 of Convention 107. Similarly Article 16 Convention 169 is much more specific on participation than Article 12 of the old Convention.

54. Rio Declaration on Environment and Development, 14 June 1992, Rio de Janeiro, *reprinted in* 31 I.L.M. 874 (1992).

55. For an analysis of the issue of latches, see, eg, Ramaswamy R. Iyer, 'A Judgment of Grave Import', 35 *Economic & Political Weekly* 3913 (2000). Note also that the Majority Judgment, above n. 11 focuses its criticism of the petitioners on the fact that they challenged the environmental clearance given in 1987 only in 1994. It does not actually refer at this juncture to the other issues raised by the petitioners.

56. Majority Judgment, above n. 11 at p. 166.

have been deprived of the modern fruits of development.[57] The judges feel that 'it is not fair that tribals and the people in un-developed villages should continue in the same condition without ever enjoying the fruits of science and technology for better health and have a higher quality of life style'.[58] In other words, the state is doing tribal people a favour by displacing them and bringing them into the mainstream society.[59] On the other hand, human rights related instruments or the World Bank draft resettlement policy recognise that displacement can be a traumatic experience and that significant efforts must be made to ensure that displaced people do not adversely suffer and do not lose out overall.[60] It is noteworthy that the WCD report's answer to this problem is to argue that adversely affected people are entitled to benefit from some of the project benefits. These can take the form of irrigated land, access to irrigation water or provision of electricity supply. If this were to be put in practice, it would constitute a sound basis for making sure that displacement does not appear to constitute the denial of existing amenities to some for increasing the amenities of other.

While the judgment never fully addresses fundamental rights issues, it surprisingly goes much beyond the scope of the petition to discuss the usefulness of dams as a whole in India. Indeed, the majority judgment clearly brings out its liking of big dams despite having specifically requested the petitioners not to comment on the usefulness of dams in general.[61] This is both surprising and partly expected. On the one hand, the Supreme Court has in recent years made a significant contribution to the language of rights, in particular in the field of the environment. As noted, it has expanded the scope of fundamental rights, and has taken a number of decisions aimed at fostering the protection of the environment.[62] On the other hand, in the case of large infrastructure projects, the Court has often put significant emphasis on what it perceives as the broader economic development interests of the country.[63] The present judgment clearly follows the second line of reasoning.

One of the major shortcomings of an approach focusing on a broad notion of well-being of the nation at large is that it completely sidelines the fundamental rights of people affected by large development projects. In the present case, the acknowledgment by the states that they do not have land to resettle oustees makes the general policy statement appear even more unbalanced and dismissive of oustees' fundamental rights. The policy statements of the majority judgment are also surprising since they

57. Majority Judgment, above n. 11 at p. 111.

58. Majority Judgment, *supra* n. 11 at p. 172.

59. Cf. L.C. Jain, *Dam Vs Drinking Water—Exploring the Narmada Judgement* (Pune: Parisar, 2001).

60. See, e.g., World Bank, Draft Operational Policies 4.12: Involuntary Resettlement (March 2001) which recognises as its first policy objective that '[i]nvoluntary resettlement may cause severe long-term hardship, impoverishment, and environmental damage unless appropriate measures are carefully planned and carried out.'

61. See, e.g., Prashant Bhushan, 'People be damned', *Hindustan Times* 21 Oct. 2000.

62. The Supreme Court has, for instance, been very active in ordering the closure and relocation of polluting industries in Delhi. The process has been heavily criticised not only by industrialists unwilling to move but also from the standpoint of workers whose jobs and livelihoods are not part of the 'environmental' equation. For recent developments, see, e.g., the several articles published in *Frontline* of 22 Dec. 2000.

63. See, eg, Videh Upadhyay, 'Changing Judicial Power—Courts on Infrastructure Projects and Environment', 35/43–44 *Economic & Political Weekly* 3789 (2000). Concerning the Tehri dam, see, eg, Shyam Divan & Armin Rosencranz, Environmental Law and Policy in India—*Cases, Materials and Statutes* (New Delhi: Oxford University Press, 2nd edn., 2001), p. 431–441.

contradict nationally and internationally accepted opinions concerning the contribution of dams to national well being. Thus, while the majority judgment opines that 'large-scale river valley projects *per se* all over the country have made India more than self-sufficient in food',[64] the WCD report notes much more cautiously that the actual extent of the contribution of large dams to these improvements is difficult to determine. The India study for the WCD does not arrive at an estimated figure and stops at declaring that dams have made a contribution to the development of irrigation and therefore to food production.[65]

With regard to the monitoring of the project, the majority judgment declares that the construction of the dam should proceed alongside the implementation of the relief and rehabilitation packages.[66] The task of supervising the process is entrusted to the Narmada Control Authority (NCA). The Court asserts that the NCA has sufficient independence to carry out this task by stating that only some of its members are government officials. In fact the independence of the NCA remains a matter of doubt since the NWDT Award establishes it as an inter-state administrative authority with a mandate to implement the project and not to independently examine it.[67] The Court's stand can be compared to the WCD recommendation that an independent review panel for social and environmental matters should be established for all dam projects. Even though the Supreme Court is not bound to implement the WCD recommendations directly, entrusting the review of social and environmental matters to the body in charge of implementing the project goes against any notion of independence in the review process. The minority judgment does recognise this problem and proposes the establishment of an expert committee alongside the lines proposed in the Environmental Impact Assessment Notification, 1994 to consider the environmental impacts of the project.[68]

Concerning the review of the project, the majority judgment reiterates that the NWDT Award is final and cannot be modified. As noted above, the judgment itself condones modifications in the Award. From the point of view of fundamental rights, it must be noted that it is virtually impossible to deal with the human rights problem without looking into the project itself. If, as seems to be the case, there is no land for rehabilitating oustees, merely restating that the height of the dam is final constitutes another way to sideline oustees' fundamental rights to food, water and livelihood. As noted, the prayer of the petitioners for examining alternatives to the dam for meeting irrigation and drinking water needs is not taken up by the Court. This is again directly against the WCD policy recommendation that all options should be examined.

On the whole, by taking into account environmental considerations and displacement, the majority judgment indirectly acknowledges the links between human rights and environmental protection. However, it fails to address the links between environmental management and human rights protection from the perspective of fundamental rights. It limits itself mainly to considerations relating to governmental efforts at complying with the legal framework provided by the NWDT Award, relevant Indian Acts and relevant international legal instruments. In this respect, one of the central

64. Majority Judgment, above n. 11 at p. 170.

65. R. Rangachari *et al*., *Large Dams: India's Experience—A Report for the World Commission on Dams* (on file with the author, June 2000).

66. Majority Judgment, above n. 11 at p. 129–30.

67. *See* Clause XIV, Narmada Water Disputes Tribunal, above n. 1 .

68. Minority Judgment, above n. 25 at p. 30.

conceptual limitations of the judgment is that it seems to adopt a view of environmental management which is separate from human rights. Thus, when the Court mentions that there is no reason to presume that SSP will result in an ecological disaster, it refers to a kind of pristine environment where conservation is largely independent from the human population living in and around the protected area. While the question of the preservation of forests and biodiversity are generally significant and very much warrant consideration, these elements should never be used to occlude the human rights challenge that is posed by the construction of a dam set to displace several hundred thousand people. Indeed, both the majority and minority judgments take, for instance, the view that canal affected persons should not be treated like dam-affected people. The crucial point is that the judges do not actually indicate what these people are entitled to and until a framework is put in place, one may infer that this silence is equivalent to denying them a relief and rehabilitation package.

CONCLUDING REMARKS

The issues raised by SSP are not limited to those of the fundamental rights of the oustees. Questions relating to the desirability of dams to foster development, existing alternatives to produce electricity and to provide irrigation and drinking water are of great importance and must also be taken into account. However, whatever path is chosen to foster economic development, it is today agreed in India and abroad that this development must be 'environmentally sustainable' and that it should contribute to the realisation of human rights for all residents of the country. The question of the 'human cost' of development cannot be dealt with in a technical manner but must necessarily refer to the fundamental rights of people whose lives and/or livelihoods are threatened by development projects. The judgment that was delivered last October fails to grasp this fundamental dimension of the development process. Strangely, the Court which is now calling for the speedy completion of the project and chastises the NBA for petitioning the Court too late and for interfering with the development process, is the same Court which previously condoned the complete stoppage of work on the dam for several years while the petition was being heard. These interim measures constituted a direct recognition that further construction while the case was being heard could create a situation where significant irreversible human hardship could ensue.

In conclusion, it is worth putting the judgment in a broader perspective. Among the various facets of the project which can be highlighted, the international dimension stands out. Whether the dam is eventually completed or not, the SSP controversy has already done more to modify the perspective on dams worldwide than any other single dam project. Indeed, SSP was, for instance, the first project where the President of the World Bank ordered an independent review of a Bank-supported project under implementation.[69] As noted, the resulting Morse Report ended up being the trigger for the cancellation of the remainder of the loan. SSP has also been closely associated with the setting up of the Inspection Panel referred to above.[70] Indeed, while there had been previous calls for a review mechanism, the controversy surrounding SSP gave a powful

69. *See* Operations Evaluation Department, *Learning From Narmada* (OED Précis No. 88, Washington, DC: World Bank, 1995).

70. Cf. Ibrahim F.I. Shihata, *The World Bank Inspection Panel: In Practice* (New York: Oxford University Press, 2nd edn. 2000).

signal to all concerned parties that the establishment of such a mechanism had become necessary to avoid further public relation disasters of this kind. It is surprising to realise that the significance of these events is completely ignored in the present judgment.

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