

HAS THE JUDICIARY ABANDONED THE ENVIRONMENT?



Has the Judiciary Abandoned the Environment?

EDITOR

Vipin Mathew Benjamin

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Has the Judiciary Abandoned the Environment?

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— **Vipin Mathew Benjamin**

Foreword

Environmental Law in recent years has emerged as an important discipline of law. Parliament by enactment of laws addressed environmental issues and Supreme Court of India, with its sensitivity and creativity in applying such laws, contributed to the evolution of environmental jurisprudence. The emergence of environmental jurisprudence was witnessed in *Rural Litigation and Entitlement Kendra Versus State of UP*, which dealt with issues relating to environment and ecological balance. The Supreme Court has used the right to life as a basis to combat environmental violations. It has directed the closure or relocation of industries and ordered that evacuated land be used for the needs of the community. The courts have taken a serious view of unscientific and uncontrolled quarrying and mining, issued orders for the maintenance of ecology around coastal areas, shifting of hazardous and heavy industries, protecting forests and water bodies and in restraining tanneries from discharging effluents. Such were the efforts taken for the protection of the ecology by the courts in India.

Matters involving the degradation of the environment have often come to the courts in the form of petitions filed in the public interest. This mode of litigation has gained momentum due to the lenient view adopted by the courts towards concepts such as locus standi and the ‘*proof of injury*’ approach of common law, which has facilitated the espousal of the claims of those who would have otherwise gone unrepresented. The Supreme Court incorporated the doctrine of *precautionary principle, polluter pays principle and principle of intergenerational and intragenerational equity*. Another application is the *public trust doctrine* to protect and preserve public land. The Supreme Court added that the doctrine would be equally appropriate in controversies involving air pollution, the dissemination of pesticides, the location of rights of ways for utilities and strip mining, of wetland filling, etc.

Accompanying the advent of liberalisation, privatisation and globalisation, barring some judgements, there has been a marked departure of the Supreme Court from the above established principles. The tacit clearance by the Supreme Court of Vedanta’s operations when norms are violated coupled with adverse findings by the Norwegian Council on Ethics, are signals of precedence, which would be adopted by the companies in future. Courts have read down in many instances, as jurisprudence by employing “sustainable development” or ignoring the mandatory

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provisions of many environmental legislations. To illustrate, forest lands are being permitted to be converted to non-forest use by levy of compensation, the determination and calculation (NPV) of which is highly questionable with options open to the companies to later reduce or seek exemption from such costs. In the case of Blue Lady, the ship carrying hazardous wastes neither carried documents required as per law. Despite valid and clear objections, the central government persuaded the Supreme Court to rule that Blue Lady be dismantled at Alang. All this is a cause for alarm especially viewed in the backdrop of the failure of the Supreme Court and more so the ministry of environment and other environmental regulatory agencies giving total disregard to protect the environment. Legislations for conservation like the Biodiversity Act are being implemented as access legislation. The Environmental Impact Assessment notification, which was the people's participation, has been watered down to a mere clearance formality due to growing industrialisation, and also pressures from other departments, have lead to undeserved environment clearances prioritising the needs of investors at the cost of ecological security.

With the ineffectiveness of the Ministry and the departure of the judiciary from the environmental sensitivity demonstrated in the 1990s, there is an urgent need for the environmental regime to strengthened and for strategies to be worked out to hold the judiciary accountable to the law.

To this end, the National Consultation Critiquing the Current Judicial Trends on Environmental Law was an attempt to resurrect the environmental jurisprudence, which was organised by a broad spectrum of groups to focus attention on the retreat by the judiciary from principles which it espoused in the early days, against the leniency towards an aggressive espousal of unbridled industrialisation and willingness to accept the whimsical decisions of environmental regulators in an unquestioning manner.

Introduction

The Bhopal tragedy hastened the decline in the standards of judicial decisions on the environment. It taught industrialists a memorable lesson. If you can get away with Bhopal, you can get away with anything. If, after thousands of people died in Bhopal, Union Carbide and the board of directors could get away with petty compensation and no criminal liability, anyone can.

Poor people don't count. That was the second lesson. The tragedy of Bhopal was that the gas leaked into the quarters where the poorer people lived. Had the toxic cloud drifted in the direction of the Secretariat, the Bhopal litigation may have taken a different turn. As things turned out, the wind changed direction and Arjun Singh, then Chief Minister of Madhya Pradesh, was able to board his helicopter and decamp.

Poor people died like flies and the litigation dragged on for years. Advocates made fools of themselves in American courts arguing, with fawning patriotic zeal, that courts in India were up to the mark. Judge Keenan took advantage of this to disguise his basically pro-business attitude with patronising sweet-nothings. Who are we to tell the Third World what they should be doing? They have their values, they have their courts, they have their standards. Who are we to decide what compensation is payable – and with words of this kind the litigants were banished from American courts into the labyrinthine mess of the Indian judicial system.

Thus with Keenan's judgement, double standards for transnationals became the norm. American corporations were required to follow higher standards of safety in America and also abide by the right to information laws and the higher level of compensation. But operating in the backwaters of the third world they were free to work in secrecy, bribe officials and tell lies in the courts. Were transnationals to be prosecuted in American courts, according to American law for disasters abroad, the occupational health and safety scenario in the Third World would have improved dramatically.

The undue haste with which the full Bench of the Supreme Court pushed through the settlement and quashed the criminal proceedings was later partially corrected when the Court reversed its decision and restored criminal liability. This haste to push through the settlement was in

sharp contrast to the manner in which the judicial proceedings went on for years. The Court's performance was a fitting answer to Nani Palkhivala's grand arguments that the Indian judicial system was competent to handle the Bhopal litigation.

Eyebrows were also raised when then Chief Justice RS Pathak went to the World Court at Hague soon after criminal liability was quashed, and then tried to hang on for a second term by unusual means. The result of all this was a clear signal to the lower judiciary that the environment was taboo and to industrialists that it was business as usual.

History repeated itself many years later when an inflammable gas leaked and ignited an explosion that shook the IPCL factory at Nagothane in Maharashtra and killed 50 workers. The management was hopelessly unprepared. The hospital, within the complex that already housed thousands, had beds for only seven patients. The doctors said that they were not surgeons. They did not know how to give an intravenous drip. They claimed that they had neither the equipment nor the medicines and that they had not been trained to deal with victims of chemical explosions. The hospital had only two ambulances with two beds each. One was so old it broke down at the gate. The bodies of workers were therefore taken to hospital by contractors' trucks. Acting in panic, doctors evacuated the factory without treating the injured and dying. They were taken northward towards Alibag over roads pitted so badly that some of the workers died on the way. After hours, they reached Alibag only to find the civil hospital without medical supplies. The trucks then turned around and came south to Bombay. At Sion Hospital the doctors found all the workers dead. They said that had elementary emergency aid been provided, by spraying the workers with cold water immediately after the explosions and then by covering them in light cotton clothing, it would certainly have been possible to save lives. Intravenous drips would have helped substantively. As in Bhopal, transnationals were involved in the fabrication of the IPCL plant and these foreigners who were working on the premises when the explosion took place. They immediately left the factory and caught the first bus home. Thus even after Bhopal no one has felt the need for a disaster management plan. Not very different is the story of the hazardous chemical leak from Century Rayon, Thane.

The government's attitude in Bhopal sent a similar signal down the line to all expert bodies. When, on behalf of the government, the Tata Institute of Social Sciences sent a team to Bhopal to document the number of persons affected and the degree of harm done, much work was put in but the records are mysteriously missing. Voluntary groups, doing similar work, had their offices raided, their activists arrested, and their records seized by the police and later destroyed so that documentation, of the nature and extent of injuries, was deliberately done away with. This ultimately led to only about one-third of the victims getting compensation. From the top came the warning to zealous officers that the environment was not to be taken seriously.

The courts, and the government, repeated this performance when activists of the Narmada Bachao Andolan (NBA) were routinely beaten up and arrested and treated as anti-nationals

and anti-development. Despite the failings of the Narmada Project, the High Court refused to entertain the petition and the Supreme Court, in this matter of national importance, passed a one-page order directing the construction to proceed apace with perfunctory remarks regarding rehabilitation. As with the Amnesty Report on torture in India, it sometimes takes a foreign committee's report to make India sit up and take notice. There could not be a more scathing indictment of the Narmada Project than the Morse Committee Report. Yet, in a situation where the governments of Gujarat, Madhya Pradesh and Maharashtra have no intention of rehabilitating anyone, according to the Narmada Water Disputes Tribunal Award and the supplementary agreements, all that BD Sharma, the intrepid ex-Commissioner for Scheduled Castes and Tribes, could get from the Supreme Court in his public interest petition was a direction against him for the work on the dam to go ahead.

The casual attitude of the courts has taught the pollution control boards a thing or two. Steeped in corruption and headed by politicians, these boards fabricate anything for anybody at a price. These pollution control boards – cesspools of corruption – have become a law unto themselves. Reports are fabricated, investigations stage-managed, approvals granted fraudulently and accidents covered up. And the position of the Minister for Environment, once a punishment posting, has become the most lucrative in the ministry. Crores of rupees, in bribe money, flow through the corridors of Paryavaran Bhavan.

The pollution control boards get away with this because courts do not question their reports. In property matters, affidavits, reports and other documents are scrutinised closely by the writ courts; in environmental matters even the most outrageous, casual or contradictory reports have passed. When expert bodies act independently and fearlessly then it is understandable that the courts would not want to substitute their eclectic knowledge of the subject for the scientific reasoning of the expert body. But when the pollution control boards act mala fide should the courts keep their eyes shut?

And in rare cases, when independent expert bodies find fault with projects on environmental grounds, the courts have skirted the environmental guidelines and critical reports in various ways. In a case of pollution, likely to be caused by a thermal power station, the Environmental Appraisal Committee of the Ministry of Environment and Forests, faulted the project, finding major flaws and violations and concluded that the power station should not be allowed in the green belt. The pollution control board ignored the violations; the court, going on the basis of the board's reports, gave the green signal.

The obsession judges have with the amount of money spent on projects is another misplaced concern. What law-breakers routinely tell the courts, in effect, is: "Perhaps we have broken the law and harmed the environment but we have spent so much money so let us continue with the construction. Otherwise we stand to lose so much money". And the courts succumb. Because of their property and profit orientation judges rarely calculate the enormous costs in terms of

environmental destruction. One exception to this rule is the decision of Justice Rama Jois of the Karnataka High Court, who stayed the construction of a dam because the authorities had not taken into consideration the environmental costs incurred by the loss of wildlife and forests.

It takes courage to condemn a mega project that will harm the environment. But it must be done and in clear terms. Judicial pronouncements, on the environment in India, tend to appear to say much more than they do. The Sriram case, for example, used wonderful language and several quotations, relied on many precedents and is said to have laid down the principle of strict liability. The casual reader might believe that strict liability now exists in India. But when read carefully the judgement is otherwise. Subsequently, decisions of the Supreme Court have not taken the Sriram case of strict liability into account. We are told that one of the judges who delivered the decision – a prominent public interest litigation proponent – has after retirement, in opinions given to industrialists, said that the doctrine of strict liability as laid down in Sriram’s case, was obiter!

Thus, after Bhopal, the separation, between what judges pretended to say and what they actually said, grew. Grand judgements were not uncommon but they had little effect because the operative part of the orders were like a mouse’s pipsqueak in comparison to the lion’s roar of the quotations and lofty ideals. By these techniques the judiciary has misled the public into believing that the judiciary was receptive whereas, quite to the contrary, judicial decision-making was characterised by timidity and subservience to the administration.

As the judiciary went into decline the movement grew and took on the dimensions and characteristics of a mass movement. Now, we are truly on the threshold of a second national movement. Public life has become so corrupt, standards so abysmally low and looting of the exchequer has become so much of a national pastime that nothing short of a national cleansing of the rot that pervades the Indian society will do.

The environment movement once stood on the fringes of the human rights movement together with other issues as just another issue. Today it stands centre stage. The nexus, between environment issues and life itself, indicates that the struggle for a healthy and sustainable environment is a struggle for changing the whole of society. Basic values, attitudes, approaches, priorities and lifestyles are called into question and the environment has transited from being just another issue of note to the subterranean strata of all movements. It is not simply an issue of forests, or water, or the air but the living together of people in harmony with nature.

— **Colin Gonsalves**
November 2010



ONE

Has the Judiciary Abandoned the Environment?



WELCOME

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Urban planning¹

Judges of the Supreme Court of India yield enormous power. Since they sit in benches of twos and threes, two judges of the Apex Court can irreversibly harm large sections of the Indian population, particularly the poor, without there being any legal remedy thereafter. That the practice, in the Supreme Court, generally requires the junior judge on the bench to follow the conclusions of his more senior counterpart, the two-judge bench decision often could be a single judge of the Supreme Court deciding the course of history. This is a frightening and unprecedented centralisation of power. Such concentration of power is not normally found in functioning democracies. It is one thing for a two-judge bench to decide an appeal relating to an individual or a group of individuals, but it is an entirely different matter when the appeal concerns the fate of an entire city. Such a case came to the Supreme Court by way of Special Leave Petition No. 23040 of 2005 in the matter of Bombay Dyeing and Manufacturing Company Limited Versus The Bombay Environmental Action Group and Others. The Girni Kanghar Sangharsh Samiti (GKSS), a union of the textile workers who worked in the mills and resided in the chawls (houses) within the mill, was Respondent No. 16 in these proceedings.

A large number of textile mills in Mumbai were either financially sick or closed. These mills were on government land that was leased to private mills on a very nominal rent and for a fixed period of time. In many cases the period of lease had expired and the land would have, in normal course, reverted to the government, who was the owner of the land. Under various regulations, one-third of the land, that would have been made available after the demolition of the structures, was to be kept vacant for parks and playgrounds; one-third was to be used for housing the poor; and the remaining could be used by mill owners for commercial development. The central issue related to whether the mill owners could be given a part of the land at all when the lease had expired and since they had, during the period of the lease, paid up rent amounting to Re. 1 per year! The second issue related to exactly how the one-third portion, for open spaces and public housing, was to be calculated. According to the petitioner's calculations, the entire

¹ Bombay Dyeing and Manufacturing Company Limited Versus The Bombay Environmental Action Group and Others (2006) 3 SCC 434

open land, after the structures were demolished, was to be taken for the purpose of calculating the open spaces and land for housing; according to the mill owners and the state government the vacant land was to be calculated on the basis of the vacant land available prior to the demolition of the structures. Given the construction at hand, there would obviously be very little vacant land. Therefore, the creation of open spaces and land for public housing depended on the approach of the courts. The Bombay High Court held in favour of the environmental group and the trade unions. As a result hundreds of acres of land were to be freed for public parks and for housing the poor. Mumbai, already overcongested and highly polluted, would finally have had something like a glimpse of open spaces and the poor, living in slums, would have received public housing. The decision of the Supreme Court changed all that. Instead of parks and public housing grotesque malls and five star hotels began to spring up. The future of Mumbai looked dismal. The Supreme Court knew well that the decision would have huge repercussions for the development of the city. The idyllic possibility of a city with open spaces and public housing would never see fruition. The future lay in overcrowded commercial constructions with no spaces for working people. In choosing commercial development and profiteering over the welfare of people at large, the Supreme Court acted against public interest, made an order that would have irreversible and drastic consequences for the environment and doomed the urban planning prospects of the city forever. Globalisation triumphed but the people suffered.

GKSS argued that Regulation 58 of the Development Control Regulations, 1991 (DCR) permitted the sale and development of mill land only for the “revival/rehabilitation of a potentially viable sick mill”. The revival, or rehabilitation of sick mills, was done under a statutory regime sanctioned by the Board for Industrial and Financial Reconstruction (BIFR) which was set up in accordance with the provisions of the Sick Industries Companies Act (SICA). If the mill was to be closed and demolished, i.e. if revival and rehabilitation was not possible, then the mill had to be wound up and no sale or development of the land could take place. The High Court accepted this argument. However, the Supreme Court decision on this point is incomprehensible.

Even assuming Regulation 58 could be used for the sale and development of land, its provisions could have been interpreted, as did the Bombay High Court, in a manner that would have benefitted public interest. Though only one-third of the land could be retained for commercial development by the mill owner, the value of this one-third portion was substantial. Secondly, the mill owner was permitted a change in the use of the land from industrial to commercial and residential. Given the prohibitive prices of flats in Bombay, this was indeed a windfall. Thirdly, the Floor Space Index (FSI), or the ratio of the area of the plot to the total area allowed for construction, was increased from 0.5 to 1.33 permitting almost three times the construction allowed prior to 1991. Further, the mill owners were also given Transfer of Development Right, or permission to use the FSI on any property in the city. In view of these provisions, which ensured that mill owners would not suffer any loss even though the land was given away for open spaces and public housing, it was all the more imperative that the court balance competing interests to do justice to the public and the working people by ensuring that substantial lands went to them. This was sadly not to be.

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It was pointed out to the Supreme Court that mills such as Kamala and Phoenix were attempting to dodge their liability under the regulations by pretending that the new commercial structures, that were to be erected, were at most an enhancement of the existing structures whereas, in fact, the old buildings had been completely demolished. It was by this sleight of hand that the mills sought to understate the open land available. Obviously if the existing structure had merely been renovated, the open land available would be much less than what would have existed had the entire structure been raised to the ground. Phoenix had set up a huge commercial structure including bowling alleys, and saunas ostensibly for the workers. In this way other mills—including Piramal, Swarn, New Great Spinning and Weaving Company Limited and Century and Raghuvanshi—followed suit and began using for commercial purposes without yielding so much as an inch for the public. All this commercial activity was done in the name of the revival and modernisation of the mill when it was more than clear that the mill had been demolished and the services of all workers had been terminated. There could have been no greater fraud than this. That the Supreme Court could not see through this is truly saddening.

Mill owners said that they had merely done the needful in order to pay the dues of workers. On the other hand, the workers were of the view that the dues payable formed only a small fraction of the sale's proceeds. "Not in our name", they said. Mill owners had been grossly unfair and dishonest. The value of the land, expropriated by the mill owners, was only a minuscule of the actual value of land.

It was said that commercial development was necessary in order to provide employment to jobless textile workers. This was an odd argument as over 30,000 workers had their services terminated during this period. Not a single member, of any family, was given employment. It was said, by the mills, that an escrow account would be kept to disburse funds for the training of workmen so that they could take up new employment. Not a single worker was trained. The mills constructed impressive commercial structures while the dues of workmen remained unpaid. They sold properties for large sums of money and yet did not pay the workers. The GKSS filed an affidavit in the Supreme Court saying that the dues of workers amounted to only 10 percent of the sale of the mill lands.

The Regulation guaranteed housing to textile workers, yet in case after case workers were evicted from their *chawls* as the promises of housing proved illusory.

Then, most damning of all, GKSS demonstrated, on affidavit, that the mills were on leasehold land that had been taken from the government almost free of cost. Many of the leasehold agreements had come to an end by efflux of time but the lands had not been taken back.

The decision of the Supreme Court, in *Bombay Dyeing Manufacturing Company Limited versus Bombay Environmental Action Group* (2006) 3 SCC 434, makes for convoluted reading. But in the end the conclusion is simple. If, says the Supreme Court, the interpretation, suggested by the Environmental Organisation and the Union, is accepted "a very valuable asset would be rendered sterile". Thus, in the opinion of the Apex Court, the use of urban land, for public spaces and public housing, constitutes a sterile use of land! By implication grotesque malls and five star hotels are a virile use of land! In paragraph 210 of the judgement the reasoning is

even starker. “Ecological factors indisputably are very relevant in construing a town planning statute. The Court normally would lean in favour of environmental protection...It must be borne in mind that there exists a stark distinction between the interpretation of planning and zoning statutes enforcing ecology vis à vis industrial effluents and hazardous industries, and those relating to rehabilitating industry...Zoning law should be construed strictly and in favour of the property owners...Therefore the Regulation cannot be struck down solely on the ground that the interests of the common citizen from the ecological point of view has been affected”

Apart from all that has been said it is important to note that the Supreme Court nowhere dealt with the argument of the union that the lands did not belong to the mill owners, that they had obtained the land on a lease paying Re 1/- per sq. mtr. and that the lease had long since expired. Even if such an utterly conservative legal view had to be taken, based on American law of all things, to the effect that zoning laws should be construed strictly in favour of property owners, the conclusion that emerged, by way of implication was that mill owners were not the owners of the land. They had usurped public property.

Marine parks and oil pipelines²

Jamnagar National Marine Park and Sanctuary lies in the intertidal zone of the gulf of Kutch, which includes 42 islands along the coast of Jamnagar in the western corner of the State of Gujarat. This is India’s first marine protected area and includes reserve forests (12.82 km), unclassified forests (347.90 km².) and territorial waters of the Government of India (GOI) (98.20 km²). The degree of protection awarded is of the highest order and no alteration of boundaries is allowed except on a resolution passed by the state legislative assembly. No grazing of livestock is permitted in a National Park.

The diverse ecosystem, within the Marine Park and Sanctuary, houses a plethora of living resource and coral reefs. The reef ecosystem is amongst the most endangered ecosystems on earth. Coral reefs are crucial and are home to nearly one quarter of all marine species in the world.

Within this pristine and ecologically fragile area, Essar Oil Limited proposed to lay a pipeline through the National Park, some part of which could go under water in the marine park. This pipeline would carry crude oil. Essar Oil said that the pipelines of other oil companies were also going through the National Park. The legal issue that arose was whether a network of pipelines carrying crude oil could be permitted either by the State Government or by the Chief Wildlife Warden in exercise of their powers under the provisions of the Wildlife Protection Act, 1972.

The permission granted to the oil companies to build a network of pipelines in the Park, would have enormous significance. In November 26, 1999 it was reported, by the Environment News Service, that the Marine National Park, at Vadinar on India’s west coast, had been hit by an oil spill that left six dolphins, five sea turtles and piles of fish dead. Mangroves and coral reefs in the Gulf of Kutch had also been found by the oil spill caused due to a leakage in the Vadinar-Kandla pipeline near Salaya. The Environment News Service reported that the Jamnagar District

² Essar Oil Ltd. Versus Halar Utkarsh Samiti and Others (2004) 2 Supreme Court Cases 392

Collector, Girish Murmu, “admitted there was some slippage of oil in the Vadinar waters which led to the death of marine life in the national park. It could have been a slippage of crude while unloading from the ship to the pipeline and not necessarily a rupture. It seems most likely that the oil slippage could have originated from the Indian Oil Corporation facilities.”

The Environment News Service went on to say that P. Basu, Additional Chief Secretary, Department of Environment and Forest, had said in Gandhinagar that “the State government has taken a grim view of the matter. Last year senior State forest officials predicted the marine park is likely to suffer great damage from crude oil spills[sic]”.

The News Service went on to quote the Editor of India’s most prominent wildlife magazine *Sanctuary* as saying “The usual denials and reputation damage control exercises have started. The clean-up has not”. He went on to say “It had to happen. The proverbial 30 pieces of silver – or 30 barrels of oil in this case – resulted in the establishment of oil facilities near one of India’s most precious marine habitats in the Gulf of Kutch, which is populated by dugongs, dolphins, octopi, puffer fish, and coral formations. The bird-death count has not even been started, but it is bound to be horrendous as this is a staging point for hundreds and thousands of migrating avians. If these go ahead we could lose this vital marine habitat, that is the breeding ground for fish and other marine species that support a multi-million dollar industry”. He alleged that the first spill in the area was noticed as far back as November 15, 1999. But at that time no one thought fit to inform the country of the event.

It was also reported that the International Union for the Conservation of Nature and Natural Resources (IUCN), has declared the park a “threatened protected area” and entered it in the red data book, saying its diverse flora and fauna could be lost forever.

Similarly the *Indian Express* reported on November 24, 1999 that the Sikka Range forest officer, BH Dave, had confirmed the slick and had said that an estimated “15 to 20 tonnes of oil must have leaked into the sea”. The officer said that “an entire mangrove forest nursery with nearly 70,000 saplings on the Narara islands in the Marine National Park were destroyed while at least 3 other islands rich with corals were seriously affected.” He said that the 12 km slick could affect the 32 km coast “There is already oil at Wadinar and Sikka ports. On Narara Island people can’t walk because of the oil” as headlines.

The *Times of India*, Ahmedabad, reported on November 24, 1999, “a thick dark layer as the oil slick spread” and “panic among coastal residents” as headlines.

Janyala Srinivas wrote, in the *Indian Express* on June 20, 2001, that the Forest Department had not yet located the source of the spill and nor had the culprits been nabbed. “It is indicative of the kind of attention that is being paid to the periodic oil spills along the coast line: Though the damage to ecosystems is tremendous, the warning bells are falling on deaf ears. The Park is constantly under threat from oil slicks and chemical effluents. With huge tankers plying in the Gulf of Kutch carrying lakhs of tonnes of crude oil, the damage is as regular as the oil spills. Over 1000 ships pass through every year, more than half of which are ultra large oil tankers, which spill at least once a fortnight”. He quoted the former Deputy Commissioner of

Fisheries, Niranjan Chaya, as saying—“the Park is under constant abuse due to oil spills and pollution. The Gulf of Kutch is a closed ecosystem: Its waters cannot flow out. So it has to be kept cleaned as it supports a large and rare ecosystem. Once an oil slick enters into the Park, it is very difficult to get rid of it. The article goes on to say that the Minister of State for Fisheries, Babubhai Bokhiriya, admitted that fish production on the coast had consistently dropped due to degeneration of coastal ecosystem. The Central Fisheries Research Institute had also found that, in December of the same year, an oil spill had killed a large number of fish. The article quotes RJ Asari, Director of the Marine National Park, as saying that the oil spills had “caused general damage to the mangroves”. It also quotes the Chief Conservator of Forests, Gujarat, GA Patel, as saying that “the situation is scary”.

Apart from these documents the Jan Sangharsh Manch, a body acting in public interest and opposing the pipelines, put on record, before the Supreme Court, a number of documents clearly establishing that the damage to the Marine Park, as a result of the pipelines carrying crude oil to tankers, was both extensive and routine. The Supreme Court ignored all these documents.

The Sanctuary was protected under the provisions of Wildlife Protection Act, 1972. Section 18 thereof requires the State Government, by notification, to declare its intention to constitute a Sanctuary and consider objections in respect thereof. Section 19 enables the Collector to determine the rights of persons residing in the Sanctuary. Once the rights are determined and a notification has been issued under Section 20, no further rights within the Sanctuary can be considered. Under Section 24, the Collector either acquires lands and rights by payment of compensation, or excludes lands from the limits of the proposed Sanctuary, or allows the continuation of the exercise of rights by any persons over any land within the limits of the Sanctuary. Section 26 A (3) specifically prohibits any alteration in the boundary of a Sanctuary except on a resolution passed by the legislature of the State. Section 27 restricts entry into a Sanctuary. Under Section 28, even relatively less harmful activities, such as photography, are restricted. Section 32 bans the use of chemicals and other injurious substances. Section 33 authorises the Chief Wildlife Warden (CWW) to take such steps as may be necessary to enhance the wildlife and its habitat. This Section requires clearance at two levels. The Chief Wildlife Warden herself on the basis of her close connection and experiences in the Sanctuary, is required to recommend to the State Government that action be taken under Section 29 to enhance the wildlife and its habitat. Only after the CWW makes a recommendation can the state government authorise the proposal for the taking of suggested measures.

The section is worded in such a way as to indicate a double check on the destruction of wildlife or the culling of trees as a measure to ensure the security of wild animals and the preservation of the Sanctuary. Parliament did not want a Chief Wildlife Warden, operating in some remote sanctuary, to merrily go about destroying wildlife. A check was needed. At the same time Parliament did not want a minister, sitting at a state capital, to order the destruction of wildlife in a sanctuary. A check was needed on that as well and thus a system of clearance at two levels was formulated.

This section was introduced because, in certain circumstances, it is necessary to cut trees (for example when a fire line is to be created in the forest to prevent the spread of forest fires, or an

infestation of trees takes place) for the betterment of the forests as a whole; or it is necessary to cull animals (for example the wild boar whose population has increased to such an extent that it is detrimental to other species) for the improvement of wildlife as a whole. For example in Corbett National Park, the invasion of a weed called Lintana is causing damage by invading the natural grassland. Therefore a programme on weed eradication to protect the habitat of the tiger and other species, is something which gets approval under this section.

Sections 29 and 35 (6) of the Wildlife Protection Act, 1972 are as under:

“Destruction, etc. in a sanctuary/ national park prohibited without permit – No person shall destroy, exploit or remove any wildlife from a sanctuary/ national park or destroy or damage the habitat of any wild animals or deprive any wild animal of its habitat within such sanctuary/ national park except under and in accordance with a permit granted by the Chief Wildlife Warden and no such permit shall be granted unless the State Government, being satisfied that such destruction, exploitation or removal of wildlife from the sanctuary/ national park is necessary for the improvement and better management of wildlife therein, authorises the issue of such permit”.

Section 33 of the Wildlife Protection Act, 1972 is as under:

“The Chief Wildlife Warden shall be the authority who shall control, manage and maintain all the sanctuaries and for the purpose, within the limits of any Sanctuary:

- i. may construct such roads, bridges, buildings, fences or barrier gates and carry out such other works as he may consider necessary for the purposes of Sanctuary;
- ii. shall take such steps as will ensure the security of wild animals in the sanctuary and the preservation of the sanctuary and wild animals herein;
- iii. may take such measures, in the interests of wildlife, as he may consider necessary for the improvement of any habitat;
- iv. may regulate, control or prohibit in keeping with the interests of wildlife, the grazing or movement of livestock.”

Section 2(ii) of the Forest Conservation Act, 1980 prohibits the use of forests for non-forest activity, save under an order of the Central Government permitting such activity. Even the State government, and other authorities, is prohibited from permitting any non-forest activity taking place in a forest area. The Section is as follows:

“2. Restriction on the dereservation of forests or use of forest land for non-forest purpose. Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing:

- ii. that any forest land or any portion thereof may be used for any non-forest purpose.”

Under the Forest Conservation Act, 1980 non-forest activity could be carried out in a forest area with the permission of the Central Government; in the Wildlife Protection Act, 1972 Parliament decided that the delicate balance between sanctuaries on the one hand and non-

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forest activity on the other, would be tilted entirely in favour of wildlife and forests. Thus, no non-forest activity is permitted in a Sanctuary or National Park. The only exception is that if the State legislature, and the State legislature alone, feels that it is absolutely imperative that certain non-forest activity be carried out in a National Park or Sanctuary, then there is provision for it under Section 26 A(3) for sanctuaries and Section 35 (5) for national parks. This can well be done by denotifying the areas where non-forest activity is likely to be carried out.

Can the State Government, in a situation where neither the state legislative nor the Chief Wildlife Warden is willing to grant permission authorise the laying of the pipeline? This only begs the question further. First, could a pipeline be authorised at all and, second, could it have been authorised without the specific permission of the Chief Wildlife Warden. Under Section 29 as set out above, permission could only be granted for a non-forest activity if it was “necessary for the improvement and better management of wildlife therein”. Could it be said that the laying of pipelines carrying crude oil was for the improvement and better management of wildlife? Is it conceivable that in a National Park where even grazing and other rights such as photography are prohibited, that the laying and maintenance of pipelines are permitted?

Moreover, in mere forest areas that are not declared Sanctuaries or National Parks, the State government has no power to permit non-forest activities and this power is given under the Forest Conservation Act, 1980 only to the Central Government. How can it be, then, that in National Parks and Sanctuaries which deserve a greater degree of protection, that non-forest activity can be allowed on the permission of the State government?

In *State of Bihar versus Murad Ali Khan* reported in (1988) 4 SCC 655 the Supreme Court held as under:

“The policy and object of the wildlife laws have a long history and are the result of an increasing awareness of the compelling need to restore the serious ecological imbalances introduced by the depredations inflicted on nature by man. The state to which the ecological imbalances and the consequent environmental damage have reached is so alarming that unless immediate, determined and effective steps were taken, the damage might become irreversible. The preservation of the flora and fauna, some species of which are getting extinct at an alarming rate, has been a great and urgent necessity for the survival of humanity and these laws reflect a last ditch battle for the restoration, in past at least, a grave situation emerging from a long history of callous insensitiveness to the enormity of the risks to mankind that go with the deterioration of the environment.”

The Gujarat High Court held, in favour of the environmental groups and the Jan Sangharsh Manch holding, that “Section 29 would show that no authorisation could be granted by the State Government for the purpose of laying down the pipeline through the protected sanctuaries. The protection of wildlife is paramount consideration. No question of granting permission under Section 29 arises unless it is found that the same is necessary for the improvement and better management of the wildlife therein. We find that the language, used by the legislature in Section 29, does not admit of any ambiguity. Would the laying down of a crude oil pipeline lead to

the better management of wildlife? The answer is in the negative. We therefore, find that the satisfaction of government cannot be said to have been arrived at in accordance with legislative intent. Instead it is based on considerations which are alien to the object of the Act and which are not at all germane”. Reacting to the argument of the oil companies that the pipelines would cause minimum damage that could well be revised, the High Court said “we find that the concept of minimal damage, reversible loss, or one time loss are alien to Section 29. In our opinion the Act read as a whole does create a closed zone for all activities and purposes”.

The High Court then said “We are simply bemoaned and shocked to know from this letter that there were two more proposals pending with the State Government; one from Essar Oil Ltd. and other from Gujarat Poshitra Port Ltd. We cannot desist from observing that we did not expect such an unreasonable and adamant stand and attitude from a welfare state which claims to be committed to the cause of environment and protection of wildlife and yet gives an evasive reply attempting to take the cause for a ride. The area which is established as Sanctuary/ National park cannot be allowed to be a network of pipelines and therefore, we, in the facts and circumstances of these cases say that enough is enough and hereby restrain the Government of Gujarat from granting any more authorisation and permission for laying down any pipeline in any Sanctuary or National Park.

The Supreme Court reversed the decision of the High Court, after hearing the State Government and after listening to what the oil companies had to say. The Jan Sangharsh Manch was not heard and was asked to file a written submission. The decision of the Supreme Court makes distressing reading. While saying in para 26 that a balance had to be maintained between economic development and environment protection, in para 27 of the decision the Court says, “But in a sense all development is an environmental threat. It cannot be said, as the High Court seems to have held, that the invariable consequence of laying pipelines through ecologically sensitive areas have been the destruction or removal of the wildlife. There is no prior presumption of destruction of wildlife in the laying of pipelines. Cases of oil spills have undoubtedly been ecologically disastrous and have drawn the attention of the world but our attention was not drawn to any instance of leakage resulting from the laying of the pipelines. There has been no study of any recognised expert body that the environmental impact of laying the pipeline would be such as would lead to irreversible damage of the habitat or the destruction of wildlife.”

With these sweeping observations the Supreme Court ignored the documents on record showing extensive damage to wildlife and environment in the Marine National Park under consideration and ignored the principles of environmental law laid down in previous decisions. The precautionary principle—adopted in Vellore Citizens Welfare Forum versus Union of India and others as reported in (1996) 5 SCC 647 and later relied to in Andhra Pradesh Pollution Control Board versus Prof. MV Nayudu (Retd) & Ors. as reported in (1999) 2 SCC 718 and (2001) 2 SCC 62—was thrown to the winds.

As first set out in the 1990 Bergen Ministerial Declaration on Sustainable Development, it was recognised that “environmental measures must anticipate, prevent and attack the causes

of environmental degradation. Where there are threats of serious or irreversible harm, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation". The same principle became part of the Rio Declaration, 1992 as Principle 15.

Dealing with the submission that the Chief Wildlife Warden had not granted permission, even though the State Government had granted authorisation, the Supreme Court held that "the absence of a formal order is an irregularity. The Chief Wildlife Warden's permission after authorisation would have to be in accordance with the decision of the State Government. Once the State Government has exercised this power, it is not open to the Chief Wildlife Warden to decide to the contrary". In this way the Supreme Court decimated the dual protection of Section 29 which required both the authorisation of the State Government and permission by the Chief Wildlife Warden, who, being the officer on the ground, would be fully aware of the situation and therefore, be in the best position to judge if permission should be granted under Section 29.

More damaging was the Supreme Court's acceptance of the argument that the damage caused by the oil pipelines was "temporary and reversible". The Court approved of the State Government's logic stated thus, "in the light of subsequent measures to be taken by the project proponents, will help in improvement and better management of the Marine Sanctuary and National Park as well as of the wildlife therein".

In conclusion it can well be said that the decision of the Supreme Court not only ignores documents on record, clearly establishing that it was an admitted position that senior officers of Government of Gujarat had stated that the oil spills had caused extensive destruction in the Marine National Park, but also eliminates the statutory protection granted under Section 29 for the preservation of National Parks. The result was that a network of oil pipelines were permitted which ultimately destroyed the Marine National Park and Sanctuary. This decision of the Supreme Court is substantially wrong. It does great injustice to people in coastal areas. It has caused irreversible damage to the environment and wildlife. Of course it has benefited oil companies. But in doing so it has ignored the Constitution of India and the protection granted to the habitat. This decision deserves to be set aside by a larger Bench.

Hazardous wastes³

By the above three decisions, the Supreme Court has reversed two erstwhile pioneering judgements regarding the import into India of hazardous waste as set out in *Research Foundation for Science Technology and Natural Resource Policy versus Union of India* (2005) 10 SCC 510 and *Research Foundation for Science Versus Union of India* (2005) 13 SCC 186. As a result, the attempts made by the Supreme Court, in the two earlier decisions to prevent India from becoming a dumping ground in the developing world for toxic waste, were substantially undermined and the breach of the Basel Convention condoned.

3 *Research Foundation for Science Technology and Natural Resource Policy Versus Union of India and Others* (2006) 3 Scale 311, (2007) 10 Scale 594, (2007) 11 Scale 75

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In the first Research Foundation case reported in (2005) 10 SCC 510, the Supreme Court dealt, for the first time, with the “alarming situation created by dumping hazardous waste” in India. The Basel Convention, signed by India on March 15, 1990 and ratified on June 24, 1992, was considered by the Supreme Court and incorporated into Indian law.

By order dated May 5, 1997 the Supreme Court imposed an embargo on the import of hazardous waste and said that “no import would be made or permitted by any authority or any person of any hazardous waste which is banned under the Basel Convention. The State Governments were directed to show cause why orders ought not to be made directing closure of units utilising hazardous wastes.”

By order dated October 13, 1997 a high-powered committee, with Prof. MGK Menon as its Chairman, was constituted to guide the Court. The Committee found that a “crisis situation had arisen from continuous illegal import and dumping of hazardous wastes.” It found the situation in India “fairly grim”. The Committee concluded that the Central Government had made “no concerted or consistent effort to implement the Hazardous Waste Rules, 1989.”

On September 24, 2003 orders were given for the upgrading of testing laboratories for hazardous wastes and recyclables. Nearly 29 imported items were prohibited under Schedule 8 of the Rules as amended in May 2003. However, more items were required to be banned to bring the rules on par with the Basel Convention, which had banned 76 items. In all, 89 sites were identified for hazardous wastes disposal. The Court observed that “there seems to be a uniform lack of concern at all levels in the Government about the serious implications of the import, generation, build-up, transport and disposal of hazardous wastes in the country.” The Court criticised the “ritualistic adherence to bureaucratic formalities, lack of focus on implementation and the paper-pushing bureaucratic approach” of the Ministry of Environment and Forests.

In a landmark direction the Court directed that production activities banned in other industrial countries “should not be permitted or licensed under any circumstances.”

The Court then constituted a monitoring committee to oversee that the directions given by the Supreme Court were implemented in a timely fashion.

Turning to ship-breaking, the Court directed that such operations “cannot be permitted to continue without strictly adhering to all precautionary principles and taking safeguards which include the aspects of the working conditions of the workmen.” The Court directed that “before a ship arrives at port, it should have proper consent from the authority concerned or the State Maritime Board, stating that it does not contain any hazardous waste or radioactive substances. The ship should be properly decontaminated by the ship-owner prior to the breaking.”

In the second order dated January 5, 2005 reported in (2005) 13 SCC 186, the Supreme Court culled out precautionary principles from the Rio Declaration which provide that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as reason for postponing cost-effective measures to prevent environmental degradation. This principle generally describes an approach to the protection of the environment or human health based around precaution even where there is no clear evidence of harm or risk of harm from

an activity or substance. It is a part of the principle of sustainable development. It provides for taking protection against specific environmental hazardous by avoiding or reducing environmental risks before specific harms are experienced.”

Dealing with the “polluter pays” principles first enunciated in the Indian Council for Enviro-Legal Action versus Union of India (1996) 3 SCC 212, the Court held that the polluter ought to pay not only the costs relating to the remedying of the damage but also the costs incurred in avoiding pollution and “the full environmental costs which are immediately tangible. The principle also does not mean that the polluter can pollute and pay for it.”

The Court then went on to extend the principle of strict liability to one of absolute liability. Referring to the English case—*Ryland’s versus Fletcher* (1868) 3 HL 330—which was approved by the Supreme Court in *MC Mehta versus Union of India* (1987) 1 SCC 395, the Court held that the Rule, in *Ryland’s case*, which “evolved in the 19th century at a time when all the developments of science and technology had not taken place, cannot afford any guidance in evolving standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. In a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to be carried on as part of the developmental programme, the Court should not feel inhibited by this rule merely because the new law does not recognise the rule or strict and absolute liability in the case of an enterprise engaged in hazardous and dangerous activity. Law has to grow in order satisfy the needs of the fast changing society and keep abreast with the economic developments taking in the country. Law cannot afford to remain static. The Court cannot allow judicial thinking to be constricted by reference to the law as it prevails in England or in any other foreign country. Though the Court should be prepared to receive light from whatever source it comes but it has to build up its own jurisprudence. It has to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. If it is found that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, the Court should not hesitate to evolve such principle of liability because it has not been so done in England. An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results to anyone on account of an accident in the operation of such activity resulting, for example, in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident as a part of the social cost for carrying on such activity regardless of whether it is carried on carefully or not. Such liability is not subject to any of the exceptions which operate vis à vis the tortious principle of strict liability under the rule in *Rylands versus Fletcher*. If the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit, the law must presume that such permission is

conditional on the enterprise absorbing the cost of any accident arising on account of such activity as an appropriate item of its overheads.”

The “u” turn comes with the decisions of the Supreme Court in the same case reported in (2006) 3 Scale 311, (2007) 10 Scale 594, (2007) 11 Scale 75.

In the first of these cases the Supreme Court, acting in excess of jurisdiction, castigated social action groups for carrying out public demonstrations. Non-violent public demonstrations are constitutionally protected. There is no law, either in India or in any democratic country, which requires the public to remain silent on a case being taken up in Court. Moreover the parties demonstrating were not before the Court, there was no heaving of the matter and no notices were issued out before the Court made the order. The order bodes ill for functioning democracies. The Apex Court cannot just hold people in contempt and mete out punitive measures for expressing an opinion. The Court held “we are shocked to find notwithstanding the pendency [sic] of the matter before this Court, public demonstrations are being held and articles are being written on issues which form the subject matter of this dispute. If any person is found to be doing so he shall be prima facie held to have committed contempt of this Court and appropriate action shall be taken against him.”

The second decision, reported in (2007) 10 Scale 594, related to the allowing into India of the French warship *Clemenceau*. The battle ship, containing large quantities of toxic material, set sail for India in defiance of the provisions of the Basel Convention and the Hazardous Waste Rules, 1989. Fortunately for India, while the matter was pending in the Supreme Court, France decided to order the *Clemenceau* to return home and hence the Court was not required to decide the legal issues arising in the context of the *Clemenceau* case. But it was not long after that the *Blue Lady* case came to the Supreme Court and the legal questions came up for consideration once again.

The Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, popularly known as the Basel Convention, recognised the “increasing desire for the prohibition of transboundary movements of hazardous wastes and their disposal in other states, especially developing countries”, and was based on the conviction “that hazardous wastes and other wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the state where they were generated”. It recorded the awareness of the international community “of the need to reduce such movement to the minimum” particularly on account of “the limited capabilities of the developing countries to manage hazardous wastes.” Accordingly Article 4 requires the Government of India to ensure that the import of waste is reduced to a minimum. Illegal trafficking in hazardous waste is a criminal activity. Hazardous waste export is to be allowed only under clause 9 of Article 4 if the exporting state does not have the capacity or the facilities to dispose waste in an environmentally-sound manner.

Article 6 requires the exporting state to notify the importing state of the details of the hazardous waste and obtain its consent in writing, prior to beginning the transboundary movement. If the above provisions are not complied with, then the transboundary movement is considered illegal under Article 9 of the Convention and is therefore considered to be a criminal activity.

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There has also been a breach of the Hazardous Wastes (Management and Handling) Rules, 1989. Rule 14 requires the exporting country to apply 90 days in advance to the Government of India seeking permission for the proposed export and transboundary movement. Government of India is required to furnish a reply within a specified period. Under sub Rule 4 the exporter has to ensure “that no consignment is shipped prior to the requisite authentication being received.” If the shipment commences without permission, the transboundary movement is considered illegal under Rule 15 and is required to be taken back by the exporter.

The provisions and rules of the Basel Convention were brought to the notice of Supreme Court and it was argued by Mr. Sanjay Parikh, counsel for the petitioner, that the Convention, and the earlier Supreme Court orders, requires that full information by the exporting country and prior consent by the importing country be provided before the ship sets sail for India. In response, the Supreme Court held that “we find many practical difficulties in accepting the suggestions in fact the decontamination aspect has been taken care of in the report. The authorities in India can without the certificate at the stage of anchorage verify and come to a conclusion that if the ship is contaminated same is to be sent back.” With these observations, many binding provisions of the Basel Convention now came to mean nothing and transboundary movement could take place unimpeded. Ships, containing hazardous material, can drop anchor anywhere in India without any consent being required. According to the judgement the implication is that the exporting company may apply even after dropping anchor, and only if the Indian authorities reject permission can the ship be sent back. As we will currently show, in the Blue Lady case, the Supreme Court went a step backwards and even allowed beaching of the ship without government consent and thereafter permitted the dismantling of the ship in India due to the *fait accompli* caused by the beaching of the ship.

The third case, reported in (2007) 11 Scale 75, related to the Blue Lady, a ship that turned up in Indian waters without permission. The High Powered Committee, chaired by Prof. MGK Menon which was appointed by the Supreme Court by its order dated October 13, 1997, submitted a report where the members were divided in opinion.

The Supreme Court accepted the report of the Technical Experts Committee and referred to “state of the art mechanisms to regulate removal of asbestos!”. Court also accepted the report that the Blue Lady contained no radioactive material on board. The Court also accepted the recommendation that permission for dismantling be granted on the ground that it would “provide this country 41,000 metric tones of steel and would give employment to 700 workmen!” The Court based its decision on the legal principle of proportionality referred to in the keynote address by Lord Goldsmith, the Attorney General UK at a conference on *Global Constitutionalism* which finds mention in the *Stanford Law Review*, Vol. 59 at page 1155. Extracting the principle of proportionality, the Supreme Court of India has reduced it to the “concept of balance” and explained this as the balancing of “priorities of development on the one hand and environmental protection on the other hand.” The Court went on to explain the doctrine of proportionality in the following words: “Ship breaking is an industry. When we apply the principle of sustainable development, we need to keep in mind the concept of development on one hand and the concepts like generation of revenue, employment and public interest on

the other hand. This is where the principle of proportionality comes in.” Noting that there was extensive asbestos in various vessel components—like partitions, walls and ceilings—the Court understated the danger posed by asbestos and went on to say that: “85 percent of asbestos is in the form of ACM in panels which is reusable. Pollutants like asbestos to the extent of 20 percent can be almost eliminated.” The PCBs were to be “dumped in landfills.” In this manner the Court concluded that “the principle of sustainable development, based on the concept of balance, stands satisfied.” The report of the TEC was declared “foolproof!” The counsel argued that a ship can well be re-floated and sent back even after beaching. The Court retorted by saying that “it is not in dispute that the process of beaching is irreversible.”

The Chairman of the Committee, Prof. MGK Menon, wrote an anguished letter to the Chief Justice, saying “any effort to dilute the Supreme Court orders of October 14, 2003 to try to remove the concept of prior decontamination would be a measure going against the interests of workers of the ship breaking yards as also a violation of the Basel Convention. This will be a violation by both Malaysia and India who are signatories to the Convention.”

That beaching was irreversible was also, contrary to the Supreme Court’s observation, heavily disputed. Titan Salvage, a division of Crowley Maritime Company and one of the largest salvage companies operating in the world today, wrote a letter to the Prime Minister on September 19, 2007 requesting him to “review the Supreme Court’s conclusions” and stating that they had “the capability and expertise to re-float the vessel.”

The controversy, relating to the existence of radioactive material in the ship, was handled in the following way. The Gujarat Maritime Board, one of the principal wrongdoers, requested the Atomic Energy Regulatory Board (AERB) to inspect the ship. AERB deputed an officer. The Board, which was very anxious to clear the ship for breaking, also deputed two officers. The report makes interesting reading. They reached the ship at about 4 pm and took a considerable amount of time struggling to get on board by a rope ladder. They completed their inspection by 8 pm. The entire inspection took a maximum of four hours. The team “could locate some ionisation smoke detectors.” These were removed and it was verified that all twelve detectors were radioactive. Because the team “could not find any instructions for emergency response related with radioactive material” and also because it “could not find any radioactive warning symbol” the team concluded that the ship “now does not contain any radioactive material!” This was the manner in which the ship was ultimately cleared for dismantling exposing the workers to radioactive emissions which in all probability would result in their death by cancer.

Tom Haugen, a fire detection system installations expert, wrote a letter of protest to the Prime Minister dated September 19, 2007, in order to maintain the factual and legal integrity of the recent rulings made by the Indian Supreme Court. He introduced himself “as the person directly responsible as project manager for the installation of the fire detection and suppression systems currently aboard the ‘Blue Lady’”. He said he was writing because he was concerned that the “Court has unwittingly made this ruling based on inaccurate and even misleading evidence concerning the presence of radioactive material within the vessel’s fire detection and suppression systems.” He informed the Prime Minister that he had installed 1100 ion smoke detectors in various parts of the ship and that he had over 200 charts showing the exact locations of these

devices and “their radioactive components containing significant quantities of the radioactive element Americium 241 which is made from plutonium”. He further stated that this radioactive material “emits gamma rays, the most dangerous form of radiation. Gamma radiation passes straight through human skin and causes the eventual destruction of DNA within human cells and increases the risk of developing cancer”. He said that it was “impossible” to avoid exposure to this radioactive material while breaking the Blue Lady unless the removal is supervised by “accredited expert technicians”. He characterised the report of the AERB and the Gujarat Maritime Board as “grossly wrong”. He pointed out that these devices were “typically buried out of sight and virtually completely hidden.” It is important to record that the AERB and the Gujarat Maritime Board completed the entire exercise in four hours and concluded that the ship was free of radioactive devices only because they could not find any direct evidence of the same! Mr. Haugen concluded that “it would be a travesty of Indian and international law for a ruling to be enforced and then profited from if that ruling was based on incomplete or even misleading evidence.”

It appears that the Supreme Court accepted the report of the TEC which was signed only by its Chairman, Prodipto Ghosh. It is now known that one of the Committee’s members, Dr. Virendra Misra, disagreed with the findings and was of the view that the “presence of radioactive materials should be ascertained well in advance. Though it is mentioned in the report that radioactive material is not available, in my opinion there is possibility of the presence of radioactive materials due to existence of liquid level indicators and smoke detectors on the ship.”

The presence of large quantities of asbestos was dealt with by the Supreme Court in a cursory manner. The Parliamentary Committee noted that the ship contained an estimated 1,240 metric tonnes of asbestos cement material (ACM) and about 10 metric tonnes of PCBs as part of its structures. The Government sought to get around this concern by saying that the vessel did not contain a single kilogram of asbestos or ACMs as cargo! Why would any ship coming to India for dismantling contain cargo in the first place! It was also argued by the counsel that the ACM panels could be safely removed and re-used and that safe use of asbestos is possible in India.

In this regard it may be useful to refer to the decision of the WTO Appellate Body in the context of the 1997 ban by France on the import of all asbestos and fibres and products. Canada, one of the largest producers and exporters of Chrysotile asbestos, objected to this, claiming that certain forms of asbestos and asbestos cement products were safe. The WTO panel took a decision in favour of France. Canada appealed to the Appellate Authority WTO and the European Community Cross Appeal. The Appellate Authority upheld the panel’s decision concluding that the safe use of asbestos “is impossible. Some people may continue to be exposed, unknowingly, to relatively high levels of fibres during installation, maintenance or removal/disposal of products containing asbestos. Given the extremely large numbers of persons concerned, the difficulty of assessing the risk, the complexity of individual and collective protection systems and their negative effect on dexterity, the need to use special equipment and the overall cost engendered by the requisite arrangements mean that asbestos containing materials cannot viably be used in a manner that will protect workers health. The indeterminate risks are incurred over a very wide spectrum of occupations where workers

come into contact with asbestos in many ways, in particular in the servicing and maintenance operations for which safe use is not a practicable option. When asbestos cement is used it is usually sanded, crushed or sawn thus releasing its carcinogenic fibres into the environment in the form of gas.” When asbestos cements are cut it “entails exposure of asbestos fibres between 7 and 12 times in excess of maximum limit, whereas manual tools without dust collection entails exposure 20 times in excess of that limit. Safe use is not a practicable option. The worst affected are plumbers, carpenters and electricians.”

The order, though cryptic, is replete with errors. To speak of state of the art equipment to remove asbestos products at Alang is ridiculous. Numerous reports, including reports made by the Delhi-based NGO Toxic Links and Greenpeace, showed with photographic evidence the plight of workers at the Alang ship breaking yard. The workers had no helmets, no shoes, no safety equipment, no breathing apparatuses and masks, no safe drinking water, no medical care and lived in houses which were worse than slums.

In circumstances such as these, to uncritically accept the empty promise of contractors saying they would use state of the art equipment is to do great disservice to the workmen for whose benefit the ships had been brought in.

The second error lay in the Court misreading and misunderstanding the speech of Lord Goldsmith on the proportionality test. The speech operates entirely against the ship breakers but it appears that the Supreme Court has completely misread what the speech intended to convey. Lord Goldsmith begins his speech on proportionality by saying that, under the European Convention on Human Rights, “some rights are absolute”. They are so fundamental that there can be no compromise on them. He made all of his comments in the context of criminal law and though he did mention the word “balance”, he immediately offered the clarification that in matters relating to right to life, as in torture, there can be no compromise at all i.e., there can be no balancing act! In other words one cannot compromise on torture by referring to any other requirement of the state. The Supreme Court takes these comments totally out of context. Can it be said that the occupational health and safety of workers and the threat to their lives when they work on asbestos and other hazardous materials is to be balanced against other developmental factors such as the import of 41,000 metric tones of steel and the providing of jobs to 700 workmen? Is it not, in fact, the other way round: that the health and safety of workers is non-negotiable and that workers must be made to work in a work environment that is absolutely safe. Why should the safety of workers be compromised for the illusory promise of 700 jobs? Even if these jobs are provided, the workers will probably be so ill at the end of the dismantling of the ship that their lives will be irreversibly affected thereafter. Why has India become so enslave to the developmental model that it will agree to be dumping ground for the West and it will accept the most hazardous and dangerous work in the guise of providing employment to workers?

If the Basel Convention mandates that export of hazardous wastes should only be done if the exporting country demonstrates that it does not have the capacity to dispose waste in a proper manner, then why should India accept hazardous waste from the developed world? Is it good enough to say that workers will get employment and India will get more steel? In the author’s

view no balancing act should be performed either by the Government or by the judiciary and a strict and absolute standard should be adopted by the Courts so that Indian workers do not land up doing other people's dirty work that would severely jeopardise their own lives.

Commercialising forests⁴

In a series of cases the Supreme Court emphasised the proposition that non-forest activities cannot take place in a forest area. Even in cases where the Central Government had granted permission for non-forest activity in forest areas in accordance with the provisions of section 2 of the Forest Conservation Act, 1980, the Supreme Court has set aside the permissions granted and has emphasised the need to stop non-forest activity in forest areas.

In *TN Godavarman Thirumulpad versus Union of India and others*, (2006) 1 SCC 1, the Supreme Court signals a U-turn, commercialising forests and making their destruction possible on the payment of money and the promise that afforestation would be done elsewhere.

Although the judgement is capable of a milder interpretation, namely that the Supreme Court only spoke of payment to be made when non-forest activity was absolutely necessary and in public interest, subsequent developments show that this decision was used to make the Supreme Court a sort of single window clearance point for all kinds of applications by parties seeking permission to cut forests. Instead of being a monitor, the Court has become a granter of permissions for non-forest use. Private parties are listened to. Those who want to cut the forests are listened to. Government counsels, who are not always very eager to protect forests, are listened to, but the tribals are not. Those who have the health of the forests closest to their hearts are characterised as encroachers and forcibly evicted. Henceforth foreign tourists and others will have access to forest areas but the tribals, who alone can protect these areas and who cannot live anywhere other than in a forest, will be seen as the enemies of the forests, and by some strange and perverse logic, will be thrown out. Throwing them out is necessary, nay imperative, because it is they who protest against the building of huge mega projects destroying the forests and it is they who are opposed to the multinational and Indian mining companies who seek to destroy forests for the minerals lying under the earth. The World Bank has always advocated that forests be seen as money-spinners. Now the Court has fallen prey to this ideology. This judgement therefore marks a clear shift in the thinking of the Supreme Court on forest conservation.

The Supreme Court introduced the notion of the net present value of forest lands were to be diverted for non-forest use; all this in the face of "the decline in environment quality due to increasing pollution, loss of vegetal cover and biological diversity." The Court also noticed data produced by the Central Government showing that as on March 20, 2001 there was a shortfall to the extent of 36 percent of total afforestation—i.e., persons got permission to cut forests on a promise of afforestation and later defaulted. This figure is probably a gross underestimate, but even as it stands it is alarming. The Court also noticed, again on perusal of Central Government data, that only half the funds released by the states in connection with afforestation had actually

⁴ *TN Godavarman Thirumulpad Versus Union of India and Others* (2006) 1 SCC 1

been used. The shortfall in expenditure for afforestation was nearly 200 acres. “Despite various environmental laws enacted between 1974–1986” says the Supreme Court, “depletion of forests has not halted.” Referring to the State of Forest Report 1995 and 1997 published by the Forest Survey of India, the Supreme Court noticed that there has been “considerable depletion of forests cover” and also “limited regeneration.” Within two years India lost 5,482 km² of forests and 17,777 km² of dense forest cover. The Twelfth Finance Commission (2005-10) noted, “the felling of trees is far in excess of what would be justified with reference to regeneration”.

Afforestation has always been a joke, not only in India but also in other developing countries. It is a flimsy excuse to cut the trees. A careful audit in India of areas where afforestation is said to have been done will show that the failure rate would be as high as 80 percent and above. This estimate is based on the verbal opinion of tribal organisations in the country. They should know!

Oblivious of this, the Supreme Court powers on. A detailed exercise is entered in to calculate how much ought to be charged per hectare for the trees cut. It was decided that the rate would range from Rs 5.80 lacs per hectare to Rs 9.20 lacs per hectare depending on the quality and density of land. This was utterly shocking news for any tribal who knows that a single tree can cost upto Rs 50,000. And now for a hectare of dense forest the price would be only Rs 9.2 lacs!

The funds generated from the cutting of trees are to be used, inter alia, for the “protection of forests!” The large public sector undertakings and power companies “which frequently require forest lands for their projects”, i.e. the main destroyers of the Indian forests, were to be “involved in undertaking compensatory afforestation!” And, dear me, the private sector user agencies were to be “involved in monitoring afforestation!” Of course it is recognised in passing that “plantations raised under the compensatory scheme could never adequately compensate for the loss of natural forests as the plantations require more time to mature and even then they are a poor substitute to natural forests.”

Interestingly, there is a reference to a format issued by the World Bank for the calculation of NPV. That format was not relied upon, it is true, but the entire trend of the decision indicates that the commercialisation of forests is indeed part of a World Bank scheme. Whereas earlier forests were considered part of the ecosystem and were to be disturbed as little as possible, preferably not at all, they are now described in the judgement as a “public project”. Phrases such as—“cost incurred”, “cash inflow/outflow”, “levelising future expenditures and benefits”, “time value of money”, “rate of discount”, “gestation period”, “ratio of deflators to the GDP”, “theory of value”, “total economic value”, “use values”, and “optional values”—are now in use.

Calculations are then made for hydroelectric projects and dams. Though earlier intrusions into forests were frowned upon, now the Supreme Court is open to “construction of dams and reservoirs, mining and industrial development should at least provide in their investment budget, funds for regeneration/compensatory afforestation.”

The judgement goes on and on. Detailed calculations are made for areas rich in major minerals and separate calculations for areas containing minor minerals. The values of different types of forests were calculated. The value of grass in a park was calculated.

On the orders of the Court, the Compensatory Afforestation Fund Management and Planning Authority (CAMPA) was set up by the Central Government consisting of government officials and three environmentalists. Strangely however, the Supreme Court prohibited the Comptroller and Auditor General from investigating accounts on the grounds that he had no jurisdiction to do so.

As one reads the judgement it becomes clear that doors are being opened for tourism, five-star hotels and other non-forest activity in forest areas. Reading between the lines one can see that those who wish to commercially exploit pristine forest areas will be required to pay according to the beauty and the wildlife and the forests in that area. Therefore the judgement calls for “the need to carry out a bio diversity evaluation”. It is recommended that, for developing countries, “it is important to evolve methods of management that enable self-financing mechanisms”. For this it is said that “the bio-diversity value for which a market exist [sic] must be taken note of!” In simple language this means that the government must now sell the bio diversity value of its forests. Tourism is mentioned repeatedly. We are advised “to take note of the nature of the market demand by tourists for different aspects of bio diversity”. It is further proposed to have “market-linked values of tourism.” “High income tourists” are to be welcomed. “It becomes necessary”, says the Supreme Court, “for economic development to use the forests for the non-forest purposes [sic]”. This is the thrust of the judgement.

By contrast, the tribals have a different perspective and perhaps the Supreme Court could well learn from the indigenous people of India. They know and if they have any religion it is this: that the forests and the sky and the air and the water and all that lies beneath the earth, is God itself. It is not to be bought or sold. It is not to be bartered. It is not to be calculated in terms of money. It should never be harmed. Human beings must exist in harmony with nature. Such a perspective is in complete disharmony with the “globalised” perspective of the Supreme Court that, like the infamous World Bank, has now begun to see forests in terms of profit, hydroelectric projects, mining for minerals and revenue from tourists. The tribals know that the best way to manage the forest is to leave it alone; they do not need to learn forest management skills from persons who have never been in a forest and cannot identify trees, or from urban dwellers who cannot understand what it means to live in harmony with nature. They do not need to read the books cited by the Supreme Court in this judgement written by foreign professors on forest management. If the judges were to come to the forests and sit with tribal elders they would learn all that is necessary to know in a day. They would understand, most of all, that human lives and forests are not to be seen in the context of profiteering.

CAMPA is referred to as the body that will, through fund raising, ensure that the interests of future generations are well protected. Unfortunately, nothing could be further away from the truth and the Public Trust Doctrine. Future generations would prefer to have forests untouched if they are to have forests at all. They would certainly not prefer money over forests.

After this judgement a large number of applications began to flood the Supreme Court. All these applicants sought to destroy the forest for commercial gain. The orders of the Supreme Court do not tell the true story because they are cryptic and often do not contain any reasons. A sampling of the orders will show how devastating the new system of clearances by the judiciary is turning out to be. In a few months of 2006, a 4 km power transmission line in the Chambal – Gariyal sanctuary (2006 7 Scale 125), a water sport complex at the Tighra Dam, Gwalior (2006 5 Scale 347), an army road in a sanctuary (2006 5 Scale 498), a power station in a reserved forest in Arunachal Pradesh (2006 5 Scale 498) and a railway line cutting into 13 hectares of forest land in a national wildlife sanctuary (2006 1 Scale 45) were cleared by the Supreme Court. In the same year about a hectare of forest in a deer wildlife sanctuary was de-reserved (2006 7 Scale 497). Most damaging, in 2006, were the permissions granted for Temporary Working Permits for mines. Not only were they allowed on a large scale, violations were permitted to be regularised and a system of fast-track clearances was allowed. (2006 5 Scale 555, 557). The earlier orders, for the closure of the mines, were revoked and mining was allowed to continue on an unprecedented scale (2006 1 Scale 45). In the same year it was pointed out to the Supreme Court, somewhat ominously, that the net asset value payments were not being made (2006 7 Scale 552). Similarly, licences for saw mills were cleared. (2007 9 Scale 268). A railway line was cleared to pass through the Central Ridge, Delhi (2008 1 Scale 325) and mining in Goa was cleared (2008 1 Scale 329). Likewise, in 2008, a diamond mining project was cleared by the Supreme Court in the Panna National Park (2008 11 Scale 428) and a hydroelectric project, requiring the cutting of hundreds of trees in the Nilgiris, was also sanctioned by the Supreme Court (2008 11 Scale 429). 42 hectares of forest land were allowed to be cleared for the setting up of a wind power project; 137 hectares of forest land were given to the Orissa Mining Corporation for coal mining; proposals for using 264 hectares of forest land for iron ore mining in the Bellary district of Karnataka were sanctioned; 883 hectares of forest land were given for the Bhilai Steel Plant; and about 150 hectares of forest land for bauxite mining in Andhra Pradesh came in for fresh consideration.

Things then became worse. In the order reported in 2008 (6) Scale 499, the Supreme Court laid down an unheard proposition of in environmental law—“the economic development shall be at the cost of complete degradation of the forest”. Thus now the legal standard was watered down to such an extent that development could take place in forest areas. Then shockingly the Supreme Court permitted non-forest activity even in national parks and sanctuaries by enhancing the payment to be made in such cases. The Lower Subhanshri Dam Project mining leases and field firing ranges were also cleared on concessional payment or no payment at all. The laying of underground optical fibre cables and pipelines, for underground gas transportation in forest areas, were made exempt from payments.

The urban jungle⁵

The TN godavarman Thirumulpad Versus Union of India and Others (2006) 13 SCC 689 case related to the development of an international hotel complex on 315 hectares of land situated

5 TN Godavarman Thirumulpad Versus Union of India and Others (2006) 13 SCC 689

in the Vasant Kunj area of Delhi. The Supreme Court allowed the complex to come up despite the following observations: “in hindsight it is evident that the location of large commercial complexes in this area was environmentally unsound”. Moreover, the Delhi Development Authority (DDA) “all through gave an impression to the parties participating in the auction that all requisite clearances have been obtained, though it does not appear to be so [sic].” Although the Supreme Court referred to the documents put on record by public interest parties showing that the “area is lake studded covering over 1000 acres and is the natural extension of a notified reserved forest” and despite the observation of the Court that “the city of Delhi is already highly congested and has been rated by the World Health Organisation as the fourth most polluted city”, the Court nevertheless allowed the construction to come up. The Court took notice of an expert committee report which pointed out that it was absolutely imperative that no construction be allowed in this area, as it was “a zone of groundwater recharge.” The Committee said that the proposed construction was not in accordance with the Master Plan and had begun without any assessment of the environmental impact. Similarly a report given by the Environmental Pollution (Prevention and Control) Authority, chaired by Shri Burelal, stated that “the entire parcel of land should be developed as green [because] there has been a clear violation of the norms”.

Written submissions made by Mr. Sanjay Parikh and Mr. Prashant Bhushan, advocates for the Citizens for the Preservation of Quarries and Lakes Wilderness (CPQLW) and the Ridge Bachao Andolan respectively, made interesting reading. They reminded the Court that it was undisputed that the entire 315 hectares constituted the ridge and the forest and that it was improper for the contending parties to say that only 92 hectares formed part of the ridge. They also reminded the Supreme Court that the Geological Survey of India had submitted a report on July 15, 1997 declaring 640 hectares as part of the ridge. Later, under the orders of the Supreme Court, an enquiry came to be conducted by the Environment Protection Control Authority (EPCA), commonly known as “Bhure Lal Committee”. This Committee found the entire 315 hectares as ridge, forest and groundwater recharge area. It was pointed out to the Court that the Central Groundwater Board had reported that quartzite fracture lain area recharged upto 85 percent of the rainfall and that development would adversely affect this, to quote the home minister, “priceless water recharge area – a water sanctuary”. They traced the manner in which builders had bulldozed the project through. Illegalities continued even after the Central Empowered Committee, appointed by the Supreme Court, had directed on March 26, 2004 that no felling of trees or construction activities would be allowed. The Supreme Court, by its order dated March 20, 2006, offered the clarification that “it is made clear that even if any construction has been made that will be subject to the results of the petition. But no third party right shall be created until further orders. If third party rights have already been created, they shall not be permitted to be worked out without leave of this Court.”

Environmental organisations anticipated a huge water problem being caused by the construction of many hotels in the ridge area. The Jal Board had stated that they could not make a commitment to supply drinking water, and water for non-drinking use, to Vasant Kunj malls. Similarly permission to sink tubewells was problematic as it could drain the groundwater table. Thus it was clear that the hotel complex had come up in a forest area which was ecologically sensitive

by carrying out the massive felling of trees and by sinking tubewells that drained and depleted the water table.

The reasoning of the Court, in allowing massive constructions to come up was utterly incomprehensible. The Court noted that the parties had made “huge investments”. The answer to this reasoning is simple. Construction in an ecologically sensitive area had to be stopped. For this the DDA, which had misled the parties into believing that all the sanctions had been granted, would have had to compensate the parties for the investments they had made and the losses they had incurred. It is shocking to note that the constructions coming up are likely to completely deplete the groundwater resource in the area and have adverse repercussions far outside the region of construction.

Had the Court been sensitive to environmental protection, most public and private bodies would have been alerted to the fact that rules cannot be flouted with impunity. No such instance would have been repeated in the future. Now the signal sent out is that one can flout laws in utter disregard of the law, if the matter goes to Court feign ignorance and then show the Court photographs of the completed construction work. The observations in the judgement indicate that the parties were quite ignorant of the rule position and had been misled by the DDA. The Court seems to have accepted this argument much too credulously. Courts routinely tell poor individuals that ignorance of the law is no excuse. Yet, when it comes to international chains of hotels with large legal departments, we are expected to believe that they had invested large sums of money without investigating whether the construction work was legal.

This is what “sustainable development” has come to mean. It has now become a magic mantra whereby the Court pays lip service to the grand old principles of environmental law laid down in the eighties and nineties but insidiously allows all kinds of horrendous commercial constructions to come up and destroy the environment.

In *MI Builders Pvt. Ltd. versus Radhey Shyam Sahu and Others* (1999) 6 SCC 464, an underground shopping complex had been constructed on a public park with the permission of the Lucknow Municipal Corporation. The Supreme Court held “unauthorised construction, if it is illegal and cannot be compounded, has to be demolished”. Despite the Builder “investing considerable amount on construction which is 80 percent complete and by any standard a first class construction,” the Supreme Court ordered the “dismantling of the whole structure and the restoration of the park to its original condition”. The “primary concern of the Court is environmental conditions in the area”. The Court directed an enquiry “as to how an unauthorised construction came about and to bring the offenders to book”.

The difference between the 999 judgement, in *MI Builder’s* case, and the 2006 judgement mentioned above is not a change in law because the law has remained exactly the same, but the impact of the ideology of globalisation on some sections of the judiciary who feel that issues of environmental protection impede growth and development.

One thing is certain: the next generation will not forgive us.

Coastal areas⁶

In this case, the public interest petitioner protested against the destruction of the sand dunes of Goa by the numerous hotels that had come near the beaches and which had led to “irreversible ecological damage” to the environment in coastal areas. The reply of the respondents was that any corrective measures would hamper and the development of the state bring it “to a grinding halt”. The Supreme Court accepted the stand of the private parties and the government and dismissed the appeal.

Mining in tribal areas⁷

This case concerned a one million tonne per annum capacity aluminium refinery with captive power plants set up by Vedanta Aluminium Ltd. at Lanjigarh, District Kalahandi, Orissa together with a bauxite mining project at Niyamgiri Hills.

The project required the diversion of about 59 hectares of forest land for the refinery, 672 hectares of land for mining, 30,000 m³. of water to be drawn from the river Tel and the minimum displacement of 102 families.

The project was opposed by Shri Biswajit Mohanty of the Wildlife Society of Orissa, Shri Prafulla Samantara and the Academy of Mountain Environics.

According to them the project would require the destruction of thick forest. They claimed that the project, which was a single integrated project, was shown as two separate projects—one for refining and the second for mining. The Ministry of Environment and Forests was aware that Vedanta wanted to mine in the Niyamgiri Hills and yet proceeded to grant clearance for the refinery without reference to the mining. Even without waiting for permission from the government, the construction of the Aluminium Refinery was begun.

The Niyamgiri forest was rich in wildlife and had elephants, sambhars, leopards, tigers, barking deer and various species of birds. It was declared a reserve by the former Maharaja of Kalahandi. In the working plan, the government proposed to notify it as a wildlife sanctuary. The government had already declared it to be an elephant reserve. Various varieties of sugarcane are found here, which are valuable genetic sources for future hybrids. It is necessary to preserve them to maintain a pure gene bank. The forests have more than 300 species of plants and trees including 50 species of medicinal plants. Six such species are listed in the IUCN Red Data Book.

There is an intimate relationship between the flat top bauxite mountains and the perennial flow of water. This is because the bauxite is porous and has a high capacity of water retention. The mining of bauxite would destroy the entire system of perennial springs.

The project envisaged the drawing of a considerable quantity of water from the Tel River which is an important source of water for irrigation and drinking for lakhs of people of Bolangir district downstream. It is basically a dry river with very little water flow. The drawing of water for the project would deprive people of water both for drinking and for irrigation.

⁶ Goa Foundation, *Goa Versus Diksha Holdings Pvt. Ltd. and Others* (2001) 2 SCC 97

⁷ TN Godavarman Thirumulpad *Versus Union of India and Others* (2007) 13 Scale 430

Activists pointed out that the employees of Vedanta had assaulted the tribals. Even though the National Relief and Rehabilitation Policy required that land-for-land should be given after consultation with the people, only cash was offered in lieu of land, which was not acceptable. Moreover, the Kondh tribe, living in the area, is illiterate and is dependent completely on agricultural land and forest for its subsistence. They were vehemently opposed to eviction. The tribals also have a deep spiritual and cultural attachment to their lands. In the face of resistance, the District Collector and the Vedanta officials launched a collaborative assault on the tribals to create an atmosphere of fear. The tribals were effectively prisoners on their own land. Apart from the tribals, the Dalits of Bandha Gunda and Rengo Pali villages were pushed out without acquisition notices or payment of compensation. Encroachment cases were filed against the tribals. They were evicted by force without verifying that they were in fact in possession of land and entitled to due process. The highly endangered primitive tribe, called the Dongaria Kandha which worships the hilltop, was similarly evicted.

Vedanta began creating Red Mud Ponds and Ash Ponds on the banks of the river Vamsdhara, thus polluting the river with toxic alkaline chemicals and heavy metals including radioactive elements. These would leach into the ground water as the overburden from the mining would likewise flow into the streams and pollute them, destroying the habitat of many unique species and wild animals using the water sources for drinking.

The State Government supported Vedanta fully. The grievances of the tribals did not appear to be of any concern at all. In an interesting admission—that the work was illegal—the state government told the CEC that “when a major project is set up, some industries do resort to undertaking parallel activities at their risk and cost. The State Government has not accorded any express permission to undertake any activity on non-forest land. At the same time it is to be appreciated that under the present legal arrangement, there is no scope for the State Government to stop the work undertaken by the project authorities on the non-forest land at their own risk.”

The Central Empowered Committee, appointed by the Supreme Court, in turn appointed a fact-finding team. The team made a report finding that Vedanta had constructed on 59 hectares of forestlands without getting clearance under the Forest (Conservation) Act, 1980. The mines, and the refinery, cannot be treated as two separate projects. The rehabilitation package was not in the interest of the sustainable livelihood of local communities as no land was given for agriculture or grazing. Mining would destroy biodiversity, affect the availability of water and would pollute the river. The bauxite mines would adversely affect the Karlapat Elephant Sanctuary. In the circumstances the team concluded that alternative sources of ore should be explored.

Dams and displacement⁸

The Tehri Dam case saw the clearance by the Supreme Court of an environmentally destructive mega project at Tehri, Uttarakhand which irreversibly damaged the environment of the entire

8 ND Jayal *Versus* Union of India 2004 9 SCC 362;
Kishore Upadhyaya *versus* State of Uttarakhand (PIL 683 of 2005) Uttarkhand High Court;
Special Leave Petition (Civil) No. 22895 of 2005 pending in the Supreme Court

state, took away scarce water resources from the inhabitants of the hills so that the sacred water of the Ganga could be sent to flush the toilets in Delhi, created instability and the sinking of hundreds of villages, caused the displacement of over 90,000 families and caused adverse climate change in the entire area.

Judges hearing such kind of projects yield enormous power. If they use this power wisely in favour of the people and going by the precautionary principle in environmental matters, they have the power to stop the damage to the earth and its people that these massive projects invariably cause. If they are however, overawed by the economic benefits flowing to the urban areas that expropriate the waters of the rural areas as if it is a birth right to do so, then they are responsible for allowing the destruction of the earth and the pauperisation of its people.

The fundamental mistake made in this decision lies in allowing the project to proceed and construction work to be done on the basis of empty assurances repeatedly made by the authorities that the environmental protection measures would be undertaken and rehabilitation done. After the court accepts these empty assurances the general experience has been that the project work continues in utter disregard of these assurances and the court orders. When the petitioners are subsequently filed bringing to the court's notice the breach of the assurances, the courts are generally loath to take any action mainly because by the time the petitioners are heard a substantial amount of money has already been spent. This is the tragedy of environment litigation in this country. Sound and fury, grand principles enunciated, sweeping assurances given and recorded but nothing done.

Environmental clearance rejected

The Tehri Dam was a joint project of the (then) USSR and India it ran into trouble right at the beginning. As a result of public agitation and protest from the people of Garhwal region to the project for construction of the dam, in March 1980, the then Prime Minister of India intervened and directed an in-depth review of the project by an expert group constituted by the Ministry of Science and Technology. The technical group submitted its report in 1986 and recommended abandonment of the project despite expenditure already incurred in the sum of Rs 2006 crores. The Environmental Appraisal Committee (EAC) which is an expert body within the Ministry of Environment and Forests recorded a unanimous conclusion that the Tehri Project did not merit environmental clearance and should be dropped. It was in February 1990 that EAC in the Ministry of Environment and Forests came to the conclusion that taking into consideration the risks and hazards involving ecological and social impact with huge cost and less benefits, the dam project does not merit environmental clearance. The exact words of EAC are as under:

“Therefore, taking into consideration the geological seismic setting, risks and hazards and ecological and social impact accompanying the project, the cost-benefit expected and after a careful examination of the information and data available, the Committee has come to the unanimous conclusion that the Tehri Dam Project, as proposed, should not be taken up as it does not merit environmental clearance.”

Nevertheless the project was allowed to continue. Being aggrieved by the major defaults in rehabilitation of the people writ petition came to be filed in the Supreme Court⁹ where

9 Tehri Bandh Virodhi Sangarsh versus State of UP & Others (1992 Supp. 1 SCC 44)

a public interest body alleged that the safety aspects had not been taken into consideration while constructing the dam and that the project posed a “threat to the life, ecology and the environment of the entire northern India as the site of the dam is prone to earthquake.” This petition was rejected.

The Ministry of Environment and Forests with the conditions on which environmental clearance was given. The respondent Corporation was directed to submit comprehensive environmental plan for effective implementation failing which remedial or prohibitive action under the Act of 1986 was proposed.

On 5.1.1991 the petitioner gave a notice under Section 19-B of the Act to the Secretary of the Ministry of Environment and Forests stating that as the result of non-fulfilment of condition of clearance of the project work. Significantly, after service of this notice on 21.10.1991 an earthquake measuring 6.1 on the Richter Scale hit Garhwal region causing massive damage to Uttarakhand and Chamoli villages killing 2000 people. Damage was also caused to constructions for dam already made and Tehri town itself. The Power Ministry, however, maintained that half-finished dam works were not damaged.

The Ministry of Environment and Forests wrote a letter on 12.4.1991 expressing dissatisfaction on failure to comply with the conditions on which environmental clearance was given. The respondent Corporation was directed to submit comprehensive environmental plan for effective implementation failing which remedial or prohibitive action under the Act of 1986 was proposed.

On 5.1.1991 the petitioner gave a notice under Section 19-B of the Act to the Secretary of the Ministry of Environment and Forests stating that as the result of non fulfilment of condition of clearance of the project work. Significantly, after service of this notice on 21.10.1991 an earthquake measuring 6.1 on the Richter Scale hit Garhwal region causing massive damage to Uttarkashi and Chamoli villages killing 2000 people. Damage was also caused to constructions for dam already made and Tehri town itself. The Power Ministry, however, maintained that half-finished dam works were not damaged.

Petition in the Supreme Court

A petition then came to be filed in the Supreme Court¹⁰. Brushing aside the objections to the project in a sweeping and cursory fashion the Supreme Court held that “when two or more options are possible and the government takes a policy decision it is then not a function of the court to re-examine the matter... it is for the government to decide how to do its job...the benefits which have been reaped by the people all over India with the construction of the dam are too well known and, therefore, the government cannot be faulted for deciding to construct the high dam”.¹¹

After the construction on the dam began, in October 1994 the MoEF noticed “the status of implementation of various safeguard measures is lagging far behind.”¹² In April 1991 another letter was sent by the MoEF “noticing the failure to comply with the conditional environmental

10 ND Jayal versus Union of India (2004 9 SCC 362 at page 374)

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clearances and pointed out total dissatisfaction on the compliance”.¹³ In September 1991, a stopwatch notice was sent by MoEF. The work commenced quickly thereafter on the basis of assurances given by the Tehri Hydro Development Corporation (THDC). That is how the matter came to Court.

Noticing that over 100 villages were likely to be affected the Supreme Court held as under:

“The construction of the Tehri and Koteshwar Dams will result in the formation of two lakes having a spread of 42 sq km and 2.65 sq. km respectively at full reservoir levels. The Tehri Dam will submerge Tehri two and 22 villages. Another 74 villages will be partially affected. A major portion will get affected in the first phase with the construction of the cofferdam and the remaining by final impoundment. In addition, 2 villages fully and 14 villages partially will be affected by the Koteshwar Dam. By the construction of New Tehri town project works and colony construction will affect another 13 villages. In total, the Tehri Power Project will affect 37 villages fully, 88 villages partially and Tehri town. Rehabilitation of these much-affected people is the main issue before us.

Rehabilitation is not only about providing just food, clothes or shelter. It is also about extending support to rebuild livelihood by ensuring necessary amenities of life. Rehabilitation of the oustees is a logical corollary of Article 21. *The oustees should be in a better position to lead a decent life and earn livelihood in the rehabilitated locations.* Thus observed this Court in Narmada Bachao Andolan case. The overarching projected benefits from the dam should not be counted as an alibi to deprive the fundamental rights of oustees. *They should be rehabilitated as soon as they are uprooted. And none of them should be allowed to wait for rehabilitation. Rehabilitation should take place before six months of submergence.* Such a time-limit was fixed this Court in BD Sharma versus Union of India and this was reiterated in Narmada. This *prior rehabilitation* will create a sense of confidence among the outstees and they will be in a better position to start their life by acclimatising themselves with the new environment.

The rehabilitation package is prepared. It is also made clear that the rehabilitation conditions in this case are also applicable to the oustees of the Koteshwar Dam as well as those living on the rim of the reservoir and to all those who are likely to be affected by the project. The authorities concerned *will have to take proper steps to rehabilitate all those who are entitled to rehabilitation before six months of the impoundment. Without the completion of rehabilitation there shall not be any impoundment.*

It is made clear that the condition of *pari passu* implementation of conditions prior to the commissioning of the project shall be closely monitored under the existing mechanism set up by MoEF and the project authorities will ensure that prior to closing of diversion tunnels T-1/T-2 for impoundment of the reservoir, evacuation, *resettlement and rehabilitation are completed in all respects.* In addition, the catchment area treatment of direct-draining areas shall be completed and the project authority will obtain clearance from MoEF before closing the outlet at EL 700 m. An additional affidavit

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has also been filed on behalf of the Union of India to the effect that a high-level Inter-Ministerial Review Committee would be constituted consisting of Secretaries of all the Ministries concerned of the Central Government to examine various aspect and closely monitor the same. *It is only after the completion of these conditions, impoundment would start.* This categorical statement made by the respondents should assure the petitioners that no impoundment would be allowed until all the conditions in the environmental clearance certificate of the Tehri Dam dated 19.7.1990 are complied with and stand fulfilled.

The order also emphasises the compensation in terms of cash was to be provided due to the submergence of the land and houses of the people and that alternative land to be given to them.

Justice Dharmadhikari's powerful dissent

Justice DM Dharmadhikari made a powerful dissent.

“The Tehri Dam Project is in the valley of Himalayas. The dam project would involve ousting of thousands of poor villagers and farmers living in the valley. Old Tehri Town would be under submergence. New Tehri Town has been raised and is being developed. The basic environmental issues are saving the flora and fauna that is abounding in the region. The other aspect is of danger to the upstream and downstream human population because Tehri Dam area and surrounding Uttarkashi area had already suffered successive earthquakes at short intervals and the area is known to be seismically unstable. It is held by the experts as earthquake-prone. The project will also destroy and has already destroyed forest tracks to a large extent. Along the river deforestation has endangered the river itself and after impounding of water there would be large-scale erosion of riverbank. When such projects are undertaken, there are competing claims of technocrats and engineers eager to put the country on the path of development and environmentalists who see a serious danger to ecology and environment. There are the two conflicting claims and aspects which need court's intervention for a balanced approach and consequential remedial action. The problem before the country with more and more dam projects being undertaken is how to make use of natural resources for improving human health, welfare and comfort without depleting or damaging them over a foreseeable period of time. A strategy for conserving or resource effective use of non-renewable resources is the imperative demand of modern times.

By river valley dam projects there are adverse upstream impacts and downstream impacts on environment. The upstream environmental and ecological impacts of big dams are:

- (1) soil erosion, (2) microclimatic changes (3) loss of forests, flora and fauna (4) changes in fisheries, especially on spawning grounds (5) chain effects on catchment area due to construction and displacement etc. (6) landslips, siltation and sedimentation (7) breeding of vectors in the reservoir and increase in related diseases (8) seismicity (9) loss of non-forest land (10) waterlogging around reservoir and (11) growth of weeds.

The downstream environmental impacts of the large dams are:

waterlogging and salinity (2) microclimatic changes (3) reduced water flow and deposition in river, with related impacts on aquatic ecosystem, flora and fauna (4) flash floods (5) loss of land fertility along with river and (6) vector-breeding and increase in related diseases.

There are economic costs as well as social costs and environmental costs involved in a project of construction of a large dam. The social cost is also too heavy. It results in widespread displacement of local people from their ancestral habitat and loss of their traditional occupations. The displacement of economically weaker sections of the society and tribals, is the most serious aspect of displacement from the point of view of uprooting them from their natural surroundings. Absence of these surroundings in the new settlement colonies shatters their social, cultural and physical links.

The poor and the marginalised group in carrying out of a dam project suffer the most because the natural resources – base of their survival – are eroded and cash compensation or land at a different location many times does not fully rehabilitate them. The dams are built by public funds with the aim to satisfy the energy and water needs but what benefit ultimately it would give to the displaced people should also be taken care of. The conflicts over natural resources which frequently come to courts are, therefore, conflicts over rights between the haves and the have-nots.

The Government can utilise the natural resources for common good but cannot be allowed to exploit or virtually plunder it in a manner to deprive those presently sustaining their lives on those natural resources and deprive the coming generations who also have a right of living on those resources. On these fundamental issues, there is a cleavage between technological experts, environmentalists and human rights activists. The Court is faced with an issue not easy to decide as to which section of experts and environmentalists is right in its approach.

We should not leave those living by the side of the river from generations to suffering by displacement to a far-off place which would deprive them of their life and lifestyle. In the march of progress, the humblest and the weakest should not be left behind. The man living in the hills or valleys is dependent for survival on natural resources. To remove him and rehabilitate him in the plains is like a fish from the river and putting it into an artificial reservoir or an aquarium where it might survive but can never be happy.

The Tehri Dam has been cleared for construction in a seismically unstable, earthquake-prone area in the valleys of the Himalayas.

The project was earlier not cleared on the opinion of the experts as a severe earthquake could burst the dam and destroy several important temples, towns and holy places like Rishikesh and Haridwar. There are other thickly populated towns and villages downstream. The members of the Environmental Appraisal Committee (EAC), which has an expert body within the Ministry of Environment and Forests, had earlier unanimously concluded that the Tehri Project did not merit environment clearance

and should be abandoned. Thereafter, a Committee of Secretaries of Departments concerned was constituted which did not agree with EAC's recommendations. A dissenting note was submitted by expert Dr. VK Gaur to the Committee of Secretaries. The Committee then assigned reassessment of the task of safety to the Department of Mines. Professor Jai Krishna, an Earthquake Engineer but not a Seismologist opined in favour of the project. The foreign expert Professor James D. Brune was Seismologist who did not favour the project due to safety aspects involved.

Second petition showing massive failure to rehabilitate

Despite the majority decisions requiring rehabilitation to be completed prior to the closure of the tunnels which would result in the backwaters rising and submergence taking place, rehabilitation was completely ignored. A writ petition¹⁴ was filed in the High Court of Uttarakhand by Kishore Upadhyaya, a member of the Legislative Assembly but the interim application for stay of the closure of the tunnels was not granted. A Special Leave Petition¹⁵ was then filed in the Supreme Court.

In the petition it was demonstrated with meticulous detail¹⁶ that rehabilitation was significantly incomplete in at least 15 large villages where the water was rising on account of the closure of tunnels T-1 and T-2 and the people of the hills were forced to flee like animals without being given compensation and without being provided with alternative sites. Lands which fell within the submergence area were not acquired and compensation not paid as in the village Uppu. Houses which had to be abandoned on account of rising waters were not acquired. Compensation to be paid for the construction of houses was not paid as in the case of village Godi-Siran and therefore even if alternate lands were provided construction of the new houses could not begin. Roads that were constructed through the lands of the people so that the dam could be constructed as in the case of Chamba Dharasu, were not counted towards acquired lands. Surveys to determine the properties that would be submerged was sometimes done in the absence of the house owners and often not at all resulting in denial of compensation. Even when the compensation was shown as payable by the authorities as in village Pilkhi, the amounts were not paid as the giving of a bribe was a condition precedent. In some cases as in Old Tehri Town, cheques were prepared but were not issued. Such was the case of village Punsada (Gadoli). Schools, hospitals, wells and public buildings such as ration shops and post offices that were submerged were not reconstructed at a higher level. Blasting work damaged the houses and disrupted the natural water sources for which no alternative arrangement was made nor compensation paid. Shopkeepers were not compensated as in village Sairan. Villages side by side as in the case of village Malidewal were discriminated in terms of the rate of compensation. Agricultural workers and landless labourers displaced by submergence were not compensated by providing them with 2 acres of land and other benefits on certification of the District Magistrate. The petition listed 34 landless labourers who repeatedly visited the District Magistrate without any results. Fully affected villages were shown as partially affected

14 Kishore Upadhyaya versus State of Uttarakhand (PIL 683 of 2005)

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and the compensation amounts reduced as in the case of village Bhaldiyana. In some cases as in village Jogyara and Badhangaon, shortage of funds was cited as reason for non-payment. Grievances regarding contested contour lines showing submerged areas were not listened to by the authorities as in village Chinari. Drinking water earlier in abundance had to be supplied by tankers after the construction work began and there was scarcity in all the villages.

Families at the relocated site faced all kinds of problems. Alternate lands were given and then the government constructed electricity towers on them without the owners' permission. Where alternative plots were provided, title deeds were not given rendering the oustees vulnerable to further eviction as illegal occupants of government land. At the relocated sites there were many problems such as provision of smaller plots and charges levied for what was supposed to be a free grant of land. Moreover, water supply was not available both for irrigation as well as drinking water. Sewage canals passed through several plots. The areas were not habitable as they did not have schools, hospitals and public facilities such as cremation grounds. At the relocated sites Bhaniawala and Athurwala the hospital was approximately 40 km away and barren land was provided in the place of agricultural land.¹⁷ Some of those rehabilitated were forced to vacate once again after working the land for 25 years, only to be evicted for the construction of an airport.¹⁸ At relocated site at Pathari there existed no girls' school while the boy's school was 5 km away. There was no inter college or polytechnic. The hospital has been constructed but when the petitioners visited it was completely non-functional and had no facilities. One room was used as a garage, another for the washer-man and the remaining as sleeping quarters. Similarly the post office constructed was used a police station.¹⁹ Sudhakar Dangwal living at Pathari told the petitioner "the dam has been built on our hearts and now we are made to beg."²⁰

Petitioner relied on a number of government orders made between 1973 and 1988 agreeing to "provide compulsory employment to one member of the affected family in the project."²¹ This assurance was never implemented though part of the project rehabilitation policy. When the petition was filed to enforce this assurance, the state of Uttaranchal filed an affidavit stating "it is also not possible to provide job to one member of each family... it is submitted that the UP state government's order dated 29.2.96 was withdrawn."²² The withdrawal order dated 27.10.98 gives no reason for withdrawal and specifies that the withdrawal of the employment guarantee is only for the Tehri project and not for other projects. Protesting, the Principal Secretary to the Government of UP wrote a letter stating "flag A page 113 to 115"²³

Keeping in view the difficulties faced by the people whose land is being acquired in public interest by the state government for various projects, the government has decided to rehabilitate such people immediately and provide compulsory employment to one member of the affected family in the same project.

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It has come to the notice of the government that the GO's issued from time to time are not being complied with adequately. Neither affected persons are being rehabilitated adequately nor any member of such affected families is getting employment in the respective projects. As a direct consequence of non-compliance of these GO's, the affected families are getting increasingly insecure, unstable and frustrated. It is significant to mention that the families solely dependent on their lands for livelihoods and that have offered the same in the larger public interest and for the development of the state, feel utterly helpless in such a situation if their problems emerging out of land acquisition by the government are not addressed timely and adequately. This is a matter of serious concern for the government and it is solely the responsibility of the government to address these problems / difficulties.

It is ironic that an area so abundant with water faces water shortage after the construction of the dam. On June 29, 2005 Sunderlal Bahaghuna brought to the notice of the petitioners the pathetic situation in the whole of Pratapnagar block and half of Jakhnidhar Block and in particular the 50 villages by the name Raika Region, where 2000 families reside. Water shortage is acute and in frustration over the years, over 100 women have committed suicide. As a result of the extreme deprivation faced by these villages on the hillside without water, all the men and women have left except the very old, the very young and women.

Connectivity

Drawings were submitted to the Court showing that bridges and roads were being submerged by the rising waters without the construction of new bridges and roads being completed as a result of which the people were being cut off and had to travel very long distances to obtain food and other supplies. For example, in village Ghonti due to the submergence of the old bridge what was earlier a 50 m walk has now turned out to be a 100 km bus ride! By letter dated 2.6.03²⁴ the then Chief Minister of Uttarakhand, Mr. ND Tiwari, wrote to the Prime Minister of India complaining that "70,000 people are affected in the cut off area of the Dam Lake... various villages... have become unstable which has resulted in drying of water sources and chances of landslides. People of the villages are feeling insecure owing to the blast for creating roads in the dam and mining areas." By a subsequent letter dated 18.11.03²⁵ the Chief Minister wrote to the Prime Minister complaining "large numbers of project affected families are insisting that the government fulfils their demands before evacuation. There is a legitimate demand from people who have been affected due to their areas becoming remote as a result of impoundment of water."

Similarly, at a meeting of the Bhagirathi River Valley Development Authority [constituted under the Uttaranchal River Valley (Development and Management) Act, 2005] on 25.8.05 called to review the rehabilitation work, it was found that out of Rs 275 crores that were to be sent by the Central Government for rehabilitation work only Rs 41 crores was sanctioned and the payment not yet done. Drinking water schemes were incomplete for the last 3 years and drinking water was not available in Chaundhar, Gwar and Narghar because the water schemes

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were incomplete and “money has been mismanaged”.²⁶ The Syanshu Bridge was found “delayed for 2 years” and the Authority observed “if the last tunnel is closed the village over river Ganga at Bhaldiyana Lamgon route would also be submerged in water. Meaning thereby the people of Pratap Nagar will have no alternative.”²⁷ The road for heavy vehicles between Tehri to Ghansali, Dharmandal and Pratap Nagar was found “not motorable”²⁸ and the alternative roads “extremely dangerous, unsafe and inconvenient.”²⁹ Families in Village Ghonti, Khand and Patti Dharmandal were “not being rehabilitated as per the rehabilitation policy.”³⁰ On the GSI survey conducted in Village Khola, Jhalwalaon and Kansali whether villages were “found to be in dangerous territory.”³¹ The Authority observed “there are many other villages where a person of little commonsense would understand that after the impoundment of the reservoir the villages will not be safe.”³²

A second report of the Authority prepared on 16.10.05 found several serious delays in the construction of roads and bridges leaving people stranded, for example the link road between Peepaldali Bridge and Rajakhet was found to be operable only in fair weather. Several other roads were found to be in various stages of disrepair. Some of the roads were not fit for heavy vehicles as a result of which supplies such as food could not be taken. Several cases of failure to rehabilitate were listed in the report. The Authority finally concluded that the closure of tunnel T-2 without rehabilitating persons first would “amount to violation of the orders of the Supreme Court”.³³

In Old Tehri town as the waters rose the 40,000 population was in distress. In the relocated New Tehri Town people receive water once in every 4 days and that too for a very short time. Slowly a historical and beautiful town came completely under water.

Geological surveys show instability

Reference was then made to the Geological Survey of India’s reports showing that the survey was done for only 3 out of the 109 unstable villages that were likely to sink into the reservoir as the water level rose. After the initial surveys by the Geological Survey of India (GSI) and particularly after the inconvenient results came in, the Authorities outsourced this work “to a virtually unknown agency (who in turn) further sublet the work to a remotely located agency creating doubt whether the dam authorities are concerned about the rehabilitation³⁴” The survey was then mysteriously discontinued.

The surveys done by GSI showed as the dam came up it caused a rise in the level of water which increased the pressure on the slopes of the hills resulting in many villages becoming

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unstable increasing the chances of these villages sliding into the reservoir. In its survey report the GSI found 26 villages sensitive to landslides or a high-risk area or an unstable area and recommended that about 2000 families be shifted immediately.³⁵ In the circumstances the Supreme Court made an order dated 23.1.08 directing the GSI to continue with the survey and directing the government to make funds available for the survey. The state government was also directed to “take all remedial measures in this regard”.³⁶

Monitoring Committees are a farce

The Monitoring Committee appointed by the Supreme Court conducted only 3 visits between 2003 and 2004. On not a single occasion did the Committee meet with the affected villagers. The reports were prepared on the basis of meetings with officials only. Even with this limited interaction the minutes were scathing of the government’s performance. “Redressal of grievances of the affected people needs more sympathetic consideration.. the results on the ground do not speak of success... employment generation schemes need to be looked into... the rehabilitation of villagers seems to have been carried out with no understanding of rural ethos... the whole exercise seems to raise more questions than answers... nothings has been thought of for providing training to unemployed youths...even basic things such as the use of remote sensing maps and topographic sheets for contours and other site features have not been attempted... Monitoring Committee has observed serious lacunae in having proper documentation, inventory of existing flora and selection of proper species... this is indeed a rather poor performance (and a serious shortcoming in the command area treatment)... the effectiveness of the grievance redressal system is not visible in view of the large number of complaints.”³⁷

During the second visit of the Monitoring Committee on 11.11.03, the grievances of the people were communicated to the Committee by the District Magistrate. In particular it was pointed out that the moneys were “diverted” for other works.³⁸ During the third and fourth visits of the Monitoring Committee in March 2004 and June 2005 only two villages were visited. Finally during the inter-ministerial review Committee meeting in August 2004 it was decided that a “reputed independent professional agency³⁹” would be appointed to verify whether the relief and rehabilitation benefits had flowed to the projected affected families.⁴⁰ Finally petitioners annexed a schedule of a particular visit of the Monitoring Committee, which showed that the monitoring was more like a tourist doing sightseeing and enjoying the hospitality of the Authority whose mal-performance it had set out to inspect!⁴¹

In view of the failure of the Grievance Cell and the Monitoring Committee, the Supreme Court made an order dated 24.4.07 directing that the remaining complaints “could be looked into by the District Magistrate and a retired Magistrate could be made available so that he can

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work along with the District Magistrate and sort out all these complaints”⁴². The problem with this order was that the District Magistrate was also the Director, Rehabilitation of the state government against whom the grievances were made. The Retired District Judge, Kishan Kumar was, according to the petitioner “doing an independent application of mind and cleared many applications as being justified. It appears that the District Magistrate and the officers of the THDC interfered with this work. He therefore made a complaint to the Chief Justice of the High Court. As he was unable to function he resigned on 31.1.08.

Today

Today the entire area faces a huge ecological crisis. The high siltation rate has resulted in the reservoir floor rising leading to decline in the storage of water. The natural flow of the river has been irreversibly stopped. The massive construction works have damaged what was once pristine areas. Hundreds of villages have become unstable and are sinking into the reservoir. Agriculture is shattered and the people rendered unemployed. Thousands of hectares of trees have been submerged together with public facilities. The historic Old Tehri Town and many other historical sites are lost forever. Water which the communal resource of the villagers has now been expropriated and taken far away to Delhi to flush the toilets of the urban inhabitants who hardly value water anyway. The only beneficiaries are the builders and politicians and officials of the state government who probably have siphoned away 50 percent of the project costs. And all this in the name of the people with the Apex Court lauding the “obvious” benefits of such projects.

42 Revised Written Submissions dated 18.2.10, page 9

Building the Commonwealth Games Village on the Yamuna River Floodplain

*Colin Gonsalves**

At a national consultation organised by the Human Rights Law Network on judicial decisions in India during the period of globalisation, Manoj Mishra of the *Yamuna Jiye Abhiyan* put the issue precisely. “Nothing”, he said, was “more important for the environment of Delhi than this river”. It is the city’s “lifeline”. When Mishra began his research in 2007 he was, as he put it, “rather naive”. He thought the main problem was the water quality but soon realised that the real problem was the commercialisation of the floodplain, and this is how the *Yamuna Jiye Abhiyan* was born. Using RTI he found that the encroachments by the government were planned as early as 1998. First came the Delhi Metro, which built its depot and headquarters on the riverbed. Then an IT park and residential quarters were constructed. Almost 50 hectare of land was in this manner usurped by the Delhi Development Authority (DDA). In 2000, the Central government persuaded DDA to handover 40 hectare of land on the riverbed to a private religious Trust to build the phenomenal Akshardham Temple. The NGOs realised this only too late and the protests began in 2007 pointing out that the floodplain should be left aside not only because it contains the floods that come every 10 years but also because it is needed to recharge the groundwater of Delhi on which 50 percent of the citizens rely. They complained that although the Delhi Government had spent under the orders of the Supreme Court Rs1,500 crore for cleaning the Yamuna river without the slightest effect, there existed a natural cleaning system in the floodplain. The riverbed was also being used by thousands of farmers to grow vegetables and fruits.

While this encroachment was going on, the slum dwellers of Yamuna Pushta had their homes demolished ironically for the reason that the slums were polluting the river. Nazima, a former inhabitant of Yamuna Pushta, was interviewed by Margrete, a volunteer working with the Human Rights Law Network. According to Nazima, her children were born there. “Life in Yamuna Pushta was good,” she said. After the demolition of the hutments in 2005 drinking water is difficult to find, the toilets are not usable and the market is very far away. The health of her children has suffered after the eviction. Ali Ahmed, Nazima’s husband, complained that whereas jobs were plentiful before the demolition, now it is very difficult to find work.

* Founder, Human Rights Law Network

At the relocated site no school existed and his children lost two years of education. The girls discontinued going to school. Ali gets nightmares of the day the bulldozers came without notice to the slum dwellers and razed their homes to the ground. Many of the families could not even retrieve their belongings.

In 2007, Rajendra Singh, Vinod Kumar Jain and other environmentalists filed Writ Petition (Civil) 7506 of 2007 and 6792 of 2007 in the Delhi High Court. In a path breaking decision dated 3.11.08, the Division Bench of the Delhi High Court held that the construction of the Commonwealth Games Village was indeed on the Yamuna riverbed and made certain directions for the protection of the same. In the initial part of the judgement the High Court commented on the deteriorating condition of the River Yamuna, observing “the Yamuna River in Delhi has been in a bad shape for quite some time now and is referred to as a dead river. Once the lifeline of Delhi, Yamuna has now become the most polluted water resource of the country. It has been reduced to a pale, sickly drain and poses a threat to the human life. It overflows with filth, effluents, dirt and even dead bodies. It is said that there is a visible difference between the water quality at Palla (where the Yamuna enters Delhi) and at Okhla (where it leaves Delhi). As the Yamuna traverse through the city, it is slowly converted from a river to a drain. It is estimated that the 22-km stretch of the Yamuna that runs along Delhi – from Wazirabad in the north to the Okhla Barrage in the south – contributes 80-90 percent of the total sewage discharge into the river, reducing it to a stinking drain. From big industries and factories to people living in big colonies, slums and rural areas -- all pollute the river with impunity because of untreated water... there was a time when Yamuna was a lifeline of Delhi providing precious potable water to its residents. At present, the quality of the river is categorised as ‘E’. This makes the water unfit for even animal consumption.”⁴³ Again in 2005, the Supreme Court lamented about the pitiable state of the river.⁴⁴

The Court then referred to the earlier futile attempts to preserve and protect the river. The Supreme Court, in *Dr BL Wadhwa vs Union of India*,⁴⁵ made certain directions. Then in 2000, after perusing a news item in the *Hindustan Times*, the Supreme Court had issued notice suo moto and made directions for the cleaning up of the river.⁴⁶ This exercise was repeated by the Supreme Court in 2004 when the *Hindustan Times* again reported on the filthy state of the river.⁴⁷

Apart from these judicial interventions, the Yamuna Action Plan was launched in April 1993 but its achievements, the Court noted, “have been woefully short of its stated goals.”⁴⁸ Though considerable sums of money was spent on Yamuna Action Plans I & II “the river continues to remain as dirty as it was about a decade ago (perhaps more) and most people believe it to be

43 Delhi High Court, order dated 3.11.08 in Writ Petition (C) 7506 and 6729 of 2007, *Rajender Singh Vs. Govt. of NCT of Delhi and Vinod Kumar Jain Vs. Union of India*, page 49 paragraph 46

44 *Baldev Singh Dhillon Vs. Union of India*, 2005 121 DLT 606

45 AIR 1996 SC 2969

46 2000 10 SCC 587

47 2004 8 SC 638

48 Delhi High Court, order dated 3.11.08 in Writ Petition (C) 7506 and 6729 of 2007, *Rajender Singh Vs. Govt. of NCT of Delhi and Vinod Kumar Jain Vs. Union of India* page 52 para 49

nothing more than a sewer”.⁴⁹ The Central Pollution Control Board report of 2007 titled “Water Quality Status of Yamuna River” listed the Yamuna “as the most polluted river stretch in the country”⁵⁰ with the bio-oxygen demand going up alarmingly from 130 tons in 1993 to 428 tons in 2004 -- “nearly 50 times the safe standard for bathing.”⁵¹ All this despite Rs 20 billion being spent. The Master Plan of Delhi – Perspective 2001 recommended several measures and the Master Plan of Delhi – Perspective 2021 made further recommendations. There was, however, no difference.

Then came a blow by way of the construction of the Akshardham Temple and its clearance by the Supreme Court. This complex covering 24 hectare on the riverbed became a “centre of controversy”⁵² in September 2004 when the Delhi Development Authority regularised the complex after the construction was completed. A writ petition 353 of 2004 was filed in the Supreme Court by the UP Irrigation Department through the UP Employees Federation alleging that the construction “would adversely affect recharging of underground water and the allotment is contrary with the land user as declared in the development plan.” The cursory order of the Supreme Court dated 12.1.05 read as follows:⁵³

“In this writ petition, the petitioners have challenged the allotment of certain land belonging to the state of UP situated allegedly on the riverbed of Yamuna. The petitioners also challenged the allotment of land abutting to the above land by the DDA to the third respondent on the ground that the same would adversely affect re-charging of underground water and the allotment is contrary to the land user as declared in the development plan.

Learned counsel appearing for the State of UP submitted that the land allotted to the third respondent which belongs to it was allotted on the condition that there shall be no construction on this land and in accordance with the said condition the first respondent has not put up any construction on this land but is developing the same as a green belt, therefore, there is no violation for the terms of the allotment.

Learned counsel appearing for the Delhi Development Authority contends that the construction that is being put up by the third respondent is in accordance with the sanctioned plan and the same is nearly 1,700 metres away from the riverbank. It is also submitted that the allotment and construction thereon was permitted after obtaining the opinion of the Central Water Commission and National Environmental Engineering Research Institute (NEERI), which is an autonomous body. Therefore, the allegation made in the petition is without any basis.

Since the petitioners are unable to rebut the above statements made by the learned counsel which is supported by affidavits filed in this Court, we are not inclined to entertain this petition and being satisfied in regard to the validity of the construction that is being made by the third respondent as lawful, we dismiss this petition.”⁵⁴

49 Page 52 para 49

50 Page 53 para 51

51 Page 53 para 51

52 Page 56 para 57

53 Page 57

54 Uttar Pradesh State Employees Confederation Vs. Principal Secretary, Lucknow, UP, 2009 8 SCC 604

It is in this cryptic manner without involving any of the NGO experts who had put in many years of studious work on the subject that the Akshardham Temple Complex was given clearance. This decision was to have almost immediate consequences as will be noticed later.

The role of NEERI in clearing (or at best being ambiguous about) projects of this kind deserves a comment at this stage. There was a time in the 80s and early 90s when NEERI could be relied upon fully by the Supreme Court to do studies and submit reports that were impeccable for their scientific calibre and integrity. Today, it is very different. Scientific institutions will prepare any report for a price. Corporations routinely influence statutory bodies by bribing them and are able to get reports clearing projects even in the face of naked environmental devastation.

In 1999, NEERI made reports calling for the protection of the riverbed. Another report titled “Environmental Management Plan for Rejuvenation of River Yamuna” submitted in October 2005 to the Government also called for the protection and preservation of the riverbed. When the present case was being heard by the Delhi High Court, however, “NEERI submitted an affidavit dated 29.1.08 clarifying that the site in question was not even a ‘floodplain’, much less a ‘riverbed’.” An anguished Court had said “we are constrained to observe that this affidavit is the result of some of the loopholes in its earlier reports which were picked up by the petitioners and pointed out to the Court. From an institution of this repute, it was not expected that report of this kind would be submitted. The Court gathers an impression that it is a tailor-made report given to suit the requirements of the respondents. In the earlier report given by NEERI, as is pointed above, it had recommended only the construction of temporary structures. It is not at all explained as to what were the changed circumstances which weighed with NEERI to opine that structures can be of permanent nature.”⁵⁵

The High Court framed two questions to be answered:

- “(i) Whether the construction is on the ‘riverbed’?
- (ii) Whether there is a clear mandate in the clearances for construction of permanent structures, as is being undertaken?”

Disinclined to grant the relief sought by the petitioners seeking a stay on all construction activities, on the ground that the petitioners had approached the court late, the High Court appointed a committee with Dr RK Pachauri as its Chair to “examine and monitor the construction carried out.”⁵⁶ The committee was to report within four months as to whether the construction would adversely affect the ecology of the riverbed, the river or its groundwater recharge ability.

The other Judge on the Bench, Justice Rekha Sharma, added very pertinent comments and sought to issue additional directions on 3.11.08 which was agreed to by the Bench and have been added to the decision by way of a “post script”.⁵⁷ Justice Rekha Sharma in her observations had a go at NEERI. She noticed that in the report of 2005 “we will find that it describes the land in question as ‘riverbed’.” Referring to the NEERI report she extracted the observation of NEERI “being centrally situated and considering pressures on the land, the land in riverbed

55 Page 87 para 92

56 Page 95 para 103

57 Page 96

is precious... The MOEF has constituted an independent expert committee called the expert appraisal committee...for seeking approval for the construction of the Commonwealth Games Village in the riverbed... The expert appraisal committee applied the precautionary principle to emphasise that the proposed work should not be of a permanent nature... and the riverbed may have to be restored to the river.”⁵⁸ Even the environmental clearance dated 14.12.06 stated “the proposals should proceed with the assumption that the riverbed may have to be restored to the river.”⁵⁹ Justice Sharma went on to say that “the reports of the NEERI on which respondents had leaned heavily do not paint this body in bright colours. Rather, they show how it has changed colours and has not bothered to contradict itself. In its report of 2005 first it spoke against ‘heavy capital investment’ and pleaded for ‘no large development activities except horticultural operations and provisions of green linkages with the adjoining and existing built up areas to maintain ecological balance and relief to the public.’ It also spoke of ‘maintenance of existing vegetation’ and warned against encroachments, building activity and ‘urban sprawl’ and in the very next breath it recommended release of vast chunk of land ‘for urban activities’.”⁶⁰

Justice Sharma found the Ministry of Environment and Forests also at fault. Initially the committee constituted by the ministry visited the site and emphasised that the construction work done “should not be of a permanent nature and the structures raised should be dismantlable.”⁶¹ The DDA stepped in. The Court observed: “Within a span of few days the report was ignored, the condition reproduced above was given a go-bye and the Delhi Development Authority was signalled to go ahead with the construction works “permanent or temporary” subject to certain conditions of little significance. In any case, the DDA had no difficulty in obtaining report from CWPRS, Pune which too, on closer scrutiny appears to be dubious... It is a sad story of men in haste fiddling with major issues and resultantly playing havoc...neither NEERI nor MoEF or DDA can be said to have acted fairly and objectively. Their hands appear to be tainted.”⁶²

The learned Judge recorded that “we were told during the hearing that construction at a massive scale was being carried out.”⁶³ In response, Justice Sharma observed that after the submission of the report of the committee to the Court, further directions would be given and the learned Judge “made it amply clear that if despite the pendency of the writ petitions the respondents were raising constructions...they were doing so at their own peril.”⁶⁴

When the decision of the Supreme Court in the Akshardham Temple case was shown to the Bench, the Delhi High Court observed:

“The order passed by the Supreme Court would go to show that the larger issues now raised before us were apparently not raised or gone into. In any case in view of the facts and circumstances of the present case and the great many disputed issues raised before us, the said judgement, with respect cannot be treated as a binding precedent.”⁶⁵

58 Rajendra Singh Vs. Govt. of NCT of Delhi , 2008 X AD (Delhi) 313 (314)

59 Page 314

60 Page 315

61 Page 315

62 Page 316

63 Page 317

64 Page 317

65 Page 314

The matter was carried almost immediately in Appeal to the Supreme Court.⁶⁶ In a situation where the Commonwealth Games was a little over one year away and the so-called prestige of the nation was at stake, the fate of this Appeal was almost predetermined. The Supreme Court found it unfortunate that the High Court had commented on the Akshardham Temple decision as “not a binding decision and not applicable to the case on hand.”⁶⁷ Setting aside the High Court order, the Supreme Court said “the conclusion of the High Court that the present construction is on the riverbed or the floodplain... cannot be sustained.”⁶⁸

To prove the Court wrong and the petitioner right came the floods of August 2010. The flood waters of the Yamuna released by the state of Haryana came into the floodplains and, finding its path blocked both by the Akshardham Temple complex as well as the massive Commonwealth Games Village, flooded parts of Delhi, leaving stagnant water everywhere and causing an almost epidemic level rise in Dengue, Malaria and other waterborne diseases. The riverbed is by its very nature, porous and were it to be left untouched and not constructed upon the waters would have gone to the underground water table, thus avoiding flooding and causing an increase in the groundwater level.

The Akshardham Temple case and the Commonwealth Games Village case are examples of the tremendous political pressure brought to bear on the superior judiciary when projects involving huge investments clearly breach environmental norms. The courts are not in a position to stand up to this pressure. The Delhi High Court decision in the CWG case is a rather rare example of a court showing true grit in very difficult circumstances. It is such kind of courage that the superior judiciary is now called upon to show as it once did in the 80s and 90s. The situation has become so severe and environmental degradation is proceeding at such a pace in utter disregard of law and in the confidence that money power will ultimately prevail, that the time has come when the superior judiciary needs to bend the stick backwards so to speak and take a harsh stand in favour of environmental protection, notwithstanding the consequences. A clear message must go out from the Supreme Court to the country that the lenient stand taken during the period of globalisation from 1995 onwards where the environment was slaughtered at the altar of “sustainable development” has come to an end. Huge projects where substantial investments have been done in breach of environmental law should be shut down with the investors suffering the consequences. No longer should the land, water, forests and the air be violated to satisfy corporate greed. It is only when in a high profile case the Supreme Court acts without compromise that the corporate world will wake up and take notice that the pillage of the environment is no longer judicially acceptable.

66 Delhi Development Authority Vs. Rajendra Singh 2009 8 SC 582

67 Page 601

68 Page 602



KOMATSU

TWO

Opinions



The Supreme Court and Hazardous Waste

*Claude Alvares**

Two issues about which there can be no dispute from anyone in this country are: a) No hazardous waste should be allowed into India for dumping under the garb of recycling since India is a Basel Convention signatory; b) Hazardous waste generated by Indian industries should be handled and disposed of in an environment-friendly manner. As the future for engineered landfills is bleak, generation of hazardous waste must be minimised at source.

When the Supreme Court took up the petition (WP No. 657 of 1995) in 1995, it was disturbed to find that even the Secretary of the Ministry of Environment & Forests (whom it had dragged to the Court) did not know the answers to: (a) quantities of hazardous waste coming into India for dumping/recycling; (b) number of hazardous waste generating units in the country and quantities of hazardous waste generated by them; and (c) what steps were being taken by the authorities to implement the Hazardous Wastes Rules, 1989. The MoEF had no answers to these questions.

Therefore, in 1997, the Supreme Court set up a high-powered committee (MGK Menon Committee) on management of hazardous waste. The committee took its work seriously and Prof. Menon himself toured the country for almost three years with his colleagues. His committee went over practically every aspect of these two issues and submitted a report to the Supreme Court in 2002, describing the hazardous waste scenario in the country as “grim”. The Committee made a slew of recommendations on issues raised in its terms of reference.

Despite the urgency of the issues raised, the Supreme Court was unable to deal with the report till September-October 2003. However, once it took notice, it submitted a separate report in March, 2007 in which it highlighted the unfinished task of the committee and recommended that the Supreme Court continue with the monitoring of its directions by whatever means.

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The Court, however, has not yet considered the Supreme Court Monitoring Committee (SCMC) reports of November 29, 2006, the report of March 2007 and of June 2007 (filed, by the two member committee, this time on waste oil). All these have become part of the mounting arrears. The delay in taking up these reports is adversely affecting the achievements of implementation by authorities and is helping the hazardous waste generators with the inadvertent blessings of the Court. As a result environmental degradation, due to illegal and improper disposal of hazardous waste, has recommenced.

Applications filed by the SCMC in early 2007, for dealing with 209 containers of hazardous waste oil at JNPT Mumbai have also become part of the Court arrears. Most of the hearings on the hazardous waste petition have been restricted to issues of shipbreaking: first, the Clemenceau and thereafter, the Blue Lady. Today more than 50 ships are beached illegally at Alang in Gujarat, but cannot be broken because of clarifications sought by the shipbreaking agencies occasioned by the recommendations of the committee of “technical experts”.

Taking its cue from these developments, the MoEF introduced a fresh draft regulation on “hazardous materials” to replace the Hazardous Waste Rules, 1989, which had itself been amended twice. If the draft becomes law, it will disembowel the October 14, 2003 order completely, leaving nothing but a return to the raw days of illegal imports and uncontrolled generation of hazardous waste within the country as well. In first week of February 2007, probably due to strong protests, the MoEF quietly withdrew the draft notification on hazardous materials from its website.

But the Court’s conduct is both inexplicable and unacceptable. As stated in the beginning, there can be no two opinions about keeping imported hazardous wastes out of the country and monitoring hazardous wastes generated within. The Court’s conduct is an affront to the exhaustive, unpaid labour of Prof. Menon and his colleagues and to the hard work of the Thyagarajan Committee documented in great detail in the March 2007 report of the SCMC.

The Court has to take a strong stand on the issue of hazardous waste. Orders, on the reports of SCMC, must be issued expeditiously. The Court should also support members of SCMC from harassment by the Government especially when it comes to reporting facts without fear and favour, particularly when it comes to the timely payment of travelling allowance/dearness allowance (TA/DA). Unless this is done achievements, arising out of implementation of its order dated October 14, 2003 and others, cannot be consolidated and will be lost forever. I fear that the situation of environmental degradation, due to hazardous wastes, will revert to the scenario prior to the filing of the PIL in 1995 or even worse. The lack of interest within the MoEF will certainly make matters worse.

Environmental Law: A Critical Appraisal

*Sanjay Parikh**

International developments on environment

It is necessary – before we discuss the development of Environmental Law by our courts, in particular, the Supreme Court – to take a brief look at the international developments on environment. Broadly, it started with the Stockholm Declaration, commonly known as “Declaration of the UN Conference on Human Environment, 1972”, where it was asserted that both aspects of man’s environment, the natural and man-made, are essential to his well-being and to the enjoyment of basic human rights, including the Right to Life. This Declaration has resulted in the 42nd Amendment in our Constitution and the enactment of Environment Protection Act, 1986 and Air (Prevention, Control & Pollution) Act, 1981. The Stockholm Declaration was followed by the “Earth Summit” known as the Rio Declaration, 1992, which was based on the 1987 report “Our Common Future” (also known as “The Brundtland Report”) which, in turn, finally culminated in the document “Caring for the Earth”. Nearly 240 treaties/declarations exist on protection of environment. Agenda 21 and Summit at Johannesburg on sustainable development should be taken special note of. But none of these international instruments have been conducive for the preservation of the environment at the national level.

Environment in India's courts

The development of environmental jurisprudence in our courts can be broadly put into cases¹. The first is whether the environmental principles, developed in international conventions and treaties, were sought to be incorporated in the municipal law on the basis that these were a part of customary international law. The Court also took them as an integral part of Article 21 of the Constitution which speaks of the Right to Life. Thus, environment has become a part of life itself. Right to Environment is, therefore, accepted as both a human right and a fundamental, constitutional right. By referring to the Stockholm Declaration, 1972 and Rio Declaration, 1992,

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1 Vellore Citizen Welfare Forum 1996 (5) SCC 647
MC Mehta versus UOI (Taj Mahal case) 1997 (2) SCC 353
AP Pollution Control Board versus Prof. MV Nayadu (Retd.) & Ors, 1999 (2) SCC 718
Indian Council of Enviro-legal Action (Bichuri case) 1996 (3) SCC 212

the Supreme Court stated the importance of Polluter Pays Principle, Precautionary Principle, Inter-generational Equity Principle, Absolute Liability Principle, Public Trust Doctrine and Reversal of Burden of Proof in important environmental cases. This was no doubt an era where the Supreme Court showed remarkable leadership skills in implementing global environment concerns.

The second line of cases² were those where the Supreme Court took cognisance of the non-implementation of the Water (Prevention & Control of Pollution) Act, 1974; Air (Prevention and Control of Pollution) Act, 1981; Environment (Protection) Act, 1986; Coastal Regulation Zone notification; Hazardous Wastes Rules etc, and issued directions to be authority to comply with the law for the protection of the environment. It said that “tolerating infringement of law is worse than not enacting the law at all.”

But on analysis of these judgements, we have to find out to what extent the environmental principles could be actually implemented and how effective was the procedure of monitoring adopted by the Supreme Court.

Implementation of pollutor pays principle and whether it was effectively implemented

The Supreme Court has often spoken of the pollutor pays principle and the absolute liability of the polluter in the given circumstances, but in none of the cases (with few exceptions) either the polluter could be compelled to make the payment and/or to restore ecology in its original position. In the Oleum gas leak case³, the Supreme Court evolved the doctrine of absolute liability, clarifying the principle of strict liability which was developed in Ryland versus Fletcher. It also developed the principle of claiming compensation under writ jurisdiction by evolving the public law remedy. But ultimately, the victims of gas leak were left to the ordinary relief of filing a suit for damages. In the *Bichuri case*⁴, regarding contamination of groundwater, the Supreme Court, after analysing all the provisions of law, rightly came to the conclusion that compensation could well be recovered under the provisions of the Environment (Protection) Act. However, the assessment of compensation—its payment, and the remedial measures—has still not been complied with. In the case of S. Jagannathan⁵, concerning destruction of coastal ecology by intensive and extensive shrimp farming, the Supreme Court had directed the closure/demolition of shrimp farms and payment of compensation on Polluter-pays-principle as well as cost of remedial measures to be borne by the Industries. But after the judgement, firstly the Supreme Court stayed its own directions in review and thereafter, the Parliament brought in a legislation overruling the directions given in the said judgement. The result is that no compensation has been paid to the farmers and the people who have lost their livelihood and groundwater. Nor has the damage done to the environment been remedied. In yet another case where fine was imposed by the Supreme court on Kamal Nath⁶ for affecting

2 Indian Council of Enviro-legal Action (CRZ Notification) 1996 (5) SCC 281

MC Mehta versus UOI (Ganga Water) 1987 (4) SCC 463

RFSTE versus UOI 2005 (10) SCC 510

3 MC Mehta versus UOI, 1987(1)SCC95

4 Supra

5 S. Jagannathan versus UOI, 1997 (2) SCC 87

6 MC Mehta versus UOI (Kamal Nath), 1997 (1) SCC 388

ecology of the river Beas, by applying the public trust doctrine, it was later clarified by the Court that no fine can be imposed under writ jurisdiction and it requires adjudication under the provisions of Environment (Protection) Act. One does not know if the river ecology was ever restored by the violator in the said case. An attempt made to recover compensation for the loss caused to the environment in the case⁷ of dumping of waste oil by various importers also failed. The Supreme Court did not develop the jurisprudence of liability of the polluter and imposed only the incineration cost (actual cost) on violators. It needs to be emphasised that all these imports were illegal and in violation of the Basel Convention. Our country has suffered the dumping of huge quantities of waste oil. Its ultimate incineration, as directed by the Court, has seriously affected our environment. But the violators have not been saddled with any liability, much less a deterrent. The Court had distinguished the judgement in Deepak Nitrite Limited⁸, where it was observed that there should be actual damage to the environment in order to attract the Polluter-pays-principle. Additionally, it rightly observed that the Polluter-pays-principle “includes environmental costs as well as direct cost to people or property, it also covers cost incurred in *avoiding pollution* and not just to those related to remedying any damage. It will include full environmental cost and not just which are immediately tangible. The principle also does not mean that the polluter can pollute and pay for it”. But as mentioned above, no damages have been imposed on the violators for illegally dumping waste oil in our country. The Supreme Court has, therefore, failed to implement its own directions in protecting the environment in many cases; still no legal principle of liability has been developed to ensure implementation of Polluter-pays-principle for recovering damages caused to the environment, to the people and for restoration of the ecology. The result is that those who cause damage to the environment are emboldened to continue with violations. They are also now using the argument of sustainable development in their support, which is unfortunately finding acceptance in the courts.

A few words about monitoring

One view is that we should have followed the law laid down in Ratlam Municipal case⁹ to generate more awareness at the local and district levels and for effective implementation by the district courts. The other view is that while exercising powers, under Art. 32 and 226 of the Constitution, the statutory mechanism should have been enforced making the authorities responsible and accountable. A sound monitoring mechanism, which should be followed by the courts in all environmental matters, is required in order to evolve.

Let us now look at the precautionary and sustainable development principles and their understanding and implementation by the Supreme Court. In several cases, the Court has referred to the “carrying capacity” of the environment and that any exploitation of natural resources should not exceed their carrying capacity or assimilative capacity. It is forgotten that the “carrying capacity principle”—evolved in the Stockholm Declaration, 1972—was given up when it was realised that mankind has immense potential to irreversibly damage the environment and under the wrong notion that nature has immense capacity to revive itself. This

7 RFTSE versus UOI, 2005 (13) SCC 186

8 Deepak Nitrite Ltd. versus State of Gujarat and Ors., 2004 (6) SCC 402

9 Municipal Council, Ratlam versus Vardhichand and Ors, 1980 (4) SCC 162

notion was, therefore, rightly substituted by the Precautionary Principle that put a check on the destructive activities of human beings; namely, warning them that it is safe to err on the side of caution. It is only in one judgement, i.e. *MV Nayadu*¹⁰, that this aspect was explained by the Supreme Court. However, we find that in subsequent judgements, till 2007¹¹, the Supreme Court was still talking about the carrying capacity and in that context applying the theory of irreversible damage. One will be shocked to find that even where experts have found that a particular eco-system has been exploited/neglected in such a manner that it has lost its carrying capacity, it is still being subjected to environmental appraisal for further exploitation under the cover of sustainable development, when the only constitutional obligation and human duty permissible in that situation is to work for its restoration and revival. Principles—like “sustainable development” and “precautionary approach”—do not apply when we deal with areas rich in natural resources, those which are the center of origin, sources of water and its conservation, fragile eco-systems etc. They must be preserved and protected for survival of mankind and for the generations to come.

In the *Narmada case*¹², the Supreme Court refused to apply the precautionary principle on big dams. This Supreme Court measure implies that the protection of natural resources, and its ultimate cost for the present and future generation, is not an integral part of development. The observation of the Court, that the said principle will apply in cases where the extent of damage is not known but not in cases where it is known, is incorrect. Natural resources, once destroyed, cannot be re-built by mitigative measures or even be substituted. In the *Tehri Dam case*¹³, a highly seismic area, was chosen notwithstanding the precautionary principle. It was done with the full knowledge that any breach in the dam would cause havoc, submerging several cities in a matter of a few hours. Justice Dharmadhikari, who gave a dissenting judgement, invoked the precautionary principle in support of the safety aspects of the Dam and concurred with the experts who had suggested 3-D non-linear analysis of the dam. But the Government authorities had refused it on the ground of scientific uncertainty. The majority accepted the Government’s view. If any calamity happens, who will be responsible?

The idea of “need” in the context of sustainable development has not been fully and correctly understood. In the *Bombay Dying & Manufacturing Co. Ltd.* (supra), the dire “need” of society has been given precedence over inter-generational interests, by using the argument of balancing environment and development. The “need” aspect has undergone considerable debate among social scientists and environmentalists world over. It cannot be taken as insatiable desire of an individual, a society, or a nation, which is another form of greed, and are thus allowed to exhaust natural resources without applying the rule of caution. Unfortunately, under the cover of need, we are allowing reclamation of sea, estuaries, ponds, riverbeds and other natural resources and erroneously calling it a balancing exercise.

10 Supra

11 *Essar Oil Ltd. versus Halar Utkarsh Samiti and Ors*, 2004 (2) SCC 392

Bombay Dyeing and Mfg. Co. Ltd. versus Bombay Environmental Action Group and Ors, 2006 (3) SCC 434

Karnataka Industrial Areas Development Board. versus Sri. C. Kenchappa and Ors, 2006 (6) SCC 371

12 *Narmada Bachao Andolan versus UOI*, 2000 (10) SCC 664

13 *ND Jayal & Anr. versus UOI*, 2004 (9) SCC 362

Let us take a quick view of the hazardous waste case. In the wake of the non-implementation of Hazardous Waste Rules, 1989, for nearly two decades of dumping of huge quantities of toxic waste by the developed countries, a public interest action¹⁴ was initiated in the Supreme Court. It was established that the states and pollution control boards were either ignorant or grossly negligent in not taking any action against the dumping of toxic waste by indigenous recycling industries and importers. A High Power Committee Report, chaired by Prof. MGK Menon and constituted by the Supreme Court, pointed out serious lacunae in the legal framework, negligence and connivance of implementing authorities. Based on that, in a significant judgement given by the Supreme Court in the year 2003, various directions were given to regulate the functioning of indigenous recycling industries and waste importers by incorporating the provisions of the Basel Convention which India had signed and ratified but not implemented. The Court also accepted transparency and public participation under Art. 21. It led to amendments in the Hazardous Waste Rules in 2003. It was in this litigation that the Court also considered dumping of hazardous waste in the process of ship breaking. One of the important directions, given by Supreme Court, was regarding “prior decontamination” of the ship by the exporting country before it reaches the country of import. Prior decontamination is necessary because trans-boundary movement of hazardous substances is an activity, which harms the environment. Also the Basel Convention has put a ban on the movement of certain hazardous wastes. Rio Declaration also talks about prior knowledge in trans-boundary movements. However the Blue Lady ship was allowed¹⁵ without prior decontamination. The ship contained, 1,250 MT (approx.) of asbestos waste, 10 MT (approx.) of PCB plus 44,000 m of cables and 1,100 radioactive elements. This quantity is many times higher than that of the French ship Clemenceau which was recalled by the French Government. In justification, the Supreme Court has referred to the concept of “balance” under the principle of “proportionality”, a doctrine which is totally alien to the environmental matters. While referring to the principle of proportionality, reliance is placed on the keynote address on “Global Constitutionalism” by Lord Goldsmith, Her Majesty’s Attorney General (UK).¹⁶

This article deals with the problem of terrorism and in that context discusses balance theory between individual rights and protection of the public while keeping in view the non-dirigible nature of some of the human rights. The Supreme Court also referred to India’s economic growth of above 9 percent after the era of globalisation and justified ship-breaking on the grounds that a large section of the population is below poverty line and that the problem of unemployment is endemic in India. How can these reasons justify violation of the obligation of prior decontamination of toxic substances and how can dumping of lethal wastes be helpful in solving the problem of poverty and unemployment? Even if, for the sake of argument, it is accepted that huge quantities of steel is generated but can it be at the cost of accepting such conditions, which even a country like Bangladesh has not allowed. To put it simply, can you allow dumping of hazardous waste provided you get some benefit out of it? As far as steel is concerned, one cannot say with certainty that it is used in our country alone. If the steel

14 RFSTE versus UOI, 2005 (10) SCC 510; 2005(13) SCC 186

15 Orders dated 6.9.2007 & 11.9.2007 (RFTSE versus UOI)

16 Stanford Law Review Vol. 59 at P. 1155

generated in the process is again imported then the only role India plays is to dump hazardous wastes, either by disposal in landfills or by incineration. The dirty job of dismantling is then done at the cost of workers' lives and their health in totally unprotected working conditions. Poverty is therefore given as an excuse to permit acceptance of outside waste in complete defiance of the principle of human dignity, right to life and health. If there is one principle that ought to have been applied, it is the following: Without prior decontamination as a safeguard to national environment under the precautionary principle, ships are not allowed for breaking. Further, after a 2005 judgement when the Monitoring Committee was made non-functional, the dumping of hazardous wastes from developed countries again started. The other day, municipal waste, sent by some foreign country, was caught by the Kerala Pollution Control Board. This is only a tip of the iceberg. Tons and tons of plastic waste, municipal waste, cow dung, paper waste, waste oil, battery waste, electronic waste etc. is being dumped into our country. A recent study was conducted to analyse whether social and economic inequalities aggravate environmental degradation. James Boyce, who contributed a paper on this aspect, revealed a shocking bias in the hazardous waste disposal policy in the United States against low income areas with a higher percentage of African-American and other minority groups. The study shows that where social and economic inequalities exist, it leads to weaker environmental policies, which, in turn, results in greater environmental degradation. The conclusion drawn by the study is that inequalities, in the distribution of power, operate not only to the detriment of specific groups but also to the detriment of environmental quality as a whole.¹⁷ It will be quite shocking to learn that, after a decade of efforts made to control and regulate the trade of hazardous waste disposal, the Ministry of Environment & Forests has now taken a U-turn and has come out with draft rules to allow import of waste batteries, waste oil and other wastes which are banned under the Basel Convention.

In another case¹⁸—concerning mining in an area which is rich in bio-diversity, a source of water recharge and where tribals have been living for hundreds of years in a symbiotic relationship with the nature—the Supreme Court has permitted mining (by imposing certain conditions) drawing support from the principle of sustainable development. Again poverty has been given as an excuse. Similarly, the Supreme Court has permitted the construction of a residential complex in a reserved forest area¹⁹ ignoring the scientific proof of existence of a forest. Similarly, the construction of a hotel²⁰, on a wrong understanding of sustainable development, was allowed by the Supreme Court in an ecologically sensitive sand dune area.

Let us, therefore, not go by words but by intent and whether nature's rights have been respected in letter and in spirit.

These principles have otherwise lost their value because we have entered a critical phase where nature and its essential principles, on which human life is sustained, have to be zealously safeguarded. No longer can we allow ourselves to be misled by the term "sustainable

17 Hindu dt. 6.11.2007 – Environment and the Poor – book review

18 Order dated 23.11.2007 in M/s. Vedanta Alumina Ltd.

19 Tata Housing & Development Corporation – 2003 (11) SCC 714

20 Goa Foundation versus Diksha Holding – 2001 (2) SCC 97

development". It is the same mindless development, least sensitive to damage and harm to natural resources and the future generation. It is nothing but another form of economic development where the indicators of growth are only economic factors like the GDP. The WTO has virtually dominated the entire area of International Law concerning environment and human rights. Everywhere, the focus is only on commercial and trade interests. In a recent ruling, the WTO²¹ has brushed aside the defence of European countries against the trade of GMOs by observing that the said principle is neither customary international law nor a general principle of law.

These instances show a dangerous trend, namely, that environmental principles are understood only superficially, without integrally connecting them with the nature's laws. Natural resources build by nature in millions of years once destroyed can never be re-created by man. Scientific efforts and processes cannot generate water and the rich eco-systems. Economic development is assessed in terms of GDP but the cost of the continuous destruction of natural resources is not counted. If a method is evolved to assess economic costs, it will certainly outweigh earnings in terms of economic gains. Natural capital is fast becoming the limiting factor while human-made capital is becoming abundant.²²

Conclusion

The need for preservation and protection of natural resources is often repeated; similarly the environmental principles namely, sustainable development, precautionary principle and polluter pays principle are chanted endlessly. The creative interpretations, whether in Courts or outside, tend to justify development under the cover of need (which is an extension of greed only) thus completely diluting these principles and making them meaningless in terms of actual implementation. It then becomes a vacuous intellectual activity and we fall into the subterfuge of language. It is quite shocking that the argument of so-called development finds acceptance even when it is for patently wrong reasons and at the huge cost of environment. Thus private interests, which have merged their identity with larger ideas of holistic development, are causing a serious imbalance in society. The benefits of natural resources should be available to all but unfortunately they are being allowed to be exploited only by a few.

It is pitiable that the State is not only completely failing in discharge of its obligations under the established *Public Trust Doctrine* but is consciously exercising its powers to the detriment of these natural resources when they need revival. How can this callous disregard, an act of culpable negligence and an environmental crime of the State be accepted. The devastation of Yamuna bed, a flood plain, and raising of unscientific issues with an attitude of violating any law or norm and arm-twisting of those who care for sanity, to impose the real estate on the river bed is quite shocking. How can a State compromise after knowing fully that the main source of ground water for drinking purposes is the river bed and if this source is sustained, you will be able to sustain the future needs of drinking water requirement of the people? How a ridge

21 EC – Biotech Dispute decided by WTO in Nov. 2006

22 Herman E. Daly "From Empty-World Economics to Full-World Economics: A Historical Turning Point in Economic Development."

Has the Judiciary abandoned the environment?

which is billions of years old can be allowed to be used for construction of buildings when the expert authorities recognise the place ecologically sensitive – a ridge, a forest and a rich source of ground water.

Is this kind of development permissible? What are the State's obligations as a trustee and what legal structure do we need to develop in order to protect the natural resources – now and in the future? In what way can people protest if the State acts totally irresponsibly and if it succumbs to narrow political considerations and vested interests? These are complex but important questions of immediate importance.

There is an urgent need for the courts to understand these issues holistically, integrally with a vision. There is no conflict between environment and development. True development can never harm environment if it is realised that without nature and its resources, life has no meaning. We need perhaps a simple principle, a simple law for complete protection of natural resources; integrated efforts for their revival and rejuvenation and their use conducive to the nature of these resources, and not the application of sustainable development principle as these resources can no longer bear the onslaught of exploitation; they are in trust with us for the future. If we still ignore this vision, be ready to lose our resources forever. The choice is quite clear.

Setting a Precedent for Trafficking Hazardous Waste

*Gopal Krishna**

By every rule in the book a ship carrying asbestos waste and radioactive elements should not be in Indian waters, let alone be beached. And despite well-premised objections, the central government persuaded the Supreme Court to rule that the toxic ship Blue Lady be dismantled at Alang.

On September 6 and September 11, 2007, two related judgements in the matter of ship-breaking and hazardous waste were issued by the Supreme Court of India. The Division Bench of Justice Dr. Arijit Pasayat and Justice S H Kapadia delivered both the orders. This was the same Bench that was seized with the Le Clemenceau case. The first order is a general order on the issue of ship-breaking. The second order was with specific reference to status of the Blue Lady (formerly SS Norway) – a ship with known dangers: asbestos and radioactive material, and without clear papers, beached at the Alang shipyard in Gujarat. This Supreme Court order gave a go-ahead to dismantling of the Blue Lady.

Dismantling the Blue Lady exposes the mostly Bhojpuri and Oriya speaking casual and migrant workers and the villagers of Bhavnagar Panchayats near Alang to toxic exposures. It also threatens their source of livelihood, fishing due to marine pollution. By the government's own admission a report of technical experts on shipbreaking states that the underground water in Alang is heavily polluted. The ship-breaking industry is already known to have a higher accident rate (2 workers per 1000) than the mining industry (0.34 per 1000) has. This is considered the worst in the world, and 16 percent of workers here are suffering from asbestos-related diseases.

In its order on September 11, the Honourable Supreme Court advanced “The concept of 'balance' under the principle of proportionality applicable in the case of sustainable development...” and ruled that: “It cannot be disputed that no development is possible without some adverse effect on the ecology and environment, and the projects of public utility cannot be abandoned and it is necessary to adjust the interest of the people as well as the necessity to maintain the

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environment. A balance has to be struck between the two interests. Where the commercial venture or enterprise would bring in results which are far more useful for the people, difficulty of a small number of people has to be bypassed. The comparative hardships have to be balanced and the convenience and benefit to a larger section of the people has to get primacy over comparatively lesser hardship.”

The apex Court gave this ruling even though it also did not dispute that the entry of the Blue Lady in Indian territorial waters, and its continued presence since June 2006, was itself in violation of the Court’s own order of October 14, 2003. It was also in violation of the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal and a number of other international environmental and labour conventions and treaties that govern the breaking of contaminated ships to all of which India is a signatory.

In the September 11 order, the honourable justices refer to former Attorney General of UK saying, “In his Keynote Address, on ‘Global Constitutionalism’, reported in the *Stanford Law Review*, Lord Goldsmith stated that the British Constitution, though unwritten, is based on three principles, namely, rule of law, commitment to fundamental freedoms, and the principle of proportionality. The European Convention on Human Rights (ECHR) also refers to the concept of balance.”

The 21-page keynote address of Lord Goldsmith includes a paragraph that has been referred to in the apex Court’s order. It reads as follows: “The third principle is that of proportionality. One of the key themes of the ECHR is the concept of balance. The Convention took its lead in this respect from the Universal Declaration of Human Rights and in particular Article 29, which recognises the duties of everyone to the community and the limitation on rights in order to secure and protect respect for the rights of others. Under the Convention, some rights are absolute. They are fundamental and there can be no compromise on them. We take the view that the prohibition on torture is simply non-negotiable. I regard the right to a fair trial as another of those fundamentals. That is why we have rejected reducing the burden of proof for terrorism offences and allowing secret evidence in terrorism trials.”

It is shocking to note that Goldsmith’s speech in question does not appear at all to be relevant to the plight of workers, villagers, environment, ship-breaking industry, and steel or hazardous wastes management. Therefore, it cannot be a convincing rationale for knowingly letting the most vulnerable workforce and communities suffer from asbestos and radioactive exposure that will arise from breaking up the Blue Lady.

Verified threat of hazardous waste onboard – radioactive elements

The bench granted permission for the dismantling based on the submission by Gopal Subramaniam, the Additional Solicitor General, to the effect that the ship does not have any more radioactive material and beaching is irreversible. But contrary to these recommendations—of the Technical Experts Committee on Hazardous Wastes relating to Ship-breaking, the Gujarat Pollution Control Board, Gujarat Enviro Protection and Infrastructure Ltd, (GEPIL) and the ship’s current owner, Priya Blue Shipping Pvt Ltd.—the ship does contain radioactive substances in thousands of places.

In the order passed the apex Court merely states, “There was also an apprehension rightly expressed by the petitioner regarding radioactive material onboard the vessel Blue Lady. Therefore, an immediate inspection of the said vessel beached at Alang since 16.8.2006 was undertaken by Atomic Energy Regulatory Board (AERB) and by Gujarat Maritime Board (GMB). The apprehension expressed by the petitioner was right. However, as the matter stands today, AERB and GMB have certified that the said vessel Blue Lady beached in Alang no more contains any radioactive material on board the ship.”

What changed?

A perusal of the report, of the inspection undertaken on August 14, 2007, shows that the entire inspection of 16 floors of a 315 m long ship seems to have been completed within a period of 4 hours (a commendable task no doubt). The report states that they could detect only 12 smoke detectors containing Americium 241. Having found these 12 smoke detectors containing radioactive materials, the report concludes that the ship “now, does not contain any radioactive material onboard”.

In my petition, I had referred to a letter sent by one Tom Haugen, (who had been the project manager for engineering, delivery, installation, commissioning and later services and upgrades as regards fire detection installation systems onboard the Blue Lady). Haugen had written to Meena Gupta, Chairman of the Technical Experts Committee (by virtue of being the secretary at the Ministry of Environment) that the fire detection system on the Blue Lady contained 5,500 detection points which included 1,100 ion smoke detectors that used radioactive elements composed of Americium 241. Further, in a separate letter to the Prime Minister dated September 19, 2007, Haugen has reiterated the fact about the enormity of radioactive material on the ship given that he himself had supervised its installation.

Countering the AERB-GMB report that the ship did not contain any radioactive material after their inspection, Haugen wrote that in most cases, the fire detection systems are not labelled or indicated in any way, as they are typically “buried” out of sight. According to Haugen, due to the risk of hazardous radioactive exposure, they should only be handled by professionals or certified technicians. “The system and its detectors are very subtly placed and virtually completely hidden in most parts, so it is totally understandable that a non-expert team might miss it during a broader inspection of the vessel,” wrote Haugen.

In fact, even though the Technical Experts Committee had put in its 2006 report saying that there was no radioactive material on the ship, one of the Committee’s members—Dr. Virendra Misra of the Industrial Toxicology Research Centre (ITRC) in Lucknow, India—disagreed with the findings. He wrote, “Presence of radioactive materials should be ascertained well in advance. Though it is mentioned in the report that radioactive material is not available, in my opinion there is possibility of the presence of radioactive materials due to existence of liquid level indicators and smoke detectors on the ship.” This was ignored by TEC’s then chairman, Prodipto Ghosh. The final report of the Technical Committee was signed by Ghosh alone. All of this is in the records of the apex Court.

The Additional Solicitor General Subramaniam persuaded the apex Court to rely on the report of the Prodipto Ghosh-led Technical Experts Committee. (Ghosh was then secretary at the Environment Ministry and chairman of the Committee. He has since retired, and his post has been taken over by Meena Gupta.) This is the report that had submitted that there was no radioactive material on the ship, as noted earlier. But following the submission of Tom Haugen's letter to the apex Court and our request to the AERB, the latter inspected the ship. As noted earlier, it concluded that there were only 12 equipments that have radioactive material in it. Subramaniam was then compelled to partially admit in the hearing to the presence of radioactive material on Blue Lady. But the fact is that there are still over 1,000 such equipments in the ship and Haugen has the diagram showing the locations of the equipment.

Verified threat of hazardous waste onboard – asbestos

On the asbestos present in the ship, the Court also heard ingenious arguments advanced by the learned Additional Solicitor General Subramaniam who said, "In the present case, the vessel does not contain single kilogram of asbestos and/or ACM as cargo". It had never been the stand of the plaintiff that asbestos or Asbestos Containing Material (ACM) was being sought to be brought in as cargo. Asbestos is already built into the ship's structure.

The question of differentiating between inbuilt material carrying asbestos and asbestos cargo had, in fact, already been addressed by a Parliamentary Committee. The Parliamentary Committee on Petitions, on August 17, 2007, issued its report in response to the matter being raised in the Lok Sabha by Basudev Acharya [CPI (M), Bankura, West Bengal]. Acharya, a senior parliamentarian, had petitioned the Committee, arguing that Blue Lady's entry violates India's sovereignty. Incidentally, the Environment Ministry did give oral evidence before this Committee, but did not disclose the radioactive content of the ship.

The Parliamentary Committee, chaired by Prabhunath Singh (MP-Janata Dal (United), Maharajganj, Bihar, in its response noted that it was extremely concerned that the ship contains an estimated 1,240 MT of ACM and about 10 MT of PCBs as inbuilt material and as a part of its structure. The Committee recognised that asbestos fibres when inhaled or when the PCBs onboard are consumed by human beings, the same may cause cancer unless proper precautions are taken for safe handling of these materials by the workers. The report then entered the issue of asbestos in the cargo versus structure, virtually indicting the government: "The Committee strongly deprecates [sic] the repeated stand taken by the ministry that since no hazardous waste has been allowed onboard as cargo, there is no violation of the Hon'ble Supreme Court directions. The Committee need not emphasise that hazardous waste whether as cargo or inbuilt material are equally detrimental to the environment and to the human health [sic]."

Earlier Kalraj Mishra (MP-BJP, Lucknow), member of the Parliamentary Committee on Industry, had asserted that the French ship Le Clemenceau had been sent back and the Blue Lady, being 50 times more toxic than the Le Clemenceau, should therefore also be sent back.

It appears that the Supreme Court has accepted that 85 percent of the asbestos, contained in the form of wall partitions, ceilings, and the roofing in rooms and galleries in the ship—did not

pose a risk if those parts were removed without damaging them. But no mention seems to have been made with regard to the balance 15 percent of the asbestos contained on the Blue Lady, which in itself would come to 186 metric tonnes. Removal of this asbestos is bound to cause grave risks of asbestosis, mesothelioma, lung cancer and other related illnesses to workers.

In my petition, I brought to the notice of the apex Court that asbestos waste is banned in India and asbestos itself is banned in some 45 countries. Even the World Trade Organisation had passed a verdict against asbestos because of its carcinogenicity at every level of exposure. There is indisputable evidence that safe and controlled use of asbestos is impossible. Despite this, the Additional Solicitor General Subramaniam argued, “Safe use and controlled use of asbestos is possible in India.” He said that asbestos waste in the structure of the ship was not hazardous and asserted that asbestos waste is banned in India; but that only applies to ‘virgin’ asbestos waste!

The Hon’ble Supreme Court has not yet dealt with the application filed by Bhagvatsinh Haluba Gohil, Sarpanch, Village Sosiya, Tehsil Talaja, district Bhanvnagar on behalf of 30,000 villagers and 12 Panchayats of Bhavnagar district of Gujarat. The villages are in the vicinity of Alang ship-breaking yard. They sought directions asking the Court to “direct that the ship named ‘Blue Lady’ (SS Norway) not be allowed to be dismantled at the Alang Ship-breaking yard.” The villagers have argued that “the dismantling of the ship would have hazardous effect on the residents of the villages near the Alang ship-breaking yard as the ship contains large amount of asbestos which, when exposed is hazardous to the health of the residents living in the twelve villages.”

In August 2006, an acclaimed scientist, a former Union Minister, Prof MGK Menon and the Chairman of the Supreme Court’s High Power Committee on Hazardous Wastes had written to the Chief Justice of India and argued that the Blue Lady should be sent back to Malaysia or Germany from where it had come without decontamination.

Faulty argument on a beached ship not being refloatable

There’s more. Allen Todd Busch, Vice President and General Manager, Titan Salvage—a Crowley Company and one of the largest and most respected salvage companies—also wrote to the Prime Minister. He said, “The primary reason the Court has ruled in favour of breaking the vessel, in its current position, is because there is a belief that the vessel cannot be removed from where it now rests.” Busch disagreed with that premise. He wrote that his firm had the capability and expertise to refloat the vessel. “Please allow us to present to the Prime Minister and India’s Court our credentials, history and experience that there is actually very high probability that the Blue Lady is not at all in an ‘irreversible’ position, as the esteemed Court has found,” wrote Busch. Also the firm Aage Anderson, which was involved in the Le Clemenceau case, has said in a technical memo, that the Blue Lady can be refloated.

Even as it was becoming clearer that the Blue Lady (SS Norway, SS France) can be sent back, the Additional Solicitor General Subramaniam led the Court into believing that since beaching is irreversible, that the Blue Lady cannot be sent back. But the Blue Lady, as noted earlier and

in previous articles, is illegally trafficked as per all relevant laws. There is documentary proof that such ships are required certification for prior decontamination of the ship in the country of export. In the case of Blue Lady let alone decontaminating the ship as per the Court's order, it has till date not even been claimed that it has been decontaminated.

Dangerous precedent for globalisation of waste

The list goes on and on. I had also pointed out, in my petition before the Hon'ble Court, that the "Prior Informed Consent" convention which has been accepted in the Rio Declaration, Basel Convention, Cartagena Protocol, Rotterdam Convention, and the Stockholm Convention—has also been incorporated in the Hazardous Wastes Rules, 1989. As per this principle, no member state can send hazardous waste to a developing country without its prior consent. This has not been followed in the case of the Blue Lady. Another important convention that has been violated is that a ship ought to be decontaminated prior to its export for dismantling, a view which has been expressed earlier by the apex Court itself.

Dismantling of the Blue Lady would set a dangerous precedent. Hazardous and poisonous material does not become non-hazardous and non-poisonous merely because the Government, the Environment Ministry and the Additional Solicitor General assert so. The Blue Lady story exemplifies how hazardous industries, substances, wastes are being transferred to India in full public glare due to the connivance of Indian authorities who have compelled the highest Court to decide matters on technical and humanitarian grounds (the original permission to beach the ship in 2006 was given on humanitarian grounds owing to inclement weather) rather than on a legal basis.

Even though the toxic ship Le Clemenceau was recalled in early 2006 on a verdict by a French Court, the Blue Lady story only exposes the conflicted European position on ship-breaking and asbestos. Germany has condoned the Blue Lady's violation of the Basel Convention – the contaminated ship left its shores in 2005 – to stay unreversed. This has in turn allowed the ship owners to successfully escape the exorbitant decontamination cost in Europe.

The news report, suggesting that the dismantling of the Blue Lady has begun, is far from the truth. In fact, it is an effort by cash buyers to tell interested ship-owners that things have not come to a standstill at Alang. This is to ensure the flow of obsolete ships at Alang. The ship-breakers have not even claimed that they have decontaminated the ship. It appears to be a planted story. The reasoning presented before the Court is an exercise in sophistry. If sustainable development is the reason then why do judges say, "Lastly, we may point out that there is no dispute that on 15/16.8.2006 the vessel beached off Alang coast. It is not in dispute that the process of beaching is irreversible." (Supreme Court order Para 14, 11.9.2007). Their main, but insincere, reasoning is that it will give jobs to 700 workers and 41,000 tonne of steel. The real number is 300 workers but how does he know? But mere 41,000 tonne is of no significance since India is the world's largest producer of Direct Reduced Iron (DRI), or sponge iron and is the seventh largest steel producer in the world with an overall production of about 40 mt in 2006. A three-fold rise in steel production capacity to 120 million tonne is going to make it the second largest steel producer in the world in the near future.

Setting a precedent for trafficking hazardous waste

Dismantling plan, submitted by Priya Blue Shipping Ltd. to the Technical Experts Committee (TEC), is simply paper work that has failed to inform the Court as to what it would do for PCBs, incineration ash, ballast water, radioactive material, lead and other heavy metals. Given the fact that there are casual and migrant workers, the commitment to protect workers is not at all credible. Safe handling of asbestos is not possible, it requires an astronaut's dress that is not possible to work in heat...in any case even the TEC report has noted that these safety gears are provided to workers only when an inspection team visits Alang yards. Riky, the Danish ship, has been dismantled and the matter is pending before this very bench but they have decided not to hear the matter so far although it preceded the present ship but showed inexplicable and exemplary speed in dealing with Blue Lady. It is quite well known that as long as Gujarat Maritime Board is the supervising authority, there will be no safety for the workers and the villagers.

Status of “Networking of Rivers”: A Case Study

Gopal Krishna

Abstract

This paper presents the legal status of the proposed project on “Networking of Rivers” in India. It showcases ample proof about the judicial role in the revival of a dangerous and disastrous idea, which has been dead for long. The way even the pretence of democratic process has been sacrificed at the altar of judicial activism is illustrated through Indian Supreme Court’s orders. It is observed that the very premise of the existence of the judiciary is being re-defined autocratically, which, in turn, proposes to re-define the eco-system. In the absence of any definite international legal framework although both Nepal and Bangladesh have raised objections against the project, there is no time, space, or process indicated for participation of communities whose riparian rights must be considered and who face upstream impacts and lesser-known downstream impacts. Transparency and accountability in this project is of enormous significance given the fact that the entire valley of the river is sculpted by its waters which is in a dynamic state. Breaking the dynamic would indeed unleash forces of uncontrolled change and invite the Law of Unintended Consequences.

Introduction

“The Networking of Rivers” case in the Supreme Court of India deserves the attention of not only the residents of India, Nepal, Bhutan and Bangladesh but also of China and the entire world. The Writ Petition (Civil) No. 512 of 2002 is a historic case in point. This case has so far been listed 16 times in the apex Court. The matter is pending hearing. The background and current status of this case is of enormous significance to get a sense of the world’s biggest river-linking project, which is indeed akin to what the *New Scientist* (a world-famous science magazine) referred to as “re-plumbing the planet.”²³ The question—“is this mega project the only way to bring clean water to all, or is it hydrological hubris?”—begs an answer. The apex Court feels it is the only way, while the majority of the people and scientists of the Indian sub-continent feel it’s a technological fantasy with irreparable and disastrous consequences for our eco-system.

²³ ‘Fred Pearl|7d’ (June 2003), Replumbing the Planet, *New Scientist*

Yamuna pollution case became networking of rivers case

On September 16, 2002 the Intervention Application No. 27 in the writ petition (civil) No. 725/1994 was filed in the matter of news items, 'The Hindustan Times' titled "And Quiet Flows The Maily Yamuna" in the Supreme Court for directions on behalf of Amicus Curiae by Ranjit Kumar and MC Mehta as petitioners. The respondents to this case included Union of India, National Capital Region of Delhi, State of UP, Central Pollution Control Board, and others. The case came up for hearing before the three-judge bench of the then Chief Justice, Justice BN Kripal; Justice KG Balakrishnan; and Justice Arijit Pasayat.

Upon hearing the counsel, the Court made the following order on September 16, 2002: "Based on the speech of the President on the Independence Day Eve [sic] relating to the need of networking of rivers because of the paradoxical phenomenon of flood in one part of the country while some other parts face drought at the same time. the present application is filed. It will be more appropriate to treat it as independent Public Interest Litigation with the cause title- 'In Re: Networking of Rivers'. Amended cause title to be filed within a week. Issue notice returnable on September 30, 2002 to respondents as well as to the Attorney General. Serve notice on the standing counsel of respective states."²⁴

Networking of rivers case commences

On September 30, 2002 the three-judge bench of the then Chief Justice, Justice BN Kripal, Justice KG Balakrishnan, Justice Arijit Pasayat heard the "In Re: Networking of Rivers" petition and upon hearing the counsel made the following order: "Learned Amicus Curiae has drawn our attention to Entry 56 List 1 of the 7th Schedule to the Constitution of India and contends that the interlinking of the inter-State rivers can be done by Parliament and further contends that even some of the States are now concerned with the phenomena of drought in one part of the country, while there is flood in other parts and disputes are arising amongst the (riparian) egalitarian States relating to sharing of water. He submits that not only these disputes would come to an end but also the pollution levels in the rivers will be drastically decreased, once there is sufficient water in different rivers because of their interlinking. Response to the petition by the Union of India and the States to be filed by October 28, 2002."

The case was listed for hearing on October 31, 2002 and Nikhil Nayyar, Advocate on Record, was appointed as Amicus Curiae to assist Ranjit Kumar, Senior Advocate appointed as Amicus Curiae in this matter.

On October 31, 2002, the petition in question was called on for hearing before the three-judge bench of Chief Justice BN Kripal, Justice YK Sabharwal and Justice Arijit Pasayat. Respondents included the Government of India and the State Governments. Upon hearing counsel the Court made the following order, "Pursuant to the notice issued by this Court to all the States and the Union Territories in relation to the inter-linking of the rivers, an affidavit has been filed by the Union of India and also by the State of Tamil Nadu. No other State or Union Territory has filed any affidavit and the presumption, therefore, clearly is that they do not oppose the prayer made

²⁴ "Supreme Court order. September 16., 2002. Writ Petition (Civil) No. 725 of 1994

in this writ petition and it must be regarded that there is a consensus amongst all of them that there should be inter-linking of rivers in India." "A majority of the state governments have yet to concur with the Court's views. The Kerala assembly has, in fact, besides rejecting the plans for interlinking questioned the constitutional validity of transfer of waters from one state to another in its resolution!"²⁵

The order further says, "In the counter affidavit filed on behalf of the Union of India, it has been stated that the Government of India has been studying and planning for inter-linking of rivers for over two decades. It is also mentioned in this affidavit that the Ministry of Water Resources had made a representation on October 5, 2002 before the Prime Minister on inter-linking of rivers and in that presentation the Deputy Prime Minister and other senior ministers and officers were also present. It was suggested that a high level task force can be formed which will go into the modalities for bringing consensus among the states. This affidavit further states that the presentation was also made to the President of India on October 16, 2002 where emphasis was laid on interlinking of rivers that has given rise to the filing of the present petition."

The order notes, "The Union of India has accepted the concept of inter-linking of rivers and in the affidavit spelt out the benefits. The state of Tamil Nadu is the only state which has responded to the notice issued by this Court and filed an affidavit. The said state also supports inter-linking of the rivers and in its affidavit has prayed that a direction be issued on the Union of India for constituting a high powered committee in order to see that the project is completed as scheduled. Along with this affidavit the prospective plan for implementation of inter-basin water transfer proposals prepared by the National Water Development Agency in May 2000 has been placed on record. We are distressed to note that milestone for the prospective plan indicated in the report of the Agency shows that even though the pre-feasibility reports regarding the Peninsular & Himalayan projects are already completed, the completion of the link projects ultimately will be completed by the year 2035 in respect of Peninsular Link Project and by 2043 regarding Himalayan Link Project."

After stating this the order observed, "It is difficult to appreciate that in this country with all the resources available to it, there will be a further delay of 43 years for completion of the project to which no states has any objection and whose necessity and desirability is recognised and acknowledged by the Union of India. The project will not only give relief to the drought prone areas but will also be an effective flood control measure and would be a form of water harvesting which is being rightly propagated by the Union of India and all the states." This is quite a weird understanding of water harvesting.

The order further noted, "Learned Attorney General states that a more realistic view will be taken and a revised programme on completion would be drawn up and be presented to the Court. We do expect that the programme when drawn up would try and ensure that the link projects are completed within a reasonable time of not more than ten years. We say so because recently the national highways projects have been undertaken and the same is nearing completion and the inter-linking of the rivers is complimentary to the said project and the waterways which are so constructed will be of immense benefit to the country as a whole."

25 Dr. Sudhirendar Sharma (February 2004), Director, The Ecological Foundation, "Interlinking the Chief Ministers"

The way judges have considered the national highways projects for roads as being complementary to the networking of rivers, à la national waterways project, provides a glimpse of their simplistic reasoning.

Union list entry 56 of Indian Constitution

Elaborating on it the judges further observe, “The report of the National Water Development Agency refers to negotiations and signing of agreements. This aspect is also adverted to by the Union of India in its affidavit when it mentioned that consent of all the states affected by the inter-linking of the rivers has to be obtained.

Learned Attorney General would like to consider this aspect as it is contended by Mr. Ranjit Kumar that if a legislation under Entry-56²⁶ of the union list of the Constitution of India is made, the need for the consent would not arise and the Centre would be in a position to undertake the project and complete the same within a reasonable period of time.”

The Constitution-makers, anticipating such situations, have provided ample power to the Union Government to enable it to deal with them. Why should not the Union, it is asked, exercise its powers of legislation under Entry-56 of List 1, which empowers it to legislate for the regulation and development of inter-state rivers and river valleys, to the extent, to which such regulation and development under the control of the state is declared by the Parliament by law to be expedient in the public interest? Such action by the Union, it is urged, will have the advantage of ensuring a quick solution of these disputes arrived at from the national perspective. Under the Indian Constitution, states have power to legislate (State list, Entry-17²⁷), with respect to the following subject: “Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power, subject to the provisions of Entry-56 of List I.” Union list, Entry-56, reads as under: “Regulation and development of inter-state rivers and river valleys, to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.”

The judges observed, “It is not open to this Court to issue any direction to the Parliament to legislate but the Attorney General submits that the Government will consider this aspect and, if so advised, will bring an appropriate legislation.” The order, in effect, does exactly what it rightly feels it is not open to do.

Misplaced claims

The Government claims that its engineering exercise will transfer 1,500 m³ of water per second from the surplus rivers to the deficit rivers “through 12,500 km of canals.”²⁸ On the other hand, official estimates indicate that floodwaters in the Ganga, Brahmaputra, Mahanadi and Godavari

26. 56 - Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

27. 17 - Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.

28 R. J Ranjit Daniels (October 25,2004), Current Science, “Interlinking of rivers: Ecologists wake up!”

add up to 30,000 m³ at peak flow. This mismatch indicates that the inter-linking plan would be totally incapable of solving the annual flood problems in the country.

Unmindful of the contradictory claims, the order observed, "Mr. Ranjit Kumar, learned amicus has drawn our attention to River Board Act, 1956 which had been enacted by the Parliament. Learned Attorney General would look into this in order to examine whether any further piece of legislation is necessary for bringing about the inter-linking of the rivers. The parties are at liberty to file in the Court any reports or papers containing studies in respect of the said project." The next date of hearing for further order was on December 16, 2002. Meanwhile, Justice Kripal retired as the Chief Justice.

On December 16, 2002 the apex Court order by the two-judge bench of Justice YK Sabharwal and Justice HK Sema reads: "Learned AG has brought to our notice resolution dated 13.12.2002 passed by Ministry of Water Resources, Government of India, *inter alia*, stating that National Water Development Agency has, after carrying out detailed studies and investigations for preparation of feasibility reports identified 30 links and prepared feasibility reports of six such links. It also notices that various basin states have expressed divergent views about the studies and feasibility reports prepared by the said Agency and with a view to bringing out a consensus among the states and provide guidance on norms of appraisal of individual projects and modalities for project funding etc., the central government has set up a task force, details whereof are given in paras 3 & 4 of the resolution. Para 5 sets out the terms of reference of the said task force and para 8 sets out the timetable for achieving the goal of inter-linking of rivers by the end of 2016. Mr. Ranjit Kumar, learned amicus curiae, prays for a short adjournment for filing response thereto." The next date of hearing was on January 20, 2003.

Rare judicial thrust and trust

On January 20, the two-judge bench of Justice YK Sabharwal and Justice HK Sema said, "it would be expedient if the matter is adjourned for about three months so that the Court is in a position to know as to what progress has been made in the matter. List the matter in the 1st week of May, 2003 [sic]."

On May 5, 2003 the petition came up for hearing again. The judges observed—"Pursuant to order dated January 20, 2003, an affidavit dated May 5, 2003 has been filed by Mr. Pandey, Deputy Commissioner, Ministry of Water Resources, Government of India, annexing thereto the resolution dated 13.12.2002 constituting a task force, time table for interlinking of rivers, other resolutions nominating part time and full time members of the task force and a few other documents. It seems that in last about four months three meetings of task force have been held on January 6, 2003, March 27, 2003 and April 28, 2003. In the last meeting the first Action Plan as per Government Resolution was considered and adopted. Now as per Action Plan-I the schedule for implementation is 10 years from the start. It stipulates that the work on the links can be started from 2007. It is envisaged to be completed by say end of 2016. Further it envisages that the group of task force of interlinking rivers will examine the two schedules and is expected to arrive at a reasonable and predicable implementation schedule in due course."

Unrealistically, the Indian Government assured the Court that it would achieve this target by the year 2016 instead of arguing that, since 1960s the idea to connect country's rivers has been talked about at regular intervals. It has been rejected each time, with incremental doubts about the feasibility and viability about the project. It could have further argued that the Planning Commission's 10th plan, adopted by the Government, has no provision for this.

There were advocates, on behalf of respondent states, besides the Attorney General and others. There was an impleadment of Shanti Bhushan, Senior Advocate; Commander (Retd.) Sureshwar D. Sinha; Prashant Bhushan and others as well on this date of hearing.

Dismissing an intervention petition seeking the attention of the Court about the ecologically disastrous nature of the project, the judges, in their May 5, 2003 order, said, "According to Action Plan -1 the said task force has laid emphasis on demonstrative value of starting work on a link or two, as soon as possible. The process of preparation of detailed project report for an inter-basin link needs to be covered also. Detailed Environmental Impact Assessment, Environmental Management Plan and R&R Plan for project-affected persons. We find no substance in the apprehension that the task force will not implement the law. We have also no doubt that in case the other experts in the field provide necessary inputs to the task force, it will give it due consideration the same deserves. For the present, we would direct posting of the matter after six months."

The judges paid no heed to the nationwide rejection of the project. A case in point is the experts' rejection of the project in Jawaharlal Nehru University (JNU), New Delhi on March 31 – April 2, 2003 at the National Workshop on Fresh Water Issues, with a Round Table on National River Linking Plans which was inaugurated by the Vice-Chancellor of JNU. The workshop was organised at the request of Mr. Suresh Prabhu, the then chairman of the task force on networking rivers. The National Workshop concluded that nobody was in favour of this grand plan.²⁹

Speaker after speaker from academia dismissed the project and said that the claims about irrigation and electricity are based on old data, which are no longer relevant. They said it is painful that there is no transparency. The Geological Survey of India is also not sharing information. Some of the questions raised at the meeting included: Are citizens, communities willing to have interlinking? Who is to evaluate the performances? Is there any credible evaluation of existing projects? Whether Ganga is a surplus or a deficit river? Also, questions about the basis of claims about irrigation and electricity benefits went unresponded and remain unanswered to date. Can advocates of this project be judges of the project too?

While the scientific community found no merit in the mega project, the Court on November 10, 2003 asked the Central Government to give a status report detailing the progress made in the networking of rivers project to link major rivers by 2016 in which the second phase of work has already begun. A bench, comprising of Justice YK Sabharwal and Justice SB Sinha, gave four weeks time to the government to file an affidavit detailing the progress made in the working out of Action Plan II of river networking dealing with the funding and execution of the project and suggested methods of revenue recovery.

²⁹ Dams, Rivers & People (March-April 2003), a periodical of South Asian Network for Dams, Rivers and People

The Government counsel informed the Court that the task force had already identified 30 major links in the networking of rivers to minimise the devastation caused by flood and hardship by drought. The task force, in April 2003, had considered and adopted the First Action Plan, which gave the outline of the time schedule for completion of feasibility studies, detailed project reports, estimated cost, implementation schedule, concrete benefits and advantages of the project.

Following the consistent demand and a contempt petition (Contempt Petition (C) No.163 of 2005) August 8, 2005, the feasibility report of peninsular component was put in the public domain.

Regime changes but order remains same

After the Bharatiya Janata Party-led National Democratic Alliance (NDA) lost the elections with its campaign for “networking of rivers”, the Congress-led United Progressive Alliance (UPA) is now the ruling alliance. Although the promise of networking of rivers failed to provide a democratic mandate to the NDA, the project remained alive due to the judiciary. Wittingly or unwittingly this subverts the mandate against “networking of rivers”. On August 30, 2004, the “networking of rivers” petition was called on for a hearing by the bench comprising of Justice YK Sabharwal, Justice DM Dharmadhikari and Justice Prakash Prabhakar Naolekar.

Upon hearing counsel the Court made the following order: “We have perused the affidavit of Mr. MS Gupta, Senior Joint Commissioner (Basin Division), Ministry of Water Resources, Government of India dated August 24, 2004 along with which progress report in the matter of interlinking of rivers has been filed. The progress report being not very clear on our query, learned Solicitor General states that the Government has taken, in principal, decision to continue with interlinking of rivers. The matter, after comprehensive review is likely to be placed before the Cabinet after about six weeks”.

It further noted, “The report of the Standing Committee on Water Resources has been taken on record. Our attention has also been drawn by Mr. Ranjit Kumar, Amicus Curiae to the Report of the Standing Committee on Water Resources 2004-2005 *inter alia* stating that the committee desires that the Government to make earnest efforts to get going the interlinking of the Northern and Southern rivers under Inter-linking of Rivers (ILR) Programme in a definite time schedule which, in their considered view, would save the nation from the devastating ravages of chronic droughts and floods. Be that as it may, as prayed by learned Solicitor General, we defer the matter by eight weeks. The up-to-date progress report be filed within eight weeks and the matter be listed thereafter.”³⁰

The case came for hearing once again on November 1, 2004 where the judges once again dismissed the apprehension of environmental damage as they had done in their May 5, 2003 order. Referring to their previous orders the judges asked the Government of India to put the feasibility studies on two links in the north: Ken-Betwa and Parbati-Kalisindhi-Chambal—on website. In the former, the concerned states are Uttar Pradesh and Madhya Pradesh. In the latter, the concerned states are Madhya Pradesh and Rajasthan.

30 Supreme Court orders. Writ Petition (Civil) No 512 of 2002 on “networking of rivers” (orders till 1 November 2004)

The Court was informed that the project would be pursued with a focus on peninsular components and the concerned state would be fully consulted. In a meeting on this project, the Prime Minister, the Finance Minister and the Deputy Chairman of the Planning Commission together decided to set up consensus groups for linking rivers the Ken-Betwa and the Parbati-Kalisindhi-Chambal. This is estimated to cost Rs 1,000 crore, the Solicitor General, GE Vahanvati, stated before a bench of Justice YK Sabharwal and Justice DM Dharmadhikari. The consensus group would intensify its efforts to resolve technical issues with Uttar Pradesh, Madhya Pradesh and Rajasthan and submit its report by the middle of November 2004, a status report discussion would be held with concerned, State for reaching the memorandum of understanding so that detailed project reports of the two links could be prepared. The matter has been listed 13 times earlier and it was last listed on August 14, 2006.

Contrary to early signals, now it is clear that the UPA Government is currently taking the approach of NDA Government as far as the networking of rivers is concerned. On October 6, 2004 in a presentation to the President, Water Resources Minister PR Dasmunsi outlined a schedule for it. He informed the President that the National Water Development Agency would complete its feasibility report of eighteen links out of thirty before December 31, 2005. The Water Resources Minister also made another presentation—on the progress and future course of action—before the Prime Minister, Dr. Manmohan Singh on October 11, 2004. Details of this presentation and the Prime Minister's response to it are not known. But after the presentation Dasmunsi has been reported to have said that networking of rivers was an "idea conceived by Indira Gandhi, former Congress Prime Minister of India."³¹

Addressing the nation on Independence Day, Dr. Manmohan Singh said, "Water is a national resource, and we have to take an integrated view of our country's water resources, our needs and our policies and water utilisation practices. We need to ensure the equitable use of scarce water resources."³² Having floated the notion of water being a national resource, contrary to the customary provision of communities being custodians of water, it was not surprising when on September 4, 2004, the Prime Minister made the stand of UPA government on networking of rivers almost clear at his first National Press Conference. He said, "The idea of linking river systems is not a new idea. I think this has been discussed and, in fact, included in Plan documents right from the early 1980s. A number of feasibility studies are currently taking place. These feasibility studies have thrown up various issues, which need to be resolved, the ecological consequences, the economic cost, the economic benefits, I do not think, the proposals are in the stage where we can say that we are ready to take investment decisions. All these factors will have to be taken into account before we start implementing this project".³³

One can easily sense that the Indian Prime Minister is circumspect. The UPA Government was charged with ignoring the interests of Tamil Nadu by undertaking the Ken-Betwa river links in Uttar Pradesh and Madhya Pradesh on a priority basis in the Rajya Sabha but UPA Ministers absolved itself by saying that these links were identified by the previous NDA Government in

31 Gargi Parsai (October 7, 2004), *The Hindu*, River-linking plan not abandoned, says Dasmunshi

32 Dr. Manmohan Singh (August 15, 2004), Independence Day Speech

33 Dr. Manmohan Singh (September 4, 2004), First National Press Conference

March 2005. The AIADMK leader, PG Narayanan, said that 40 Lok Sabha MPs from Tamil Nadu should take up the issue or the people of the State would give them a "fitting reply" in the next Assembly elections. Given the fact that Narayanan is the Chairman of the Parliamentary Standing Committee on Science, Technology, Environment and Forests, it is quite evident that the ILR project is not being pushed both inside and outside the parliament on merit but because of parochial regional interests."³⁴

On April 20, 2005 Jairam Ramesh, Member of Congress, gave a speech in the Rajya Sabha saying, "Sir, since 1951, according to the Tenth Plan document, there have been 1,300 irrigation projects that have been taken up for implementation, out of which, only 900 have actually been completed. So, in this country today, there are 400 irrigation projects being implemented at some critical levels of financing, and I think, really this reinforces the point that I want to make that it is really project implementation, projects under implementation, that need to be completed. You don't need a new category called "projects under contemplation".

During the course of the meeting with civil society members, six leading advocates of decentralisation and people-centred planning (Medha Patkar, LC Jain, Kuldip Nayar, Maj Gen SG Vombatkere (Retd), Himanshu Thakkar and Ramaswamy R. Iyer) met the President of India on April 20, 2005 to impress upon him that the Interlinking of Rivers project as currently being envisaged is the wrong direction for the country to take. They have since written a letter to the President addressing his questions. President made some observations and raised some questions, to which it was not possible for them to respond immediately and adequately. However, the points were important and needed to be answered properly. In fact, he asked for notes on some of his questions. In what followed, this is what transpired at the meeting. The President posed some questions and he was adequately responded to. The same paraphrased below:

President: "There are floods in Assam and Bihar and droughts in Rajasthan. Through water-transfers, it makes sense to moderate the former and mitigate the latter. There are huge floods in the Brahmaputra. How can we use them? Let us not talk about flood management; let us think about how the flood waters can be used."

Citizen's Answer: Yes, there are floods in Assam and Bihar, and droughts in Rajasthan and elsewhere. The answer to the latter does not lie in the former. The two phenomena have to be dealt with separately.

Floods (sometimes high floods and occasionally catastrophic ones) are bound to occur in our rivers periodically. They cannot be prevented or controlled. Embankments are a remedy worse than the disease. Big dams (if properly operated – which is problematic because of the claims of irrigation and power-generation) may moderate floods to a small extent, but may themselves cause problems if waters have to be released in the interest of the safety of structures. (This has happened from time to time.)

³⁴ March 25, 2005, The Hindu. "Centre denies 'north-south' divide on linking of rivers"

Has the Judiciary abandoned the environment?

Increasing green cover in the catchment area, extensive water harvesting, groundwater recharging, and so on, may perhaps slightly reduce the incidence of floods. However, floods will occur from time to time, and we have to learn to live with them, minimise harm and damage and maximise benefits. Good and timely information systems, and contingency plans for dealing with disaster when it comes, are the answers.

As for 'using' flood waters, floods and waters that flow to the sea are in fact 'used' waters and not 'wasted' waters. Floods bring many benefits. They carry silt and make lands fertile; deltaic areas are their creation; that is why all folklore praises floodwaters as a 'gift'. Waters that flow to the sea also serve many economic, social, cultural, ecological and other purposes, including the control of salinity ingress from the sea.

Massive transfers (which might moderate floods to some extent) are infeasible, and if attempted, will cause enormous problems. Small diversions through canals will have hardly any 'moderating' effect during the flood season, but could cause problems downstream in the lean season. (A 100m-wide 10m-deep canal that can carry only about 1,500 cumecs cannot make a dent on the Ganga floods that are around 50,000 cumecs on an average, while the same level of diversion can seriously deprive the downstream area of water during the lean season when the river flow is at 5,280 cumecs.)

In so far as the Brahmaputra is concerned, its location in a corner of India, its sheer size (it can be 18 km wide in places), and the magnitude of its floods (60,000 cumecs), are such that its waters simply cannot be 'transferred' to distant areas. Any such attempt will make little techno-economic sense. The best that can be done is to use the waters locally to the advantage of the North-eastern States. There are apprehensions (well-founded or not) in the Northeast of their waters being taken away. It seems unwise to add one more irritant in an already troubled area. (The links envisaging transfers from the Ganga and the Brahmaputra have also caused great anxiety in Bangladesh. That anxiety needs to be allayed through appropriate explanations.)

As for droughts, experience of decades has shown that the existence of thousands of dams, reservoirs and canals has not prevented or reduced droughts. (Incidentally, droughts are not entirely natural phenomena; there are also politico-socio-economic factors behind them.) The answer to droughts has to be primarily local. It is only in an exceptional case where local answers are inadequate or infeasible that one needs to think of bringing in external water. In any case, the ILR will not serve the needs of the uplands and dry lands of India.

President: "How much of the Brahmaputra basin or catchment is outside India? How can you do water-harvesting there?" (Similarly about the Ganga.) "Rainwater harvesting is all right if there is rain. How can we do water harvesting if there is no rain?" "Pointing to success stories (local augmentation of availability through water harvesting, social mobilisation) in a few villages here and there is not enough. We have to think about the 600,000 villages of India."

Citizen's Answer: It is true that parts of the catchments of the Himalayan Rivers lie in the mountains and outside India. When we talk about water harvesting, we usually have in mind areas in central, western and southern parts of the country with medium to low rainfall, and

not mountainous or high-rainfall areas in the country, much less areas outside the country. However, among the early success stories in water harvesting was Sukhomajri in the Shivaliks; and even Cherrapunji, one of the wettest places on earth in terms of seasonal rainfall, suffers from drinking-water shortages in the lean season because of rapid runoff, and rainwater harvesting seems to be the only answer to its problem. If there is no rain then even dams and reservoirs will be of no use.

The benefits brought by local community-led water harvesting are not negligible. The instances mentioned above not only brought about prosperity and economic transformation, but they enabled the villages in question to cope with three or four successive droughts. If such instances are multiplied in thousands across the country, the results will not be minor or insignificant. Two distinguished scholars (Profs. Kanchan Chopra and Biswanath Goldar of the Institute of Economic Growth, Delhi) have estimated the "additional runoff capture" as 140 BCM, which is a substantial figure. Others may differ on the number, but there is no reason to doubt that this can be a significant component of national water planning. (In other words, the 600,000 villages of the country can benefit by this approach; it is difficult to say whether, and if so to what extent they will benefit from the ILR Project.)

President: "It is not good to be negative all the time. Instead of saying why things cannot be done, let us consider how they can be done." "The ILR is not yet a Project. Everything will come into the public domain. The Project will be discussed in Parliament. There will be plenty of opportunities to examine everything in due course. There is no need for anxiety at this stage."

Jairam Ramesh's Answers: Sir, so much has been said on river linking. This was made the touchstone of Indian nationalism by the NDA Government. On the scale and magnitude that is being talking about. I think we need to proceed with some caution; obviously, it needs to be sequenced. There may be some cases where intra-basin transfers could be financially feasible, but I do believe that in today's day and age, with today's media, with today's civil society, it is not possible for us to overlook the ecological and human population resettlement consequences of such a massive scheme. Sir, even today's day and age, I do not think that we can rush into this project oblivious of the consequences of resettlement of millions of people, and let us also face it, Sir, India's track record in resettlement and rehabilitation has been pathetic, has been poor. This is a blot on our collective conscience."³⁵

In July 2005 the Rajya Sabha was divided over the issue of inter-linking of rivers project to tackle the problem of recurring drought and floods. Congress member, Jairam Ramesh, opposed it. Participating in a short-duration discussion on the situation arising due to drought and floods in parts of the country, Ramesh said that the inter-linking of rivers was not a solution to the problem."³⁶

The Supreme Court of India has ruled that High Courts cannot interfere in the Government's policy decisions. They cannot intercede even if they have an alternative point of view. It has ruled that High Courts cannot interfere with policy decisions of the government. The Apex

³⁵ May, 2005, "Not the litmus test of patriotism". <http://www.indiatogether.org/2005/may/opi-jairamilr.htm>

³⁶ July 27, 2005. The Hindu, "Rajya Sabha divided on linking of rivers"

Court has cautioned the lower Courts against intervening in the Executive's administrative actions, since the scope of judicial review is limited in questioning such decisions."³⁷

This Supreme Court ruling was made on July 17, 2006, while dismissing petitions—filed by the Ekta Shakti Foundation, Surya Society and Jay Gee Society—against the Delhi Government's policy decision to implement the Integrated Child Development Scheme. The petitions questioned the rationality and legality of certain terms in inviting offers for supplying nutrition to children of *anganwadis* in Delhi under the scheme.

“The scope of judicial inquiry is confined to the question, whether the decision taken by the government is against any statutory provisions or violates any of the fundamental rights of citizens or is opposed to the provisions of the Constitution,” said the bench of Justice Arijit Pasayat and Justice CK Thakker.

“The correctness of the reasons which prompted the government in decision-making, taking one course of action instead of another, is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation,” said the SC bench. “Thus the position is that even if the decision taken by the government does not appear to be agreeable to the Court, it cannot interfere,” the bench ruled. Maintaining that policy decisions must be left to the government, as it alone can decide which policy should be adopted after considering all points from different angles, the SC said: “So long as the infringement of fundamental rights is not shown the Court will have no occasion to interfere and the Court will not and should not substitute its own judgement for the judgement of the executive in such matters.”

The bench noted that, “while exercising the power of judicial review of administrative action, the Court is not the appellate authority and the Constitution does not permit the Court to direct or advise the executive in matters of policy or to sermonise on any matter, which under the Constitution lies within the sphere of the legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory powers”. It added that even if the Court does not agree with the decision taken by the government, it could not interfere. In matters of policy decisions, the Court should not substitute its own judgement for the executive's judgement. It also ruled out the possibility of a review of the correctness of the reasons for the government adopting a particular course of action, saying, “In assessing the propriety of a decision of the government the Court cannot interfere even if a second view is possible”.

In such a scenario the supreme question is why did the Supreme Court interfere in the policy matters of the government against its own interpretation of its *lakshman rekha* and presume consensus among states, which is manifestly non-existent as is evident from the Terms of Reference (TOR) of the Task Force, constituted to ensure networking of rivers and also from the Courts most recent order. The TOR says, “Devise suitable mechanism for bringing about a speedy consensus”. This presumed consensus is the *ratio decidendi* (the reasoning behind the decision) of the judgement on networking of rivers. If something is a legal system, it must meet factual criteria. In the case of the ‘networking of rivers’ one fails to come across a cogent *ratio*

37 July 20, 2006, The Hindu, The Indian Express, “Courts cannot interfere with govt's policy decisions: Supreme Court”

decidendi; that is, "Any rule of law expressly or implicitly treated by the judge as a necessary step in reaching his conclusion."

Through public interest litigation, judges have rendered considerable service to bonded labour and child labour and in cases relating to pollution and the environment. Some of them might have gone too far in public interest litigation, carried away by the praise showered on activist judges. And the activism being shown by the judges in the proposed networking of rivers project falls in this category. It is not great jurisprudence to suggest ways of water management without understanding democratic tenets of management through community participation. If there is water problem in various parts of the country, each local region will have its own solution. This strange reasoning of judges to provide judicial solution to management problem defies understanding. Also, one fails to comprehend how does it fall under its jurisdiction and mandate of interpretation of law.

The "networking of rivers" petition was filed following the speech of the then President APJ Abdul Kalam suggesting inter-linking of rivers. Unmindful of his initial speech, where the President underlined that "such programmes should have a large-scale people participation even at the conceptual and project planning stages, "Hon'ble President never misses an opportunity to express his support for the "networking of rivers" project precluding any scope of participation in the decision-making which entails rewriting the geography of the country. This is quite autocratic. The President has not paid even an iota of attention to the participatory democratic decision-making process, in gross violation of citizens' right to be consulted which is in real terms the bedrock of democracy.

Regarding the judiciary in particular, legal analysis in the sense of comprehensive analysis, reducing complicated and otherwise incomprehensible issues to their fundamental constituent parts is a *sine qua non* for the judges to follow the principles of empirical science based on clear and evident observations of facts.

All the scholars of law know that much of English legal thought perhaps being followed by the concerned judges is obscure, non-scientific, high-minded and unempirical. It is high time Indian jurists paid heed to analysis in their judgements to banish these anti-scientific elements from legal thinking.

Besides technical problems in the networking of rivers project, given the enormity of political and legal problems witnessed from the way in which neighbouring countries like Nepal and Bangladesh have raised objections and the way Indian states been quarrelling with each other over water in general and networking of rivers in particular, the feasibility of the project is questionable and improbable. These states have been compelled to flout not only the tribunal awards but also the Apex Court orders.

International law

The international law on sharing water is unsure. The UN General Assembly adopted the UN Convention on Law of Non-Navigational Uses of International Watercourses in 1997. India expressed its objections because it was not adopted by consensus. It was adopted on May 21,

1997 with a majority of 104 countries votes. The three countries which opposed the convention were China, Turkey and Burundi. India and Pakistan were 1 of the 26 countries, which abstained.

India had reservations regarding its participation in the Principle of Equitable and Reasonable Utilisation contained in Article 5, which states:

1. Watercourse States shall in their respective territories utilise an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilisation thereof and benefits there from, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.
2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilise the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.

India also had reservations about Non-discrimination Article 32, which states, “Unless the Watercourse States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who have suffered or are under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse, a watercourse State shall not discriminate on the basis of nationality or residence or place where the injury occurred, in granting to such persons, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried out in its territory”.

The Indian position was that Article 32, of the Convention, presupposed regional integration and hence did not merit inclusion. On dispute settlement Article 33, which states, “If the Parties concerned cannot reach agreement by negotiation requested by one of them, they may jointly seek the good offices of, or request mediation or conciliation by, a third party, or make use, as appropriate, of any joint watercourse institutions that may have been established by them or agree to submit the dispute to arbitration or to the International Court of Justice”. India felt that it contained an element of compulsion. Any procedure for peaceful settlement of disputes should leave the procedure to the parties. Any mandatory third-party dispute procedure was inappropriate and should not be included in a framework convention. India voted against these provisions in the working group and therefore abstained from voting.

The Convention is yet to enter into force, as it has not yet been ratified, accepted, approved, or acceded by 35 instruments (state and/or regional economic integration organisations) as stated in its thirty-sixth article. Currently, only 16 countries have signed the Convention, eight of which have ratified it. Most major basin countries are hesitant and have reservations about entering into this Convention. From the 16 signatory countries, many are non-basin states. The major concern is that the eventual 35 signatures are likely to be mainly those of non-basin countries, which means that the Convention will enter into force, theoretically. The fact remains the Convention provides an excellent basis for co-basin countries which wish to form agreements.

No one can deny the necessity of agreements to streamline ways of benefiting from international river water. The conflict emerges from theories such as the theory of absolute territorial sovereignty, implying that the country of river's origin is free to do what it likes with the water without taking into consideration the rights of co-basin countries. This is in contradiction of the theory of absolute integrity of the river, which does not allow co-basin countries to use water in such a way that would violate the rights of others. Between the two extreme theories mentioned above are two moderate theories of limited territorial integrity and community of interest. The former envisages that each country uses the water of the river that flows through it but considers the rights of other sharing countries. The latter calls for ignoring political borders between countries and looking at the watercourse as one basin that comprises a geographical unit, considering the whole watercourse, from its origin to its end, as a hydrographical basin.

The Report of the National Commission for Integrated Water Resources Development Plan, Government of India which felt that the interlinking of the Himalayan component may not be feasible till 2050, pondered over UN Convention on Law Of Non-Navigational Uses of International Watercourses as well. The Report concluded: "The bilateral or regional treaties and understanding entered by India with any of its neighbours will normally take precedence over the UN Convention, which is framework to which India is not a signatory. However, although India abstained from signing the Convention, we could draw upon the principles enunciated in it usefully for the purpose of evolving an interpretative matrix not spelt out in our bilateral treaties."³⁸

In the context of networking of rivers, a balance between the theories of limited territorial integrity and community of interest through a binding international law or treaty is urgently required to obviate war-like situations.

Available alternative solution

In any case, the moot point is how to solve the water problem. As per the Planning Commission's Tenth Plan document, there are 383 ongoing major and medium projects awaiting completion, 111 of which have been lying pending since the pre-fifth Plan period i.e., for more than 26 years. All these can be completed within five to eight years, yielding an additional potential of about 14 million hectares at a cost of Rs 77,000 crore as estimated by the plan task force, now raised to Rs 100,000 crore.³⁹

The second component listed in the Plan is the development of minor irrigation, mostly in the Eastern and North-eastern regions. The total potential assessed is 24.5 million hectares with a total investment of Rs 54,000 crore, of which the Government is expected to provide only Rs 13,500 crore, the balance coming from beneficiary farmers and institutional loans. The cost per hectare is only Rs 20,000 and gestation period almost nil, against a cost of Rs 100,000 and a 12-years' gestation period in the case of major and medium projects. The third

38 "September 1999, The Report of the National Commission for Integrated Water Resources Development Plan, Government of India

39 Som Pal (September 30, 2004), *Forgotten Links: Focus on Existing Projects, Not 'River Garland'*, former member, Planning Commission, *The Times of India*

equally beneficial scheme, mentioned in the Plan, is that of the groundwater recharge master plan prepared by the Central Ground Water Board needing Rs 24,500 crore to trap 36 billion m³ of water annually.⁴⁰

These measures are quite clearly better than the project of networking of rivers. The concerned judges would serve the ecological interest of the subcontinent better if they could pay heed to these proposals of the Plan document. Judges at all levels have, by and large, justified the confidence reposed in them. But there is scope for improvement in several spheres and it is up to the Judiciary itself to rectify the defects in its role and to prove to the public that as long as there is an efficient, impartial, independent and incorruptible Judiciary, democracy in India will be safe from the tyranny of the Executive and also the Judiciary.

The Apex Court came to the rescue of a river in the Kamal Nath Hotel case where a hotel company which had stakes of Kamal Nath, the then Union Environment Minister (presently Union Minister), had unilaterally taken a number of measures to divert the course of the Beas River near Kulu-Manali in Himachal Pradesh (for instance, earthmovers and bulldozers were used to create a new channel) when floods threatened land in its possession. The Court used the Public Trust Doctrine to define the state as a trustee of natural resources.

The present UPA Government has released its National Environmental Policy (NEP) that refers to the Public Trust Doctrine saying, “The State is not an absolute owner, but merely a trustee of all natural resources, which are by nature meant for public use and enjoyment, subject to reasonable conditions, necessary to protect the legitimate interest of a large number of people, or for matters of strategic national interest.”⁴¹

The NEP says, “The broad direct causes of rivers degradation are, in turn, linked to several policies and regulatory regimes. The result is excessive cultivation of water intensive crops near the headwords, which is otherwise inefficient, waterlogging, and alkali-salinisation of soil.” It also refers to factors causing reduced flows in the rivers and seeks to ensure maintenance of adequate flows. As an action plan for river systems, the NEP expresses its intent to “mitigate the impacts on river flora and fauna, and the resulting change in the resource base for livelihoods, of multipurpose river valley projects, power plants, and industries.”

Need for judge watch

Citizens of the sub-continent wonder why the Supreme Court of India is taking an executive’s role. The success of a democracy, especially one based on a federal system, depends largely on an impartial and independent Judiciary endowed with sufficient powers to administer justice. Judges can impart their personal views in interpreting a statute but they must not assume the role of guardians of public policy and should not play God. A distinction must be drawn between personal idiosyncrasy and the incorporation of new economic and social policies in the interpretation of law.

40 *ibid*

41 National Environment Policy 2004. Ministry of Environment and Forests. Government of India, http://envfor.nic.in/nep_him

The proposal of networking peninsular and Himalayan Rivers emerges from a lack of rigorous evaluation of the ecological impacts which would prove disastrous not only to the fishery, but also to the biodiversity and biotic processes that have evolved over the past hundreds of millions of years. One cannot expect the judges to understand but venturing into an area of their ignorance is against all canons of wisdom. It is a fact of life now that Courts have begun to micro-manage the lives in India through curtailing workers right to strike etc.

In the case in question the judges went on to advise the Government that in case consent was not forthcoming from the states, the Government should consider passing a legislation to obviate consent of the states for this project. Since criticising the judges is a criminal offense, the advocates of resistance who are not shackled by their funding sources from among the civil society needs to keep a watch on the impeachable antecedents and future activities of the judges. The rampant violation of statutory principles and natural justice requires a vigilant citizens' network as opposed to a fund agency-driven initiative in order to investigate both why the judges have sold themselves to the ideology of the free market and undermining democratic rights of its citizens, as well as to bring the truth about it to the public domain.

Conclusion

Networking rivers does not mean drawing some mega litres from one river and pouring it into another like one does with static containers, or even with canals. The ramifications are much wider because a river is not only the water (that flows or the channel, which holds the flow rather its much more. The river is the dynamic face of the landscape. In the drama of history, the eco-system is not the stage setting; it is the cast"⁴²

In most cases, the practical solutions required are local, reflecting the geographically and culturally specific nature of water-use. The Cold War era of "the bigger the better", which prompted the construction of 45,000 large dams throughout the world, is over. This thoughtless tampering with nature has left a terrible legacy of thousands of acres of fertile land having been lost with man-made catastrophes such as in the Aral Sea region causing immeasurable suffering."⁴³

In the past, the Court has rightly and consistently held that large infrastructure projects invariably raise technical and policy issues which the Courts are not equipped to handle. In view of the reasons cited above, and especially an evolving international law on transboundary rivers, there is a clear case for the Apex Court to review its order on "networking rivers".

As per National Water Policy, 2002, "Water resources development and management will have to be planned for a hydrological unit such as drainage basin as a whole or for a sub-basin, multi-sectorally, taking into account surface and groundwater for sustainable use incorporating quantity and quality aspects as well as environmental considerations."⁴⁴ Outlining India's

42 Devashis Chaterji (2004), <http://groups.yahoo.com/group/riverlink/>

43 Mikhail Gorbachev (October-November 2000), "The Global Water Crisis", former President of USSR, *Civilisation*, the Magazine of the US Library of Congress

44 National Water Policy (2002), Ministry of Water Resources, Government of India, <http://wrmin.nic.in/policy/default4.htm>

Has the Judiciary abandoned the environment?

National Water Policy in 2002, the then Prime Minister Atal Bihari Vajpayee said that the policy should be people-centred and those communities ought to be recognised as the “rightful custodians of water.”⁴⁵ “This clearly shows that networking of rivers is contrary to the Government”; stated policy which means vested interests are so powerful that they can subvert the role of both the Executive and the Judiciary.

Given such a background, the hearing of Writ Petition (Civil) No. 512 of 2002 is very crucial. In the days, months and years ahead it is likely to reveal the Indian Government’s exact policy vis-à-vis the networking of rivers and the Apex Court’s considered response in the face of sub-continental protest. This case is likely to give birth to a new international legal order to safeguard the legitimate regime of rivers from the obsolete notions of conquering nature and taming of rivers. If the environmental movement in the Indian sub-continent fails to stop this mega project, it would mean nothing short of a premature death of the movement itself.

⁴⁵ Francois M. Farah (October 23. 2003). UNFPA Representative, UNFPA Water and Sanitation Report

Environment Crimes and Compensation: The Bhopal Gas Litigation

*V. Venkatesan**

The Bhopal Gas Litigation has several dimensions. It is generally assumed and asserted by the Government time and again – and tacitly endorsed by the Supreme Court too – that as far as compensation is concerned, there is nothing much left to litigate, as the Supreme Court sought to extinguish the civil claims by reaching the settlement on February 14, 1989 for the sum of 470 million US Dollars (Rs 712 crores).

But this assumption and the assertion has no basis, when tested against facts. As demonstrated by the IA filed by Bhopal Gas Peedith Sangharsh Sahayog Samiti and Bhopal Gas Peedith Manila Udyog Sanghathan (IA1&2 in LA No.48 and 49 in CA3187/3188/1988), the February 1989 settlement was ordered by the Supreme Court on the assumption that the total number of victims were only around 105,000, including 3,000 dead. However, the Union of India's submission before the Supreme Court on March 19, 2007, has revealed that, as on February 28, 2007, over 573,537 victims (including 5,294 “proven” death cases and 10,007 other death cases where claims have been converted from death to injury) have been paid compensation. This was achieved by spreading the Settlement Fund, meant for 105,000 victims, thin. The Settlement Fund was never augmented from any other source. Effectively, each victim has received one-fifth of what he/she was entitled to under the terms of the Settlement.

Had the US \$470 million been divided equally among all 105,000 victims, each would have received an average of Rs67,857 at the 1989 value of the rupee. However, when the same was divided among 573,537 victims, each on an average got only Rs12,423 at the 1989 value of the rupee. This was the basic argument for pleading that the Settlement Fund be augmented by a factor of FIVE.

Hence the IAs prayed for enhancement of the total compensation sum in proportion to the actual magnitude and impact of the disaster.

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Now what did the Supreme Court say in 1989? In Para 37 of its Order dated May 4, 1989, (3) SCC 38 it said:

“A settlement has been recorded upon material and in circumstances which persuaded the Court that it was a just settlement. This is not to say that this Court will shut out any important material and compelling circumstances which might impose a duty on it to exercise the powers of review. Like all other human institutions, this Court is human and fallible.”

In another order on December 12, 1989 (Paragraph 164. 1990 1 SCC613) the Court reiterated its May 4, 1989 order that it would be only too glad to consider any aspects that may have been overlooked in considering the terms of the settlement.

Very important, the Court admitted that a correct picture as to whether the amount of compensation for which the claims have been settled is meagre, adequate or excessive will emerge only at the stage when all the claims have been processed and their aggregate is determined.

The I.As, filed in 2004, were rejected on May 4, 2007 by the Supreme Court Bench without citing any reasons. In paragraph 18 of the Order, they directed the applicants to file the application before the Welfare Commissioner and the High Court of Madhya Pradesh before approaching the Supreme Court for relief. These applications were seeking re-examination of the overall settlement in terms of the actual magnitude and gravity of the disaster, which is solely within the jurisdiction of the Supreme Court. The direction to approach the WC would make sense, if the prayer pertained to individual compensation cases. On the crucial issue of magnitude of the disaster, the number of actual victims, and the compensation being determined on a much lesser number of victims, the Court recorded no findings. The two organisations have now filed an application for modification and clarification of the order, which will be heard tomorrow.

What was the Union of India's response to this IA? In its counter-affidavit, the UOI said: “so far as adequacy of award of compensation is concerned, It has been considered by this Hon'ble Court in several cases”, including in Writ Petition (Civil) No. 66 of 1995. This petition concerned with adequacy of compensation in individual cases, which is different from the issues raised by the current I.As.

In para 6 of the Counter Affidavit, the Union of India has averred that: “the contention of the applicant that the settlement of the entire case for an amount of 470 million US Dollars was based on the assumption that there were only about 3000 fatal cases and about 102,000 other injury cases of various degree, is baseless.” The applicants reaffirm that the above-mentioned figures are entirely true and are based on the Order of this Hon'ble Court dated May 4, 1989 and reported in (1989) 3SCC 38. The same has also been summarised and annexed as Annexure – 1 in IA Nos. 48-49. Therefore, for the Union of India, at this moment, to claim that the said figures quoted by the Applicants were “baseless” is preposterous. Is the UOI desperate to conceal the magnitude of the disaster as was assessed at the time of the settlement with UCC?

The Union of India then tried to qualify the above-mentioned personal injury figure by making the following untenable claim. According to the Union of India: “*Regarding 01 category [personal injury cases], it is submitted that it was decided that an amount of Rs 25,000/- may be paid to each claimant whose presence on the fateful night in any of the 36 affected wards of the city of Bhopal is proved, irrespective of whether they suffered injury or not.*”

Therefore, the Union of India did not explain under what law of the land the decision to pay compensation to claimants had been taken “*irrespective of whether they suffered injury or not*”. If a claimant has not suffered any type of injury, including mental agony or material loss, there is absolutely no legal or moral ground for paying any compensation to such a claimant since there is no way that the claimant can be categorised as a “victim” or “heir of a victim” of the Bhopal disaster. The Union of India is expected to act as a trustee of its citizens’ wellbeing and lawful interests including its objections in law to act in public good. It cannot be expected to take an adversarial stance in the matter of this nature.

Dow’s liability

The question of cleaning up the abandoned plant site at Bhopal has taken several twists and turns. Hundreds of thousands of tons of extremely toxic wastes and hazardous chemicals have been buried in over 11 waste pits at the site. Till 2004, both the State and the Central government were not concerned about the issue. In 2004, the US District Court for the Southern District of New York, in a civil suit for environmental damages filed by gas-affected persons, agreed to consider the claim for site remediation only if the Indian government agreed to cooperate. The UOI submitted a letter on June 28, 2004 to the US District Court stating that neither the UOI nor the State Government had any objection to any relief for environmental remediation of the plant premises being ordered or directed by a competent Court or tribunal of the US. The UOI further conveyed its readiness to cooperate with any such relief measures as and when announced by the US District Court.

Then came the PIL filed by one Alok Pratap Singh in MP High Court seeking to hold Dow Chemical, the company that bought UCIL, responsible for causing environmental pollution and to assume, as the UCC’s legal heir, its liabilities. But the Court was quick to address his second plea, to ensure immediate clean-up of the plant site.

In the US District Court, the UOI took a clear stand that, pursuant to the polluter-pays principle, the UCC should bear all of the financial burden and cost for environmental clean-up and remediation. Before the MP High Court, however, the UOI discovered the “legal” duty to remove toxic waste. It distinguished the matter of financial liability from that of executive responsibility for the removal of toxic wastes. It cited Rule 16 of the Hazardous Waste (Management and Handling) Rules, 1989, enacted under the EPA. This rule lays down that the financial liability of remediation and restoration is that of the polluter and that an amount, equal to the cost estimated by the State Pollution Control Board, should be paid in advance to it by the polluter. Rule 16(2) is clear that only after such an advance is paid by the polluter, can the Board or Committee plan or execute the programme for remediation or restoration. But the UOI

mistakenly displayed an inexplicable optimism about the willingness of the polluter to pay and went ahead with the Task Force and approved the Madhya Pradesh Pollution Control Board's action plan.

This was inconsistent with the formal position of the UOI and the Madhya Pradesh Government told the US Court that they would not incur any costs for the clean-up and all liability would be borne by Union Carbide as the polluter.

Even as the Madhya Pradesh High Court is yet to decide the issue of Dow's liability, the UOI appears sympathetic to the pleas to absolve Dow of any liability. While the PMO has taken on its file, a legal opinion—tendered by Abhishek Singhvi in favour of Dow (it was given to Dow, saying it is not liable)—has apparently overlooked an interesting fact

Dow was a respondent in the petition filed by Alok Pratap Singh in the MP High Court. Dow requested the High Court to implead UCC (USA) and Eveready Industries India Limited (EIL) as respondents, and delete its name from the array of parties on the grounds that it had nothing to do with the matter. The High Court permitted the inclusion of UCC and EIL, but is yet to issue orders on whether to delete the name of Dow. The Court did not give priority to determining Dow's liability for the cleanup.

In the criminal case, being heard by Chief Judicial Magistrate, Bhopal, the CJM issued a notice dated August 9, 2004 to be served on Dow Chemicals India Private Limited. The DCIPL appeared before the CJM, Bhopal on September 3, 2004 and claimed that the DCIPL, which is a company situated at Mumbai, had no direct nexus, either in terms of holding or in terms otherwise, with The Dow Chemical Company, USA and, or the UCC.

However, the same DCIPL intervened before the High Court to stay the notice issued to TDCC, USA on January 6, 2005 by the CJM, Bhopal. If the DCIPL's claim—of no direct nexus with TDCC—was to be accepted, then it clearly had no locus to seek a stay from the High Court.

Justice for Nature

*Vikram Soni**, *Sanjay Parikh***

In the last three decades, from Stockholm (1972) to Rio (1992) to Bali (2007), enlightened international concern has drafted several environmental principles. Included precautionary principle to balance human development with the protection of the natural environment and valuable natural resource. But have we really balanced them or have we created climate change? The polluter pays principle seeks to repair environmental damage caused by the polluter or industry – but how do you repair natural resource loss that is original forest, when the damage is irreversible. The principle of respecting carrying capacity – but look at megacities and megadams – Delhi, Mexico City, Tokyo or Shanghai and the Three Gorges Dam.

At Bali (2007) we are still struggling with just text on mitigating climate change. It is ironic that the largest polluter, the United States, is the only country not to make a written commitment to mitigate. Even more ironic, it is the “American” lifestyle of conspicuous consumption that is the role model and engine behind climate change.

Declarations have not worked and it is too late to set general principles. The present contingency demands only one rule: keeping development off irreplaceable natural resources like rivers, lakes, mountains and forests for our survival and for future generations.

Climate change and natural resource loss

There is a common perception that the biggest blight upon us is climate change. Climate change is associated with an alarming rise in greenhouse gases, particularly carbon dioxide and methane, which cause global warming. Glaciers, for example, are receding due to climate change. The vast Amazon tropical forest is one of the largest carbon sinks – it removes large amounts of carbon dioxide from the atmosphere and converts it to tree biomass and oxygen. But a third of the global warming, which arises from the sacking of the tropical forests (i.e. in the Amazon, Sarawak, Indonesia and elsewhere) is not due to climate change. On the contrary, it is climate change which is due to the savage destruction of these huge natural reserves by greedy human consumption. Similarly, rivers are not silting and are dwindling due to climate

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change – glacier melt would increase the flow in rivers -but due to the razing of forests around their catchments, which steadily release water into the rivers. In addition, underground aquifers are not drying out due to climate change but due to human over-exploitation and poor decision-making. So, we must not confuse cause and effect: climate change is not equivalent to natural resource loss.

We may ask, if climate change and natural resource loss are not equivalent, where do they stand on the environmental Richter scale. Climate change is certain and slow death, if not stopped. But it can still be halted, albeit inconveniently, and is then reversible. On the contrary, the loss of natural resource, created over aeons of evolution, is immediate and irreversible. Natural resource loss, rather than climate change, tops the danger list. However, this has not come to the forefront in the climate debate. Natural resource loss has yet to clearly be seen for what it is on the early warning radar.

Loss of forests, glaciers and river siltation have cut water storage on the planet. The contamination of aquifers has decimated quality drinking water sources. What's more, increasing population has cut the availability of water to a third of what it was 50 years ago.

Consider the economics of drinking water. Natural mineral water cannot be technologically created – that is why we cannot drink distilled water. From being freely available almost everywhere on the planet, natural mineral water now comes from mountain streams in plastic bottles that over half of the world's population cannot afford. At 5 cents per litre and 3 litres per day per person, drinking water, for 2 billion people, will cost 100 billion dollars a year to provide. Governments, like Chinas, officially report that 5 percent-13 percent of GDP every year will be needed to repair the total environmental damage. Natural resource loss is not cheap and may eventually become fatal.

In caricature, this has invented “Doom Tourism”, which is now transporting people to see the melting glaciers of Patagonia, the corals of the Great Barrier Reef and the Gaumukh glacier – the source of Ganges—before they become extinct!

Human rights and human survival: nature's rights

Another common misconception is about human rights. Human Rights Commissions are obligatory national and international vigilantes in all democracies. Human rights concern the foibles and inequality between one set of human beings and another set. These can range from usurping the sovereign rights of one nation by another more powerful one to more local violations. They come up when the rich and powerful exploit the poor and disenfranchised to destitution. They come up in the violence towards women, violence towards lower castes or creed and many other instances. They are horrible and portrayed graphically. But as far as the rest of creation (i.e. nature) is concerned, the assault is equally appalling. However, it often passes through the filter simply as environmental damage, notwithstanding the Stockholm Declaration which accepts environment as a part of basic human rights – the right to life itself. The United Nations Millennium Ecosystem Assessment Synthesis Report and the IPCC reports—indicate that 60 percent of the eco-systems of the planet—on land and at sea—are seeing terminal loss.

Such natural resource loss—be it the Amazon forest, the whales and sharks of the sea, the elephants and tigers on land, the rivers and lakes, the glaciers on the mountains, or aquifers below ground—strongly impact human life.

Whereas human rights occupy centre stage and deal with human conflict, the loss of nature's resource threatens human survival. It is time to understand that the more fundamental human rights—on which human survival depends—are nature's rights. Human rights for future generations and survival are really Nature's rights.

The subterfuge of language

Language is such a powerful medium of human communication that it colours all our metaphors, beliefs and imagination. But language can also craft deception. It can wash over common sense and sensibility. This has happened in the present climate of extreme material consumption powered by the global free market. Let us see how this has happened.

Whether it is the Government, or Courts, or the Global free market, the seductive vision of development has become so pre-emptive that the precious remaining original forest, our biodiversity treasury, is being extinguished for huge mines, or dams, or even lucrative real estate projects by justifying it in the name of 'compensatory afforestation'. These words carry tantalising deception, suggesting that whatever damage was done can be undone or compensated for by artificial plantation. It then seems to the unschooled and unsuspecting that this is a fair trade-off for development. It is like giving sanction to the insane notion that it is fine to kill wild tigers as long as we replace them by farming the same population in captivity. Can valuable natural biodiversity, created by evolution, ever be equated with compensatory plantation? Such a subterfuge finds acceptance by Court and Government and is often subsumed in the now dangerous cliché of sustainable development. If sustainable development of this ilk will finish off all our biodiversity, heritage, and resource, is it admissible?

"Green buildings" are acceptable currency to scotch immensely valuable heritage and resource. In popular imagination the word "green" is so comforting that it clouds real and irreplaceable loss. So are modern terms like eco-tourism and eco-friendly development, where the prefix 'eco' works to trample nature's value. Natural water resources are taken out by commercial buildings for short term profit and are substituted by the magical phrase, "water harvesting". It is a well-kept secret that water harvesting can collect not more than five percent of the original resource, apart from taking out an irreplaceable natural resource like an aquifer or a floodplain.

We have to remove the hypocrisy of these green cliches like sustainable development, "green" buildings, compensatory afforestation, eco-friendly, etc. from our dictionary before such language seals our fate.

Laws of nature

A law is one thing, but its application and implementation is another. The precautionary principle has not been enforced on big projects like the Three Gorges Dam on the Yangtze River in China, which has now been declared a disaster by the Government. The Tehri dam

on the Ganges, in a seismic Himalayan zone, and the Sardar Sarovar dam, on the Narmada, in India may follow suit.

Another “notion” is that poverty is itself a cause of pollution and that economic development will remove poverty and better the environment. Poverty alleviation—in terms of “right to shelter” and “right to employment”—is often misused to justify development at the cost of environment degradation. Let us see what is happening to the people who have no link with the global economy but live simply amidst pure unpolluted streams, pure air and forest. This is what gives their life a quality that cannot be bought, and they have preserved it, as their simple lifestyle is non-invasive. But now this basic and essential resource is being whittled away by big companies that acquire large swathes of virgin land for mining or development. These people are then left mute and destitute. This indicates that an appreciation of concerns for nature requires a different mind set, a consciousness, which sees life in totality. The market economy does not address these concerns. In the present climate, when we have already lost over half of our natural resources, it is evident that principles like the polluter-pays or the precautionary principle or sustainable development no longer work – we are well past the point of precaution – and must be changed to prohibit further damage to such resources which cannot be created by man.

The mandatory Environmental Impact Assessment (EIA) is so notoriously manipulated that it has ceased to be effective. Instead, we should have a Nature’s Rights Commission made up of concerned citizens and scientists whose integrity is above any political and monetary affiliation. There is a precedent for this. The Israeli Parliament, the Knesset, has set up the Israeli Commission for Future Generations as an inner parliamentary entity. Its charter is to safeguard valuable natural heritage and natural resources. Its role is to supervise each legislative process, with special regard to long-term issues, and to prevent potentially damaging legislation from being passed in the Knesset. This Commission is given the authority to initiate bills that advance the interest of future generations.

We need just one simple law which provides absolute protection for all valuable natural resource, be it forest, rivers, aquifers, or lakes. Such a law will be a public trust doctrine. These doctrines have their basis in the ancient wisdom that nature’s laws impose certain conditions on human conduct in its relationship with nature. This relationship has to be kept in absolute trust. It was for this reason that in Roman law the concept of *jus gentium*, a law for all people and nations, was developed to protect nature’s irreplaceable resource. Later, this led to the public trust doctrine in the Magna Carta of the thirteenth century. More recently, the Water Framework Directive of the EU recognises natural water resources as a protected heritage.

We urgently need this singular and uncompromising governing code if we are to safeguard nature and its natural resources to preserve life on the planet.

Environment Crimes and Compensation: Are We Concerned About the Survival of the System or Human Beings?

*Rohit Prajapati**

Violation of environmental laws⁴⁶

Legal procedures and laws are devised with the intention to secure the ends to justice. A “legal battle” requires evidence and a protected trial under civil, criminal, or any other kind of law that applies to a particular situation. The environmental problems we face are such that the average citizen can hardly afford protracted battles. This was the main reason for which affected people moved various petitions in the High Courts under Article 226 and the Supreme Court under Article 32 of the Constitution of India. In some cases, the Courts moved swiftly by employing “creative reason”, under judicial activism, with a goal to secure the ends to justice and protect the right to life. This is actually the essence of Article 21 of the Constitution of India, which is open to interpretation when dealing with various environmental laws. Public interest litigations were undertaken to design remedial measures, prevent further pollution and restore ecology to normalcy. These litigations have yielded some positive and many negative results.

The public has developed awareness in general about pollution as an issue. The industry and the state have been compelled to rethink their processes.

It has opened up new areas of pollution prevention and remedial technology. The general public has become aware about technical issues like pH; TDS; COD; BOD; primary, secondary and common effluent treatment plants; incinerators; scrubbers; and air quality control mechanisms. Attempts were made to discuss various kinds of raw materials used in the industry that contribute to pollution and impact human beings, animals, vegetation, air, water and other natural resources.

It is well known, at least for the Gujarat State, that in 1995-97 several industries were closed down for the violation of Environmental Laws. However, most of them re-opened, claiming

* Rohit Prajapati, Social Activist from Gujarat

⁴⁶ For more detail – Mockery of Environmental Laws – An assessment of Gujarat’s record in the implementation of environmental laws, *Combat Law*, December – January 2003 by Rohit Prajapati

that they had mended their ways and that they were meeting the norms. Because of our intervention the High Court also made an order that the industries should pay the wages of workers even during low production or closure of factories. However, everybody knows that workers' signatures were taken on the pay register but no payment was made. Actually, it was the State Pollution Control Board and State which orchestrated the funniest of the cord by misusing its rule-making authorities. The norms were revised without public debate. The menace of corruption also played havoc because, at a given point of time, most of the industries were defaulters and much was required to be done. All of a sudden, some "miracles" occurred and the situation came to be reported to have improved in a very short period. It is needless to say that the State Pollution Control Board, and most of the industries, are criminals and they are guilty of having made paper arrangements to show that everything is good on paper. It has also been observed that officials of the State Pollution Control Board gained eminence and their indirect income may have grown. Most of the technical experts and consultants who are registered with the State Pollution Control Board to work as environmental auditors work hard to please the State Pollution Control Board to see that they get favours.

The GEC report⁴⁷, prepared by the TATA Consultancy Services in April 2001, states, "GPCB can give site clearance only after assessing the environmental impacts of units. Senior pollution board officials, according to the report, admit that in some cases they are forced to issue site clearance due to political pressures even if the proposed site is unsuitable. This indicates some degree of interference from the state government with the functioning of regulatory agencies in the implementation of environmental laws. This problem of interference was also expressed by various officials during their meeting with the Consultants."

'The problem of pollution in Gujarat is huge due to very high industrialisation' ... 'GPCB has very limited infrastructure and manpower.' Several officials of GPCB mentioned that it is very difficult to implement pollution laws with the present institutional set-up of GPCB. Officials have reported that recruitment in GPCB has not kept pace with industrial development.

The pressure on the industry has led to more pollution inside the factory's premises and the conditions inside the factory have rapidly declined, jeopardising the health of workers at large.

Therefore, a major question arises as to whether the environmental awareness and multiple actions as a result of several public interest litigations and *suo motu* cases have improved the environment. The situation seems to be deteriorating rather than improving with the mushrooming of environmental consultants and lawyers.

I strongly feel that judicial activism has been used by the Ministry to generate revenue from pollution-related penalty fines. However, judicial activism has not improved the condition of the environment as a whole. On the contrary, the pace of environmental contamination and degradation has now accelerated and the illegal actions and irregularities of the industries have increased. It is public knowledge that many industries have evaded payment of taxes by showing closures or production cuts due to orders by the High Court. However, many of them

⁴⁷ Gujarat Ecology Commission, State Environmental Action Programme, Industrial Pollution, July 2000, by TATA Consultancy Service.

are reported to have continued to surreptitiously conduct business while showing no production or less production. The initiatives taken by environmentalists, in the High Court and Supreme Court, have backfired. The industry has devised ways of dealing with judicial activism by avoiding proper application of the law.

About the Environmental Standards, the GEC report prepared by the TATA Consultancy Services in April 2001 states, "In most of the developed countries, the environmental standards are load-based. In India, however, load-based standards have been specified only for certain industries

The main drawback of concentration-based standards is that it allows the industry to dilute the effluent before discharging instead of treating the effluents to remove the pollutants. Thus, in effect, the actual pollutant load reaching the environment is not reduced."

The environment Annual Audit notification came into effect with the control objective of introducing a self-regulatory mechanism of the industries but State Pollution Boards are not empowered to take any legal action against industries for non-submission of the report or for false reporting of data.

I would like to pinpoint some of the examples, which clearly speak for it about how lawmakers, the law and the Judiciary look at the issue of environment. You will agree with me that the Government of Gujarat is in love with the capital and ready to go to any extent to support the capital, at any cost.

The environment impact assessment, 1994⁴⁸

The Notification on Environmental Impact Assessment of Development Projects (better known as the EIA Notification) was issued in January 1994 under Section 3(1) and Section 3(2) (v) of the Environment (Protection) Act, 1986 and Rule 5(3) (d) of the Environment (Protection) Rules, 1986.

This notification makes Environment Impact Assessment (EIA) mandatory for identified industries and projects. Any person, who wants to undertake any of these projects or wants to expand or modernise any such existing industry or project, is required to obtain environmental clearance from the Central Government, i.e. the Ministry of Environment and Forests (MoEF). But if we take the recent example of Gujarat it clearly indicates a mockery of these provisions.

The United Phosphorous Ltd., Ankleshwar Unit No. II, Unique Chemicals, Dist: Bharuch, Darshak Pvt. Ltd. & Nirayu Pvt. Ltd., Village: Panelav, Tal: Halol, Dist: Panchmahal Industries Group of Alembic Ltd. and other such industries (an estimated 23 or more) have actually started their industries after 1994 without fulfilment of the requirement of Environmental Impact Assessments notification dated January 27, 1994.

The Environmental Public Hearing for United Phosphorous Ltd., Unit No. II, a pesticides company started in 1994, was held on January 15, 2002 at Ankleshwar Shalimar Hotel. Unique

⁴⁸ [http://envfor.nic.in/legis/eia/so-60\(e\).html](http://envfor.nic.in/legis/eia/so-60(e).html)

Chemicals, a bulk drugs company started in 1996, a public hearing was held at the same place on January 25, 2002. Environmental Public Hearing for Darshak Pvt. Ltd. and Nirayu Pvt. Ltd., a group of bulk drug companies started in 1996 by Alembic Ltd., was held on January 30, 2002.

During the public hearing of UPL, Unit No. II, on January 15, 2002, Mr. SH Vegda, the Regional Officer of the Gujarat Pollution Control Board (GPCB) Bharuch, shockingly informed the general public that there were a total of 23 such industries which had commenced work without any clearance from MoEF and for which a hearing would be conducted. A public hearing for all such industries was completed haphazardly in the year 2002.

During the public hearing on the Environment Impact Assessment Report (EIA) of the aforementioned companies, questions were raised by the Paryavaran Suraksha Samiti (PSS) as to how the companies could start their operations without the necessary environmental clearance and what is the purpose of ex-post-facto environmental public hearing and environmental clearance. Its legality and validity had been challenged during the public hearing by PSS. The Public Hearing Committee could not decide the issue but chose to proceed with the hearing.

Another major problem, which came to the notice of the PSS at the time of public hearing, was with regards to unpreparedness of the companies and their consultants to answer the most of relevant questions on EIA. It also came out clearly that on various technical and other issues the EIA was fraudulent and did not provide necessary information. It appeared that the public hearing was for the sake of formality and there was no seriousness either on the part of industries or Gujarat Pollution Board. It also became very clear that the GPCB officers had not screened the EIA before putting it before the public for the purposes of public hearing.

The PSS addressed a series of letters dated January 24, 2002, as well as January 28, 2002 and January 30, 2002 on the subject, but no action was taken by either the Ministry of Environment & Forests, or the Government of India, or the GPCB.

In fact, all such EIAs reflect fraudulent data collected subsequent to the start of the projects and therefore the same cannot be relied upon to understand what was the environmental condition prior to commencement with a view to understand the impact on environment after commencement of the projects.

The PSS's demand for action by the MoEF and GPCB allow ex-post-facto EIA and public hearing—is contrary to science and law. A Public Interest Litigation was filed in the High Court of Gujarat by way of Special Civil Application No. 3443 of 2002 with the prayer that the public hearing held be quashed and set aside. The High Court of Gujarat passed the following order in the matter after arguments at length on 18 April 2002.

“In substance, the petitioners complain that respondents Nos. 6, 7, 8 and 9 have established industries in violation of the provisions of the Environmental (Protection) Act, 1986, (hereinafter referred to as ‘the Act’) and the Rules made thereunder.

After careful scrutiny of the facts and circumstances emerging from the pleadings contained in the petition, and from the arguments advanced by the learned counsel, the Court is of the opinion that-for agitation and redressal of the grievance raised

herein, the appropriate forum and remedy is as contemplated by the Act, especially the provisions of section 5 of the Act.

If it is correct, as alleged, that respondents Nos. 6, 7, 8 and 3 have contravened the provisions of the Act, undoubtedly, they have exposed themselves to appropriate action and penalty, as contemplated in sections 15 and 16 of the Act, and there is no occasion for this Court to intervene.

For what has been stated above, the petition fails and is dismissed summarily. [Chief Justice DS Sinha and Justice BC Patel, JJ]⁴⁹

Before the PSS approached the Ministry with reference to the High Court of Gujarat's order, the Minister of Environment and Forests came out with the notification, dated May 14, 2002, to legalise illegal industries. This notification speaks for itself. It says that "In the past it was noticed that several units had come up in violation of this notification. A view was then taken in this Ministry that such units are permitted to apply for environmental clearance by March 31, 1999. This Ministry's Circular No. J-21011/11/98-IAI dated November 5, 1998 refers. Simultaneously, the State Pollution Control Boards were instructed to issue notices to all such units to apply for environmental clearance by the above date. It is also seen that though June 30, 2001 was the last date for the delinquent units to apply for environmental clearance, applications have been received/were being received even after that date. In some cases, proponents had approached the Board for the conduct of Public Hearing before the due date, but public hearing could not be arranged in time. In a few other cases, public hearing proceedings had not been forwarded before the due date.

Keeping the foregoing in view, it was decided to extend the deadline up to March 31, 2003 so that defaulting units could avail of this last and final opportunity to obtain ex-post-facto environmental clearance, it is therefore, necessary that all the SPCBs/PCCs issue fresh notices forthwith to all such defaulting units asking them to apply for environmental clearance without any delay and, in any case, not later than March 31, 2003 with complete information. Units which fail to comply with these directions shall be proceeded against forthwith under the relevant provisions of the Environment (P) Act, 1986 without making any reference to this Ministry." This is the level of concern shown by the Ministry of Environment and Forests regarding the implementation of environmental laws.

Keeping in mind the outcome of the High Court of Gujarat letter dated November 22, 2003; it was sent to the Minister of Environment and Forests of Government of India but Ministry did not reply to the letter. The PSS was left with no option but to file one more Public Interest Litigation by way of filing the Special Civil Application No. 17417 of 2003.

It is clearly mentioned in the petition that the GPCB and MoEF have failed in their legal duty to comply with the legal provisions with regard to EIA 1994 & Public Hearing 1997 notification and thereby they have failed in their legal duty together with the concerned industries who have failed in their legal duties to comply with the legal provisions of EIA and public hearing prior to commencement, and have grossly violated the law by commencing their activities without the necessary additionally clearance.

⁴⁹ <http://envfor.nic.in/divisions/iass/notif/ec14may.htm>

Has the Judiciary abandoned the environment?

The PSS clearly mentioned that all such industries were functioning unlawfully and the authorities, including MoEF and GPCB, had unlawfully allowed such industries to function without necessary environmental clearance. Therefore, the GPCB and MoEF are bound by the legal duty to take action against such industries and their officers as per law. The PSS demanded that the concerned industries cannot be permitted to continue with illegalities and they cannot be permitted to go on with public hearing of other such more than 23 companies based on baseless EIA to mislead people and damage the environment. The PSS also demanded that to quash and set aside the action of the authorities of allowing commencement of industries without necessary clearance from MoEF and holding ex-post-facto public hearing unlawfully contrary to environmental laws and notifications of EIA and Environmental Public Hearing. The PSS also demanded to direct the State and GPCB to take action against such industries for having commenced their industrial operations without necessary environmental clearance from MoEF in accordance with the law by resorting to the provisions of Environmental laws including the Environment (Protection) Act, 1986 and its rules.

On March 19, 2004 PIL 17417 of 2004 was heard by the Chief Justice bench (Hon'ble Chief Justice Mr. Bhawani Singh, Hon'ble Mr. Justice HK Rathod) the PIL was admitted and ruled. It was expected from the High Court to have clear-cut interim direction for such a great violation but the case just got admitted and now it is pending for the final hearing. It is important to note that this is not the scenario in Gujarat alone, but there are a number of such industries all over India.

Any ordinary person could have the following questions to the law and the High Court of Gujarat did not answer them:

- Whether the public hearing on EIA, of the proposed new project for clearance from MoEF, could be conducted after starting the industry without the necessary clearance?
- Whether such an industry, which admittedly operates without any clearance, could be permitted to operate as per the environmental laws and specifically the Environment (Protection) Act and Rules 1986?
- What action the Central and State Governments and the GPCB, as per law, should take against such erring industries? Why has no action been taken against the erring industries so far?
- An industry, which commences its work production without the required clearance, exists unlawfully and invades the ecology contrary to the law by causing destruction/damage to the same, including the damage to people's health. Hence, should they be compelled to compensate the people of the area? Should they be forced to restore ecological balance at their own cost?
- Will an industry be put to heavy costs payable to the public when it openly comes unprepared to face the public hearing on EIA; fails to answer the relevant questions; and openly admits to having started working without the clearance?
- Should the GPCB and MoEF be directed to check and screen the EIA on their own with the help of experts before placing the same for public hearing?

- Should the GPCB and MoEF be directed to take necessary action against those officials who have failed in checking the commencement of industries without the necessary clearance?
- Should the member of public, voluntary organisation be permitted to be involved from the stage one of preparations of EIA by the industry to ensure its fairness and trust worthiness'?

Actually the action of the Ministry of Environment and Forests are coming out with a circular dated 14-5-2002 extending the date for applying for clearance up to March 31, 2003 and thereby regularising the offences of the delinquent industries by exposing the real understanding of the Government and its environmental laws. This circular renders the entire exercise of public hearing meaningless, as it remains only a paper arrangement just to make a show that the people are heard. In other words, it leads to continuation or perpetuation of illegalities one after the other because the first paragraph of the circular itself speaks of the conduct of the industry; yet, further extension has been given in a manner as if nothing has happened. This type of action cannot be termed as reasonable exercise of power by any stretch of imagination but they clearly appear to be collusion between the erring industry and the lawmakers. Even while permitting the extension no penalty is imposed on the erring industry. It is interesting to note that para 3 of the circular admits of the violation of law and still the authorities have adopted an approach of '*Jane Do*' (Let it go). A vital question that arises is whether such an approach with laxity and uncalled for concessions should be permitted in sensitive environmental matters?

Today, these industries are running and the matter is pending in the Court for the final hearing. This reflects the real understanding on environment of the lawmaker, law and the judiciary.

Case of hazardous chromium waste in Vadodara, Gujarat⁵⁰

Chromium is a highly hazardous chemical and the most significant produced pollutants of Hema Chemical Industries of Vadodara. Chromium chemicals are used in wood preservatives, coloured glass, glaze, tanneries, textile dyes, pigments for lithography and the like. Hexavalent Chromium (Cr^{+6}) is a known human carcinogen. Chromium exposure leads to skin disease (contact dermatitis), non- or slow-healing skin ulcers which may lead to amputation of toes, asthma, nasal septum perforation, perforations of the eardrum, liver damage and kidney malfunction.

The ill effects of Chromium on workers of Hema Chemical have been confirmed again and again. The company's approximate 250 workers were victims of chemical trespass by solid, liquid, and gaseous forms Chromium. The workplace environment was not monitored and toxins were allowed to penetrate the bodies of workers mainly through unhindered skin contact and inhalation. Findings of a study, conducted by the National Institute of Occupational Health Ahmedabad,⁵¹ indicate that the Blood Chromium levels exceeded permissible levels in 14.80 percent workers, in some cases as high as 27 microgram/100ml.

50 For more detail -Making Industries Accountable "Polluter Pays" Principle is in action against Hema Chemical Industries of Gujarat, but workers are still awaiting relief. *Combat Law*, November – December – 2004. By Rohit Prajapati

51 Report on Biological and Environmental Monitoring and Health Surveillance of Chromium (Cr) exposed workers in Chemical Industry by National Institute of Occupational Health, Ahmedabad.

Moreover, workers were also exposed to physical hazards like heat, radiation (infrared), damaging levels of noise and ergonomic problems. The composite of these occupational hazards led to damage to eyes, hearing and upper-limb musculoskeletal problems. Experts of the National Institute of Occupational Health also found that dust, other than chromium, led to restrictive respiratory problems amongst workers. The certifying surgeon, working under the Factory Inspectorate Vadodara, then carried out physical examinations with the help of Government Medical College, Vadodara. The initial examination revealed that 26 workers were suffering from contact dermatitis and 43 workers were suffering from nasal septum perforation. The People's Training & Research Centre (PTRC), Vadodara, also surveyed the condition of exposed workers through a diagnosis camp and found damage to the eyes and hearing.

Voluntary organisations, like the Paryavaran Suraksha Samiti, have repeatedly raised the issue of hazardous Chromium waste contamination of groundwater, soil and occupational health problems. Ongoing verbal complaints have been made about the dumping of illegal hazardous Chromium waste since 1991. Later on these complaints were backed by reports of illegal dumping of toxic Chromium waste in important documents. The High Powered Committee on Management of Hazardous Wastes (Volume 2, p 180) reported that "Ecological crisis has resulted due to M/s Hema Chemical Industries indiscriminate dumping of sodium chromate [sic]." The Human Development Vision 2010, Gujarat Social Infrastructure Development Board (p 185), states the sad reality of how illegal dumping affects the lives of common people. The report mentions "[The Hema] basic chromium sulphate-manufacturing unit in village Gorwa in Vadodara district has been dumping its chromium waste for the last 20 years. The villagers used that waste for building houses and making pathways. The exposure to this waste is causing nasal perforation, skin ulcers and lung cancer." The list goes on the Gujarat Ecology Commission's State Environmental Action Programme on Industrial Pollution (July 2000, pp 5-9) and numerous media reports, between 1998-2004, have highlighted the toxic waste and occupational hazard issues of Hema Chemicals, including editorials in major dailies like *The Indian Express* ("The Invisible People: Those who are forgotten from birth to death," July 15, 1998).

Ultimately in 1999, the company was issued a directive for closure under section 5 of the EPA. This came with a concomitant direction, to concerned authorities, to disconnect the services of water and electricity to ensure closure. After some time, the order of closure was revoked. The company simply continued to dole out empty promises while exploiting political pressure to evade the law and violate the order in whatever way it could. Presently Unit II of the company is closed while Unit I is running.

The workers were not paid wages during the closure in spite of a previous precedent set by a Gujarat High Court order which states "135 (xiv) Closure of the units at any point of time due to their not meeting GPCB parameters will not result in the denial of wages to any of the workmen. This will not mean a closure under the Industrial Dispute Act, 1947."⁵²

52 Special Civil Application No. 770 of 1995, Corm Mr. BN Kripal, Chief Justice, and Mr. Justice HL Gokhale, order dated 5/8/1995.

Closure, however, does not ensure environmental rehabilitation. August 2004 witnessed a historical ruling on this issue. After consistent follow up of Paryavaran Suraksha Samiti, Hema Chemical Industries was required to take responsibility for its environmental contamination under the polluter pays principle. SCMC pressure on the issue of hazardous Chromium waste forced the Gujarat Pollution Control Board⁵³ to issue the direction: “Now, therefore, you are hereby directed to pay Rs 17.00 crores as an advance towards initial remediation work within seven days. Failing which you shall be liable for prosecution under Section 15 of Environment (Protection) Act 1986.”

The Chairman DR. G. Thyagarajan of Supreme Court Monitoring Committee, issued the following appropriate direction in the light of the polluter pays principle.

“Dear Chief Secretary,

The Supreme Court Monitoring Committee has been set up by the Apex Court to ensure implementation of its directions given in the order dated 14.10.2003 in Writ Petition No. 657 of 1995.

The SCMC has accepted the recommendations of the Subcommittee.

These are now being communicated to you for compliance:

- a) A careful physical investigation of the site and quantities of hazardous wastes to be carried out by an expert body at the cost of the owner of the unit. The report to be submitted to the SCMC within 60 days of the receipt of this direction.
- b) An expert body may be requested to undertake a rehabilitation plan based on transfer of the wastes to an engineered landfill. The plan is to be submitted to the SCMC 60 days after the first report is submitted.
- c) Till such time as the site is rehabilitated, the owner of the unit may not be permitted to go abroad. Home Department of Gujarat Government should ensure this.
- d) Till such time as the site is rehabilitated, the owner will not be permitted by any of the agencies of the Gujarat government to dispose of his assets in the following firms:
- e) A medical study is to be carried out by the NIOH to evaluate the impact of these unattended wastes on the health of the people living on the site with a view to award damages. The study is to be commissioned and completed in six months and the costs of the study to be debited to the owner of the unit.

The SCMC has determined that neither the Gujarat government nor the Gujarat PCB has moved expeditiously to halt the careless, irresponsible and indiscriminate dumping of hexavalent chromium wastes by Hema Chemicals.⁵⁴”

53 Letter dated 18th August 2004 to the Hema Chemical Industries by the Chairman of Gujarat Pollution Control Board.

54 Letter dated 2nd August 2004 of the Chairman of Supreme Court Monitoring Committee to the Chief Secretary of Government of Gujarat. – http://scmc.info/special_issues/hema_chemicals_directions.htm

But you will not find any direction for the Workers of Hema Chemical Industries even after repeated letters to the SCMC on the issue of the workers.⁵⁵ More importantly, workers have been left out of the equation altogether. Workers of Hema Chemical Industries, have in effect, become victims of the order of the State PCB. When the Gujarat PCB ordered Hema to close the plant, the company was allowed to simply close the doors to workers. They are neither employed nor retrenched. They have been paid neither compensation nor wages. Their plight seems to fall on deaf ears.

There are a number of very specific items that could be undertaken immediately to rehabilitate workers. The Employees State Insurance Corporation (ESIC) must be directed to pay all the Chromium affected workers at 100 percent disability as they have been left with zero value in the labour market. Documents pertaining to employment of workers and ESI records with M/s Hema Chemicals Industries should be taken into custody by the SCMC, so that they are available for any investigating agency that needs information to handle the issue of compensation.

All workers who were employed for a minimum 6 months continuously, whether presently employed or not, should be examined by the All India Institute of Medical Sciences (AIIMS), Delhi. This examination should not only limit to the nasal perforation but all body systems should be examined. This program should be continued until all the workers have been thoroughly examined or at least given enough chance to present themselves for such examination. A separate cell should be opened by the SCMC (or other agencies authorised by it) to inform the workers and facilitate them for such an examination. A special financial assistant must be given to the workers for that to cover the expenditure. Families, of the workers who have died in last at least 10 years, should have been paid dependent benefit from the date of their death by ESIC. All workers, who have completed 6 continuous months with Hema Chemicals, should be offered free medical treatment by ESI, including their family members, throughout their life. Looking at the extra-ordinary situation created, Court should direct the Company to pay all pending wages, as per High Court of Gujarat order dated August 5, 1995 in Special Civil Application No. 770 of 1995, and also pay extraordinary compensation.

Thus Hema Chemicals is an exceptional story of good and bad precedent. Whereas the environment finally won the attention and action that it deserves, the workers are left hanging. Industrial poison of the environment should not be regarded as more pressing than poisoning of the workers; bodies such as the SCMC should view it as their duty to ensure that victory for one does not mean loss for the other.

Even today the SCMC direction are waiting for the implementation and the approach of the direction is compensation and not beyond that. The SCMC direction is surprisingly silent for the rights of the workers who are the first victims of the chromium pollution. I fail to understand why the law and judiciary is not able to grasp this simple point that fine without the direction for the remedial measures and long term plan to rehabilitate workers is inadequate and to be more blunt useless.

⁵⁵ Letter dated 25th March 2005 by Paryavaran Suraksha Samiti to the Chairman of Supreme Court Monitoring Committee and its members. – http://scmc.info/ngo_reports/paryavaran_report.htm

Gujarat on environment

The severity of the situation can well be comprehended by a perusal of the reports of the Comptroller and Auditor General (CAG) of March 2001 regarding the status of environment and functioning of the Gujarat Pollution Control Board. The reports deal with the following.

Procedural lapses in presenting cases in Courts: Under Section 22A of Air (Prevention and Control of Pollution) Act 1981, the Board can make an application to a Court, not inferior to that of a Court of a First Class Magistrate, for restraining air pollution by apprehended industries. The Board mentioned non-preparation of Panchnamas, defective resolutions of the Board, incomplete inspection reports, non-preparation of maps while taking samples, etc. as procedural lapses. As of 333 industrial units were prosecuted. Of these, only 46 cases (14 percent) were decided in the Board's favour while 146 cases (44 percent) were decided against them.

Moreover, 141 cases (42 percent) were pending in the Court for more than five years. The delay in disposing of the cases could potentially cause serious damage to the environment. 92 percent of industrial units, in hazardous waste generating sector, were functioning without authorisation from the Board. Several cases of injury/damage to the health of people, due to exposure to hazardous waste, were reported from Vadodara and Vapi. Only 0.03 lakh units, out of the 0.8 lakh units which were given consent, installed air pollution control devices. The Board did not prepare a comprehensive program and plan for prevention, control, or abatement of air pollution as required under the Air Act.

Industries functioning without consent: Only 5 percent of industrial units obtained consent. The entire state was declared as an air pollution control area in August 1984 and specified industries were required to obtain consent from the Board and meet the prescribed norms of emission. With the amendment of the Air Act, in December 1987, all industrial units were required to obtain consent from the Board. However, as against 1.72 lakh industrial units in the State, only 0.10 lakh industrial units have applied for consent as of March 2001, out of which only 0.08 lakh (5 percent) industrial units were granted consent. Consent was not given in 0.02 lakh cases. Thus, 95 percent of industrial units in the state were functioning without consent of the Board and were thus not covered under the surveillance of the Board, regarding the provisions of the Air Act. The Board had no knowledge about the extent of the pollution caused by these units especially in the Ahmedabad, Bharuch, Mehsana, Surat, Vadodara and Valsad districts. Belated preparation/ submission of Annual Reports by the Board: The Board was required to prepare an Annual Report within four months of the end of the Financial Year for submission to the State Government, and within nine months of the end of the Financial Year to State Legislature. It was noticed that the reports were delayed by 11 (1996-97) to 15 months (1997-98) when sent to the Government and by 3 (1995-96) to 14 months (1997-98) in placing the report before the State Legislature. Report for 1998-99 was sent to the Government after 12 months; the same was not placed before the Legislature; and the report for 1999-2000 was not prepared at all (May 2001) though it was required to be sent to the Government by July 2000 and placed before the Legislature by December 2000.

These reports of the CAG clearly indicate that the GPCB is haphazard and inefficient in its functioning and its officials appear to be supporting the polluting industries that they should be taking action against.

Gujarat has made rapid strides in the industrial sector, with chemical and related industries playing a dominant role. During the last two decades Gujarat has emerged as one of the major players in the country's industrial arena. An industrial belt was gradually developed from Mehsana in the North to Vapi in the South and was later christened the "Golden Corridor of Gujarat". The chemical industry is heavily concentrated in this belt, with members from both the public and private sector.

As one of the most industrialised states in India, Gujarat had 1.72 lakh industrial units as of March 2000, according to the Commissioner of Industries' figures. There are 1.69 lakh industrial units in the small-scale sector, while 3,000 industrial units are in the medium and large-scale sectors. Of these 79,000 (46 percent) industries are engaged in production/ manufacture of chemical, bio-medical, petro-chemical, textile, engineering, ceramic products, etc. causing air and water pollution, while 43,000 (25 percent) industries generate hazardous waste.

With all environmental concerns and norms thrown to the wind. Gujarat embarked on an obsessive journey of industrialisation. Massive chemical estates have been established in areas near Ahmedabad, Vadodara, Bharuch, Surat and Vaisad. There was no proper environmental impact assessment carried out before setting up these estates, nor was it considered important to take note of the fact that industrial centres had been established dangerously close to human settlements and cities and could well have hazardous consequences. In addition, the hazardous solid waste and toxic effluents that are spewed out are not being monitored properly, neither has their disposal been given proper attention nor any action taken by State agencies, like the Gujarat Pollution Control Board and the Gujarat Industrial Development Corporation. Judicial activism, has proved to be, at best, grossly inadequate and, at worst, a total eyewash.

About Gujarat Dr. NH Hosabettu, Director, Ministry of Environment & Forests (MoEF), and the Member Secretary of the Monitoring Committee constituted by Supreme Court clearly state in the affidavit filed in Writ Petition (Civil) No 657 of 1995 that:

"1.5 As stated above, pursuant to the directions of the Hon'ble Court and the constitution of the Committee, the Committee or its Sub-Committee have visited different areas in the country to evaluate the ground realities in so far as hazardous waste management is concerned. The Committee has found in some of these areas that the indiscriminate dumping of hazardous waste due to non-existent or negligent practices together with lack of enforcement by authorities has affected the groundwater and drinking water supplies have consequently been damaged. Site inspections at industrial estates of Vapi, Ankleshwar and Vadodara in the State of Gujarat and Union Carbide Plant in Bhopal, Madhya Pradesh, have revealed that the dumping of hazardous wastes or their neglect has resulted in total unavailability of ground water supplies. Committee is firmly of the view that Communities surrounding these areas have suffered deprivation of water supply for too long. The situation in all these areas has not changed even

though it finds mention in the HPC Report submitted to this Hon'ble Court in 2001. The Committee feels that unless this Hon'ble Court directs the State Governments of Madhya Pradesh and Gujarat to immediately step in and supply fresh water in tankers or in pipes, for drinking and also for agricultural purposes, the present situation, is bound to continue for several more years since detoxification of the contaminated ground water resources strongly recommended by this Committee, will take: a few years. Therefore, Hon'ble Court may consider issuing appropriate directions to the State Governments of Madhya Pradesh & Gujarat to take following steps:

- (i) Direct closure of all hand-pumps and bore wells in the area and wherever possible, these are to be permanently sealed. The project for decontamination of the ground water should be worked out within a specific timeframe. The water for agricultural purposes should be made available to the farmers 2 months prior to the closure of the bore wells which are contaminated.
- (ii) The State Government of MP and Gujarat should be directed to supply water to the affected communities through tankers on a daily basis at the cost of the Government and the concerned industry associations.
- (iii) Within 6 months, the Government should release permanent water connections through pipes for drinking purpose and some appropriate arrangement for irrigation purposes so that the dependence on tankers is removed.
- (iv) In those cases like Union Carbide and Vapi where there are already overhead tanks installed, the governments be directed to ensure the release of water within the span of 2 weeks, before the intensification of summer.
- (v) The status report of contamination of water be prepared and based on that, action plan for decontamination of ground water also be made within a reasonable time frame.”

Based on this report, the Supreme Court (Hon'ble Mr. Justice YK Sabharwal and Hon'ble Mr. Justice Mr. SB Sinha) passed the following order on May 7, 2004:

“We have perused the Second Quarterly Report from February 2004 to April, 2004 filed by the Monitoring Committee to oversee the implementation of directions passed in the writ petition. The report records that due to indiscriminate dumping of hazardous waste due to non-existent or negligent practices together with lack of enforcement by authorities, the ground water and, therefore, drinking water supplies have been effected/damaged. The state Government of Madhya Pradesh and Gujarat are directed to take steps to supply fresh drinking water in tanks or pipes, particularly, taking into consideration; the fact that summer season has already set in. It shall be done expeditiously.

Industrial estates of Vapi, Ankleshwar and Vadodara in the state of Gujarat and Union Carbide Plant in Bhopal, Madhya Pradesh were inspected by the Committee. The two State Governments would ensure supply of water in such villages/areas which are affected, list whereof has already given by learned counsel for the petitioner to learned counsel appearing for the two States.

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Regarding supply to overhead tanks as mentioned in clause (iv) of point 1.5, the governments shall ensure release of water through overhead tanks as expeditiously as possible.”

The Apex Court of India has clearly passed its directions as above. Yet, there are ongoing actions contrary to what the Court has ordered. This order is waiting for implementation.

‘Polluter Pays’ Principle in practice means ‘Pollute and Pay’ if you can or ‘Pay to Pollute’

The Gulf of Khambhat has the largest concentrations of chemical industries on one side and ship-breaking industries on other side, in Gujarat. If Government and Industries are to be believed, the industries dump a minimum of 350 Mm³ effluents annually into the Gulf of Khambhat. It is a known and admitted fact that almost 95 percent of effluent dumped into the Gulf of Khambhat is not treated even as per the norms and understandings of the Gujarat Pollution Board. In addition, the Gulf of Khambhat receives good amount of pollutants from ship-breaking industries at Alang, Bhavanagar most of which are highly toxic. Ship traffic, ports, fishing harbours and salt industries also contribute their shares of pollution load to the Gulf of Khambhat. The sewage is also dumped into the Gulf of Khambhat. Nowadays, sewage also carries chemicals because of large-scale misuse of detergents, acid, and many more other things. All the major rivers had medium to large dams; so during rainy season, no river carries any fresh water into the downstream rivers nor the Gulf of Khambhat. Now the big Dam on Narmada River will also drastically reduce the freshwater flowing into downstream rivers and the Gulf of Khambhat. Now, Chief Minister of Gujarat has inaugurated the pipeline project at Ankleshwar to dump the chemicals into the Gulf of Khambhat and on the other side he also talks about Kalnsar Project.

The cost of the project is Rs 131.43 crores. Out of this cost, industries have contributed only Rs 21.75 crores comes from industries, Rs 27.42 crores comes from a State Government subsidy; Rs 20.15 crores contribution of GIDC, Rs 30.86 crores subsidy by Central Government – All taxpayers’ money. Why government is not ready to implement the principal lay down by the Supreme Court – Polluter’s Pay Principal.⁵⁶ The industries are making profits and we have to bare the cost of their pollutant. The Government is not serious about the consequences of the dumping of waste into the Gulf of Khambhat. The Government of Gujarat is not even discussing the issue of contamination of Gulf of Khambhat and on the other side it talks about the Kalnsar Project. It’s like somebody is saying that half on left side and half on right side and other behind me. Big dam stop all most all river water and remaining water is fetch away by the urban city by very deep bore well into the river bed. What's left in the last 50 Km of the river is the effluent of industries and urban waste.

The downstream river, of Golden Corridor, carries most of the time effluent into the Gulf of Khambhat. Pollution of estuaries and downstream rivers has affected the livelihood of local villages and fisher folks.

⁵⁶ CM seals pipeline, ‘but gulf already polluted’ – The Indian Express January 26, 2007.

We think that none will dispute that ocean space is not boundless but finite with competing uses and abuses thereby requiring enunciation of definite policy for proper management.

The contamination of groundwater is known and admitted by the Government of Gujarat in so-called “Golden Corridor”. It is also known fact that the sea is coming in by ground roots and also through the rivers which does not have fresh water all most all 8 months.

More than 350 m³ of untreated effluent have already contaminated the Gulf of Khambhat and the same has contaminated the sea by making inroads via ground and river routes. The real figure is almost twice as much. Fish production is going down and the contamination of fish and seafood is a growing issue.

The Gulf of Khambhat has suffered severe degradation in a short span of 25-30 years, resulting in a rapid decline in mangrove cover. 7.45 percent area of the Gulf of Khambhat was salt-affected in 1960 but now areas rose to 54 percent in 1984; 57.6 percent in 1986; and 64 percent in 1993. Now, due to heavy industrial effluent discharge, levels are expected to reach 70 percent. And this will become not just salt affected area but it will also be salt and industrial pollutant affected area. As if this was not enough, ports and terminals have been planned along the Gulf of Khambhat; such as Umargaon-Maroli, Vansi-Bordi, Hazira, Daheja and Dholera. The Gujarat Government is embarking on port-focused industrialisation. The Gujarat Government has failed to come out with detailed Coastal Zone Management Plan (CZMP).

If we test the fish we will have some idea about the level of contamination of Gulf of Khambhat. Unfortunately, there is no regular monitoring going on.

It is high time to give serious thought about the haphazard contamination of downstream rivers like Sabarmati, Mahi, Mini, Narmada, Tapi, Damanganga, Par, Kolak etc. of the Golden Corridor and Gulf of Khambhat.

Instead of reducing pollution, the law and Judiciary have entered into the issue of “pollution rights” by simply moving pollution from one area or region to another. The polluting industries are then provided with facilities such that they can “pay to pollute” and “pollute and pay if they can”. There are substantial examples—like the case of the Bhopal gas tragedy, or Hema Chemical Industries and Industries of Golden Corridor of Gujarat—in which we find that the role of the law and judiciary with respect to the environment does not go beyond compensation.

Problem with the monitoring system

State Pollution Control Board (SPCB) and Central Pollution Control Board (CPCB) follow old methods of assessing parameters and eventually conclude that pollution either does not exist at all, or even if it does, it is within limits. Routine SPCB, CPCB and other such Government body assessments only measure Sulphur Dioxide (SO₂), Oxides of Nitrogen (NO_x) and Suspended Particulate Matter (SPM). Selection of locations for monitoring the area is also a big problem and the three pollutants, measured in the ambient air, do not necessarily represent industrial pollution. Meaningful parameters must be chosen that are based on the individual industry. In addition, the types and measurement of toxic gases produced must be taken at suitable locations.

Air pollution is particularly elevated in areas where dyes, dyestuff, paper and pharmaceuticals are manufactured in the areas like Golden Corridor of Gujarat. Details on limited pollution monitoring can be seen at the website of the Central Pollution Control Board.⁵⁷ Due to this limited monitoring, we have hardly any data on air quality and so it is difficult to remove pollutants from the air; SPCB's annual reports do not compare annual changes in environmental quality and do not examine the reasons for improvement or deterioration of quality. There is also no mention on the kind of action taken when pollution is found in a particular area.

In the area like the Golden Corridor of Gujarat, you must also consider the following: NH₃ (Ammonia), H₂S (Hydrogen sulphide), HC (Hydrocarbons), CO (Carbon monoxide), Cl (Chlorine), HCl (Hydrochloric Acid) mist, PAH (Poly-Aromatic Hydrocarbons which are considered as potential carcinogens), NMH (Non-Methane Hydrocarbons), POM (Particulate Organic Matter), Benzene, 1,3 – Butadiene, Formaldehyde, Tetrachloroethylene, PCDD and PCDF (Polychlorinated Dibenzodioxins and Polychlorinated Dibenzofurans), PAC (Polycyclic Aromatic Compounds), Mutagenic Heterocyclic Amine, etc. We can add more gases to this list depending on the particular chemical industries in the area. There is no limit specified by the CPCB for any such pollutants. Therefore even if you measure them, it is not much use in the absence of a datum. Clearly, monitoring of merely Sulphur Dioxide (SO₂), Oxides of Nitrogen (NO_x) and Suspended Particulate Matter (SPM) is not adequate to assess the impact of industries on the ambient air, and more industry-specific air pollutants may need to be monitored for an actual assessment of the status of ambient air quality in a particular area. Even while monitoring SPM, current knowledge about SPM effects on human health is ignored. Recent research has shown that particulate matter of 2.5-micron has more harmful effects than its 10-micron equivalent. Also, monitoring this parameter is more relevant in urban areas.

It is also to be noted that most of the manufacturing processes of industries in the state are old and devoid of built-in pollution control measures. Many of them were set up even before the enactment of the Air Pollution Act, 1981. Installation of air pollution control devices, as add-on units to these industries, means capital investment and recurring expenditure, which is not linked to production efficiency. In the absence of regular, systematic, area-specific monitoring of emissions, many industrial units avoid installing such units to save both capital and recurring expenditure.

PSS, in collaboration with Farmers Action Group, sampled air along the “infamous” Effluent Channel Project of Vadodara, the Ankleshwar GIDC and the Vadodara Petrochemical Complex (see attached map for exact locations) as part of a collaborative effort with the International Bucket Brigade. The Bucket Brigade uses a special non-reactive Tedlar[®] plastic bag and pump to collect ambient air. This device is internationally recognised and has been approved of by the US Environmental Protection Agency. Since no laboratory in India was willing to take on such rigorous testing, we were forced to send the air samples to Columbia Analytical Services Inc. in the USA for testing. These samples are representative of typical emissions and effluents from these industrial estates because we intentionally chose a time when the odour was at an

⁵⁷ <http://www.cpcb.delhi.nic.in/air.htm>

average level. The samples were taken on June 1-2, 2005; the results would be more shocking had they been taken in the winter.

Our fears stood confirmed when the laboratory returned reports of alarming cocktails of cancerous and dangerous toxins contaminating the air at the Vadodara and Ankleshwar Industrial Estates. By far, Ankleshwar wins for being the most hazardous industrial estate to the public. The list of chemicals found amongst the three samples⁵⁸ is disturbing: Carbon Disulphide; Acetonitrile; Isopropyl Alcohol; Acrylonitrile; Methyl Ethyl Ketone (2- Butanone); j 1,2 Dichloromethane; Toluene; Acetone; Chloroform; Methylene Chloride; Benzene; Ethanol; Hydrogen Sulphide-Methyl Mercaptan; Dimethyl Disulphide; n-Hexane; Carbon Tetrachloride; Trichloroethylene; Toluene; Ethyl Benzene. The air sample, collected from Ankleshwar, revealed the presence of four cancerous chemicals much higher than international standards. A sample, collected at the Vadodara Petrochemical complex, had two cancerous chemicals that exceeded the same standards, while the sample collected along the Effluent Channel Project at Ekalbara contained three cancerous chemicals. Cancer is not the only concern, however. These chemicals affect the reproductive system, the central nervous system, the kidneys and the liver, among other things. Since these are not chemicals naturally in the air at these levels, their mere presence bids warning of the severity of pollution.

The real issue

An increase in pollution, and pollution-related problems, has a direct nexus with increase in consumerism; multiplication of created human “needs”; a profit-oriented new phase of capitalism; and globalisation which, along with others live beings on the earth, eat away natural/green resources and makes the earth the worst place to live.

Since there are no specific perfect and foolproof methods to combat pollution of air, water, soil and agriculture products, the present capitalist system is trying to bring pollution within tolerable limits to be able to live with such pollution, assuming that it may cause the least harm by applying certain technical controls.

Most of the controls look good on paper but do not give good results because human factors are always at play. Ultimately it devolves in a crude exercise meant mainly for psychological satisfaction; such exercise does not go beyond dilution, shifting, dumping and, in certain cases, of avoiding pollutants.

Human beings believed in their erring vision that something they cannot see does not exit and hence they began with the child’s play of shifting of polluting industries/plants/processes/products from the so-called First World to the so-called Third World countries; within the country, from one state to another state and within the state, from one area to another. You cannot see major outlaw of polluting plants, process and products from the earth. Now in that the so-called Third World has to ensure that the people should somehow manage to live, not for the sake of life but to supply goods to the First World, the First World thought it fit to export to

58 PSS Finds Carcinogens In Ambient Air Yet no ambient air quality standards for dangerous toxins in India – http://www.sipcotcuddalore.com/downloads/air_pr_2005.pdf

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them polluting plants/process/products with some till their gradual death in bits and peaces the go on producing goods and services mainly for the rich who have gifted them pollution by sifting polluting industries.

While the political system in most countries appear to speak against pollution, often they make no deviations from past practices and only impose small fines or ordinary penalties on polluting industries to show on record that they have done something. In fact, such recovery of a fine or penalty may enrich the government coffer, but pollution remains as it was.

Ordinary people who may think of taking some actions do not have the power and support. In addition, they are always in danger of losing their employment if they raise their voice against pollution. The common person is afraid of being treated as an enemy of the industries and so-called progress and therefore become untouchable in relation to industries.

It is, however, true that in this game of so-called efforts of removing pollution the so-called experts definitely get rich because their certification are sold instead of their efforts. Therefore, we all are assured of continuous and increasing pollution for tomorrow.

Our political system, judiciary and the people at large are definitely showing seriousness of pseudo-intellectual having no intention of doing anything seriously till the dooms day.

Although it cannot transcend the laws of nature, in various ways, the mode of capitalist production comes into fundamental contradiction with nature and the natural evolution process. For capital, only the quantitative aspect is decisive, determining the relation between labour, time and money in the framework of the law of value. Qualitative and global relations are never taken into consideration.

Capitalist production is based on carrying out cyclical processes in the shortest possible time in order to get the highest possible returns on the capital invested. Thus, it must impose a rhythm and framework on natural processes that is foreign to them. It is not capitalism's lack of wisdom that brings about environmental destruction, but rather the very logic underlying the system which does this. Here is yet more proof that these problems cannot be viewed as "breakdowns" or "system failures"; they correspond to this system's logic throughout the world. They virtually complete exploitation of the last cubic centimetres of land for use as industrial zones, shopping centres, bedroom suburbs, theme parks, or administrative zones has greatly increased commuting time and traffic, while the structure of needs has remained essentially unchanged. Transport policy, based on private cars using petroleum fuel, has resulted in chronic traffic congestion and threatens all major metropolitan areas with paralysis and asphyxia.

Today, a practical approach to environmental problems is part of every bourgeois government's programme. In general, there is an attempt to set limits to air, soil and water pollution. Added to these are gradual plans to reduce the dangerous effects of production-process residues. When all is said and done, these are band-aid measures that do not counteract the real destruction taking place. Economic programmes and policy orientations concerning the "ecological market economy" have also taken up importance. Up until now, attempts to re-orient the capitalist economy to an environmentally-friendly functioning have not got off the drawing table.

However, in the context of capitalist globalisation, a vast offensive is underway to impose a system of “marketing the right to pollute” on the world level in order to reduce the quantity of greenhouse gases. Advocated by the United States, this mechanism was accepted by the European Union. This is a dangerous development that must be fought. Firstly, it opens the way to strengthening underdeveloped countries’ dependency on the North. In a mechanism that assigns each country with an exchangeable pollution quota, the decision-making power belongs to those who hold financial power to trade in pollution as they see fit. The highly indebted countries of the South and the East would run the risk of selling their quota to the Northern countries, though the latter pollute the most by far. Moreover, the system aims to make pollution a commodity, hence a source of profit. How could we imagine under such conditions that this would lead to an effective reduction in pollution?

Finally, it must be emphasised that the purpose of this mechanism, the key element of the liberal offensive in the environmental field, is to defuse the subversive power of the ecological critique, which raises a challenge to the overall functioning of the capitalist system. It aims at restoring credibility to the idea that the market is the best instrument in the fight against pollution and that more capitalism would make for an intrinsically “cleaner” capitalism. This idea must be fought, just like the thesis whereby environmental protection could become the motor behind “a new modernisation of the capitalist economy”.

Vedanta Case⁵⁹

*Margreet Wewerinke**

The UK-based company—M/S Vedanta Alumina Limited (Vedanta)—has been given a go-ahead for the bauxite mining of the Niyamgiri hills in Lanjigarh, Orissa, a place considered sacred by members of the Dongria Kondh tribe. Indeed, the tribals conceive the hilltop as the very home of a god called Niyamraja, from which their tribe would originate.

The mining project interferes with the livelihoods and identities of 8,000 Dongria Kondhs, who live in 90 scattered settlements in the Niyamgiri area. However not only the Dongria Kondhs but also the Majhi Kond, a tribe consisting of 2,000 people spread over 10 settlements that are mostly situated in the foothills of the mountain, face forced evictions.⁶⁰ The Housing Land Rights Network has pointed out, before the United Nations Committee on Economic, Social and Cultural Rights, that the project “will threaten [these people’s] human rights to water, freedom of movement, health, housing, land and livelihood.”⁶¹ HLRN also points out:

The plan to expand the illegal refinery from 1 MTPA to 6 MTPA would require an additional 13.43 square kilometres land (to the existing 6.06 square kilometres). Another 22 square kilometres would have to be acquired for waste disposal. This would result in the displacement of an additional 300 to 400 families.⁶²

The mining project not only has a direct impact on these people but also causes environmental degradation and pollution of the river. It puts a whole section of scarce and protected species at risk.

On 21 September 2005, the Central Empowered Committee (CEC), an advisory body of the Supreme Court of India, made a strong indictment of the mining project. Still, Vedanta went ahead with constructing the alumina refinery. Later on, it even ignored an interim order of the Supreme Court, which clearly forbade Vedanta to mine the Niyamgiri hills. However, in the same judgement, the Court mentioned that Vedanta could get environmental clearance through its Indian subsidiary, Sterlite. This suggestion paved the way for the latest Supreme Court

* Intern with HRLN

59 TN Godavarman Thirumulpad Versus Union of India and Others (2007) 13 Scale 430

60 Housing Land Rights Network, Shadow Report to the CESCRs Review of India, available at http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/HousingLandRightsNetwork_India40.pdf (last consulted September 6, 2008).

61 Ibidem.

62 Ibidem.

judgement, which proved fatal to the livelihoods of tribals as well as to the environmental sustainability and diversity of the region.

The Supreme Court ruling was strongly opposed by farmers, campaign groups and tribals, all of whom spoke about the devastating impact of Vedanta's presence on the region's culture, nature and wildlife.⁶³

In its judgement, the Court showed a neo-modern vision of "development", whereby it blindly assumed that this would result in significant economic growth for the entire nation. This neo-modern paradigm implies a "trickle-down effect" of economic growth. In other words, it implies that poor and marginalised people would *automatically* benefit from growth at the top of society. The paradigm lost credibility in the sixties. Development scholars, progressive policy-makers and civil society organisation no longer lead credence to this belief.

Using an obsolete paradigm, the Court has turned a blind eye to decades of evolution in developmental thinking. It is widely accepted that no (sustainable) development can occur without due respect for human, economic, social, cultural rights and environmental protection. To protect human rights and environment, The Court should have protected the tribal inhabitants of the Orissa against agreements between the State Government and the Vedanta Company. These agreements were at odds with the Constitution of India as well as with India's obligations under international human rights law and international environmental law.

At this point it is worth highlighting some of the Concluding Observations of the Committee on Economic, Social and Cultural Rights on India's most recent report. In para. 44, the Committee

notes with concern that some of the development measures and projects that have been carried out have not sufficiently taken into account the way of life and specific forms of livelihood of numerous communities in India, in particular the scheduled tribes in the Northeast, thus affecting the right of everyone to take part in cultural life.⁶⁴

The Committee elaborates on this point in para. 84 in its recommendations, explicating that

The Committee recommends the State party to consider going beyond the creation of museums and hosting of exhibitions as a way of preserving and promoting culture, and to ensure that no development initiative is carried out without effective consultation with the local communities, and that any potential negative impact on their right of everyone to take part in cultural life be taken into serious consideration when conducting social audits.⁶⁵

It seems that, when trying to understand the position of the Court, one must take into account the blinding impact of India as a "money-making machine" upon large parts of India's middle-class, including India's judges. Vedanta claimed it had spent \$1bn on building a giant alumina

63 "India Court okays mining project", BBC News, August 8, 2008, available at http://news.bbc.co.uk/2/hi/south_asia/7548953.stm (last consulted September 1, 2008).

64 Committee on Economic, Social and Cultural Rights. Concluding Observations of the Committee on Economic, Social and Cultural Rights on Report Submitted by India, E/C.12/IND/CO/5, April 28 - May 16, 2008, available at <http://www2.ohchr.org/english/bodies/cescr/cescr40.htm> (consulted on September 6, 2008), p. 7.

65 Ibidem, p. 14.

refinery close to the Niyamgiri Mountain. In spite of the fact that this investment was actually illegal, the Court considered money as a valid enough reason to allow the mining project to continue. Apparently, violations of human rights and environmental damage, are acceptable. Loss of money, instead, has become an absolutely intolerable scenario and a *carte blanche* for an increasing number of otherwise controversial projects.

It may not be surprising that the Court's answer to the tribals, whose rights are being violated, also comes in terms of money. The Court ruled that Vedanta has to invest a minimum of \$2.5m on the "development" of local tribes. The Court seems to forget that irreparable environmental degradation cannot be "compensated" for. This is perhaps even more so with the destruction of a sacred mountain and the damage to the identity of tribal people.

The tribals, opposing the Court's ruling with all their might, have claimed they will "fight to the death [sic] rather than leave their sacred home".⁶⁶ "Even if you kill us we will not give Niyamgiri", said one tribal member, Jairam, in a press statement issued via the British charity—ActionAid. Dongria Kondh member, Jitu Jakeskia, said: "We are deeply connected with the mountain. It is home to our God Niyamraja. We will not allow the company to mine our land, our sacred place. Any compensation they offer is worthless to us."⁶⁷

Ironically, Vedanta now seems to be getting affected by its victory in Court. Indeed, Martin Currie Investment Management, a leading Scottish investment fund, recently sold its Vedanta shares after campaigners, from Survival International, underlined violations of tribals human rights.⁶⁸ The Edinburgh-based fund released its £2.37 million holding in Vedanta on behalf of the tribals. The shares were sold at about £18 each. As part of the campaign, some tribals travelled all the way from Orissa to London to attend Vedanta's annual shareholder meeting.

A Martin Currie spokesperson declared that:

It is fundamental that we expect companies to behave both within the law and morally... We sent a detailed list of questions to Vedanta and spoke with Survival to discuss their claims. We received responses to our questions from Vedanta and had dialogue with [Survival International]. The doubts over the issues with the bauxite project ... led to exiting the stock.⁶⁹

Notably, the Norwegian Government is the second investor who withdrew after having been notified of Vedanta's irresponsible practices in Orissa.⁷⁰

Apart from this Vedanta heads the list of the three "worst companies abusing tribal peoples' rights". This is what Survival International has said to mark the UN Day for Indigenous People on August 9. With its listing, Vedanta has "beaten" hollow the Franco-British oil company Perenco (infamous for putting lives of Indian groups at risks by drilling in the Peruvian

66 Opcit. n. 4.

67 Ibidem.

68 Ross, Shan, "Scots firm pulls cash out of mining scheme on 'sacred' Indian mountain", August 14, 2008, available at <http://thescotsmen.scotsmen.com/scotland/Scots-firm-pulls-cash-out.4388531.jp> (last consulted September 2, 2008).

69 Ibidem.

70 Ibidem.

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Amazon) and Samling (which logged vast areas of rainforest in Malaysia, including ancestral tribal lands). Perenco and Samling were placed second and third respectively in the “unholy trinity”.

According to Survival’s Director, Stephen Corry, the companies “have one thing in common – a total disregard for the lives of the people whose lands they are destroying.”⁷¹

⁷¹ Survival International. Survival: the Movement for Tribal Peoples, ‘UN Indigenous Peoples’ Day – Survival names ‘unholy trinity’, August 8, 2008, available at <http://www.survival-international.org/news/3577> (last consulted August 20, 2008).

Coastal Regulation in India: A Saga of Betrayal

*Ranjan Solomon**

The Coastal Regulation Zone Notification, 1991 is the most significant and specialised legislation guiding developmental activities along the coast and in islands. Since its inception, it has been amended 20 times, each time diluting its provisions further. In an unwarranted move, the Ministry of Environment and Forests is now proposing to replace the CRZ Notification with a Coastal Management Zone Notification based on recommendations of the Swaminathan Committee Report. There are many doubts and concerns that are raised because of this move. The critical ones being: the impact on coastal communities and eco-systems; conservation and sustainable development; and a complete lack of democratic processes in making the new law.

A. Background and context

The Indian coastal stretch is made up of diverse eco-systems – sand dunes, beaches, wetlands, mangroves, estuaries, backwater lagoons, and coral reefs. Settlements of traditional people comprising about 10 million fisher folk are concentrated in these areas as they mainly depend on coastal resources and seas for their survival. Several activities are affecting the coast such as unregulated tourism; polluting industries like infrastructure development, aquaculture, sand mining, construction of sea walls and rapid urbanisation. These pose a serious threat to the health of these eco-systems and to the lives and livelihoods of coastal communities. The recent 2004 tsunami has shown that the coast is a naturally vulnerable area and that these activities have worsened the impacts on coastal people.

The Coastal Regulation Zone (CRZ) Notification, issued in 1991 using the provisions of the Environment (Protection) Act, 1986, is the most significant and specialised legislation regulating developmental activities along the coast.

The CRZ notification was introduced with three main principles:

- It is necessary to arrive at a balance between development needs and protection of natural resources;

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- Certain activities are harmful for both coastal communities and their environment and these should be prohibited or regulated;
- If coastal eco-systems are sustainably managed, then the livelihoods of millions will be protected and their survival guaranteed.

The CRZ Notification includes the strip of coastal land abutting the sea all along the Indian coast and her islands. It extends 500 metres from the High Tide Line. In this narrow, sensitive region, certain activities are regulated while other inappropriate ones are prohibited. This was a far-sighted law declared by the Central Government which recognised India's need to protect the interests of millions of her coastal people while ensuring their overall development.

The CRZ notification seeks to operationalise three objectives, which are very significant:

I. Siting or location of activities or operations

This is based on the understanding that coasts perform an important function for coastal communities and eco-systems. The coasts are important nesting and feeding grounds for several terrestrial and aquatic species. These coastal habitats also provide sustenance and livelihood opportunities to several coastal communities (both fishing and non-fishing communities). Rules for the siting of activities can ensure that the rights of traditional fishing and coastal communities over certain areas are not compromised to meet the increasing development requirements such as the demands of the burgeoning tourism industry.

II. Restricting and permitting activities

The CRZ Notification defines the nature of activities that are to be regulated or restricted. It does not issue a blanket ban on all activities and instead lists activities that are restricted and those that are permitted.

III. Balancing development and protection needs

This objective is ingrained in the spirit of the CRZ, which recognises that different areas have different ecological sensitivities and therefore need varying levels or modes of protection. Thus, the protection afforded to CRZ I is designed to be more stringent than that accorded to CRZ II areas, where more activities are permitted.

With respect to Andaman & Nicobar Islands and Lakshadweep, the CRZ would be instrumental in deciding activities and developments because of their special status as oceanic island groups recognised by CRZ as Category IV. Moreover, environmental issues, confronting these islands, are more complex. It is critically important to address these.

B. What went wrong with the notification?

The implementation of this critical notification was by and large ignored by many state governments. Vested interests from various lobbies, such as the tourism and industrial lobby, have constantly sought to get rid of this notification. The CRZ Notification has been amended 20 times and each dilution has rendered the law more impotent. The December 26, 2004 tsunami starkly demonstrated the impact of this gross neglect. Innocent people paid dearly for this.

I. Evidence of poor implementation

1. The Coastal Zone Management Authority has been completely ineffective as an implementing agency and has had no representation from Panchayats or qualified persons in its composition. The CZMA has not executed half of its responsibilities, such as the preparation of plans for ecologically and economically sensitive areas.
2. Coastal Zone Management Plans: Not a single coastal State or Union Territory has a fully approved Coastal Zone Management Plans. This document is critical to the implementation of the law as it identifies the various CRZ areas and therefore the range of activities that can be permitted or prohibited. Without this unregulated activities take place on the coast and this is true of the present state of the Indian coast.
3. The High Tide Line or the 500 m line is not demarcated in any of the states and it becomes impossible to determine the extent of the CRZ areas.
4. The CRZ has been continually amended to permit activities that were initially prohibited such as—storage for petroleum products (4th August 2000 amendment); oil and natural gas exploration in CRZ-I (April 12, 2001 amendment); and IT and service industries through Special Economic Zones (May 21, 2002 amendment). SEZs have been controversial and there are many concerns about labour and environmental norms in them.
5. The “deadline” for permitting sand mining in erosion-prone Andaman & Nicobar Islands, has been meaninglessly extended 10 times with no promotion of alternative building materials.

II. Present status of coastal zone management plans

There has been no fully approved Coastal Zone Management Plan for any coastal State, Union Territory, or oceanic island groups in India since the initiation of the CRZ Notification in 1991. All that is available for implementation agencies is a draft CZMP that has been conditionally approved by the MoEF. This conditional approval could mean that the AN I Administration would need to revise their maps and plans along the conditions specified in the MoEF’s letter dated September 27, 1996 and submit the final revised documents to the MoEF. It is not clear whether this has taken place since there is no letter from the MoEF to this effect.

III. Initiation of an Integrated Coastal Zone Management Plan for the islands

The MoEF also initiated a parallel process of drafting an Integrated Coastal Zone Management Plan (MoEF 2004). This was initiated for the Andaman & Nicobar and Lakshadweep islands through scientific institutions such as the Institute of Ocean Management, Anna University, Chennai⁷²; and the Centre of Earth Science Studies, Thiruvananthapuram, respectively. Under this project, twenty inhabited islands of the Andaman group have been selected for developing ICZM Plans based on the status of the environment, socio-economic conditions

⁷² Integrated Coastal Zone Management Plan Preparation for Andaman and Nicobar islands. A study commissioned by the Ministry of Environment and Forests, GOI. Period of the study: 2002-2004. Cost involved: Rs 83.00 lakhs
The objective of the project is to promote the sustainable development of natural and physical resources and the maintenance of coastal ecological processes and genetic diversity in the coastal resources of Andaman and Nicobar islands through Integrated Coastal Zone Management plans.

and development potentials. The ICZMP is yet to be completed, finalised and discussed with various civil society groups that are involved in ecological, social and anthropological research and advocacy. However, without completing these processes, the MoEF amended the CRZ notification to state that, based on the findings of the ICZMP in identified areas of 13 islands which are part of the ICZMP process, the NDZ can be reduced from 200m to 50m for tourism development.⁷³

The ICZMP report has not been finalised⁷⁴. The study considered the constraints to development in the coastal areas of inhabited islands. As per plans, Cinque, Havelock, Neil, Rutland, North Passage, Long Island, Ross and Smith Islands have been recommended for development through tourism in the ICZMP.

IV. Reduction in the No-Development Zone for promotion of tourism

- The first amendment to the Notification was made because of pressure from the tourism lobby;
- The amendment was vide notification no. SO 595(E) dated August 18, 1994 on recommendations of the BB Vohra Committee, which was constituted on January 1, 1992 and the report submitted on December 31, 1992. The issue dealt with was that of tourism. The reason for the constitution of the committee was that there was intense pressure from the hotel and tourism lobby on the GOI stating that the said notification was very stringent and their work was severely restricted by the CRZ;
- One of the recommendations of the Committee was reduction of distance of the NDZ in selected coastal stretches for promoting tourism. The Ministry amended the CRZ Notification, 1991 on August 18, 1994, reducing the No-Development Zone (NDZ) area all along the coast from 200m to 50m. The amendment also permitted construction in NDZ thus giving expansive powers to the Central Government to permit such constructions on the landward side within 200m from the HTL according to its discretion;
- Although the SC quashed the amendments later, the tendency of the MoEF to dilute its own laws raises concerns about where its loyalties lie. It is that much more of a facilitator of impact inducing developments rather than it is a regulator;
- The tourism chapter of the State Development Report of Andaman & Nicobar Islands (draft) voices the same attitude: “While most of the Acts in force are designed to protect the ecology and environment, *the CRZ guidelines are generally perceived to be inhibiting*. In case of CRZ I, no new construction is permitted up to 500m from the HTL, while this is reduced to 200m in the case of CRZ III. CRZ II and IV also restrict development up to 200m from the HTL; however, it is reported that internationally, CRZ norms of 50m and 70m are commonly used and combined with stringent limits on land area covered, number of buildings, etc. There is thus a suggestion to look at the CRZ regulations on a case-to-case basis”;

73 SO 838 (E) dated 24th July 2003, vide Gazette of India (Extra) No. 654.

74 Pers. Comm. Samir Mehta, Dec 2005.

- The NDZ reduction was eventually reduced to 50m in the case of A&N Islands and Lakshadweep for tourism development through amendment of amendment, SO 838 (E), July 24, 2003 against the directives of SC in 2002, which were based on the Shekhar Singh Committee report. The relaxation was based on identification of areas in NDZ by the Integrated Coastal Zone Management Plan study conducted by the Ministry of Environment and Forests;
- First, the CZMPs of states are not prepared including those for Andaman & Nicobar Islands. Next, an ICZMP is commissioned specifically for the purpose of relaxing CRZ norms for tourism development. To date, both the CZMP and ICZMP have not been finalised or approved. But the objective of reducing the NDZ to 50m has been successfully achieved for tourism development purposes!

Tourism has succeeded in achieving its objective of reducing the NDZ from 200m to 50m in the A&N Islands. This has been possible with active connivance of the MoEF. What the MoEF could not get through in Aug 1984, it achieved in July 2003. This was done in the guise of the ICZMP. The Department of Environment & Forests, A&N Islands Administration has included 40 islands to be opened up for 'ecotourism' in the Andamans. For the vulnerable and ecologically sensitive islands, this could as well mean doom.

C. Some recent moves on CRZ violations and tourism

1. **Andhra Pradesh:** The High Court gave stay orders against Thenneti Park – an amusement park being constructed by private players at a cost of 6 crores in Vishakapatnam as a CRZ violation.
2. **West Bengal:** Courts have upheld a verdict for a PIL filed by National Fishworkers' Forum and DISHA in relation to violation of CRZ rules by the tourism industry. As per the judgement of the District Court, upheld by the Appellate Body and the High Court, the Pollution Control Board has asked for the demolition of more than 10 hotels (some with an investment of above 10 crores) in the Midnapore area of West Bengal Coast. The hotels had displaced and taken over the fishing grounds of more than 10,000 fishermen in the region.⁷⁵

The West Bengal government is moving Court against the unauthorised hotels and resorts that have come up on the sea beach at Mandarmani in violation of Coastal Regulation Zone (CRZ) norms. "We are going to file an affidavit in the Calcutta High Court. We have already informed the Court about the gross violation of CRZ by the hotel owners and the environmental damages in the coastal belt," a senior environmental department official told IANS. Mandarmani, located about 180 km from here in East Midnapore district, is a virgin sea resort to which tourists are flocking in large numbers.

On February 20 last year, the West Bengal Pollution Control Board (WBPCB) issued an order directing them to demolish their hotels. The order stated the hotels had violated the CRZ notification of 1991.

⁷⁵ West Bengal to Act against Illegal Hotels on The Beach: New Post India on line: <http://newspostindia.com/report-37096>
Dated: Thursday 14 of February 2008

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According to sources, none of the hotel owners at Mandarmani had received a clearance from the Pollution Control Board.

After the WBPCB order, hotel owners moved the High Court. Counsel for the hotel owners told the division bench—of Chief Justice SS Nijjar and Justice Pinaki Chandra Ghosh in Calcutta High Court that the necessary permission for the hotels had been obtained from the local administration (panchayats).

The Calcutta High Court directed the State Government 1 February to file an affidavit within two weeks. “The local administration along with state environment department officials, went there repeatedly to demolish the construction but failed due to resistance from the local people,” the WBPCB official said.

Mandarmani – a small coastal area in Ramnagar block-II of Contai sub-division in East Midnapore—is a brand new destination whose ecology is being devastated due to permanent constructions in the inter-tidal zone.

The Coastal Regulation Zone Notification of 1991, under the Environment Protection Act 1986, says no such construction may be carried out in the area falling between the Low Tide Line (LTL) and the peak High Tide Line (HTL) – the area which falls within 500 metres of the landward side of the Highest High Tide Line.

According to the notification, the High Tide Line means the line on the land upto which the highest water reaches during the spring tide. Just five years back, before the land developers discovered it, the beach was a breeding ground for mud prawns, metaplex – a very rare type of crab – and red crabs (ocypod).

“Unfortunately, the character of the Mandarmani beach has changed because of the illegal hotel industry there. If the local body (according to petitioners) had allowed them to build permanent construction on the coast, it was a major crime and we will take action against them too [sic],” the official said.

He said the National Coastal Zone Management authority has already told the State Government to take immediate action against the violators of the law at Mandarmani.

3. **Goa:** A number of blatant violations of the CRZ (Coastal Regulation Zone) on the tourist coast here will face the axe under a revived Goa Coastal Zone Management Authority headed by Chief Secretary JP Singh.⁷⁶

Tourism development has taken a huge toll on Goa’s coastal environment with violations mounting by the day. A few months ago, the State Government identified over 300 constructions that defied the ban on construction within 200 metres of the High Tide Line.

Mr. Singh, who took over as Chief Secretary some months ago, is perhaps the first high ranking bureaucrat to take a stand to protect whatever is left of the coast here. Hundreds of illegalities have escaped being demolished in the past with the connivance of politicians. The authority has also ruled against beach shacks on turtle nesting sites like Galijibag beach in South Goa and Morjim in the north. Morjim beach attracts a large number of Russian tourists, many of whom have taken over the business of running shacks, illegally from locals.

⁷⁶ Goa tough on CRZ violations; http://www.deccanherald.com/Archives/Jun242006/national195217200_6623.asp

4. **Karnataka:** A beach resort is quietly raising its head on the Devbagh beach in violation of Coastal Regulatory Zone (CRZ) rules.⁷⁷

It is certain that the resort will become a hotshot tourist destination when it is fully developed. Already there is a resort run by Jungle Lodges and more resorts near the spot where the Kali River meets the sea. The new resort has been built two kilometres away from the Devbagh beach on the stretch that leads to Majali. It is said that this area comes under the jurisdiction of the Majali Gram Panchayat limits, though it is on the Devbagh beach.

Small cottage-like structures have come up as part of the resort. A swimming pool is already under construction. It is still not known who the owner of the resort is, or who has been contracted for the construction.

When contacted, CRZ Regional Director, Vasanth Kumar, said the issue of the resort had come to the notice of the department. Mr. Vasanth Kumar added that he had already gone to the spot and inspected the survey number and other documents available. A case of violation of rules has been registered, he said. "A structure is coming up next to the Highway near the lower region of the Sadashivgadh Hills. It appears as if there are plans to construct a three-star hotel there. It is 150 metres away from the river bank. If it was on the beach, constructions within 500 metres of the beach are not allowed," Mr. Vasanth Kumar pointed out.

Why is it that the officials, who take stern action when the poor fishermen build something on the coast, turn a blind eye when it comes to the moneyed? Officials, who were asked the question, drew a blank. Pleading helplessness, they explain that they had no authority to take action on their own.

"A high-level meet will be held in Delhi on April 26. There are possibilities of making the rules less rigid," Mr. Vasanth Kumar said.

The spot where the resort is coming up is a beautiful one and is bound to attract a lot of tourists. If there is any way the resort owners can circumvent rules, it is certain that they will do it. Instances of CRZ rule violation are plenty, especially on the beach near Murudeshwar. However, no action has ever been taken by the Government.

Because tourism is booming in Goa, the CRZ rules there are less rigid. Stringent rules in Karnataka have been flouted blatantly.

Conclusion

The CRZ Notification has a positive side to it as well. One example is classifying CRZ to include rivers, creeks etc., up to the point where a minimum salinity level of 5 ppt is recorded; and for the first time in history of CRZ, the clause of Environment Protection Rules 5(4) have been used to actually prevent further ecological damage, unlike earlier instances where the same clause was used to relax provisions of the Notification to allow more activities on coasts. But where the Notification fails miserably is in its poor implementation by State Governments

⁷⁷ New resort raises head on Devbagh beach

Source: http://www.deccanherald.com/Archives/Apr232006/state21575200642_2.asp

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and Union Territories. It has also been interpreted inconsistently due to its many provisions that are ambiguous and incomplete—like the lack of guidelines for demarcating HTL. One glaring aspect is that the Ministry of Environment and Forests has succumbed to the development lobby, first from tourism and later others. It has frequently sought, and actually managed, to dilute it. It has rendered the CRZ Notification an instrument to plan and execute developmental activities rather than protect the highly pressured coastal systems.

Until the people, especially coastal communities are mobilised and a sustained struggle is created, there is little chance that those who hold political power or judicial authority will act and judge in favour of the environment and not in favour of those whose only interest is to profit over people and their natural environs.

The Concept of ‘Sustainable Development’

Margreet Wewerinke

In *TN Godavaraman Thirumulpad versus UOI (or Vedanta case, p. 138)*, the Supreme Court gives a very flawed interpretation of ‘sustainable development’. After recognising that “[a]s a matter of preface, we may state that adherence to the principle of sustainable development is now a constitutional requirement”, the Court states:

How much damage to the environment and ecology has got to be decided on the facts of each case [sic]. While applying the principle of sustainable development one must bear in mind that development, which meets the needs of the present without compromising the ability of the future generations to meet their own needs, is sustainable development. Therefore [sic], courts are required to balance development needs with the protection of the environment and ecology.

The phrase, “without compromising the ability of future generations to meet their own needs”, indicates that no damage to environment and ecology should be allowed.

In the same judgement, the Court notices that:

Indian economy for last couple of years has been growing at the rate of 8 to 9 percent of GDP. It is a remarkable achievement. However, accelerated growth rate of GDP does not provide inclusive growth. Keeping in mind the two extremes, this Court thought of balancing environment vis-à-vis protection of wildlife ecology and environment in view of the principle of sustainable development.

It shall become clear that, on the economic side, the principle of sustainable development is meant to promote economic growth for the well-being of poor and marginalised groups. Common sense confirms that large mining projects are not necessarily to be seen as “developmental”. First of all, poor groups benefit economically from these projects only to a very limited extent. In addition to this, if poor and marginalised groups (such as indigenous communities) object to a project, there is little space to argue that this project is to be supported for the benefit of the poor. In other words, it is misleading to call such a project “developmental”. Rather, it must be seen as destructive, both for the environment and for the livelihoods of vulnerable groups. The mining project affects the traditional and sustainable way of life of tribal people who see the Niyamgiri Mountain as sacred. The Court is not only compromising the ability of

future generations to meet their own needs, but is also compromising the rights of vulnerable groups against the needs of the economic establishment. This implies misreading the principle of sustainable development to legitimise a ruling that is morally unacceptable and contrary to the basic provisions of customary international law and international human rights law.

In *Essar Oil Ltd. versus Halar Utkarsh Samiti and Others*, the Court makes similar misinterpretations of sustainable development. In para 26 the Court refers to the Stockholm Declaration. The mistake comes in when the Court mentions that:

The importance of maintaining a balance between economic development on the one hand and environmental protection on the other is ... emphasised in Principle 11 [of the Stockholm Declaration] which says: “The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries nor should they hamper the attainment of better living conditions for all.

And in para. 27 the Court continues:

This, therefore, is the aim, namely, to balance economic and social needs on the one hand with environmental considerations on the other. But in a sense all development is an environmental threat.

In the *Blue Lady* case, para. 10, the Court refers to *TN Godavarman Thirumulpad versus Union of India and Ors.* (i.e. the *Vedanta* case), para. 35:

It cannot be disputed that no development is possible without some adverse effect on the ecology and environment, and the projects of public utility cannot be abandoned and it is necessary to adjust the interest of the people as well as the necessity to maintain the environment. A balance has to be struck between the two interests. Where the commercial venture or enterprise would bring in results which are far more useful for the people, difficulty of a small number of people has to be bypassed. The comparative hardships have to be balanced and the convenience and benefit to a larger section of the people has to get primacy over comparatively lesser hardship.

The Court continues stating (para. 10) that:

The above paragraphs indicate that while applying the concept of “sustainable development” one has to keep in mind the “principle of proportionality” based on the concept of balance. It is an exercise in which we have to balance the priorities of development on one hand and environmental protection on the other hand.

In *Goa Foundation, Goa versus Diksha Holdings Pvt. Ltd.* (2001) 2 SCC 97, Justice Pattanaik, J. (for himself and Banerjee, J.) states in para. 6 that:

We think it appropriate to notice one or two decisions, indicating the approach of a court in such matters concerning environment and development. The Calcutta High Court in the case of *People United for Better Living in Calcutta-Public versus State of WB* had the occasion to deal with a similar problem in relation to the wetland, and the

learned Single Judge (UC Banerjee, J.) came to the conclusion: “There is no manner of doubt that the issue of environmental degradation cannot be but termed to be a social problem and considering the growing awareness and considering the impact of this problem on the society in regard thereto law courts should also rise up to the occasion to deal with the situation as it demands in the present day context...” The learned Judge had indicated in the said judgement that there should be a proper balance between the protection of environment and the development process: the society shall have to prosper, but not at the cost of the environment and in similar vein, the environment shall have to be protected but not at the cost of the development of the society- there shall have to be both development and proper environment and as such a balance has to be found out and administrative actions ought to proceed in accordance therewith.

Justice Umesh C. Banerjee, JJ states in para. 17 that:

While it is true that nature will not tolerate after a certain degree of its destruction and it will have its toll definitely, though it may not be felt in present. The society has a responsibility towards the posterity so as to allow normal breathing and living in cleaner environment but that does not by itself mean and imply stoppage of all projects. In my judgement in regard to East Calcutta Wetlands (People United for Better Living in Calcutta-Public versus State of WB) I did speak of a balance between development and ecology and since my learned brother Pattanaik, J. has already dealt with the issue, I refrain myself from dealing with the matter in extenso in that regard excepting however, recording my concurrence therewith and state that harmonisation of the two, namely, the issue of ecology and development project cannot but be termed to be the order of the day and the need of the hour.

In *Bombay Dyeing and Manufacturing Company Limited versus The Bombay Environmental Action Group and Others* (2006) 3 SCC 434 (paras 251, 252 and 256) the Court held that:

With major threats to the environment, such as climate change, depletion of natural resources, the eutrophication of water systems and biodiversity and global warming, the need to protect the environment has become a priority. At the same time it is also necessary to promote development. The harmonisation of the two needs has led to the concept of sustainable development, so much so that it has become the most significant and focal point of environmental legislation and judicial decisions relating to the same. Sustainable development, simply put, is a process in which development can be sustained over generations. The Brundtland report defines “sustainable development” as development that meets the needs of the present generations without compromising the ability of future generations to meet their own needs. Making the concept of sustainable development operational for public policies raises important challenges that involve complex synergies and trade-offs. The Indian judiciary has time and again recognised this principle as being a fundamental concept of Indian law.

After this misinterpretation of sustainable development – as if there is a contradiction between development and environmental protection - the reasoning of the Court becomes even more

ambiguous in para. 272:

The development of the doctrine of sustainable development indeed is a welcome feature but while emphasising the need of taking into account the ecological impact, a delicate balance between it and the necessity for development must be struck. Whereas it is not possible to ignore inter-generational interests, it is also not possible to ignore the dire need of that which the society urgently requires.

The implicit assumptions are flawed. Is there really a contradiction between inter-generational interests and “that which the society urgently requires”? Would not each generation, including the presently living ones, urgently require housing and public green in an overcrowded city?

1. The Supreme Court has taken over the definition (but not the understanding!) of sustainable development from several international declarations, where it is literally defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

This definition appeared for the first time in a report *Our Common Future* that was published in 1987 by the Brundtland Commission. According to the report, three components (environmental, economic and social) should be in balance if development is to be sustainable. This implies, inter alia, that “growth” needs to take place in such a manner that livelihoods are sustained in the long run, eco-systems are respected, and poverty and other human rights violations are progressively and effectively eliminated.

2. The connection, between economic and social aspects of development, is clearly drawn in Article 55 of the Charter of the United Nations:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 of the UN Charter subsequently provides that “[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55.” Clearly, Article 55 views economic development as a means to fulfil social conditions – which is, in turn, a condition for world peace – rather than as a value as such. This is important, as economic growth does not necessarily translate into less poverty. Relative poverty might increase despite general affluence.⁷⁸

⁷⁸ UNEP, *Geo Outlook 4*, 2007, p. 306.

Viewing social and economic development as two sides of the same coin is in line with the concept of sustainable development. Yet, the first component of sustainable development – environment and the need to ensure that growth does not harm the environment, is not mentioned in Article 55. The reasons for this absence might be rather simple. Till as late as 1945, most state leaders were ignorant of the devastating effects of human interference with the environment.

3. Indeed, with the increase of environmental awareness, the United Nations has become a major international forum for discussing environmental concerns, sharing knowledge and seeking international cooperation to enhance environmental care. A landmark event in this regard, was the United Nations Conference on the Human Environment, which took place in Stockholm in 1972. The Conference led to the establishment of many national environmental protection agencies and to the creation of the United Nations Environment Programme (UNEP). The “Stockholm Declaration”, that was adopted at the end of the Conference, is widely acknowledged as customary international law.

The Stockholm Declaration mirrors the rise in global environmental awareness in the late 1960s and early 1970s. The Preamble of the Declaration provides that:

A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well-being depend.⁷⁹

The Preamble also recognises the narrow relationship between economic and social development on the one hand and environment on the other. It states that defending and improving the human environment, for present and future generations, has become “an imperative goal for mankind—a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of worldwide economic and social development.”⁸⁰ The Declaration emphasises the importance of economic and social development in developing countries, though not at the cost of the environment, suggesting that development could combat inhuman and degrading poverty.⁸¹ Thereafter, it sets down a number of Principles that are to be respected and promoted. The Principles include specific guidance about how the environment can and should be protected.⁸² Moreover, Principle 1 draws a direct connection between environmental care and human rights:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

79 Stockholm Declaration, United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14, revised by UN Doc. A/ CONF.48/14/Corr1, June 16, 1972 (hereinafter “Stockholm Declaration”), available at <http://unep.org> (last consulted July 28, 2008), Preamble, para 6.

80 Stockholm Declaration, Preamble, para 6.

81 Stockholm Declaration, Preamble, para. 4.

82 For example in Principle 6, which provides that “[t]he discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon eco-systems.”

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This Principle can be interpreted as the basis for the human right to environment in customary international law.⁸³ It is supported by Principle 6, which provides among other things, that “The just struggle of the peoples of ill countries against pollution should be supported.”

The insight—that development should be based on a balanced concern for economy, environment and society—is reflected in Principle 13, which provides that:

In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population.

Last but not least, Principle 22 provides that:

States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

This Principle reflects the polluter pays principle, which is now extended to international problems.

4. Contemporaneously with the adoption of the Stockholm Declaration, the Club of Rome published *Limits to Growth*. This controversial report says that if economic development continues, without changes in processes of production and natural resource exploitation, non-renewable resources will be exploited before 2072. The likely result would be, according to the Club of Rome, “a rather sudden and uncontrollable decline in both population and industrial capacity.”⁸⁴ The OPEC oil crisis, in 1973, seemed to confirm the report’s conclusion that economic growth must urgently be altered and made more sustainable. Altogether, it is increasingly being understood that development as such is dependent on due care for the environment. Human beings are capable of causing irreparable damage to the earth, often in relation to the exploitation of non-renewable resources and other “development” projects with undesirable side effects.
5. The actual term “sustainable development” first emerged in 1980, in the context of the World Conservation Strategy released by the International Union for Conservation of Nature (IUCN). The section “Towards Sustainable Development” called for a new international development strategy to redress inequity and materialise a durable balance between society, economy and environment.⁸⁵ However, it would take until 1987 for the term to be popularised and elaborated. Still, support for the values, that underpin sustainable development, was visibly increasing.

83 Even though the Declaration is non-binding, it is widely recognised as a source of customary international law. See UNEP, A Legal Framework for the Integration of Environmental, Social and Governance Issues Into Institutional Investment, October 2005, available at <http://www.unepfi.org> (last consulted July 26, 2008), pp. 30-31.

84 Meadows et al. *The Limits to Growth*, Universe, 1972, p. 23.

85 See www.iucn.org.

6. Indicatively, in 1980, the newly-established Independent Commission on International Development Issues published “North-South, A Programme for Survival”, also known as the Brandt Report. Emphasising human dependence on natural resources, and the need to prevent uncontrolled exploitation of those resources, the report called for a new economic order. This order should, among other things, be based on a balanced relationship between North and South and thus on social and economic sustainability.
7. Moreover, on the environmental side of sustainability, the United Nations General Assembly adopted the World Charter for Nature in 1982.⁸⁶ The Charter provides that:

In formulating long-term plans for economic development, population growth and the improvement of standards of living, due account shall be taken of the long-term capacity of natural systems to ensure the subsistence and settlement of the populations concerned, recognising that this capacity may be enhanced through science and technology.⁸⁷

In more concrete terms, the Charter states that:

Activities, which might have an impact on nature, shall be controlled, and ...

- (a) Activities, which are likely to cause irreversible damage to nature, shall be avoided;
- (b) Activities which are likely to pose a significant risk to nature, shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature and, where potential adverse effects are not fully understood, the activities should not proceed;
- (c) Activities, which may disturb nature, shall be preceded by an assessment of their consequences and, environmental impact studies of development projects, shall be conducted sufficiently in advance and, if they are to be undertaken, such activities shall be planned and carried out so as to minimise potential adverse effects; ...
- (e) Areas, degraded by human activities, shall be rehabilitated for purposes in accord with their natural potential and compatible with the well-being of affected populations... Discharge of pollutants into natural systems shall be avoided and ... [w]here this is not feasible, such pollutants shall be treated at the source, using the best practicable means available.⁸⁸

Thus, the World Charter for Nature lays an initial basis for environmental impact assessment. The precautionary principle, establishing that uncertainty about the effect of activities must trigger further research and extra care, is laid stress upon. Thus it becomes clear that decision-makers cannot turn a blind eye to possible environmental consequences on the mere basis of uncertainty.⁸⁹

⁸⁶ World Charter for Nature, Annex to General Assembly Resolution A/RES/37/7, October 28, 1982, available at www.un.org/documents/ga/res/37/a37r007.htm (last consulted July 28, 2008).

⁸⁷ World Charter for Nature, II (7) and II (8).

⁸⁸ World Charter for Nature, II (11) and (12).

⁸⁹ This is confirmed in III (21): “States and, to the extent they are able, other public authorities, international organisations,

8. In 1984, the United Nations General Assembly established the World Commission on Environment and Development. The mandate of this Commission is, among other things, to “assess and propose new forms of co-operation that can break out of existing patterns and influence policies and events in the direction of needed change”.⁹⁰ The appointed Chairperson of the Commission was Gro Harlem Brundtland. As a result, the Commission became popularly known as the Brundtland Commission. After meeting in Tokyo in 1987, the Commission issued the Tokyo Declaration. The Declaration mentions in the Preamble that:

[the Commission remains] convinced [sic] that it is possible to build a future that is prosperous, just and secure... But realising this possibility depends on all countries adopting the objective of sustainable development as the overriding goal and test of national policy and international co-operation. Such development can be defined simply as an approach to progress which meets the needs of the present without compromising the ability of future generations to meet their own needs.

Thus, this Preamble gives birth to the definition of sustainable development as it is still being used today. The Preamble also notes that, “all the nations of the World”, should integrate sustainable development into their goals and adopt a set of 8 principles, which are given in the Tokyo Declaration. These principles include “revived growth” (for the sake of combating poverty) and “changing the quality of growth”. The latter is “a new kind in which sustainability, equity, social justice, and security are firmly embedded as major social goals.” Development planners are called upon to “take account in ... reckoning of national wealth not only of standard economic indicators, but also of the state of the stock of natural resources.”

Drawing links between economy, society and environment, Principle 2 of the Declaration states that:

Income distribution, reduced vulnerability of natural disasters and technological risks, improved health, preservation of cultural heritage ... all contribute to raising the quality of [revived] growth.⁹¹

The concern for future generations becomes clear in Principle 3:

Sustainability requires the conservation of environmental resources such as clean air, water, forests and soils; maintaining genetic diversity; and using energy, water and raw materials efficiently ... All countries are called upon to prevent environmental pollution by rigorously enforcing environmental regulations, promoting low-waste technologies, and anticipating the impact of new products, technologies and wastes.

individuals, groups and corporations shall ... [c]o-operate in the task of conserving nature through common activities and other relevant actions, including information exchange and consultations... [and implement] the applicable international legal provisions for the conservation of nature and the protection of the environment” and in III (23): “All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.”

⁹⁰ Tokyo Declaration, February 27, 1987, Preamble.

⁹¹ Tokyo Declaration, Principle 2.

The other five principles are: “ensure a sustainable level of population”; “reorient technology and manage risks”; “integrate environment and economics in decision-making”; “reform international economic relations”; and “strengthen international co-operation”.⁹² The Brundtland Report defines sustainable development as “meeting the needs of the present without compromising the ability of future generations to meet their own needs” and gives detailed guidance on how to put this idea into practice.

9. After the publication of *Our Common Future* or the Brundtland Report, the General Assembly took over the definition of sustainable development, in a resolution, and declared that sustainable development “should become a central guiding principle of the United Nations governments and private institutions, organisations and enterprises.”⁹³ The Resolution states that the Assembly:

Agrees with the [Brundtland Commission] that while seeking to remedy existing environmental problems, it is imperative to influence the sources of those problems in human activity, and economic activity in particular, and thus to provide for sustainable development...[and] that an equitable sharing of the environmental costs and benefits of economic development between and within countries and between present and future generations is a key to achieving sustainable development...The critical objectives for environment and development policies which follow from the need for sustainable development must include preserving peace, reviving growth and changing its quality, remedying the problems of poverty and satisfying human needs ... and merging environment and economics in decision-making...⁹⁴

The resolution calls upon governments to ensure that their sectoral economic agencies mainstream sustainable development in policies, programmes and budgets. Moreover, governments should “strengthen the role of their environmental and natural resource agencies in advising and assisting central and sectoral agencies in that task.”⁹⁵

10. An imbalanced emphasis on economic considerations can trigger environmental degradation. This became strikingly clear in developed countries that wanted to be rid of hazardous wastes and which made use of the apparent economic needs of developing countries. These “toxic traders” are found to export hazardous wastes from developed countries to whichever country that accepts it, for money (“trash for cash”). This problem led to the adoption of the Basel Convention in 1989.⁹⁶ The Basel Convention refers to major environmental soft-law and legal instruments, such as the Stockholm Declaration and the World Charter for Nature, stating that—“States are responsible for the fulfilment of their international obligations concerning the protection of human health and protection and preservation of the environment, and are liable in accordance with international law.”⁹⁷

92 Tokyo Declaration, Principles 4-8.

93 *Ibidem*, Preamble.

94 *Ibidem*, paras. 3-5.

95 *Ibidem*, paras. 7.

96 Dutta, Ritwick, *The Environmental Activists' Handbook II*, Mumbai: Socio-Legal Information Centre, 2002, pp. 144-188.

97 Basel Convention, Preamble.

At the same time, it is recognised that developing countries have “limited capabilities ... to manage hazardous wastes and other wastes.”⁹⁸

Developing countries, supported by some developed countries and activist groups, criticised the Convention as it did not prevent the movement of hazardous wastes; instead it seemed to legitimise it.⁹⁹ This criticism led eventually to the so-called Basel Ban—an alliance of developing countries, some European countries and activist groups—that effectively banned “all forms of hazardous waste exports from the 29 wealthiest, most-industrialised countries of the Organisation for Economic Cooperation and Development (OECD) to all non-OECD countries”, as of January 1, 1998.¹⁰⁰

However, with regard to countries in Asia and the Pacific, the UNEP recently pointed out that—“[although] most countries ... have ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the region as a whole lacks a common approach to the import of hazardous wastes.”¹⁰¹

11. 3 years after the adoption of the Basel Convention, in 1992, the UN Conference on Environment and Development (UNCED), also known as the Earth Summit, took place in Rio de Janeiro. At the Earth Summit, governments endorsed non-binding Forest Principles and the Rio Declaration on Environment and Development (RDED), which begins with the statements that:

[h]uman beings are at the centre of concerns for sustainable development [and the] right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.¹⁰²

Principle 4 of the Declaration provides that:

[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.¹⁰³

The Rio Declaration, like all other sustainable development-related declarations, names eradication of poverty as a prerequisite for (sustainable) development. It also emphasises the importance of popular participation:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation

98 Basel Convention, Preamble.

99 *Ibidem*, p. 145.

100 *Ibidem*.

101 UNEP, *Geo Outlook 4*, 1997, p. 225.

102 Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, UN Doc. A/ CONF.151/1, June 3-14, 1992 (Rio Declaration), available at <http://www.unep.org/Documents.Multilingual> (last consulted July 25, 2008), Principles 1 and 3.

103 Rio Declaration, Principle 4.

by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided... States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.¹⁰⁴

However, this does in no way mean that sustainable development requires care for environmental damage once it has already occurred. Liability and compensation should serve only to deal with cases that slip through the cracks of a system that protects the environment by sound laws and thorough assessment of environmental risks. In line with the Stockholm Declaration, the Rio Declaration provides a basis for the precautionary principle in international law:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.¹⁰⁵

12. Also, at the Earth Summit in 1992, state leaders adopted the Convention on Biological Diversity and the Framework Convention on Climate Change (UNFCCC). The UNFCCC also refers explicitly to sustainable development and seeks to make it compatible with climate change. The UNFCCC is the first legally binding document that aims at “stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”. Article 2 provides that this aim:

should be achieved within a time frame sufficient to allow eco-systems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

Importantly, Article 3 adds that the Parties, to the UNFCCC, “have a right to, and should, promote sustainable development.” The UNFCCC also embeds the precautionary principle by restricting greenhouse gas emissions. Indeed, the presumption that emissions cause irreversible damage to the earth, and thus to humanity, is a sufficient basis to establish mandatory emission cuts upon many of the world’s emitters.

13. To monitor and report the overall implementation of the Earth Summit Agreements on sustainable development, as well as to ensure due follow-up, the Earth Summit has established the UN Commission on Sustainable Development (CSD). The CSD was to monitor the comprehensive action programme, “Agenda 21” (Agenda for the 21st century), that was freshly adopted, and which is built on the assumption that state actors,

104 Rio Declaration, Principle 10.

105 Rio Declaration, Principle 15.

private actors and civil societies should enhance care for the environment. An explicit aim of Agenda 21 is to involve major groups—such as those of women, children and youth, indigenous people and farmers—in the promotion and realisation of sustainable development.

The Agenda is built on socio-economic objectives such as combating poverty, changing consumption patterns and protecting and promoting human health conditions.¹⁰⁶ Secondly, Agenda 21 elaborates objectives that relate to conservation and management of resources for development. These include protecting the atmosphere, combating deforestation, managing fragile eco-systems, protecting the quality and supply of fresh water resources, environmentally-sound management of toxic chemicals and environmentally-sound management of hazardous wastes.¹⁰⁷ Agenda 21 might be seen as the first coordinated attempt to put “sustainable development” into practice.

According to Chapter 8 of Agenda 21, countries should adopt National Strategies for Sustainable Development (NSDS) that both build upon and harmonise economic, social and environmental policies and plans that are operating in the country.

Paragraph 2, of Chapter 8, states that:

An adjustment or even a fundamental reshaping of decision-making, in the light of country-specific conditions, may be necessary if environment and development is to be put at the centre of economic and political decision-making... The responsibility for bringing about changes lies with Governments in partnership with the private sector and local authorities, and in collaboration with national, regional and international organisations, including in particular UNEP, UNDP and the World Bank...

The explicit objective of Chapter 8 was to “improve or restructure the decision-making process so that consideration of socio-economic and environmental issues is fully integrated and a broader range of public participation assured.” This includes the following four specific objectives:

- (a) To conduct a national review of economic, sectoral and environmental policies, strategies and plans to ensure the progressive integration of environmental and developmental issues;
- (b) To strengthen institutional structures to allow the full integration of environmental and developmental issues at all levels of decision-making;
- (c) To develop or improve mechanisms to facilitate the involvement of concerned individuals, groups and organisations in decision-making at all levels;
- (d) To establish domestically – determined procedures to integrate environment and development issues in decision-making.¹⁰⁸

106 Agenda 21, available at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> (last consulted July 29, 2008), Section I.

107 Agenda 21, Section II.

108 Agenda 21, Chapter 8 para 3.

14. In 1993, the Commission on Sustainable Development held its first meeting, during which strategies to implement Agenda 21 were discussed. The CSD still holds annual meetings to discuss the implementation of Agenda 21 on the National and International levels. The current focus of the CSD is the materialisation of the Millennium Development Goals regarding water and sanitation in the context of poverty.
15. As is being revealed during CSD meetings, governments differ upon how best to implement Agenda 21 at the National level. A famous example of national implementation is China’s Agenda 21—a White Paper on China’s population, environment and development—which the Chinese Government adopted in 1994.¹⁰⁹ It identifies discrepancies in various thematic areas of sustainable development with regard to healthcare, a shortage of health resources in rural areas and uneven distribution of healthcare in cities. It also sets forth the objective of westing to improve conditions in townships and village clinics. Under Agenda 21 China has established 6 environmental laws, 8 resource management laws, more than thirty administrative regulations, and three hundred-and-sixty environmental standards. Further laws have been established on education, health, culture and social security.¹¹⁰ Significant improvements—in the realisation of sustainable development, including increased access to health care—are the said result of these policy changes. Recently China introduced a series of policy measures to promote small-scale projects and invested more than US\$2.5 billion in 2000-04. The number of people who now have access to safe drinking water is close to 60 million.¹¹¹

Nevertheless, the overall picture, of action taken by world leaders, appeared to be less rosy. In 1997, 5 years after the Earth Summit, the UN General Assembly reviewed the Earth Summit in a special session. It became clear that, in most countries, Agenda 21 had not been effectively implemented, or not implemented. It was thought that new commitments, established at the special session, could lead to a changing trend. The importance of National Strategies for Sustainable Development was emphasised and a target of 2002 was set for their formulation and elaboration.¹¹²

16. In 2000, the UN Millennium Summit took place, which was the largest-ever gathering of world leaders, setting down the Millennium Development Goals (MDGs) to be achieved by 2015. During the Summit state leaders agreed to a set of time-bound and measurable goals for combating poverty, hunger, disease, illiteracy, environmental degradation and discrimination against women. The first objective of MDG 7—Environmental Sustainability—explicitly refers to sustainable development and environmental protection, the objective being to “integrate the principles of sustainable development into country policies and programmes; reverse loss of environmental resources”.
17. In the meantime – to be precise, five years before the UN Millennium Summit – the World Trade Organisation (WTO) was established. The WTO’s main function is to facilitate

109 See <http://www.unescap.org> (last consulted August 8, 2008).

110 See <http://www.un.org/esa/agenda21/natlinfo/countr/china/inst.htm> (last consulted August 8, 2008).

111 UNEP, *Geo Outlook 4*, 2007, p. 219. China is however infamous for its Three Gorges Dam Project, which has anticipated social and environmental impacts such as loss of livelihoods in areas that will be submerged and loss of some biodiversity and eco-system functioning (*ibidem*).

112 See www.iisd.ca/linkages/csd/ungass.html (last consulted August 1, 2008).

international trade liberalisation and eliminate market restrictions. In 2001, the Fourth Ministerial Conference of the World Trade Organisation took place in Doha, Qatar. During this Conference, environment and development concerns received explicit recognition in the final Declaration, which is known as the Doha Declaration. Moreover, at the NGOs and the WTO agreed to re-interpret the Agreement on Intellectual Property Rights regarding access to medicines and public health.¹¹³ State leaders made it very clear that trade liberalisation can well be compromised for the sake of protecting public health and with due regard to vulnerable groups in developing countries.

18. In 2002, 10 years after “Rio”, the World Summit on Sustainable Development (WSSD) was held in Johannesburg. The WSSD urged States to take immediate steps towards the formulation and elaboration of National strategies for sustainable development and to begin implementation by 2005. At subsequent sessions of the Commission for Sustainable Development, governments have continued to reiterate their commitment to develop and implement NSDS.
19. In 2005, the famous Kyoto Protocol to the UNFCCC entered into force, setting down legally-binding commitments for developed country parties to cut down greenhouse gas emission reductions. It also established the Clean Development Mechanism, allowing developed countries to reduce officially registered emissions by implementing projects that contribute to sustainable development in developing countries.¹¹⁴ According to Kyoto Protocol Article 12 (2), the purpose of the clean development mechanism is:

to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.¹¹⁵

20. Also in 2005, at the World Summit, the United Nations General Assembly reiterated that:
sustainable development is a key element of the overarching framework for United Nations activities, in particular for achieving the internationally agreed development goals.

In General Assembly resolution 59/227, it is explicated that these goals refer to the Millennium Development Goals and the objectives of the Johannesburg Plan of Implementation (General Assembly resolution 59/227).

21. Conclusion

The concepts of “development” and “sustainable development” have evolved keeping the economy, society and development in mind. With the adoption of the UN Charter, development was mostly considered as economic growth. In this “modern” paradigm, development was optimistically put forward as a way to increase standards of living and social welfare.

113 See www.ictsd.org/ministerial/doha/ (last consulted August 1, 2008).

114 See www.iisd.ca/process/climate_atm-fccclntro.htm (last consulted August 8, 2008).

115 Roughly speaking, Annex I lists down developed countries whereas non-Annex I countries are developing countries.

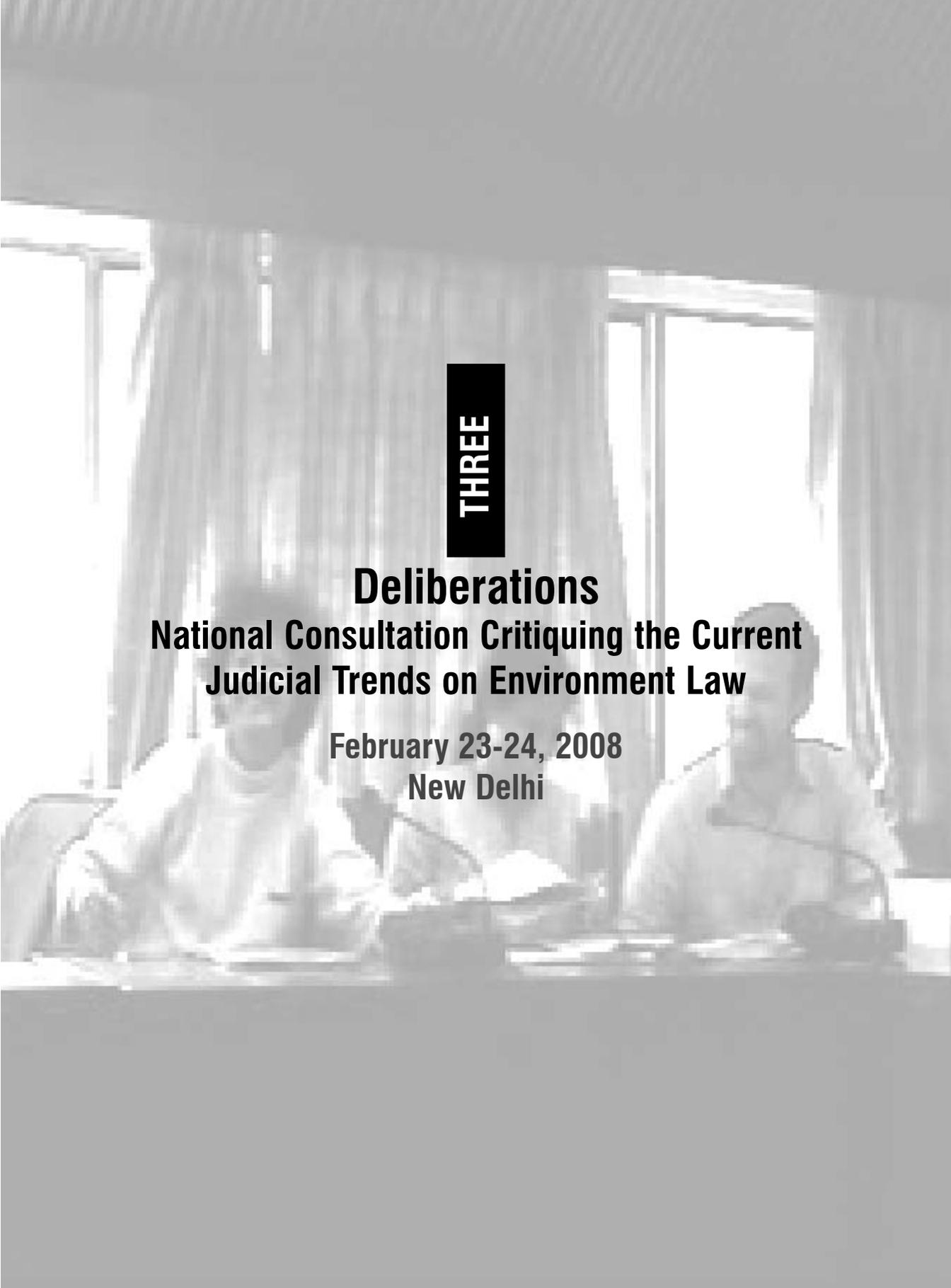
The Concept of “Sustainable Development”

This view, on development, was revised in the early 70s, when it became increasingly clear that economic development was doing grave damage to environment, health and life. Unrestricted economic development was a threat to present and future societies and to human rights. It is important to note that 3 distinct points, about development, have been recognised at international declarations, conventions and institutions from 1972 to present:

- Promotion of economic growth and development should impact positively, not negatively, upon fulfilment of rights and needs of present and future generations. Thus, respect for the environment is a prerequisite for economic development and cannot be compromised;
- There is no reason to promote economic development if people – especially the poor – do not benefit from growth. States should promote economic development in order to eliminate poverty;
- Policy-making, on development and environment, should be participatory and the voices, of those who are directly impacted by developments, should be heard and respected.

Since 1987, the concept of “sustainable development” has been used to refer to these 3 points. Indeed, sustainable development allows no scope for compromising societal needs (including the need for pro-poor economic development), or for causing damage to the environment. Development—that destroys or damages the earth, rather than respects or restores ecological resources—is unsustainable and cannot be called development. Sustainable development requires precautionary environmental research and public participation in environment-related research and decision-making.

Lastly, it must be noticed that, though the concept of sustainable development has evolved through the years, in reaction to threats such as climate change and water scarcity, the basic insight—that development is to serve present and future generations and not damage the environment—has remained unchanged.



THREE

**Deliberations
National Consultation Critiquing the Current
Judicial Trends on Environment Law**

**February 23-24, 2008
New Delhi**



Colin Gonsalves Founder, HRLN



Over the last ten years or so we have seen a very big change in the attitude of the Supreme Court towards the poor, we link it up with globalisation in some way and we have seen a change on labour law, we have seen a change on environmental law, we have seen a change in housing rights and a huge change in the attitude towards the poor. Roughly about a month ago, or about five or six weeks ago, criminal lawyers, from all over the country, came down to Delhi and we had a very interesting session on how the judgements of the superior courts criminal law protection for accused persons is being completely dismantled. A signal is being sent out to the country that you must try and put as many people behind bars as possible, the conviction rate must be pushed up to sixty percent or seventy percent, that is the target in many places and if the standard of proof is not met in many cases it does not matter, the middle classes want as many people behind bars as quickly as possible, they are not bothered about the lawyers fascination with human rights standards and technical aspects of evidence and proof, so go ahead and put people behind bars. That trend started somewhere in 1999-2001 and we have traced the judgements from 2000 till date and we have seen a catastrophic degeneration in criminal law jurisprudence as far as criminal law is concerned and criminal lawyers, throughout the country, got very upset and were very distraught at what they saw, a wonderful science of criminal law being completely undermined.

Globalisation I suppose requires that you take as many people as possible and put them behind bars and not worry too much about the niceties of criminal law jurisprudence? But as far as the poor people were concerned, and those who were the victims of this trend, it was simply awful and we have come with a magazine, a *combat law* issue on this, which speaks about the tragic decline of criminal law, where we have looked at the judgements of the courts and very often found two-Judge bench decisions and sometimes three-Judge bench decisions to have overturned five-Judge bench decisions and seven-Judge bench decisions and so on. So we see a disregard for the past, a disregard for precedent and a disregard for well established principles of criminal law jurisprudence and the start of a new way of thinking.

Last month we had labour lawyers and trade unioners from all across the country coming down to Delhi to make a similar protest on labour law, it is quite an amazing trend over the last seven years and I practice as a labour lawyer, I started my practice as a labour lawyer many years ago.

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We have seen the system disintegrate in front of our eyes and it's quite a tragic and sad decline and well established principles of law by larger judge benches being undermined by two-Judge benches and every principle of law going. The labour lawyers, who participated last week, were also very distraught by what they could see as a break up of a very fine tradition of law, where labour was treated with some degree of respect and the Trade Union Movement was given the kind of respect and recognition that it deserved. Today all that is gone, all the judgements have changed that and there was a very important decision made by a two-Judge bench, recently, last year in a matter relating to back wages and reinstatement of workers where a two-Judge bench said at the end of the judgement, that before parting we must say that the earlier judgements of the Supreme Court including judgements of larger benches are no longer relevant in the present scenario of Globalisation, Structural adjustment and Privatisation. So with one stroke of the pen all the judgements of the earlier period are sort of swept aside and judges of the labour courts to day will tell you, "Don't show me a judgement of the Supreme Court of the 90s, haven't you seen the latest judgements? We are not supposed to look at that we are supposed to look at the judgements of the 2000 plus judgements.

With this, a fine tradition of labour law went and today we are at the environment law meeting and I am not really an expert on this but I do know that we suffer from the same reverses in environmental law that we have suffered in labour law and criminal law and sir I can't tell you how happy we are to have you here with us, Justice Kuldeep Singh, just as we had Justice Krishna Iyer for labour law and like many fine judges of the earlier period, Justice Kuldeep Singh played a very important role in bringing Environmental Law to the centre stage and the judgements of that period actually influenced a lot of the environmental thinking of that period and completely changed the way in which the judiciary looked at the environment, but as Claude, and our friends here in the environmental movement will tell you, all that is now being undone and the reason why we are meeting is not to have a discussion on environmental law but to offer a critique of the courts so that ultimately we could publish a document where we could openly criticise judges, whoever they may be, that it is not acceptable to the environmental movement, it is not acceptable to the human rights movement and it is not acceptable to all the movements in this country, that you can take earlier precedents and change it in the way that you are currently doing, it causes enormous damage to the environment, it causes enormous damage to the country and it is not acceptable to the people of India, unless we make that protest in Criminal Law in Environmental Law and in Labour Law, unless we make that protest that the people's movement is not going to say that you are a Supreme Court judge therefore we just listen quietly, no we have a democratic right to say that no this is not acceptable and this is not correct, this is not technically correct, this is not correct according to environmental law standards and this is not correct according to international law standards and I am sorry we don't agree and please change the trend because it is causing enormous damage to the environment. That is the reason why we are having this meeting.

Justice Kuldip Singh *Former Justice, Supreme Court of India*



I think what has been done in the field of environment during the last decade of the last century by the Supreme Court is primarily because of the assistance rendered by the fraternity of lawyers of which we are all members, without them nothing could have happened and I am still with an optimistic frame of mind and I believe that we will be able to come back to the same stream pretty soon and this is just a passing phase. When you are headed towards a final result you are faced with some ups and downs in between and I am confident that we will be achieving our goal very soon with no difficulty. According to this programme, I have been asked to say a few words on Supreme Court directions and monitoring, before I come to that I would like to remind all of us that the basic concept, on which all this struggle between the ecologist and the economist is going on, and all concepts like sustainable development are coming up. It is a very simple concept, I am sure most of you must have read a well known book called *The Only One Earth* written by Barbara Ward. The late Barbara Ward was a director in the United Nations Environment and Development Programme and she has done a wonderful work of it. In fact the Stockholm Declaration of 1972 is primarily the result of this work that she did. I will only take you through the beginning of the book.

She begins the book by saying that this is only one earth but man lives in two worlds. The one is the natural world of rivers, oceans, forests and mountains. The world of flora and fauna, animals and all of the nature that you see. This world has existed for billions of years and it came much before us and today we are a part of it. The second world, she talks about, is the world that we make with our own science using our own brain, in the garb of and in the shape of development for our own comfort, by carving out and consuming the natural world one by one, we build an aerodrome we demolish a forest, we build a road we demolish something else. We build a housing complex we demolish something, the coming of the commonwealth games is bringing with it the construction of 5,000 flats and provide all the infrastructure that is required, push the sewerage into the Yamuna river which is already a dead river.

This is what is being done and these are the two worlds in which we are living. One of which as we know is the biosphere of our inheritance and the second is the technosphere of man's own creation. These are the two worlds that we are living in, now imagine if you keep on finishing all the greenery, all these trees, to start building everywhere, what will happen, where will we live? You may live for a few days, but there will be no next generation, no children, no children of theirs. Therefore the concept that we are fighting for is this, that if you keep on going with this world that you are preparing and proceed in this haphazard manner, without looking at anything then you are going to bring about the end of humanity and it is a very slow poison that is being administered and we are already neck deep in it and each one of us will understand only when we won't have anymore time left, so this is the basic, it is very important and we must move on it. It is thus essential to keep a balance between the two worlds of man, we don't want

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to stop development, we are not against it, yes development must be there. It is not possible to have quality of life without development but not at the cost of the environment, you must see that your ecosystems are working, that they are operating.

Within the carrying capacity of your ecosystem do what you like, we don't want to stop you, but once a system is choked and out of order you can't go on burdening it with a shameless face, you must stop there and say that no this world is full for the time being and we must stop it here and build on the other one. You keep on developing we won't stop you but when it comes to the round-about phase, when the ecosystems are choked, then at least stop and try to revive them until they come back to their normal self and then start developing again.

This balance between the two worlds is very important and it was this concept that was developed in the 1972 Stockholm Declaration which is now going on and on and our own judges, in the Supreme Court, have also lately, in 2000, posted these two dam judgements and the Blue Lady case has talked about this proportion that there should be a balance and they have said this without understanding that this balance, of which you are talking, is already tilted. You cannot talk of balance in this way, balance has to be seen properly.

So this is the concept on which our whole case has to be built. It is a very simple thing. All the six billion of today's world and the nine or ten billion of tomorrow's world have to live in this world. You have not found any other planet to shift our population to and you may do it and the only place you may shift them will suffocate and kill them. Therefore this balance is necessary and we are fighting for it, we are fighting to ensure our own existence, we are fighting for an inter-generational equity, we are fighting for our own children who are going to come tomorrow and their children. The Tony Opoza's case in the Philippines dealt with the incessant demolition of the forests followed by subsequent giving of the area thus obtained to the public. The people said that the case may be such that for us there is space to live and air to breathe but what about our children?

You keep on going like this then there will be no forests left. The lower courts did not accept the plea of the people and were of the opinion that present development should not be curbed because of what might happen to subsequent generations in the future. The Supreme Court of Philippines however said give the right to the people to fight for the coming generations and bring the incessant deforestation under control.

In India, the Supreme Court is the pioneer of the law, we are in front of everybody, but it is this very Supreme Court that has said, in your dam cases, that the precautionary principle is not applicable as regards the construction of these dams. The Malaysian Supreme Court however has acted altogether differently. They feel that wherever the public involvement is necessary, say for example as regards the building of a big dam or a building or an industry, there might be a short term benefit from it but who knows what the hidden malignancies of it may be. Only the public, when it comes, will be able to tell, what the real thing is, so this precautionary principle is being done away with. I do not know why it cannot be implemented.

This Court has held, in the Vellore Citizens case, that the precautionary principle is taken to be the law of the land, but if not it is held that from the day the judgement is passed it becomes

the law of the land but I say it is already a law of the land. Therefore with the coming of this background I would say that the involvement of law in all these matters, in matters of pollution control and environment protection, is of utmost importance. Nothing can be done without the involvement of law. Either the legislature should make the law as all documents or soft international instruments starting from the fifteen documents of the Stockholm Declaration all the way up to the Rio Declaration have said that the legislature must make law and thus give more power to the judiciary so that they can tackle the problem because the mission of law is to integrate the Environmental, Social and Economic consideration into one viable sustainable management system.

There are stakeholders who project Economics, some who project pure Ecology, some say something in between but all these diverse claims can be sorted out only if the legislature passes law and empowers the judiciary. However as it is not in this country we have The Air Act, The Water Act and The Environmental Protection Act. But these are useless acts. Someone said that if you create a law and do not give it teeth then a farce is created. A lot of law-making is a farce so the judiciary should take this opportunity and rise up to it. It is very important for us, the lawyer fraternity, I will call myself more of a lawyer, I have been in the Supreme Court for about seven or eight years but the rest of my professional life of thirty to thirty-five years has been spent as a lawyer, so we should, as the fraternity of lawyers, take up this big responsibility.

I give all the credit to the team that was assisting the green bench in the Supreme Court during 1993-97, Sanjay Parikh, MC Mehta, Advocate Venkatramani they were all practicing lawyers and they all came out to assist us during that time and they came up with wonderful concepts and without them we could not have done it, what with this concept of Public Trust that was enunciated by the Supreme Court in Kamal Nath's case, it was given by the Supreme Court but unfortunately now it has been forgotten.

The Doctrine of Public Trust, as had been laid down by the Supreme Court, said that the government does not own anything, the government is not the owner of all this greenery or anything, they cannot say that this is government property we will therefore build two thousand flats over here. The court said that such property was public property and it has been entrusted into the hands of the government for the benefit of the public and you can use such property only if it is for the benefit of the public. This was laid down by the Supreme Court in the case where 25 acres of land, from a reserve forest, was given by the government to Mr. Kamal Nath for use of his motel. The court however struck it down and said that the Minister for Environment could not possibly do something like this. His lawyers retorted by saying that Mr. Kamal Nath had not touched the file for the requisition of the property and it had been bypassed and had gone directly to the Prime Minister.

Anyway we are now concerned more with what is the law of the land. Now coming back, I have to say that there has been a lot of monitoring during the period of (1993-97) in cases like The Vellore Citizens Case, The Taj Mahal Case, the Hazardous Industries Case, The Aquaculture Case from the south and so on and so forth. All these cases, adjudged by the Supreme Court, are a result of months and months of diverse monitoring. I was reading one of the documents, that have been issued by the Human Rights Law Network, criticising the Agra Judgement to

the extent that the industries that were running there and were as a result of the judgement were not causing harm to the people but the Mathura Refinery that was causing the greatest amount of damage was still there.

However the credibility of this publication is doubtful as the person who has drafted it is completely misinformed. So far as this Mathura Refinery is concerned the Supreme Court has not passed any judgement but it has monitored its functioning and made sure, by way of enforcing certain changes in it, that the Mathura Refinery ceases to become a hazard to the Taj Mahal.

When the case was initiated the bench, that was set up to adjudge the case, was told that there was an Italian firm of expert architects that had found out, on conducting certain tests, that the Mathura Refinery was emitting upto 500 to 600 kilograms of carbon every hour and if it is permitted to continue then probably within the next fifty to seventy years the Taj Mahal will cease to exist . Along with it a cartoon was released on the Supreme Court file depicting a scenario where a guide was showing certain tourists, who had come to see the Taj Mahal, the place where the Taj Mahal used to exist. The bench was alarmed and issued a notice to the government and to NEERI (The National Environmental Engineering and Research Institute) headed by the late Dr. Khanna, an eminent and devoted environmentalist. The researchers, from NEERI, went all over Agra and set up various mechanisms for studying the amount of pollution and they confirmed the fact that all the emissions were directed on the Taj Mahal and unless it is stopped nothing can be done to salvage the situation. The bench also got several other reports, monitoring the situation for days and then providing reports to them.

The bench had with them nearly five thousand unsigned reports on the Taj Mahal itself. The Supreme Court bench themselves did not want to pass an order to shut down the refinery because it was the lifeline of the country. Expert reports, as received by the bench, advised them to enforce the refinery to use Combustible Natural Gas as fuel for running the refinery rather than Fossil Fuels which were being used by them at that point of time so as to bring the pollution under control, and the Government of India, which in spite of being endowed with an abundance of natural gas at Bombay High, said that it was not possible for them to bring in natural gas from Bombay High as the nearest pipe was passing four hundred kilometres away from the refinery and it would cost an exorbitant amount of money to do so. The government also felt that the court should not involve itself in the matters and the working of the government.

The bench was not awed by the decision of the government which had brought out an affidavit and revoked the court order. The green bench did not back down and, in an open court, they summoned many influential people of the government including the chairman of the Natural Gas Commission and tried to persuade them into accepting their advice by saying that the Taj Mahal is a National Monument and it brings into the country by way of funds from tourism huge amounts of revenue and name and it should thus be protected with every resource which is at the disposal of the government. Ultimately the government agreed to the proposal of the court and decided to bring in natural gas from Bombay high and use it as the fuel for running the Mathura Refinery. Then Mr. MC Mehta, along with the aid of the members of NEERI, proposed the most efficient method that could be employed by the government to bring in the

Natural Gas. The bench, however, even after passing this order kept on monitoring the progress made by the government, they looked into matters like how much of the pipeline had been laid down, whether there had been any lapse on their part and if they found any flaw as far as their functioning was concerned they would immediately pull up the chief engineer and then as a result of the constant perseverance of the board the government came out with an application and said that they would shift over to Natural gas on December 25, 1996 and that was done.

The bench, at that point of time, had already assessed the emission situation and was aware of the emission levels of the Mathura Refinery after their starting usage of Natural Gas as a fuel. In the meanwhile however NEERI advised the bench that if, apart from using Natural Gas, the refinery administered the Hydro Cracker method then their emissions would become negligible. The bench, on the advise of NEERI, ordered the refinery to have the Hydro Cracker methods implemented into their system as well and the emission levels of The Mathura Refinery were reduced to negligible levels and it became the only Green refinery in the country today and this has been achieved only due to the efforts of the Supreme Court and nobody else.

Thus when Agra received a supply of Natural Gas the court ruled that only those industries, that use Natural Gas as the fuel for their functioning, will be allowed to operate in Agra. The Gas Authority of India said that they would supply natural gas to all industries in Agra at subsidised rates so that these industries could shift over to natural gas and bring their emission levels under control, in spite of this when some of the industries claimed that natural gas was far too expensive for them to afford and run their industries with, the court arranged for land for them somewhere else and thus aided them in reallocating.

I have given only one instance to show how the Supreme Court has been monitoring the situation of pollution from industries in India and striving to bring the situation under control, so I say that you equip yourself with the latest technology. I advise you to hammer the judges, I must confess that most of the judges, like me, depend completely on you for what you tell them, judges are otherwise average persons and if you think that there is anyone who is ignorant of the law then it is a judge and nobody else. If you really want to get a judgement which is in your favour then you have to tell him, hammer the judge by reading out sections and principles of the law that you want him to implement, because he would not be aware of them otherwise. If you really want to make use of the Judgements of the Supreme Court passed between 1990 and 2000, you will really have to endeavour towards it.

R. Venkatramani *Senior Advocate, Supreme Court of India*



The legal fraternity in our country has witnessed and has been a party to significant changes in several dimensions of law, changes which have carried the jurisprudence of rights and the entitlement of the common man to secure access to justice, changes in principles of governance and changes in principles of accountability for both the public and the private sector, some for the good and some for the worst, but they are a part of the larger historical processes which man is a party to and a creator of. Coming to environmental concerns, I have been asked to speak about the recent trends

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of the Supreme Court, and on even a superficial observation it is immediately noticed that there is a shift, or a change in the stand of the Supreme Court's perception and environmental concerns to be of the core values of existence and life and liberty.

Why has this happened? If a body of judges, a decade ago, were able to sit and head a set of values and promote them as a set of deep and integral part of law and jurisprudence and not to be looked at in isolation, then what has happened to facilitate a shift from that? Is it that there has developed an inherent weakness in the judge laying down the jurisprudence which changes from time to time depending upon the chancellor's court as they call it? If that is the case then there is a need for the retention of the values of law and jurisprudence and if it is possible then how can it be done? Before I address some of the broader questions I felt that it was necessary to keep this principle in mind.

I must talk about the Bombay Environmental Action Group and then talk about the Bombay Dyeing Case, at the end of the day when I read the judgement what comes to my mind is that the court went through about a hundred odd judgements to reach a very simple conclusion. I believe that the development regulation was outside the ambit of Article 14 and Article 21, and the process, employed by the court, ultimately decides the case is a very interesting process and the court loses sight of an important element namely that there are two ways of looking at the planning process in our country, though, as far as this case is concerned, it is the urban planning scheme under the Maharashtra Town Planning Legislation. Up to a point in the growth of a country and its history, the planning legislations are seen differently, it is basically a safe haven for architects and town planners, who look at town planning as a very mechanical task of dealing with allocation of spaces and buildings. A stage has come however that the system of town planning legislation, or for that matter any other legislation, has to move away from mere concerns of architects and buildings and allocation of spaces. The court, while trying to enforce the basic principles of the concept of sustainable development, probably lost track of the endeavour to integrate this concept into town planning legislations. Ultimately, the question that remains to be asked is that the urban space that forms the natural resource of the community, which under the Article 39 B of the Constitution of India says that it will be so used so as to sub serve the common good. It was in fact that concept of subserving the common good that failed to inform the court while they came to their conclusion. Therefore very important concepts which can guide the court to facilitate itself not only the future generations of judges but to facilitate a good governance in the legislators understanding their role as law makers, is not enough to hand over a judgement, it is not enough to say that directions are issued here for your compliance.

It is more important, because we have this very unfortunate doctrine of separation of powers, I call it unfortunate because all kinds of pedestrian perceptions seem to be erupting these days, but we have that doctrine and we have a very outdated perception of governance which will probably, sooner or later, people, in their larger wisdoms, will be able to evolve into doctrines of sharing of powers and not separation of powers, but be that as it may the role of the court is not to issue directions or an order but its importance lies in facilitating other organs of the government in understanding and rearranging their role, if that object is not realised then perhaps there is a failure of justice in the larger sense of the term and that is perhaps what the

Bombay Environmental Activists Case missed. It is not education which is important it is not the amount of case law that you have cited that is important but the integration of principles which may weave a larger set of understanding to facilitate everybody in good governance to be able to march towards and keep alive the principle of sustainable development, whatever we may stuff in to it like the Indian Supreme Court has stuffed into the Article 21 and everything under that basket of life and liberty, all possible things can go into sustainable development and the end result is denuded and it leads to a different story all together whatever you may do about it. It is an interesting story at the integration level where many interesting developments are taking place but, from the point of view of this judgement, it appears to be that one is back to the days of zamindari abolitions, the court was dealing with land as a resource and the change of the board of development from the feudal to the capitalist frame of mind where it was believed that land is an important resource and it should be retained in the hands of those who do not want to grow out of the feudal structures. You only see a weakening in the Urban Land Development Act and we have now an important land resource in the urban scenario, the rural scenario will thus have to strive to convert itself into a more urban nature as quickly as possible, it's a land used as a resource and we don't understand that, it is not merely an application and a regulation of the law from a constitutional perspective, so when the Supreme Court said, in this case, that ultimately the land owners and the mill owners and the DRC must be seen in this perspective, I felt that the court was going back to the period of zamindari when it was looking at land for the exploitative purpose of revenue generation for the private sector. While we had a generation of important Supreme Court judgements trying to landscape how one may look at environmental concerns but then there is always an inundation of environment into economics and the free market and development, the so-called integration is a very difficult thing to handle if you don't have norms for handling it. Adopted norms very often fail and I am sorry to say this that both of us, sometimes lawyers and sometimes judges, fail to clutch and adopt norms and they are in a hurry to reach a final situation as there are urgent problems to be solved, if there are urgent problems like the Mathura Refinery case that are solved there are larger problems that are missed out in the process, this happens because it is and I am presenting a larger criticism of how it happens, it is not aimed at any particular actor but more towards the legal community, all of us lawyers, lawmakers are all part of this whole process but there is as Justice Kuldeep Singh rightly said, it is not a matter for dismay but it is more of a situation that demands proper accounting followed by an auditing of our performance. This important case eventually throws open a dimension for the reassessment of the whole set of legislations and executive decision making processes, which are not informed by well settled principles of environmental concerns, the urban planning process, the town planning process is one such area, we have now about forty to fifty years of town planning legislations and after 1973 after all the developments of Environmental Law we find that this town planning legislations are in the sense of the term still archaic because they have not grown or evolved with time. In some other sense the court could have said that these legislations are archaic and cannot be used and integrated into modern day developments and one looks at the thrust of arguments in the Bombay Dyeing case and larger perspectives are thought to have been asked for. Unfortunately there are no sectoral issues and if you look at the judgement the court has not been able to put it into a larger fabric of understanding and realise that the workers have a certain right. So this case is an illustration

to show how, on the one hand, we have a large body of laws and executive processes which have so far been immune from the scrutiny of integrated environmental concerns and, on the other hand, the failure of the judicial system itself in the receiving and creatively applying the available set of principles and legislations and thirdly the failure of the court in not being able to link the public test doctrine with the planning process.

At the international level, we have a body of thinking that designates certain things as global public goods and the environment is considered to be a global public good and the public test doctrine is one of the guiding and pioneering ways of looking at it.

The only point I want to make is that, while at the intellectual level as Sanjay pointed out, great success of inventing something new and imaginative called “Sustainable Development”, and the way the Supreme Court is turning it on its head, it can happen anywhere but whoever had embarked on this interesting adventure of coining the term “Sustainable Development” probably did it with good intentions and a great amount of conviction to push an agenda, to prevent the onslaught of the free market in a way but then the stealthy inroads taken by this very free market and to deflate this concept has happened before our eyes and how has it happened and is there any way of arresting its degenerative encroachment into the concept of “Sustainable Development” are matters of concern and I feel still, agreeing with Justice Kuldeep Singh, that the system of judicial review is very important even though it may sometimes be very doubtful and uncertain method of arresting that process.

Sanjay Parikh *Advocate, Supreme Court of India*



Lawyers, when they argue before the court, certainly read and try to understand the law and that is how we were all reading The Environment Protection Act and The Air Act and The Water Act. The idea, as pointed out by Justice Kuldeep Singh, is to bring in sensitivity towards these issues.

It is necessary, before we discuss the development of Environmental Law by our courts, in particular, The Supreme Court, that we have a brief look at the international developments on environment. Broadly it started with the Stockholm Declaration commonly known as “The Declaration of the

United Nations Conference on Human Environment, 1972” where it was asserted that both aspects of man’s environment, the natural and the man made, are essential to his well being and to the enjoyment of basic human rights, including the right to life itself. This declaration had resulted in the 42nd Amendment to our Constitution and the enactment of the Environment Protection Act of 1986 and the Air (Prevention Control and Pollution) Act of 1981. The Stockholm Declaration was followed by the Earth Summit known as the Rio Declaration of 1992 which was based on the report of *Our Common Future* which is also known as *The Brundtland Report* which finally culminated into the document *Caring for the Earth*. Nearly 240 treaties and declarations exist on protection of the environment, among them Agenda 21 and the Summit at Johannesburg can be taken note of, but whether the ideas, that have been developed in these international, have made a real impact in preservation of the environment at the national level is required to be seen.

The development of environmental jurisprudence in our courts can be broadly put into the landmark cases of The Vellore Citizen Welfare Forum case of 1996 and the Taj Mahal case of 1997, where the environmental principles, developed in international treaties and cases, sought to be implemented in the Municipal Law on the basis that these principles are part of customary international law.

The court also took them as an integral part of Article 21 of the Constitution which protects life. Thus the environment became a part of life itself. Right to Environment is thus accepted as a human right and also as a fundamental constitutional right according to the Stockholm Declaration, 1972 and the Rio Declaration of 1992. The Supreme Court stated the importance of the Polluter Pays Principle, Precautionary Principle, Inter-generational Equity Principle, Absolute Liability Principle, Public Trust Doctrine and Reversal of Burden of Proof in the important Environmental Law cases. This was no doubt an era where the Supreme Court showed remarkable leadership in implementing the global environment concerns. The second line of cases, including the Ganga Water case of 1987 and the CRZ Notification case of 1996, were those where the Supreme Court took cognisance of the non implementation of the Water (Prevention and Control of Pollution) Act, 1981 Environment (Protection) Act, 1986, Coastal Regulation Zone Notification, Hazardous Wastes Rules and gave several directions to the authorities to comply with the law for protection of the environment. It said that, "tolerating infringement of law is worse than not enacting the law at all." On an analysis of these judgements, however, we have to find to what extent the environmental principles could actually be implemented and how effective the procedure of monitoring, adopted by the Supreme Court, was.

To begin with, let us have a look at the Polluter Pays principle and decide whether it has been properly implemented. Though the Supreme Court accepted the Polluter Pays Principle and the absolute liability of a polluter in the given circumstances, in none of the cases would either the polluter be compelled to make the payment or restore the Ecology to its original position.

In the Oleum Gas Leak Case, The Supreme Court evolved the doctrine of absolute liability which had been developed in Ryland versus Fletcher, it also developed the principle of claiming for compensation under writ jurisdiction by evolving the public law remedy.

Ultimately, the victims of the gas leak were left to the ordinary relief of filing a suit for damages. In the Bichuri case, regarding contamination of ground water, the Supreme Court, after analysing the position of law, rightly found that compensation can be claimed under the Environment (Protection) Act. However, the assessment of compensation, its payment and the remedial measures have not been complied with. In the case of S.Jagannathan, concerning the destruction of coastal ecology due to intensive and extensive shrimp farming, the Supreme Court had directed closure or demolition of the shrimp farms and payment of compensation on the basis of the polluter pays principle as well as the cost of the remedial measures to be borne by the industries. After the judgement however, firstly the Supreme Court stayed its own directions in review and thereafter, the parliament has brought a legislation over-ruling the directions that had been given in the said judgement. Therefore, neither has any compensation

been given to the farmers and the people who lost their livelihoods and ground water nor has the damage, that has been done to the environment, been remedied. In yet another case where the fine had been imposed by The Supreme Court on Mr. Kamal Nath for effecting the ecology of the river Beas, by applying the public trust doctrine, it was later clarified, by the court, that no fine can be imposed under writ jurisdiction and it requires adjudication under the provisions of the Environment Protection Act. One does not know whether the ecology of the Beas river was restored by the violator in the said case. An attempt made to recover the compensation for the loss caused to the environment, in the case dumping of waste oil by various importers, also failed. The Supreme Court did not develop the jurisprudence of liability of the polluter and imposed only payment of incineration cost or actual cost on the violators. It needs emphasis that all these imports were illegal, in violation of the Basel convention and our country had suffered the dumping of a huge amount of waste oil and its ultimate incineration, as directed by the court, had seriously affected the environment, but the violators were not saddled with any liability, much less a deterrent.

The Supreme Court had distinguished the judgement in Deepak Nitrite Ltd versus State of Gujarat and Ors, 2004 (6) SCC 402, where it observed that there should be actual damage to the environment to attract the polluter pays principle, which “includes environmental costs as well as direct costs to people or property, it also includes costs covered in controlling pollution and not just those incurred in remedying them. It will include full environmental cost and not just those which are immediately tangible. The principle also does not mean that the polluter can pollute and then pay for it, but as mentioned above, no damages were imposed on the violators for illegally dumping waste oil in our country. The Supreme Court has, therefore, failed to implement its own directions in protecting the environment in many cases. No legal principle of liability has been developed to ensure implementation of the polluter pays principle for the recovering damages caused to the environment, to the people and for the restoration of the ecology. The result is that those who cause damage to the environment are emboldened to continue their violations. They are also now using the argument of sustainable development in their support, which is unfortunately finding acceptance in the Courts.

Few words about monitoring. One view is that we should have followed the law that had been laid down in the Ratlam Municipal Case to generate more awareness at the local and district levels and for effective implementation by the District Courts. The other view is that, while exercising powers under Article 32 and Article 226 of the Constitution, the statutory mechanism should have been enforced making the authorities responsible and accountable. A sound monitoring mechanism, which should be followed by the Courts in all environmental matters, is required to be evolved.

Let us now look at the development Precautionary and the Sustainable Development Principles and their understanding and implementation by The Supreme Court. In several cases, the Court has referred to “carrying capacity” of the environment and that any exploitation of the natural resources should not exceed their carrying capacity or assimilative capacity.

It is forgotten that the “carrying capacity principle”, evolved in the Stockholm Declaration 1972, was given up when it was realised that man has immense potential to irreversibly damage the

environment and under the wrong notion that nature has an immense capacity to revive itself. This notion was therefore rightly substituted by the Precautionary Principle to put a check on the destroying activities of the human being, namely, warning them that it is safe to err on the side of caution. It is only in one judgement, as far as I can recall, that this aspect was explained by the Supreme Court. However, we find that in subsequent judgements of the Supreme Court till 2007 and also in 2008, the Supreme Court is still talking about the carrying capacity and, in that context, applying the theory of irreversible damage. One will be shocked to find that even where experts have found that a particular Eco-System has been exploited or neglected in such a manner that it has lost its carrying capacity, still it is subjected to environmental appraisal for further exploitation under the cover of sustainable development when the only constitutional obligation and human duty permissible at that time is to work for its restoration and revival. Principles like “Sustainable Development” and “Precautionary Approach” have no application when we deal with the rich areas of natural resources, those which are the centre of origin, sources of water and its conservation, fragile eco-systems. They have to be preserved and protected for survival of mankind and for future generations

In the Narmada case, The Supreme Court refused to apply precautionary principle on the big dams as if protection of natural resources and its ultimate cost, for the present and future generation, is not an integral part of development. The observation of the Court – that the said principle will apply in cases where the extent of damages – is, with due respect, incorrect. Natural Resource, once destroyed cannot be rebuilt by mitigative measures or even be substituted. In the Tehri Dam Case, a highly seismic prone area, right in rare Himalayan ecology, was chosen not withstanding precautionary principle.

It was done with full knowledge that any breach in the dam will cause havoc, submerging several cities in a few hours. Justice Dharmadhikari, who gave a dissenting judgement, invoked the precautionary principle in support of the safety aspects of the dam and agreed with the experts who had suggested 3-D non-linear analysis of the dam, to be on the safer side, but the government authorities had refused it on the ground of scientific uncertainty. The majority accepted the view of the government. If any calamity happens then who will be held responsible?

The idea of the “need” in the context of sustainable development has not been fully and correctly understood. In the case of Bombay Dyeing and Manufacturing Company Limited, and this is what they said. The dire need of the society has been given precedence over the Inter-Generational Interests by using the argument of balancing environment and development. The need aspect has undergone considerable debate among social scientists and environmentalists the world over. It cannot be taken as the insatiable desire of an individual, a society or a nation, which is another form of greed to exhaust natural resources without applying the rule of caution. Unfortunately, under the cover of need, we are allowing reclamation of sea, estuaries, ponds, riverbeds and other natural resources and erroneously calling it a balancing exercise. Let us have a quick view of non-implementation of Hazardous Waste Rules, 1989 for nearly two decades and dumping of huge quantities of toxic wastes by the developed countries. A public interest action was initiated in The Supreme Court. It was established that the State Pollution Control Boards were either ignorant or grossly negligent in not taking any action against dumping

by the indigenous recycling industries and the importers. A High Power Committee Report, chaired by Professor MGK Menon and constituted by the Supreme Court, pointed out serious lacunae in the legal framework, negligence and connivance of implementing authorities. Based on that, in a significant judgement given by The Supreme Court in the year 2003, various directions were given to regulate the functioning of the indigenous recycling industries as well as the waste importers by incorporating the provisions of the Basel Convention which India had signed and ratified but had not implemented.

The Court also accepted transparency and public participation as parts of Article 21. It had led to the amendment in the Hazardous Wastes Rules in 2003. It was in this litigation that the court also considered dumping hazardous waste in the process of ship breaking. One of the important directions, given by the Supreme Court, was regarding “prior decontamination” of the ship by the exporting country of import. Prior decontamination is necessary because trans-boundary movement of hazardous substance is an activity, which harms the environment and further The Basel Convention puts a ban on movement of certain hazardous wastes. Rio Declaration also talks about prior knowledge in trans-boundary movement. In spite of this, a ship, the Blue Lady, was allowed without prior decontamination. The ship was found to contain 1,250 Metric Tons of asbestos waste, 10 Metric Tons of Poly-Chloro-Biphenyl (PCB) along with 44,000 metres of cables and 1,100 Radioactive elements. This Quantity is many times higher than that of the French ship, Clemenceau, which was recalled by the French Government. In justification, The Supreme Court has referred to the concept of “balance” under the principle of “proportionality”, a doctrine which is totally alien to the environmental matters. While referring to the principle of proportionality, reliance is placed on the keynote address on “Global Constitution” by Lord Goldsmith, Her Majesty’s Attorney General. This article deals with the problem of terrorism and, in that context, discusses balance theory between individual rights and protection of the public while keeping in view the non-derogable nature of some of the human rights. The Supreme Court also referred to India’s economic growth being above 9 percent after the era of globalisation dawned and justified ship breaking in the ground that large section of the population is below poverty and the problem of unemployment is endemic in India.

How can these reasons justify violation of necessity of prior decontamination of toxic substances and how can dumping of these lethal wastes be helpful in solving the problem of unemployment and poverty? Even if, for the sake of argument, it is accepted that, in ship breaking, a huge quantity of steel is generated but should this argument be accepted when even a country like Bangladesh has rejected it.

To put it simply can you allow dumping of hazardous waste provided you get some benefit out of it? As far as steel is concerned one cannot definitely say that it is used in our country only. If the steel, gathered in the process, is again exported then the only role that India plays is that of:(i)dumping of hazardous wastes; (ii) its disposal in the land fills or its incineration; (iii) and the dirty job of dismantling done at the cost of the workers lives, their health in totally unprotected working conditions. Poverty is therefore given as an excuse to permit acceptance of outside waste against human dignity, right to life and health. If there was one principle,

which ought to have been applied, it was, that without prior decontamination as a safeguard to national environment under the Precautionary Principle, ship will not be allowed for breaking.

Further, after the 2005 judgement, when the Monitoring Committee was made non functional, the dumping of hazardous wastes, from developed countries, started again. The other day municipal waste, sent by some foreign country, was caught by the Kerala Pollution Control Board. This is only the tip of the iceberg. Tons and tons of plastic waste, municipal waste, cow dung, paper waste, waste oil, and battery waste and electronic waste is being dumped into our country. Recently, a study was conducted to analyse whether social and economic inequalities lead to environmental degradation. James Boyce, who contributed a paper on this aspect, revealed a shocking bias in hazardous waste disposal policy in the United States as against low income areas with higher percentage of African Americans and other minority groups. The study shows that where social and economic inequalities exist, it leads to weaker environmental policies, which, in turn, results in greater environmental degradation. The conclusion, drawn by the study, is that inequalities in the distribution of power operate not only to the detriment of various groups but also to the detriment of the environmental quality as a whole.

It will be quite shocking to know that, even after a decade of efforts made in controlling and regulating the trade of hazardous waste disposal, The Ministry of Environment and Forests has now taken a U-turn and has come out with a draft that allows import of waste batteries, waste oil and other wastes which are banned under The Basel Convention.

In the Vedanta Alumina case concerning mining in an area which is rich in Bio-Diversity, a source of water recharge and a place where tribals have been living for hundreds of years in symbiotic relationship with the nature, The Supreme Court has permitted mining, drawing support from the principle of sustainable development. Again poverty has been given as an excuse. Similarly, The Supreme Court has permitted construction of residential complex in a reserved forest area ignoring the scientific proof of existence of a forest. Similarly, construction of a hotel, on wrong understanding of sustainable development, was allowed by the Supreme Court in ecologically sensitive sand dune area. Let us, therefore not go by the words but more of the intent of it and whether nature's rights have been respected in letter and spirit.

These principles have otherwise lost their value because we have entered into a critical phase where nature and its essential principles, on which human life is sustained have to be zealously safeguarded. No longer can we be allowed to be misled by the term "sustainable development". It is the same mindless development, least concerned about the damage and harm to the natural resources and to the future generations. It is nothing but another form of economic development where the growth indicators are only economic factors like the GDP. The World Trade Organisation has virtually dominated every area of international law concerning environment and human rights. Everywhere, the focus is only on commercial and trade interests. In a recent ruling, the WTO has brushed aside the defence of European countries against the trade of GMOs by observing that the said principle is neither customary international law nor a general principle of law.

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As has been said by Herman E. Daly in his book, *From Empty World Economics to Full World Economics*, a historical turning point in economic development economics.”, These instances show a dangerous trend, namely that the environmental principles are understood superficially, without integrally connecting them to nature’s laws. The natural resources, built by nature in millions of years, once destroyed can never be recreated by man. Scientific efforts and processes cannot generate water and the rich eco-systems.

The economic development is assessed in terms of GDP but the cost of continuous destruction of natural resources is not counted. If a method is evolved to assess the economic costs, it will certainly outweigh earnings in terms of economic gains. Natural Capital is fast becoming the limiting factor while human capital is becoming abundant.

What is Therefore the Conclusion?

The need for preservation and protection of natural resources is often repeated, similarly the environmental principles, namely, sustainable development, precautionary principle and polluter pays principle are chanted endlessly. The creative interpretations, whether in courts or outside, tend to justify the development under the cover of need, which is an extension of greed itself, thus completely diluting these principles and making them meaningless in terms of actual implementation. It then becomes an intellectual activity and we fall into the trap of a subterfuge of language. It is quite shocking that the argument of the so-called development finds acceptance even when it is for patently wrong reasons and at the huge cost of the environment. Thus private interests, which have merged their identity with the larger idea of holistic development, are causing a serious imbalance in society. The benefits of natural resources should be available to all but unfortunately they are being allowed to be exploited only by a few.

It is pitiable that the State is not only completely failing in its obligations under the established Public Trust Doctrine but it is consciously exercising its powers to the detriment of these natural resources when they need revival. How can this callous disregard, this act of culpable negligence and an environmental crime of the state be accepted? The devastation of the Yamuna bed, a flood plain and the raising of unscientific issues with an attitude of violating any law or norm with an arm twisting of those who care for sanity, to impose the real estate on the river bed is quite shocking.

1. How can a state compromise after knowing fully well that the main source of ground water for drinking purposes is the river bed and if this source is sustained you will be able to sustain the future needs of drinking water requirement of the people ?
2. How a ridge, which is a forest and a rich source of ground water, be allowed to be used for construction of buildings when the expert authorities recognise the place to be ecologically sensitive?
3. Is this kind of development permissible? What are the state’s obligations as a trustee and what legal structure we need to evolve to protect the natural resources for now and for the future?
4. In what way can the people protest if the State acts totally irresponsibly? What if the State succumbs to narrow political considerations and vested interests?

These are complex but important questions of immediate importance. There is an urgent need for the courts to understand these issues, holistically, integrally with a vision. There is no conflict between environment and development. True development can never harm environment if it is realised that, without nature and its resources, life has no meaning. We need perhaps a simple principle, a simple law for complete protection of natural resources, integrated efforts for their revival and rejuvenation and their use conducive to the nature of these resources and not the application of sustainable development principle as these resources can no longer bear the onslaught of exploitation, they are in trust with us for the future. If we still ignore, be ready to lose them for ever.

The choice is quite clear.

List of Cases

1. AP Pollution Control Board versus MV Nayudu 1999(2) SCC 353
2. Bombay Dyeing versus Bombay Environmental Activists Group 2006 (3) SCC 434
3. Essar Oil 2004(2) SCC 392
4. Indian Council of Enviro-legal Action (Bicchri Case) 1996(3) SCC 212
5. Indian Council of Enviro-legal Action (CRZ Notification) 1996(5) SCC 281
6. Karnataka Industrial Area 2006(6) SCC 371
7. MC Mehta versus UOI 1987 (4) SCC 463
8. MC Mehta versus Union of India 1997 (2) SCC 353
9. MC Mehta versus UOI 1987 (1) SCC 95
10. MC Mehta versus UOI 1997(1) SCC 388
11. Narmada Bachao Andolan 2000 (10) SCC 664
12. ND Jayal and Anr versus UOI 2004(9) SCC 562
13. RFTSE versus UOI 2005 (13) SCC 186
14. RFSTE versus UOI 2005 (10) SCC 510
15. S. Jagannathan versus UOI 1997 (2) SCC 87
16. Vellore Citizens Welfare Forum 1996(5) SCC 647

PB Sahasranaman *Environmental Law Expert*



One is that there is no public hearing and that is as it is a violation of the notification, second is, we are not made available at the public hearing. Now the third round of litigation is going on, on the same clearance and they have again granted. Now the EIA process is not complete because the EIA is normally prepared by some outside agency, then unless it is accepted by the public in a public hearing, it is not an EIA and it is only an Environmental Assessment. The public should accept that it is a comprehensive document and accept everything that is stated in it, otherwise it is not fully an EIA

because, in that case, the EIA was prepared by a Bombay company in Delhi and they had not even come to the site and inspected it to gauge the impact it would have on the surrounding

environment. We have produced documents to show that they had not even visited the site or inspected it and since it is against the EIA regulations, we are challenging it for the first time, i.e., the EIA itself. We have to tell the court things like what is EIA, what are its functions, why the EIA is required. Most of the times, in the judgements, what I have found out is that the courts are not even aware of what the EIA is. The main problem that I find is that judges, coming from the different localities, are incompetent for adjudicating issues in another locality, for example a judge from Punjab was sitting in Kerala and we said that the river sand mining causes environmental problem, he said that no, how can that be, when you mine you get more water so mining should be encouraged. In a state like Kerala, where the sea water will rush in to the land if the riverbed goes down, the judges do not know the repercussions their decisions might have.

Another problem is the vernacular problem. In Kerala we have papers in Malayalam and while translating the paper loses its originality and in the end the judges will not know what is what and one of my suggestions is that the green bench should be constituted of the local judges consisting of at least two persons. We feel that if some environmental damage is caused as a result of the judgement then your family will be affected as well and we can tell the court that if you want that particular industry, or mine, to continue functioning, then you may let it do so but your family will be affected as well. So my suggestion is this that the green bench, in a state, should be constituted of the local persons.

Prafulla Samantara *Environmentalist & President, Loka Shakti Abhiyan, Orissa*



Honourable chairman I am going to speak about the judgement of the Supreme Court, but here in the presence of Advocate Sanjay Parikh and Advocate Ritwick Dutta. They can speak much more about the legal aspects of the actions of the judiciary. As a petitioner to this central monitoring committee of the Supreme Court, on behalf of the people who are struggling to protect Niyamgiri in the kalahandi district of Orissa, our problem was violation of environmental laws and forest conservation laws by Vedanta; violation of fifth schedule provision for the protection of tribal land; negative environmental impact of the mining and alumina project; impact on water regime including impact on Nagabali, Banchadhara; destruction of an important cultural and religious landmark; and enforcing a project against the desire and interests of the local people including tribals and violation of democratic norms so as to benefit a multinational company.

This committee unanimously examined, interviewed the people, went to the government office, saw the files and listened to every section and then advised the Supreme Court that there should be a ban of mining of bauxite in the Niyamgiri district of Orissa because once bauxite is exhausted, it will bring to an end the supply of a perennial supply of water from natural springs and streams and two rivers have taken birth from the womb of Niyamgiri, which is very important as they form the life line of five districts in Orissa as well as Andhra Pradesh.

The second recommendation was that there should be a stoppage to the construction work of Vedanta so far as the refinery and the alumina plant is concerned because there was violation

of forest law as well as the pollution so far as the amount of permitted emission clearance was given by the Ministry of Environment was also against the guidelines of the Ministry of Environment. So the committee also recommended to the Supreme Court to put a stop to the illegal construction but unfortunately the Supreme Court did not stop the construction by any order, either direct or indirect, and allowed them to construct for years together and ultimately, the judgement came just two to three months back and it is our horrible experience not so far as my position as a petitioner but more as a citizen friendly activist. As far as the Judgement is concerned, if I study it from my position as a lay man, I am not an advocate neither am I a learned person that I should comment upon the judgement passed by my lords in the judiciary, but as a citizen I have a right to speak about the intention of the judgement, this is not a judgement based upon the law or taking into consideration ethics or anything for that matter, it is just to escape denying in the name of Vedanta but giving the fault of mining to another name of Vedanta like sterilite. The Chairman of either Vedanta or sterilite is the same Mr. Anil Agarwal and Vedanta is also a 70 percent shareholder of sterilite and we have gone to stop the mining to save Niyamgiri and in the same judgement a line has been written, I think which the court has been compelled to write because of public opinion, because of the opinion of the government about Vedanta, because *Times of India* wrote in their paper a headline which says, "Which is bad for Norway is good for Orissa" because Vedanta is a violator of human rights and environmental laws not only in India but in many countries where mining is taking place by this company and also it is very important for us that the Finance Ministry of Norway has accepted the finding of this committee of our Supreme Court, so I think that the judges felt embarrassed and they wrote a line against the Vedanta company saying that they were unreliable and unaware and they were to be given mining permission, but at the same time they accepted that they do not oppose mining and hence they made it clear that they accept mining.

There is no mention in this judgement about the findings of The Central Import Committee about the pride of the people, what will happen so far as the environment and the natural resources are concerned? Nothing is mentioned in the judgement, I can speak, I am even prepared to face the contempt of the court, but this judgement has been purchased by the company, because in between when the problem first came to the Forest Advisory Committee and the Supreme Court, I was approached by the company through an agent to withdraw the petition to withdraw the case, I told them that the company may purchase the judgement if they want to but, the common people have no price and unfortunately a judge sitting on this three-Judge bench comes from Orissa, in the last week of December, The State Pollution Control Board of Orissa has conducted a national study, The Chief Justice of Orissa and Justice Pasayat were present during that time. When the Chief Justice said that there must be a balance between the ecology and development, Justice Pasayat pounced upon the speech and he spoke directly and said that some of the environmental loss is draconian in nature and the over emphasis on environment is against development and this news was said in a seminar was already shown in *NDTV* and then how can you expect a positive judgement from a judge sitting on the environment protection committee and speaks against the environment and against the over emphasis of the environment. This is the very problem that we have to face, address and speak the truth about. Recently I have also written to the Chief Justice of the Supreme Court that Justice Pasayat

Has the Judiciary abandoned the environment?

should not be allowed to sit in the bench at least to protect the image of the judges and the court and the reasons for asking for this had also been mentioned, this is one of them.

Recently in our fortnightly journal which is the think tank of our people's movement and the editor of which is Mr. Sudhir Pattnaik, boldly wrote an editorial that Justice Pasayat should resign and he should speak for the companies. It is distributed in the High Courts and many advocates took the magazine and distributed it. This is the image of The Supreme Court judges and the experience of people like Advocate Sanjay Parikh can be here also be heard by all of us.

Orissa has already become the laboratory of the multinational companies to exploit and loot the natural resources, forty six steel plants will completely destroy the reserve forests and once the reserve forests are destroyed, the natural water resource system will also be destroyed, ten alumina plants from Vedanta to Utkal Alumina and other multi national companies. Sixty percent bauxite is available in Orissa, the next large resource is Karnataka and then Andhra Pradesh, so once the bauxite is consumed, it will lead to an immediate loss in the perennial source of water and greenery and bio-diversity. Thirdly it is also a loot of the national property and the national assets because we are giving iron ore at the cost of twenty seven rupees as a lease twenty seven rupees which is the market rate is rupees four thousand at present and two hundred dollars in the international market. As regards bauxite it is leased at a meagre sixty four rupees because in our independent India has not been able to fix the price of bauxite because its price in the international market is thirty five dollars and we are getting only sixty four rupees from Vedanta. This is the way to loot the property, destroy the national assets and the natural resources, which are the perennial sources of life and livelihood, it should not be done only for the sake of protecting our environment because now the environment is linked with the millions of people of the country, so it is not just protecting the environment for the sake of protecting the environment but protecting natural resources signifies guaranteeing the economic life of the country and the life of the common people of the country that is why we have to go with a campaign on how to protect all the laws and how to protect our natural resources and if necessary we must educate the courts and If necessary we must also campaign and educate the judges who are anti people and anti environment.

Ramesh Gauns *Goa-based Environmentalist*



The graphical area of Goa is 3,702 square kilometres out of which the Western Ghats cover 600 square kilometres, thus the net geographical area is 3,102 square kilometres, coastal region is 80 square kilometres and the north to south distance is 150 square kilometres, out of which 95 kilometres of this stretch has already been occupied by the mining activities. There are two major river systems in Goa, one being the Mandavi river system and the other being the Zuari river systems, there are nine main rivers and 42 tributaries originating from the Western Ghats.

Mining, as defined by me, is an illegitimate child conceived by the central government, nurtured by the state government and brought up at the cost of everything else. How do you put it vis-à-vis the legal aspect, that you have to decide because you are much more experienced than I am

as regards the legal aspects of such issues. The role of the judiciary has already been discussed but I want to highlight a few areas wherein the entire process begins at different levels, what happens as far as mining in Goa is concerned is that at every level there is a violation of the preset norms of environmental protection and mining regulations which are in themselves a totally false and fabricated document, based on these regulations the environmental clearances are sought by the mine owners.

There is an interesting situation which can be studied in the recorded summary of the seventh meeting of the appraisal committee and I am talking for one of the issues in which the environmental clearances has been held up, now what has happened in the seventh meeting of the environment impact assessment on 14 and 16, they have given a very clear cut indication that the whole assessment is to be looked at by the environment impact and it is to be sent back to the Goa Pollution Control Board, wherein they can go for the public hearing, where as putting everything else aside the public hearing was already conducted.

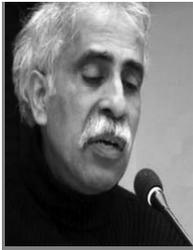
We talk of the judiciary but, on the other hand, the minister for the environment is least bothered as to whether his supportive body or his auxiliary body has given certain reports which have already been violated and bypassed by these multinational companies and they also got the environmental clearances. Now these companies have already sought the environmental clearance so their activities become legal, now how can you say that no mining can take place in these areas, because these companies have already got their environmental clearance done. Basically what is happening is that the entire process is entirely illegal so the question that arises is how would you check it, now there are many things have been violated by these companies, one of which are the environmental regulations and the other things are the concern, The Pollution Control Board, The Mining Authorities, The Indian Bureau of Mines, the mining department, The State Government, everybody has to look in detail, there must be someone who is authorised to look into these EIA reports and look into whether they are relevant as far as these projects are concerned or not. It is to be checked, for example in the Environment Impact Assessment, that illegality begins at this level, then further we can talk about the court, no factual reports have been prepared which is in itself an illegal thing which is going on, The Sarvana Mining case is a very interesting case and I hope that with the passing of its judgement will lead to becoming a landmark case in this aspect and I am positive because it is in the processes and the passing of the judgement of this case will be a shocking event that will send tremors through the mine owners and it has potential.

In most of these cases the excuse given by the mine owners is that mining is taking place for the purpose of sustainable development and both the judiciary and the common people are falling into this trap of mining for sustainable development. They can get on with all their illegal activities and it cannot be questioned because the Supreme Court has already accepted the fact that the mining activities, that are being carried on, is for the purpose of sustainable development.

That is why it will be very difficult either at the High Court level or the Supreme Court level to deal with this problem. Let me put it in this way, we convicted Hitler for putting the Jews in the

gas chambers and killing them, now all the environmental pollution all over Goa is nothing but a gas chamber wherein the entire population of Goa is put into the gas chamber, so that is a thing that we need to understand and that is not the only thing I have also noticed that the Supreme Court does not check into the illegal activities that the corporate companies are indulging in whereas it is always ready to challenge the happenings inside the parliament. The Supreme Court, which has the power to challenge the functioning of the parliament, cannot challenge the illegalities and the violations of environmental laws that are being conducted and carried by the corporate sectors. This is what astonishes me as a common man.

Claude Alvares *Environmentalist & Director, Goa Foundation*



In Goa we have about 700 mines given to us as concessions by the Portuguese. The Portuguese gave them to us and forgot about them. People had these *parchas* with them by way of which they could mine here or there and sometimes entire villages got about 15 to 20 mines and if you actually operate all of them there will be nothing left of Goa and nobody ever thought that such a situation would arise because most of the mines are small and are manually operated. Then the government, along with these mining lobbies, tried to take away these concessions and they were given on leases and finally the parliament passed a law which was just for Goa whereby the system of concessions and leases were abolished because the people, who were running these mines on lease, were not willing to go by any of the environment protection norms and they said that their leases had been given before any of these regulations were in force.

Then a famous judgement came in the Aravali case where the court decided that, for the renewal of a mining lease, environmental clearance is required. The court had decided earlier the same thing as far as the Forest Conservation Act was concerned whereby a forest clearance was required for the renewal of the lease. Even if a company has been mining without a forest clearance before 1980, it became mandatory for a forest licence to be obtained for the renewal of a lease. Despite that we had to argue the case again in the Aravali and finally the court decided that even for the renewal of mining leases an environmental clearance is required. This is so because, in 1994, the EI notification had come into force and a lot of governments had given renewals despite the fact that people did not have the required environmental clearance. The Ministry of Environmental Clearance kept delaying every year because they did not want to be burdened with too much work and they did not want to stop mining in any case. Finally, in 2004, the issue was settled and within months we filed a petition in the Supreme Court saying that a large number of industries are operating without an environmental clearance on the grounds that renewal does not require environmental clearance. Then the Supreme Court, in 2005, passed a huge order which threatened to, in one day, shut down more than 200 industries all over the country. Of course they did not understand the implications of passing an order like that because entire power plants would have to be shut down and entire mining areas in Maharashtra would have to have been abolished. It would have resulted in complete chaos in the entire economy. The Supreme Court, as happens in all these orders, delayed the implementation of its order by five weeks and instead lay emphasis on environmental clearance.

That was the excuse for all these people to line up and get the environmental clearance. Now you know how the government gives environmental clearance. You have to approach the minister, the payment has to be made and then it is put into the file and then the bureaucrats collaborate in ensuring the procedure of environmental clearance so that the form is maintained and they have gone through all the EIA processes, the committee has given the recommendations and finally the environmental clearance has been issued and that is what happened in a few months time and all the mining industries were given environmental clearance like *parchas* and cyclostyle pieces of paper and as Ramesh has been saying, the environment clearance orders do not even reflect what is happening at the ground level. They have got all wrong facts, they have got block copied for going from one environment clearance to another, so all names are mentioned, different types of waste are mentioned and every sort of fact that was there, you could challenge the expert committee and they would not know where to look, but eventually all of them were given these permissions and they are operating and that is the blanket that has been given to them by the Supreme Court and we are back to square one and now we have to implement those environment clearances and we have now reached a stage of desperation and we have this week filed a petition on mining in the High Court which is challenging all the clearance which have been given.

So we are very clear about the options in our mind, we know that we can get an order from the court, but if we do not get an order then we will go crash the site. So some times we are a bit weary of encroaching and I feel that all this mischief is created by the legal fraternity and I am part of the legal fraternity so I can't say too many bad things but when you look at it we know where we stand with all these judicial pronouncements, Ultimately I, as an activist for twenty years, have come to the conclusion that the only safe place to stand is on the street and if you can get a mob of twenty to twenty five people then you can enforce the law and you can enforce the law to your advantage.

The Supreme Court itself will withdraw when it comes to enforcing it's own regulations. They say that it is a case by case approach and we say that it is a suitcase by suitcase approach. So this is the situation as far as the Environmental Clearance judgements are concerned. There are large number of things that do not follow, for example the State Government of every state is supposed to provide, to the Supreme Court, information regarding buffer zones from their wildlife sanctuaries and national parks and we have no indications on the same.

For example under the Right to Information Act we have got all the buffer zones prepared by the Goa government and we are now filing a proceeding under the Union Board of Wildlife to say that what is being done is improper and therefore what should be done to review the situation. There are many things that come out from the Supreme Court orders which sometimes remain restricted to certain NGOs but we try to see that other people get this information, but our NGO community is not very well networked and I think Colin this is something that you should take note of. Awareness of judgements is much better known internationally than among the national groups themselves. Sahasranaman was just talking about two orders which were that ground water table cannot be disrupted by the mining operations. We have over fifty environment clearance orders which state very clearly that we know that the ground water is

being intercepted in this region and we are asking the mining company to know do a hydro-geological study. That is ridiculous because there is not even a baseline study which is available for these mines, they are going to do a ground water study and of course these studies are conducted by their own people that is the people of The Indian Institute of Mines who look on it as a means of getting more EIA studies and Ground Water studies. We have asked them how it is that these mining companies are supplying water to the people who are living in these mining areas.

Doesn't that make some impact on you, I mean that you have already disrupted the water supply so that the mining companies are supplying water to the workers in the mining areas, but when the mine closes within three years or twenty years time, then there is nobody to supply water to them in tankers because the mining companies just close up and walk away because they have no other liability. They have the liability to put some mud back, but they have no liability to supply water permanently, so some of these issues I think we should discuss in a very significant way because there the judges should not be allowed to get away scot free.

Ritwick Dutta *Environmental Lawyer, Supreme Court of India*



I just want to highlight some issues that I feel are important and need to be addressed. The first of which deals with Vedanta and on which Prafulla ji had adequately elaborated. When you look at the judicial trend, what I have noticed, through the last eight or ten years as most evident, is the judicial response as regards Vedanta and when one looks at it and compares the judgement with the same court, deciding in the case of Kudremukh, an amazing change is apparent. In the case of Kudremukh a functioning profit-making Government of India iron ore company shut down. It is a functioning company which had been running for thirty years and it was shut down on the grounds of violating The Public Trust Doctrine, besides violating the Forest Conservation Act and Supreme Court Directions, that you started with the work and that you continued with it in spite of the Supreme Court direction on February 14, 2000 that no removal of grasses can happen in a national park and therefore, under that ground, a company continuing is completely illegal and you are directed to shut down in a very short period of time. When one looks at that judgement, it puts in the concepts of “Sustainable Development”, “Precautionary Principle”, “Conventional and Biological Diversity” and once we have signed the CBD we are bound to actually follow its provisions. From there to Vedanta is a very amazing journey, because Vedanta comes as one of the few reports of the CEC which have not been accepted by the Supreme Court, so it marks another trend where not a single provision of the entire recommendation is accepted. Another amazing aspect of the Vedanta case, in spite of the CEC recommending that the court should order Vedanta to stop the construction work on their refinery immediately, is that the refinery gets completed by the time the case is heard and there the one very important issue I feel that comes up in the judgement is the concept of five percent of the profit to be given for tribal development.

Now that is neither in the CEC recommendations nor is it asked for by any of the petitioners and I think, following from the Samata, that 25 percent profit recommendation that followed, but here neither of the parties have even argued this thing, that on what ground five percent of the profit should be given for tribal area development? What will be the basis of it? After this they come to the whole conclusion that you will have to give an amount of fifty crores for wildlife region protection and others.

Now on those grounds is it very significant because none of these orders are based on any of the submissions made by either party and they are ultimately based on whatever judgement existed at that point of time. So I think that this aspect itself is an issue of great concern because it sets a very negative example. This five percent profit aspect can itself cause a great rift within existing movements, because you are dividing profits in a situation where the people do not want the profits. Then you set up whatever it is and on what basis do you draw the conclusion? That Kalahandi district is a backward area, there is a high level of starvation, now there are contradictory reports existing, but did they look into the matter actually coming to the conclusion that to salvage the situation we need sustainable development? If you look at the very trend, even in the judgement in Vedanta, the trend is actually something which has been wonderfully discussed in the preceding sessions and I think that the concept of “Sustainable Development” seems to have been lost because what has replaced it is “Sustained Development”, and that is what I feel is the most unfortunate part. Even the judgement, quoting it in the last part, despite the CEC being ordered to reconsider their report, an event which I think has not happened in the past, twice they were asked to reconsider the report and submit it again. The CEC submitted their report again and said that mining, in an ecologically sensitive area, should not be allowed to continue very clearly. The court then came up with a conclusion that natural resources of the country cannot be left in the hands of a company like Vedanta. But if they come in another form – by creating what is called an SPV – then we may consider it and if they conform to the prescribed conditions, and I feel that this is amounting to a situation where the High Court passes a judgement and then gives you the grounds for appeal, these are the grounds of law on which you should file an appeal and nothing more than that.

This I feel represents a very significant issue. In respect of a lot of issues on Goa, I see that a significant number of cases are being filed in the High Court at the very time that the public hearing notices are issued with the basic idea that a mine will be cleared or even be considered for clearance. They go before the High Court and these are not even High Courts that are even within the geographical boundaries, because I have seen, for example, mining cases in Maharashtra where the project proponent goes to the Delhi High Court with the Minister of Environment as a party and the prayer is to direct the Minister of the Environment to clear it immediately because it is causing delay, the expert appraisal committee is directed to clear the project and then the project gets clearance and when it gets clearance there is some other case pending in the High Court in Maharashtra, challenging the false citing criteria and then the ministry gives its clearance letter and I feel this is a trend which we have noticed in the last six to eight months, that the ministry, in its clearance letter says that, we hereby grant clearance for mining, but the proponent will be free to do it, it will however be subject to the final out come of such and such case which is pending before the high court, that does not stop the company from

continuing with the mining and thus by the time the judgement comes, if at all it comes, the mining would have already started at other points which are important as regards mining cases which are going before the courts by the CEC, is looking at it from a case to case basis, but there are many progressive issues, when we talk about the judiciary coming in, there are a lot of progressive points that get mentioned in many of the reports before the CEC and the Supreme Court, but what is interesting, however, is the amazing manner in which those important issues never get reflected in the final judgement. Now I will give an example. In respect of the Vedanta case and two other cases, the court has mentioned, in the POSCO case also, that the CEC has recommended two important violations that are taking place today. Number one is that ideally, the forest clearance should precede the environment clearance, but what actually happens is that you get the environmental clearance, based on that you start preliminary work and then you try to get the forest clearance. Now this is a very unfortunate situation and, in the Vedanta case, the court said that there should be a clear bar on such practices.

Second what they very clearly state that the terms of reference, of the EIA consultants even in the case of Vedanta, should not be set up by the project proponent and it should be set up by the government. In that situation we find complete silence, again from the side of the Supreme Court, with no mention of this particular point.

Third, as regards mining, they have passed two orders, one is that we need a comprehensive picture again based on the CEC reports and that we need information as regards mining leases which have been given to areas which are less than five hectares. The location of these mines and the effect that the mining activity in these areas is having in the surrounding areas has to be determined. In order to escape from the EIA clauses they would actually split up the mining and ensure that we take a clearance from one mine and not show that there is another mine right next to it. So the net area impact is not five hectares and it can be up to thousands of hectares like it has happened in the case of Goa. The court had asked for a comprehensive picture to be given and again a complete silence was received. Last is the fact of the whole issue of de-linking projects. If it is a mining project, and for example if in the case of mining for bauxite, what is important is the mining component in the site. You have a conveyor belt, you have a refinery and the third component is a smelter plant, so the bauxite comes in here, then it converts itself into alumina and finally it becomes aluminium and then it goes to a port from where it is exported out. The clever strategy, which has been adopted right from Vedanta to POSCO in the recent cases, is in effect very simple. The most difficult task is obtaining a mining lease, because you have the tribal groups against you, you have the wildlife groups against you and you have to get the forest clearance which is in itself a pretty hard job. So start with the port, then ask for the refinery, then ask for the smelter, then construct the conveyor belt and then ask for the mining lease. This is a time tested strategy and again the court said that you cannot de-link and thus it just delays the project. The best strategy is setting up three different companies to run three different units.

The smelter is run by XYZ company of the same subsidiary, or some different form of it, so you say that we are three different proponents and it is an accident that we are linked at a later point of time in the same project. POSCO comes up and says that we do not need the mine, you give

us the port, you give us the area and five years later we may even consider importing the ore if you do not give us the mine. Why on earth will a company, which is investing 62,000 Crores in Orissa, want bauxite to be imported from Australia or South America? That is the irony of it and they are well aware that after five years, neither the CEC, which made the recommendations, nor any other authority will be there to enforce it. So I think this is an issue of serious concern. On Claude's point, as regard the issue of this EI case, I am not directly part of it and I have seen, in terms of some implementation, the court's efforts and also where the courts may have not ruled very strictly against the government. The whole issue of safety zones came up as a very relevant issue. Twenty five kilometres, as per the Wildlife action plan, and then the court said that you must have a safety zone for mining which must be ten kilometres away from the boundary of national parks and wildlife sanctuaries and then the Ministry of Environment said that there are differences between states and there should be enough flexibility to allow a limit and let it be placed. I think over a year and a half has passed and we still do not have the safety zone issue in place. Mining leases are being granted and the states are at liberty to grant the safety zone and I was amazed by one such decision where the debate is between 25 and 10 kilometres, then the courts said that it should ideally be some where around 10, the affidavits, say for example, filed by the state of Bihar were amazing and that is on record and in spite of whatever we have done it has not been changed because that is the de facto safety zone in Bihar. It said that Bihar was the first state to declare safety zone, the issue was between 25 kilometres and 10 kilometres and the state of Bihar has declared 30 metres outside national parks and sanctuaries as safety zones for mining and it's amazing because, after they have filed an affidavit, over a year has passed and they are granting mining leases left, right and in the centre. So how does one deal with it because what you have are issues coming but we have no systematic reforms and no method of dealing with these issues.

We are dealing with it, as Claude was saying, on a case-to-case basis, so each case is looked on and the saddest part, in the mining cases, is the contradictory nature of the judgements of each case. I was amazed because you have Vedanta being considered but you have a huge number of small mining and stone crushing operations being stopped in the Arravali hills. Any mining is bad, but mining in an ecologically sensitive area is particularly bad, but when you see a kind of situation, in which small stone crushers in the Arravali's ten kilometres outside city borders, are being shut down by court orders on a daily basis and you see mines being opened in the most ecologically fragile areas, it's an irony, in terms of the judgement itself and the last thing is that, nowadays we don't really have judgements and that's the tragedy of it. The judgements of today are like Government circulars and, in fact, the whole of writ petition 202 reads like a government circular because you can't make out which mine it relates to and where that particular mine is located, so this results in upto three or four years of work which are put into judgements that are reflected in ten page orders and sometimes even in ten line orders, where it doesn't even mention who the project proponent is, where the state is located. As a result you are made to find out from the original petition file what it relates to, because all it says, in the petition file, is that we hereby order such and such, as mentioned in the petition, to shut down and that leaves you no ground to challenge the order. Even in the Vedanta case the saddest part today is that the court does not give any reasons for overruling the CEC recommendations,

because it does not overrule it outright and all that it says is that we are, in principle, supporting the project, but it does not say that we are in principle opposed to the CEC, so we are stuck in between and we don't know where to go and what to do and I think that is the saddest part. Kudremukh represents some judgements but we do not find any such judgements actually being passed today.

Intervention 1

But the manner in which it is given, the box sticking approach, the problem is the lack of institutional favour to accomplish what you want to accomplish through the EIA, the problem is not the concept of EIA, so our concentration should be on how to develop this process so that there is a reverse process in place and the tampering can be minimised and it is not received as a manner of routine, but one has to sort of do many things to actually acquire an Environmental Impact Assessment clearance.

Intervention 2

Now part of the problem is that, this is a part of a non monetary economy which is itself a very difficult thing to measure, it's a non measurable economy and this has various adverse implications for the Environmental Impact Assessment in as much as these livelihoods are concerned. If you have a capital sensitive project, it provides monetised employment which is easier to count isn't it, that's an advantage you have as a capitalist country. You have an account of the work that is being done.

So there's a bit of a contradiction because on the one hand you are saying that you are providing for sustainable development and, on the other hand, you have monetised employment with the objective that every body becomes rich. This is an impossible aim and there can be no natural reasons to do it because there aren't enough natural resources to ensure it, thus by forcing a quantified framework what happens is that the monetised livelihoods don't count and they don't exist and are not counted when it comes to recognition by the court. The question that thus arises is how can you change this enforcing a legal process, in terms of reference of the Environmental Impact Assessment, so they do count these livelihoods and a majority of these livelihoods that are otherwise invisible to the courts?

R. Venkatramani

There are many disparities that exist as regards the functioning of most of these projects. If there are a hundred mining applications in the State, you have Environmental Impact Assessments disparately for each application. The damage is done, but if the Environmental Impact Assessment goes beyond separate applications, let us say at the level of the state, the total mining operations in the state constitute a total impact in the state on the ecology and on the environment, not one that issues from individual disparate applications but one that issues from the total impact on the state, but I don't think that law looks at it either favourably or disfavourably because I don't think that we have even made an attempt towards it.

The whole effect of the concept of The Environmental Impact Assessment has been at a very minimal level on a project-to-project level, probably if you are looking at mining operations or perhaps any one of those operations that deal with these environmental issues at a very destructive stage, then you have to go on to a very different way of looking at the environment impact assessment, when you go to the forest conservation aspect you will have to look at it from a different perspective. Neither the environmental law, nor the environmental impact assessment, in respect of various issues, can invoke the precautionary principle any further, a stage of complete extermination, so if we have reached that phase and we use it as an injunction feature, not as regards the amount of damage done, then I think there is a way of salvaging the situation and perhaps we can look at it.

Sanjay Parikh

If you look at the Vedanta case, it is evident, when you see the report which has been given by the CEC, that Niyamgiri is an ecologically rich natural heritage and the tribals have been living there for thousands of years. The question is whether you can say that there will be sustainable development on the environmental impact assessment on this area, so that's why when I was talking on sustainable development I said that some of these things have to be excluded. You cannot afford to have an EIA of this kind of natural resource. The second case, where I have finished my arguments, is the river bed case. Now there is an expert body report which says that it has lost its carrying capacity, so how can you have an EIA assessment for the commonwealth games, when the only thing that can be done is to revive the situation, so therefore I say that this EIA, and this "Sustainable Development" principle, will not apply in certain cases. I am not saying that as a concept it is something bad, what I am saying is that it has lost its meaning in the present context.

Vikram Soni *UGC Professor, National Physical Laboratory*



If the original forest is going to be destroyed and you plant the same number of trees, it's like saying, that you take out all the wild tigers and you rear the same number of tigers in the zoos. Then of course, the whole wildlife board will jump to the ceiling, if it is at all a wildlife board. So you shuttle back and forth and somehow, at the end of the day, you will get through, so you cannot do a case-by-case thing and this also what we have also noticed, that every time there is a project in a city like Delhi where the real estate prices are escalating day by day, the approach of reacting and going to court is an

absurd approach because all you do is to lock yourself down and it would result in you dying a little bit earlier.

So now what do we do? I think that you cannot engage in a reactive process in this country anymore, you have to do a preemptive approach and all these laws are becoming obsolete because they cannot service the situation and the only thing that I suggest is that we have to look in every state or even at the district level, at something that you might call a natural resource commission which should not be made up of people who are either bureaucrats or

lawyers but a bunch of citizens like a human rights group for example and we should quickly make an archive of all valuable natural resources and once we make that archive, that archive should be sacrosanct because then there is no question of going to court about it because after that all hands are off it. If we do that then we can fix the problem, whether it is ten kilometres or one kilometre and we can salvage the situation once and for all with the help of this commission and it will bring this story to an end. If we do not do this at a local level, I think there is no chance.

Bhushan Oza *Gujarat-based Activist*



Just to be obtained and then in the court, the court gives time to obtain permission, they say that, after the petition is filed, that has happened in the ESSAR case near Ajirah in Surat, where a public interest litigation is filed and they have filed an affidavit in the High Court, saying that we have applied for prior permission which is after filing the petition and so the court grants them time, thus the prior word has no meaning, the court gives no importance to the prior word and I think that is coming up in subsequent presentations. The other question is that of archives. I think it is very important because it is a very relevant document essential for the protection of the environment from that point of view, because in Adani near Kutchh , 96 percent of the mangrove forests are removed and then the port is being built. If the satellite pictures can be kept as archives then we can demonstrate what Adani has done and now they are saying that there is no mangrove forest and it is only an earlier record which is showing in the map, that there were mangrove forests, but there are actually no mangrove forests.

Praveen Sabnis *Goa Bachao Andolan*



It is about time that the people start understanding what their rights are. When this happens and when everyone gets together there is for instance a case like Ramesh, who is a lone warrior and he is a very powerful one at that, but at the same place where he works, there are groups which come, who have acceptance in the media and in the general public perception but these people are traders and they can use this movement to trade. Ramesh is not credible however and that is because of his commitment, so when the people of his village connect in commitment, it becomes difficult to trade and regarding the judiciary, I have a very simple way of looking at it, I am not a lawyer and to me the judiciary is present at various levels, what is required is for the law to be implemented by the one's who are supposed to enforce it, so that is where the people's movement can start creating the pressure and it does work. We are not sure that we will win in the end, but we are creating a lot of inconvenience without, and I repeat without, any violence.

Intervention 1

See, that is exactly the point that I was trying to make, that our system should not depend on any one particular individual manning an institution or organisation. The institutional

frameworks, and the procedural frameworks, should be so strong and robust that it should be independent of who is occupying that position in the system. The system should be so strong and the institutional framework should be so strong that everyone should have access to justice and everybody should be so empowered, that it is not only on paper that they are being empowered but this empowerment is a ground reality so that people can have access to justice in the real sense of the term. That is exactly my point, that our systems should be robust and our institutional processes should be robust, so that this resort to violence does not come to anybody's mind.

Praveen Sabnis

The systems should be open in such a way that people have the scope to access whatever is going on, like say for a public hearing that takes place, if the hearing is not taking place in the village and is happening some forty to fifty kilometres away, then even the best of systems would not work.

Intervention 1

A robust system would not have a public hearing taking place at a location which is fifty kilometres away from the area where the public actually reside. When I talk about a robust system I talk about all such parameters being taken into consideration.

R. Venkatramani

The main problem that is faced by lawyers before the court is to structure the discretion of the court in dealing with the materials that are put up before the court. If there is an Environmental Impact Assessment then whatever means prepared over at the agency and through what process, through what process of acceptable objective devaluation can before it undergoes the Supreme Court lay its hands upon for an assessment. Can you think of any such structured process, everybody has their concerns as regards such a structured process through which an application by any agency what so ever is subjected to a thorough check before the court can signify its acceptance to it. Today the courts have enough of a discretionary power whereby they can reject any argument contrary to or oppose to the EIA. It is therefore important to reduce or minimise the discretionary levels of the judicial process in evaluating and accepting such sort of reports, can you think of it.

R. Venkatramani

In the Supreme Court, particularly from the state of Gujarat and very often appearing to protect the interests of the people ensuring the right to life of a person, one now reaches a stage where one experiences and experiments redefining the forest rights and today we have a stage where the Supreme Court is inclined to hear a petition in the new Forest Conservation Act. One sector of environmentalists are worried that encroachment, in favour of people, is going to have disastrous implications on the forest ecology as a whole. That brings in some inherent contradictions in the ecological movement itself and perhaps we can look at it. Conservationism,

brought about by wildlife conservation on the one hand and people's rights on the other hand, has been going on for quite some time and with the Supreme Court missing an opportunity in an earlier point of time when cases came up from Madhya Pradesh and the issue of dealing with people's rights and entitlement in the forested areas. So we have, on the one hand, a new legislation and, on the other, several claims as regards the environment and the ecology against the new legislation and partly in favour of it. If we broadly look at the kind of cases that come up before the court particularly in the area of forest related issues, as a council who was more passionately involved in protecting the interests of the people who is said to have been in a symbiotic relationship with the forest, I have used them sometimes very sentimentally, historically or whatever it may be, I find that, as of now, that particular dimension of the forest attitude has taken a backseat, whatever be the impact of the new legislation is yet to be seen and therefore let's keep all these dimensions in mind while going in to the discussion.

Ritwick Dutta

I will focus on two to three specific developments with respect to the issue of forest and I think when we are looking at the issue of the current judicial trend, we should actually start with the Godavarman case and end with that one as well because it is the sum total of the on going Forest Matter. We started from 1996, which I feel is a very significant development despite many viewpoints to the contrary. I would say that the start of the case itself was a very significant event in the environmental law development of the country, as it started in a way which is unparalleled. It's an unparalleled involvement of the courts on the foresting matter, on a weekly basis – Friday to Friday that too going on for the last ten years is significant precisely because of the fact that the time in which it came, during 1996, the deforestation rates may not have been very high, but it was very significant, the forest conservation act did not reach out to non reserve forest areas and deforestation issue in the North East was a very big issue. In many parts of central India and the court coming out with two significant judgements in this respect, the first being the December 12, 1996 order which goes on to define the forest irrespective of ownership and classification. Now what really was not understood, in a majority of these processes, was that the dictionary sense of the word forest did not affect the rights per se but it said that a mandatory clearance, under the forest conservation act, is required for mining purposes. Therefore the scope of the Forest Clearance Act was tremendously increased. On November 13, 2000, The Supreme Court, in the WWF case i.e., in The Centre for Environmental Law, passed another order, because what the December 12, 1996 order precisely stated was that you are not to use forest land for non-forest purposes without the prior approval of the Central Government, so it basically reiterates the role of the Central Government and it does not in any way substitute it.

I think the most significant matter was that of the WWF case in the Centre for Environmental Law of November 13, 2000, in which the court says that, "no de-reservation of any national park, sanctuaries and forest without approval of the courts, so now that was a very unique situation vis-à-vis the whole concept because what it would imply and that is how it has been practiced over the last ten years is that when a particular, and that is where the dichotomy can be seen, mining company wants to mine a forest land then all it requires is a section to approval

under the Forest Conservation Act from the Ministry of Environment as per the Supreme Court directions and as per the provisions of the law.

This would apply to all types of forests as per the Expert Committees which were subsequently formed. The November 13, 2000 order said that, if there is a de-reservation and the forest ceases to be a reserve forest then you will have to take the approval of the Supreme Court. Now the government obviously adopted a very smart way of doing this and all mining leases and all permissions for constructions of dams would very clearly say that we are hereby allowing you to construct these dams, the legal status of the area however will continue to be that of a reserve forest.

Thus ultimately there is no de-reservation so all of the land, on which we have our mines and in which our dams are being constructed, continues to be reserve forests. Unfortunately and that's where Madhu Sarin will be able to elaborate more, is that on the same ground, the moment you change the record of rights, it is de-reservation, so our forests village cannot be converted into a revenue village because that is de-reservation. So pattas cannot be granted, but the mining leases can be granted as a result of this, the de-forestation rates in the country did not actually change much, but legally, since you had a great amount of forest land still existing, because in spite of the mining operations and the dams being constructed, the land on which such activities were happening were still legally reserve forests. I think, in terms of the development of the case, it was a very very significant one and I think, without doubt, there must be some viewpoint to the contrary on it.

The whole institution of The Central Empowered Committee coming in was a very innovative step in that direction and I think that allowed a great number of issues to be brought before the court in an indirect manner and that I think represented a very important step in terms of the judicial activism itself because it allowed for what I say, a much more liberal standing, any person can bring any issue before the central empowered company, so whether it was Mr. Prafulla Samantatra who took it up, there was very limited hurdles in coming before the committee with a particular issue, you could have written a letter, or you could have just sent it across and that is how it went in. I think some of the most significant challenges were possible because of this liberal standing and that it was possible to do it and that it was what I feel what the court has used as an authority in the bulk of the cases, but I think the only fallacy was the selective nature in which only certain issues were taken in and the selective nature in which certain other issues were not taken in and specially that concerns the bigger industries, because if we generally notice the nature of the recommendations, made by the Central Empowered Committee to the Supreme Court, it has been broadly uniform and that is a particular trend which I have noticed.

If they have said that if the fish workers and shrimp farmers cannot exist the even Vedanta has no right to exist and a company like this should be debarred. If they have said that one particular thing, in respect of this company is wrong, it has more or less followed the similar policy with other companies as well. It is unfortunate, but in terms of the overall community pattern, they have said that it will be irrespective of whether they are dealing with the rich or the poor and as far as the recommendations are concerned, they have been as tough on the richer section and

the industrial houses, whether it is POSCO or Vedanta. It is one of the only institutions that have taken suo moto cognisance of the fact that POSCO is likely to violate the laws country. Therefore I think it was a very interesting one and I think one of the other issues, which came in the whole forest issue, as the temporary working conditions came up, Claude is here to highlight it, because as far as what the forest case did was also to look at making institution function in a very transparent manner and that is where the Ministry of Forest and Environment have consistently diluted the situation and had it not been for some amount of effort on

the part of the CEC, a huge amount of our conservation efforts would have suffered and I will give an example vis-à-vis the Forest Advisory Committee, a mandatory committee under the Forest Conservation Act, it provided for official members and non official members and it provided for a very interesting debate that took place, because the CEC put forward that at the fundamental root of the problem with regard to the de-reservation of the forest is the role of the Forest Advisory Committee as originally envisaged, the FAC has to have a total of about eight members of which five would be official members and three would be non official members. The non official members should be NGOs, environmentalists, ecologists, activists and others who will be able to take the viewpoint of the concerned public.

The government brought out a notification at that point of time, stating that we are appointing non official members, but the non official members are experts in the field of civil engineering, chemical engineering and developmental economics. So they effectively cut off NGOs, environmentalists and ecologists and subsequently it was put forward by the CEC that such an action, on the part of the government, was totally against the spirit of the Forest Conservation Act, because you must have independent members in the non official members. The issue was considered and then subsequently another category of mining experts was added to the list of non official members. The CEC put forward its own list in front of the Supreme Court as *amicus curiae* in which Mr. Claude Alvares was suggested as a member and the reaction of the government was very strange, predictable but derogatory.

The government affidavit, signed by the secretary, contained two important clauses which said that, none of the people, who the CEC, have actual experience in the field of forestry and its allied disciplines. The NGOs, that have been recommended, are basically amateur enthusiastic laypersons. That was the exact word that was used, they do not have any expertise in the field of forest or environment. One particular member they said is not an Indian citizen and cannot therefore be taken into account. The third member, they said, was a retired government officer and good governance requires that once you have retired from the government, you should no longer be a part of the government.

The fourth member has a vested interest because she has a tourism resort outside Kanha National Park and because tourism projects require environmental clearance she must have vested interests in the venture. The government, on its part, put forward three members to be nominated as a part of the Forest Advisory Committee as non official members. One was the former chief conservator of the forests of Punjab who again is a retired government officer, but the principle of good governance did not apply for him, the second was a person called Mr. Dilip Khatao who runs a tourism lodge outside Corbett National Park and the third person

was again another government official. That whole issue came up and the fourth issue that was put forward by the government was that the court had no right to interfere in the matter of the forests because deforestation rates have gone up ever since the courts have been given the right to look after the forests, which is very ironical because unless the Forest Advisory Committee clears it no forest in India can actually be de-reserved of the Act.

The reaction to this was that the courts did not ask for the removal of the names of those people from the list of nominations put forward by the government and the comments that were made against such individuals were wrong. They said that the Forest Advisory Committee would function in the form and at the same time the government said that the CEC will not be granted an extension and if they are granted an extension, to change its membership, and unfortunately, that has happened today and again I think, just in the preceding session, we were discussing about the issue about how suddenly in the aspect of mining a lot of Orissa is being discussed, the new composition of the FAC suddenly sees a predominance of people from Orissa, again a whole lot of Pattnaiks, Mohapatras, Mohantis suddenly figuring unfortunately in it and the reasons cited are not very difficult to locate. Suddenly it finds mention that a retired FAO representative got to sit in the CEC today, the Director General of the forest, who is part of the FAC, and that is where every recommendation of the FAC in Goa was found to be faulty by the CEC, because they had in certain cases granted clearance to certain projects even before the proposal were sent.

What I therefore say that in the last two years there has been a huge downfall in the forest case itself and part of it I think will be coming in, in this whole concept of this net present value which supposedly was thought of as a hurdle to de-reservation, but unfortunately, today has become one of the licences to grant every kind of clearance that is available. Very few projects today are being stopped and the only issue, that is being debated, is whether the MPV amount has been paid or not paid and the role of the FAC has been shifted from that of a regulator to that of an accountant. That means the only activity is to find out whether the area is twenty or twenty one hectares, if it is twenty one hectares then this is the calculation and nothing more than this seems to be happening. One of the few cases, which I think that was significant in the whole forest case, was that of the case where the additional chief secretary of Maharashtra, as well as the Forest Minister of Maharashtra, was sent behind bars for the violation of the Forest Conservation Act, we have very few examples where ministers are sent behind bars and members of top offices like The Additional Chief Secretary were there and I think that was a golden era in it and today we have a diluted CEC and we have an FAC that functions today to clear projects, the last report of the FAC of the CEC was very significant as it said that every single proposal, that comes before the Forest Advisory Committee, gets approved by the Ministry of Environment and Forests first. Not a single case has been rejected by the FAC and this aspect I think represents the real tragedy as far as the whole decision-making process is concerned. When it goes in appeal in the Supreme Court, all the Supreme Court is looking at is whether MPV has been paid or not but the fundamental issue of whether clearance has been given goes unchallenged and that is where I think at the end of it we will lose out because what we will have is a large expanding purpose in the Compensatory A forestation Management and Planning Agency but very little forest left in the country.

Madhu Sarin *Forest Rights Activist*



I think Mr. Ritwick Dutta has given a good overview of the background and I will focus particularly on the view from the ground. In a sense you have also expressed your concern for the Forest Rights Act and I think one has to look at how The Godavarman case itself has produced this act. It's a response to a lot of the orders which had come of the years and which did not at all look at firstly what is forest on the ground? Secondly how it is impacting the people who are living in those lands. So I think some of the less discussed dimensions of the forest case, which are very important and very linked to why this new legislation came up, are to do with firstly real forests. Legal forests are not necessarily real forests, we have to look at how the lands are legally notified as forest. I think, in the last forest survey, it was checked for the first time as to what the forest cover was on the legal forests, at a time when twenty percent of the forests did not have a speck of forest cover, because it included snow covered peaks rocks and other non forested features. So then I think, The Forest Conservation Act kind of built upon that and added to a defect which the British had brought in, which was the British Reserve Forest.

How historical accidents scribbled as forests on the government records becomes legal forests, I don't know, because if you see on the ground, a lot of these lands are actually the ancestral tribal lands of the countries' indigenous communities. Then you had the Godavaraman case, and this extension of definition to dictionary definition irrespective of ownership.

I think that one really needs to ask, under what law is this being done? Is the Judiciary interpreting the law or is it itself making the law and which land is it that is being declared forest and is being brought under the Forest Conservation Act? In fact I believe a couple of weeks ago, this matter came up and all state governments were asked to set up their own committees to define what would be considered to be this dictionary definition of forest. Non Forest Land, I mean Non Notified Land which has some forest cover on it but to cover it somehow into forest land. So this came out in the Uttar Pradesh Case and they were pulled up and they promised that in the next four months they would identify all such forest like lands and hand them to the forest department. Now which law permits this? Whose lands are they? Are there any tribal laws legitimising this action? Are there any common property resources? Are there any livelihood resources? And who has authorised transfer and where is the statutory process? Where is the statute? Under which law is this being done? And these kind of things are going on all over the country and no one is monitoring it and unfortunately the CEC is pushing and encouraging the whole process. In Orissa they had asked why all the land, that was with the revenue department, had not been shifted, but then I think, from the point of view of the local communities, because a lot of the land, which has been notified or recorded as forest on paper, is not notified as forest by utilising the due process of law which is required to do this, through recognising rights, even the process which is required under the Indian Forests Act, what you ended up with is a very large number of people, particularly in tribal areas, whose lands have never been surveyed and whose villages have never been surveyed but on paper, all of this land has been recorded as forests and with the Godavarman case, for these people, life became a sort of progressive

hell. Getting kicked , being subjected to a constantly decreasing level of toleration and I think what this case has done, it is very intriguing actually, as Mr. Ritwick Dutta said, at the time when it came it had very laudatory objectives and concerns but it started as a case against the malfunctioning of the forest department.

It extends itself to the entire country and what has it done at the end? It has centralised such immense powers in that same forest department, by saying that these forest type lands go under the ambit of forest as defined by the act and even the community lands in the northeast covered under the sixth schedule of the constitution which belong to people can be managed only as per the management decisions of the forest officials, management schemes or working plans. Now what are these working plans? The court has mandated that forests can be managed as per working plans prepared by the forest department, but what are these working plans? These are part of nothing but a colonial concept aimed at exploiting the forests and today it is mandatory that nobody, even my own forests I cannot touch unless the forest department assents to my utilising it in a particular pattern. I mean what is this that is going on? I think that this case is going totally out of bounds and what it has done for the ordinary people and the event which actually led to the beginning the campaign for the new law is the eviction order of MoEF based on the interpretation of court orders and concerns about encroachers. One has to understand that there exist such people who go and encroach on forest land and there are people who have been there for generations, but it is the state which has declared itself to be the owner of their property. So it's the reverse encroachment and there is no space in this law to recognise that there is that reverse encroachment and till you rectify that major defect in the original law and the way it was formulated, you are never going to resolve any conflicts and there is no way that this biased view, or this mindset of foresters and technocrats or conservationists, can resolve the immense conflicts in the countryside over resource rights. So I would just like to delve upon a few other things like who is the case against at the moment? Who is the party on the other side? It has become something that has taken up a form of its own and as we have seen over the last few years as well as with the coming of the Vedanta judgement, what empowers the court to overrule the views of a technical expert? And this was a case that started off with the view to protect the forests and here is a judgement where the judges have invited a new party to apply for mining.

Now who empowers the Supreme Court to invite parties to apply for mining? The whole process of centralisation that has taken place over time, these concepts of indigenous knowledge, these conventions on bio-diversity, recognition of local rights etc. Now what has happened to all of that, there is absolutely no space for that and in a country blessed with India's diversity? With such diverse local regimes of rights views patterns and livelihoods based on those resources, if we sit in Delhi and just look at how forests in one particular place are being destroyed, it's just going to lead to a greater crisis than what he have faced before. As regards the net present value, I feel again that it is a very controversial issue; can you convert irreplaceable resources into net present value? But leaving that bit aside, once again what is happening is that it is the local people who are losing local resources and all this money is finding its way into the centralised funds, now it seems to be managed by the judges and a handful of technocrats. Now what is the justification of doing something like this? The court set up a committee that recommended

that you must take into consideration local rights, if the village of a local forest is destroyed and they have been protecting it for a long time, then they should be the first claimants over whatever compensation or possibility of replacing that is there, but these people don't seem to come anywhere in the picture at all.

I think that the other major thing is this entire process of centralisation, because today no one in the districts, or anyone else for that matter, can take up an issue related to the forests take it to the local courts because the Supreme Court is handling the matter. Now the denial of access to justice as regards these matters, at the local level, how many of the tribals or adivasis can come to the CEC, may be it is a bit more accessible than the court and they can approach the CEC if they are linked to the other networks. So the Forest Act, in its truest sense, is purported to remedy the lack of recognition of those rights and the question remains whether the judges still sit on the bench and pass judgements on whether the issue is a political matter, or they look at it from the point of view of the interpreting the law and whether it is constitutional or not and we are already having very biased opinions being expressed on the same.

Shankar Gopalakrishnan



The Godavarman case has already been presented. I am not going very much into that. What I am going to discuss very briefly is how we see the court's intervention in the larger political economy of what are called as forests in Indian law and as far as resource control in India is concerned. Only if we have a larger understanding of this issue can we see reason behind the action of the court intervening in these issues. For that purpose I want to start with one particular axiom which is that we have an automatic, inherent tendency to equate tighter control and stricter regulations with conservation. This however is not the case. The question is not the regulation, or its nature, or its text, but who controls it and who enforces it and what the interest of the system, that has created it, in doing so is. This is more fundamental with the result and the meaning of a regulation than the fact that there exist orders that say that no forests should be cut down in India. This is what the Supreme Court's order says. This however does not mean that no forests, across India, will be cut down, what it means is that the Supreme Court has intended to do this and in order to understand the meaning of that order we have to look at the system that has created it and the system that is tasked with enforcing it. So in the light of that and taking into consideration this nature I want to start with saying that for the next five minutes or so we should drop the notion of Environmentalism and instead look at this issue as a struggle over resources, which is fundamentally what environmentalism is all about and, in its more radical and progressive wings, it is more of a question of how we understand resources and the control of such resources.

So if we look at it in that light and we look at the history of India's forest law, India's forest acts were created openly and explicitly and this was not a way of accusing them of a hidden agenda. It was enacted by the colonial powers at that time and date with the question in mind as to what should be the adequate forest law for India. Over the centuries the question is that of protecting

India's timber. How do we ensure that India's vast and immensely valuable timber resources are not lost to the colonial powers by what they understood to be mismanagement, profligacy and thievery. The Forest Acts were created essentially with this purpose, so the first step in this is the understanding of India's forests as timber. To this very day however India's Forest Development Working plans are concerned with timber, they are not concerned with any other factor. To some extent, they may include the more valuable forms of NFP but by no means do they include people's values and their activities in these forests, nor do they include the notion of a forest as an ecosystem because it is not possible to have a working plan for that, a working plan may be applicable for a timber working plant, so if this the first step and we trace this back, we see that this is the mindset that has enunciated India's forest plan of 1952. Why are forests to be conserved? For the needs of the nation. Needs which are better understood to be the industrial needs for timber and other forest resources. Over time however as India's industrial needs changed in nature and particularly after the colonial powers departed and the world economy also began to change, the importance of timber to the industry has declined and the importance of timber as an economic resource has also declined. So you also see a shift and the importance of timber to the purpose and structure of the Forest Department also begins to change and the most striking indicator of this shift is the Forest Conservation Act of 1980 versus the greatest forests acts which have understood forests as timber and the Wildlife Acts which understood them as habitats for a specific list of animals, The Forest Conservation Act understood these forests as land. That's why The Forest Conservation Act says that, within the area defined as forests as under the act, no non forest activity should be permitted.

What is a forest area? It is not as if the drafters and the framers of the Constitution and the Forest Conservation Act did not know that India's forests are a hugely contested area and thus the question of what is forest and what is not forest is itself a matter of debate. This is not any secret information and is mostly public knowledge, the fact that in this regard, since there is a sweeping law, no matter what the intention of the drafters may have been. The intention of the Act was not the conservation of the forests as an eco system but the treatment of a certain category of legal land called forest land and it was in this context that the Godavarman orders began to come. Effectively they came from the time period of the late 1980s to the early 1990s. The system of the Forest Department's control over land begins to break, its control over timber was easier but its control over land becomes more and more difficult, because you can see that in a rising wave of movements, particularly in the tribal areas, that reached a peak in the 1980s and it led to the particular manner in which the Forest Development began to restructure itself. Most evidently in what we call Joint Forest Management which may have been initiated by a handful of forest officials, but its final intentions, as compared to the JFM guidelines of the 1990s, can be perceived to be nothing more than an eyewash, so as to parcel out control over forests to certain decentralised bodies which effectively remained under the control of the Forest Development. Thus essentially the system begins to fracture and with time, it begins to come under more and more criticism. In 1995, a certain judgement by the name of TN Godavarman Thirumalpad approaches the Supreme Court and I mention his name not out of amusement but because it is very striking who this person is. And in essence who this person is and what his background is has been essential to the development of the case, though it is not

discussed in the north but is a matter of great talk in the south. TN Godavarman Thirumalpad is a zamindar, he comes from a family called the Neelambur Kovarililam which is a Kerala-based zamindari family, from a small priestly state which has been there since British times and has controlled 1 lakh acres of area in what is now the Nilgiri Hills. Godavarman was the last descendant of that family who was witness to the transition from zamindari to the expropriation of zamindari in 1969 by the Tamil Nadu government followed by the subsequent takeover of that land. Expropriation had problems of its own thus leading to a perennially confused land situation in the state.

Now Godavarman approached the state with an intention and an argument very similar to the British argument of the nineteenth century which was that loss of the land on the part of my family means that the forest is being destroyed and we need the land back under our control so that we can protect the forests and have our own land back. This is very openly known, so he approaches the court on this ground. Now whether you want to say that the court played into this or it was manipulated and the court itself wanted to do it I don't want to go into that, but what I mean is that the resulting impact of the court orders, starting from that first petition and then on, has been to intensify, expand and deepen the control of the Forest Authorities over land and not over forests. If it intended to increase the power of the authorities over forests, it would not make sense to issue an order saying that any land as recorded in any government record can be considered to be forest at any time. I mean, it is not that we don't know the state of government records in India, but issuing an order like this clearly indicates the privacy of the order of the court, the fact that land is important, not even trees and till this day they have stood by it and they are now saying that forest surveys estimate of India's tree cover to be an indicator of the state of India's environment, when the poor forest survey itself has said that they are not measuring forests, they are measuring trees and the net result of this is that today, particularly, this trend has been growing for the last five years as a result particularly of the FAC and the CAC orders. In the name of environmental conservation the Supreme Court has essentially created a single window for forest destruction and that is effectively what has happened. So today, and we saw this the most glaringly in the Vedanta case and also for instance in the POSCO hearings that are going on right now, let us just imagine that the Supreme Court approves POSCO's application there is not a single forum in India, administrative, judicial or political that you can then use to address concerns about POSCO and there is no application that POSCO has made, requesting clearance, there is no IA in the Supreme Court about POSCO this has just come because the Supreme Court has effectively taken control over the forest clearance process from the FAC. So if the Supreme Court issues that order then the only thing any person can do to oppose POSCO is to go back to the very same Supreme Court.

This is excellent as far as corporates are concerned, this is single window clearance, and this is what they demand. So effectively what I would like to conclude by saying is that this system is faced with the question of a different system of resource control, an evolving system of resource control in keeping with the needs of a certain sector of society, control over forest timber and the forest management plan has been evolving and the Godavarman case, in my mind, is essentially a use of the judicial system in order to change that system of control in a more friendly way so as to meet the needs of the current economic development system in

India. In particular, in India today, timber is useless as far as large corporations are concerned, these corporations are concerned primarily with land and with the extractable resources that this land has to offer, for them a system like that which has been evolved in the Godavarman case is very convenient and the final indicator of the that is the same Forest Survey of India by way of which the Supreme Court has been assessing the condition of forests in India as per my knowledge, show no significant decrease in forest destruction or de forestation since the beginning of the Godavarman case and in fact the rate at which the diversion of forest land has and is taking place since the Godavarman case began is three times more since then. This should be enough to help us see what the nature of this case is and what the nature of the system that is making such orders is.

Sanjay Upadhyay



I want to present some of my thoughts as regards the judicial trend relating to forest management. I think the fight is not really at the Supreme Court level and most of the offences, regarding issues dealing with forests, are fought at the district level at the DFO courts of which we rarely find any reporting. Most of the wildlife cases are filed and fought at the trial level and are rarely reported. In Delhi there are more than 280 cases which have never and will never be discussed unless some politician, or known name, is involved. A lot of these fights are going on at the village and the district

level and most of which are not freely reported. If you look at the judicial trends in the early 1990s, the focus is more on the factor of livelihood and it is more of the process on substantive laws and balancing the ecology and the economy which I think we have lost out on today. If you look at the Godavarman case and I think Mr. Shankar did present very substantially what it is doing, but there is a trend there as well and you will find that there is a three-step process which the court is following very clearly. It starts with a shock therapy in the beginning which is represented by way of a total ban of sorts, then there is the setting up of a committee, or the enforcement of a commission mechanism often filled up by babus and some so-called experts who have very little time and very little resource to really talk about or understand the implications of these orders and they come back and report and the court is completely reliant on the reports of those so called experts and former bureaucrats and sometimes existing bureaucrats. This is the trend which we can see throughout the Godavarman case, whether it is a good strategy, certainly not at least in my opinion, we need to think outside the box.

I think this point has already been made but I want to reiterate it. The forests are being viewed .as land resource which is a typical middle class mainstream mindset. I don't think that there are any good scientific views that actually examine the real crux of these orders. There is too much reliance on the amicus, with all due respect to the lawyer, I think the court is relying too much on these two-three lawyers to really seal the fate of forests in India and I think we need to be very careful as to the kind of strategy that is being employed. I doubt that I have ever come across a court anywhere else in the world which relies so much on an amicus. If you look at the trends of how it all started with the SIB industries and how few eucalyptus trees were cut in Tamil Nadu where the whole issue started. I think we need to be very careful, in

situations where the court is being goaded and I feel that we need to question that and in that light I feel that there are very few systemic responses from within. As Justice Kuldip Singh very rightly said that they hardly know anything in spite of sitting out there and are thus guided in different directions. He may have meant it as a joke but I think it is the truth and we need to be careful about how judges are being guided. There is very little suo moto caused from the side of the court itself to understand the forest development perspective or the forest dependant perspective for that matter. I think they are equally voiceless as far as this particular aspect is concerned and inspite of all the efforts, their voice is not being heard by the courts. As regards the kind of experiences that I have had in trying to raise those voices, after some research The Orange Areas case, filed in 2003, in more than five years we have not even been able to elicit a response from the state government and this has also been filed in the CEC for more than four years and about five months last year when the Supreme Court finally issued a notice and even till date we have not had any response from either of these state governments, now this is not a small matter.

This is an issue that affects 47 lakh acres and about 15 lakh families where the only dispute is between the forest and the Revenue Department. This is not a result of a dispute between the people and the State but people are being impacted and the court has almost no sensitivity to such issues. There are similar examples as Mr. Shankar will be aware of from the states of Maharashtra and Rajasthan where the CEC has not even been heard of by these people. The state based PESA in Rajasthan was challenged last year and it took me five hearings to the then high court judge who is now an honourable Judge of the Supreme Court to just explain what the role and the function of the PESA is. This itself has an impact on two to three lakh people in Southern Rajasthan and I will be talking about people's rights and CEL case which Ritwick mentioned. We were the original perpetrators of this case when I was in WWF, where the whole issue was to look into the matter of settlement of rights in national parks and sanctuaries. There were about five or six prominent national parks and sanctuaries there. As of now there exist only two orders which talk about the expeditious settlement of rights and in these thirteen years the Supreme Court, with all its might and with all the might if the State behind it, has not been able to get rights settled during the last thirteen years and the period for which this case has been pending. I wish that Mr. Ajay Panjwani was here. He would have thrown a bit more light, I am not sure on which side but he would definitely have told us, from the perspective of the court, what was happening. The Court is almost insensitive to the settlement of rights process and I am not quite sure why. Just to give you the other side, I was trying to look at the Godavarman case on which Mr. Ritwick Dutta has beautifully elaborated and I was looking at the orders and I found that the court took so many hearings to punish some corporates for painting rocks in Himachal Pradesh. The court took so many hearings for punishing a mining official for contempt and finally conviction was till the court rose, that's it. So the official was convicted only when the court rose, you can well imagine the amount of time that must have gone into arguments and how many committees and commissions must have been sent to Mirzapur to actually come up with this brilliant order to be convicted till the court rose. We have had several hearings to sanction the allowance of a few eucalyptus trees to be cut in Tamil Nadu for the SIV industries.

As Mr. Ritwick Dutta also pointed out, the position of the court has been denigrated to the level of a clearing house for most of these projects and I think the applicable word in this situation is divert and not de reserve because de reserve is a very long process and if you divert an area, the land status remains unchanged and then you just pay up some money and I feel that the whole objective of doing this is to create an authority for retired bureaucrats because more than five thousand crores of rupees sitting in this CAMPA. It is a huge amount of money to play around with, I can tell you that. So today the mechanism is such that you just pay up NPV being debated since so many years now again between 6 to 9 lakh per hectare, which is again disputed. The Institute of Economic Growth, who talk about what should be the value of forest land, but actually at the end of the day there is an authority which has been created perhaps for other reasons. It was said in the morning that the situation is being monitored very well and Justice Kuldeep Singh spoke about how well the situation was managed and controlled as far as the Agra case was concerned. I don't believe this, if you look at the monitoring process for any of these orders today it is far from satisfactory and I really don't think that we have any constitutional mechanism and I think that is why Ms. Archana's point in the morning was valid, that we do not have a robust constitutional mechanism to actually monitor these orders and processes and now of course The Forest Rights Act has been challenged and one of the culprits who drafted it. It is not that now The Forest Rights Act has been challenged in a new petition but this was actually challenged in a counter affidavit in another institute of The Bombay Natural History Society. I have never seen a substantive law being challenged in a counter affidavit as a lawyer and this was being challenged at first very stealthily, in fact it was challenged even before the very law it self was made. I still have the IA which Mr. Harish Salve wrote with all due regards to him. My only question is that whatever is being said about the Forest Rights Act and so on, whatever has been said, has been said in the last fifteen to sixteen years, if you look at all the 1990s circulars, which are all essentially ingredients of the Forest Rights Act, why were they never challenged? Why were they never held to be unconstitutional? And do these rights not exist? My only question is, is recognising the rights of the vulnerable, the voiceless and the weak unconstitutional?

Under the same people who are watchers, guides, forest labourers, the same people who build our culverts, who dig our trenches and who make our fire lines to save the same tiger, I think these are the very people we are talking about. I don't there is any huge dichotomy and some times I think all of this is just playing to the gallery and I think we will wait the wait and wisdom on the quarter on this one and I will stop there.

Ritwick Dutta

All matters, to do with Hazardous Wastes, fall under the Research Foundation for Science and Technology. So I don't think the whole issue, about Godavarman's having originated from a Neelambur estate, has anything to do with the final outcome. The second point I would like to make is that, if you read the first order itself, it will become evident that the case has nothing to do with forest land. The first order of December 12, 1996 says there shall be no felling of forests in any of the North Eastern states and no felling of natural forests in Arunachal, Tirap and Changlan. I feel that bringing felling under control was one of the primary objectives

of this case. In respect of the court doing it, if you look at it, you will see that the origin of Godavarman is actually very strange. A writ petition was filed by the Khasi Students Union in the Guwahati High Court against the operations of saw mills in Meghalaya. Today the courts have allowed felling as per the working plan, but it is the tribal groups, in North Eastern India, that are opposing any kind of felling because the saw mills are operated largely by non tribals. The second thing is, it's not right to relate to an order of the FAC or the CEC. As far as the Vedanta case goes, we can definitely criticise the court, but we should not undermine the role of the government on the process.

Vedanta got cleared at long last by the Supreme Court but this was possible only because the State of Orissa, The Ministry of Environment and Forests and the Forest Advisory Committee supported it. In the Kudremukh case, The Forest Advisory Committee said no to the project and the Supreme Court accepted the recommendation of the FAC. In the Vedanta case, the Ministry of Environment filed an affidavit saying that Bauxite mining leads to heavy blasting, micro cracks and the seepage of ground water. As a result, and this is the key argument, there will be a recharge of the water and therefore the post mining condition accounts for much better ecology than the pre mining condition. The Government of Orissa, filed an affidavit in this respect which became the basis of the final order. One of the most pressing problems in the State of Orissa is the problem of shifting cultivators. The most effective way to deal with shifting cultivators is to turn these agricultural workers and shifting cultivators into mine workers. So mining actually helped in controlling shifting agriculture and what the Supreme Court did was to refrain from reviewing this administrative act. The problem is that sometimes, within our community, we say that if a court reviews an administrative act it is judicial overreach but it is not and I think that was what was crucial in the first phase of judicial activism, that ultimately, at the end of the day, it is the government that gets the environmental clearances done and it gets the orders passed, because what the CEC wanted is, that if it is a forest advisory committee, to get the right people in to the committee. The government however is not competent for the job. What is an expert appraisal committee, headed by the former secretary of mines ML Majumder, what is the expert committee of power when the former secretary of power sits on it. Thus leaving such a task to the government, with a system that does not allow the judiciary to actually challenge it, is to get the right people in and I feel that this is the need of the hour and nothing else. All the decisions of the Supreme Court have been possible because the government has supported it not because of the NGOs and this is a very declining trend.

Kanchi Kohli *Social and environmental activist*



I don't know whether, on either side of the fence, it is a good idea. You know, the question is should the Supreme Court be governing India's forests or should the Central Government be doing it. The trend in the Ministry of Environment and Forest, with the environmental clearance and forest clearance breaking up early, is of very little significance. The trend has become such that you make law in such a way that nothing is illegal anymore. You pass judgements of such a nature that it becomes easy to evade the law. The other thing that I want to flag is an issue that had come

up in what Ms. Madhu Sarin had been talking about earlier in the day and that is the whole issue of governance. It is a very interesting development that some of the, whether accomplished by biased interests, or the Supreme Court or The Central Empowered Committee, is this whole issue of what is known as conservation offsets.

Now forest is important. Conserving the forests is important, but it is not necessary to think about the people inhabiting such forests. The Polavaran report, of the CEC, actually brought about a very fascinating aspect. It said that you are allowed forest clearance for the project, but it said that another area needs to be declared as a protected area. This dichotomy needs to be understood to know where the whole situation is headed. These are a few issues that I wanted to flag and they are the issues of governance and I don't know whether, at this point of time we should say it, the Supreme Court should be taking a proactive role, whether we will be in good hands as far as the Ministry of Environmental Laws are concerned and it is evident that we won't be and we are in deep trouble and that is all I wanted to say.

Ramaswamy Iyer *Environmentalist Water Expert*



Eventually in October of 2000, when they delivered the judgement, it was one of the judgements that marked the backtracking of erstwhile attitudes to Public Interest Litigations. They have made some very harsh remarks about Public Interest Litigation. They have criticised the Narmada Bachao Andolan in very severe terms and it represented, I think in some way, a retrograde development in judicial attitude towards these issues. Fortunately there was also a minority judgement, by Justice Bharucha, which was very good, but unfortunately had no legal effect. So when I speak of bad judicial activism, what I mean is an example like the case of the interlinking of rivers where the court certainly overstepped all bounds but for a wrong purpose. It is not just a case of bad judicial overreach, but also of bad judicial floundering. In the earlier NBA judgement of October 2000, there is one long and embarrassing passage which is a harangue on the virtue of dams which is not only uncalled for, but is also of a puerile nature. If it had been a paper written by a student in an examination, he would have failed. The same approach was brought out in the interlinking of rivers case again and, in that particular case, there was not even a Public Interest Litigation. It merely converted the petition of the amicus curae into a Public Interest Litigation and proceeded to pronounce orders to the government to accelerate the pace of the project and complete it in ten years time.

They refused to listen to a wide range of views, they issued notices and, apart from the state of Tamil Nadu, no state government bothered to reply. They took this development to be consent and they did not consult other engineers, environmentalists, hydrologists and so on and they proceeded to say that if the project was worth doing, which was in itself an unexamined assumption, it should be done in ten years time. Justice BN Kirpal, after his retirement, said that it was not a direction and I fail to understand what else it could have been. Periodic progress reports are submitted to the Supreme Court and this trend is precisely what I mean by bad judicial activism. In other situations, the Supreme Court has been unable to deal with

the Constitutional and legal issues that have been placed before them and these are instances of judicial failure. I do not wish to elaborate on this any further but, in parallel ways, on the governmental side there has been the weakening down of the Environment Protection Act through notifications and policies. In which essentially the attitude, towards environmental concern, is one that considers environment a waste of time; a useless and inconvenient thing that delays matters; and one that does not provide for profitable returns from investments. Thus the recent attitude is that everything must be made investor friendly and development means flyovers, malls, shopping complexes and so on. Anything that impedes this “progress” is anti development and this is not only a governmental but also a social attitude and it prevails among the urban middle classes and the judiciary is no exception to this. They tend to see development along these lines and that is evident in their nature towards the Narmada Displacement and Failures on the Rehabilitation case which is still going on and I think the next hearing is probably on the March 10. I am also a petitioner there along with Upendra Baxi and a lot of others. The attitude of the Supreme Court today is not what it was in 1993 or 1994. They are impatient and are of the opinion that if a development project is good it should be gone ahead with. This not only affects the government, but it also affects the media, the opinion makers, the urban middle classes and the judiciary. That is the kind of attitude that prevails now and I thought I would set this background to you. Then there is this third case that I want to mention and I think it will be dealt with later in detail, which is the Plachimada case, where the first judgement, the single-judge judgement, pronounced the Public Trust Doctrine saying that natural resources are held by the state in trust for the community. Unfortunately that was never paid heed to in the division benches judgement which gave Coca Cola the right to extract 5 lakh litres of water a day. I don't think that they specifically referred to the Public Trust Doctrine but impliedly they disowned it. That case is at present before the Supreme Court and I have been trying to tell the Minister for Water Resources that this is an important case and, when the judgement is pronounced in this case, it is going to be a landmark judgement and it will have major implications on future water law. Meanwhile we have disturbing developments by way of the Pepsi Cola case where the State Government has issued a licence, that cannot be interfered with by the panchayat, to the company. It would be very unfortunate if they do the same thing in the Plachimada case.

T. Shankar



We have been filing Public Interest Litigation Cases since 2003. We have filed many cases and we have been successful in a majority of the cases. All the cases are related to the violation of CRZ 1 regulations and the resultant displacement of five villages. There was a road development project for which five villages were evacuated without a word of notice given to the communities residing in these villages. This development project was initiated in 1984 and next to the development project is a small fishing village. Earlier the fishermen of the village could directly reach the sea and fish but after the development of this particular park they have imposed a mandatory entry ticket which has to be purchased by the fishermen in order to reach the sea and fish. We had

filed a case with the intent of requesting the government to do away with the mandatory entry ticket and, as a result of this initiative on our part, now the government has allowed the fishermen to enter the park free of cost. The imposition of an entry fee comes under the ambit of violation of human rights. The next case was filed under the Rishikonda project, that is a jetty project, and fifty families were evacuated without notice. The government had proposed a park and this was also a violation of the CRZ regulations. The issue was taken to court and filed under a Public Interest Litigation in the High Court of Andhra Pradesh and finally the court gave a stay order and despite that the Municipal Corporation of Vishakapatnam continued with their construction and finally these people filed a contempt case and based on this the High Court has demanded an explanation from the Commissioner of the Municipal Corporation. The Commissioner came to the High Court with the explanation that the proposed development project was for the benefit of the public and should be accepted as such but the court did not accept that particular view and finally the construction was demolished. There have been many cases of a similar nature regarding the violation of the CRZ. Fishermen societies are regularly approaching the authorities to curb the violations of the CRZ regulations. This is another case of violation and you can see how close this place is to the sea, this case has been brought up to the notice of the administration stating that they are dumping the construction material into the sea and are thus violating the CRZ regulations. The third issue was the water sports complex, which is the Eleventh Public Interest Litigation filed by the society and almost all of these were filed before Justice Singhvi of the Andhra Pradesh High Court. Justice Singhvi gave an order stating that all constructions, that were in violation of the CRZ, had to be demolished. Only when the demolition was begun would he listen to the explanations of the reasons behind these violations. Like wise he gave an order to the administration to demolish any and all of the constructions which were in violation of the regulations. The society has, through its endeavours, identified the number of violations to be to the tune of 348 in number and have given a status report on almost all the cases to the High Court in order for it to act upon them. On one particular occasion, the District Judge was asked if he had any knowledge of the violation of the CRZ regulations that have occurred in spite of the fact that the society had already brought a large number of cases regarding such violations to the High Court. The District Court Judge replied that he was not aware of any of these violations. Finally, the Honourable Chief Justice of the High Court directed all the State Governments to ask their District Collectors to report on the state of CRZ developments in the state. We are an innocent community of fishermen that is not much aware of these laws and regulations. Finally after being subjected to and observing these violations, we approached someone and had the CRZ notification translated into Telegu and likewise came to know of the rules and regulations. Now whenever there is a violation the society approaches the relevant authority to ask for the necessary action. It seems however that we are not getting the necessary response and are becoming mute spectators of these violations. So after giving the report on these 300 odd violations, which they campaigned for in the city of Vishakhapatnam, we are more aware of what is CRZ, what are the rules and how the violations of these rules are taking place. As a result they have managed to spread more awareness of the situation to other communities. There is a beach in Vishakapatnam and the administrative board is only interested in developing entertainment structures and other structures like ports, but they are least bothered about cleaning up the beach and maintaining the coastal ecology of the area.

So our stand in this regard is that we are not against the process of development and the progress as such, but our only request is this development not be at the cost of our livelihoods or our lives, so something has to be done to see that the systems of our livelihoods are protected. Actually this is a violation of our human rights and originally the city of Vishakhapatnam has developed from a small settlement of fishermen. With the advent of this trend of development and progress, the fishermen are being forced to evacuate their homes and their settlements and all these activities are happening in the name of development of the coastal corridor, the industrial corridor and development of ports all along the beach. This is my village and it is very close to the city of Vishakhapatnam and the level of development in the two places is evident and our only slogan is this, “See our life, the Coast is our Right”.

Rakesh Shukla *Fisherfolk Cooperative, MP*



I will be speaking mostly about the trends of fishing near and around the Tawa Dam in Hoshangabad district of Madhya Pradesh. There is a cooperative functioning over there called Tawa Matsh Sangh and we have been quite reluctant to take them to court given the recent attitude of the judiciary, however the matter is now pending in court and I will give you a brief background of the issue. The Tawa dam is one of the first dams in the whole Narmada Valley Project and this series was in fact made in the early 70s – 1973 and 1974 – and fishing was actually vigilised even at the time of the initial proposal. After its formation, and later on in the present day, it is a part of the Bodhi Sanctuary, The Pachpadi Sanctuary and now the Satpura National Park. These however are subsequent developments. From 1975 to 1996 the Madhya Pradesh Fisheries Federation, had either been auctioning the fishing rights or it had been conducting the fishing themselves. The people, who were the original inhabitants of this area and were subsequently in the 1970s relocated from these areas, were not really rehabilitated as such and what happened, as a result, was that these people moved a bit further upriver and now inhabit the regions which are near and around the dams. So once these contracts were given out these people were immediately stripped of all their rights and were as a result treated badly and forced to work in the fisheries. There was however a small progressive political formation there and after much struggle these people, in 1996, formed a committee called the Baswan Committee. This committee was well equipped with all the necessary people. It had a Secretary for Forests; a Secretary for Revenue and so on and so forth. Hence all departments were adequately represented in it and this committee went into all the issues that were raised and then decided that there were 44 cooperatives that were formed near and around the dam. They said that anyone staying within three kilometres of the dam and also genuinely displaced people, who are further away than three kilometres, could become members of this federation. This is called Tawa Matsh Sangh.

So after a lot of struggle to get these rights, in 1996 the Madhya Pradesh cabinet took a decision to give a lease for five years to this Tawa Matsh Sangh. They also imposed a certain royalty to the Madhya Pradesh Federation at something like six rupees a kilogram. This situation continued till 2001 and, during this period, the fishing was at its peak irrespective of whether it was being done directly or through contractors. Then in 2001 again the issue – of the renewal of

the lease that had been provided for – came up and was singularly lacking in clarity. However the lease was again renewed for a period of five years – from late 2001 to December 2000. throughout this period all the people, including the bureaucrats involved, advised the Tawa Matsh Sangh to go to court. We had been in consultation and I had advised them not to go to court. The manner in which they have been conducting their fishing is noteworthy. These are all self regulated mesh size of a 150 millimetres. They have divided the time into a closed season and a breeding season during which they don't fish. They use manual boats and even as far as the fish is concerned, they put the seedlings of the fish in little ponds near and around the dam and, as a result of this practice, the average size of the fish has increased. Then with the coming of 2006, the government everywhere becomes nervous so as to renew the lease and there is a February 14, 2000 order of the Supreme Court about not removing anything from sanctuaries. In 2004 The Central Empowered Committee of the Supreme Court wrote to everyone saying that you cannot do any of these things without the prior permission of the Supreme Court. The Madhya Pradesh Fisheries Board hereafter came to the Supreme Court, asking for a clarification saying that fishing should be permitted in this area. The matter was then referred to the Central Empowered Committee and at that point of time even we decided on behalf of the co-operative and we thus filed an application on the Central Empowered Committee as part of a separate application and we had also filed an application in the Supreme Court. The proceedings took a long time and they have finally come out with a report. The report has been sent to the Supreme Court and the matter is presently pending there.

Now what the CEC has done is it has said that 400 individual permits will be issued, secondly it has said that, as regards the dam, already a part of it should be denotified, which is to be determined by experts later on and fishing should be permitted on one part of this water body. As regards this area, we have to go further back, actually settlement of rights in this regard never really took place. This was the first reserve forest in the country in 1879, there was a small tribal king in that particular area Babhuti Singh who fought for three years against the British and thereafter, the British evicted a lot of people and the area was declared to be a reserve forest. Throughout however no settlement of rights has taken place and, in fact, the collector, at one stage in 2004 as part of this process under the Wildlife Act, had recommended that the dam be taken out of the sanctuary. However immediately after that, the decision was over ruled and this decision was, as far as the people were concerned, one that looked like the most workable decision. So this settlement never took place, all the arguments have been presented, but the settlement of rights has never taken place in this area and there is not much to talk about anyway. However now with this legislation, it has been said that whatever can be considered to be reserve forests, is deemed to be a sanctuary irrespective of whether settlement of rights has taken place or not. The result, that is being declared from 1879, is that, in these reserve forests, even till today, there is no settlement of rights and therefore it is very difficult to establish whether there were any fishing rights present before the construction of the dam. It is obvious that people must have been fishing in the Tawa river before as well. The other factor is that these people have been displaced as a result of the construction of the dam. In the whole area these people must have been relocated three to four times as a result of the construction of the dam and as part of the rehabilitation package this fishing and draw down cultivation so that

the levels of water consumption goes down. That question however is fortunately not before the court at this point of time. We have got to carry this logic further.

Let s now go into the question of irrigation. Irrigation is permitted because of the necessity of food and similarly fish is a kind of food and it cannot be looked upon as something that falls within the ambit of hunting within the sanctuary. Secondly this dam is not located in the core area of the sanctuary. Instead it is located more toward the outward region that forms the boundary of the sanctuary. Also the CEC, although forbidden from involving themselves in the matter, in a way reflect present judicial attitudes and have said that the relocation and evacuation of these people should be done as soon as possible and they must be moved out of the area immediately. This whole Panchbadi area has a history of having developed from a very ancient prehistoric civilisation. It has a culture of stone paintings and people having living in this place for ever. Today to suddenly relocate these people, who have been staying in harmony with flora and fauna of the area, is not something that should be done.

Today, the Supreme Court is itself not clear on what it should do as regards this present matter as far as the CEC ruling is concerned, as regards their order to implement regulated fishing and their ruling for the provision of individual permits, but the question that remains is who is going to engage in it? We have said that they can do it, but there should be a separate committee consisting of the Chief Wildlife, The President of the Madhya Pradesh Federation, The Director of the Satpura National Park and the Collector. This whole experiment – of a co-operative functioning of the displaced people fishing themselves – is, I believe, the only available illustration. 80 per cent of the available money has been given to those who are involved with fishing. However, in the case of huge bodies like The Madhya Pradesh Federation, 80 per cent of the money is used for the payment of fees and salaries of the administration. The Tiger Task Force has actually accepted this as an example of a local community existing in harmony and also being able to sustain themselves through fishing and satisfy their bona fide interests. Various other bodies, including this particular experiment, are the class seven NCERT textbooks Today however since the lease has not been renewed the system has become one that is free for all , irrespective of whether it is the Supreme Court or the Central Empowered Committee. Last year they tried very hard for some order to be passed before the monsoon season. Today the Tawa Matsh Sangh is unable to regulate because they do not have a lease so the situation is like a free for all and when this was pointed out it was like saying that the forest department would do it. Everyone knows what the forest department does the Tiger Task Force had contrasted the decision of the bench to ban fishing in the National Parks and what does this lead to.

It leads to a whole unreal world in which the judiciary exists. What it leads to is that, there is no dam in which fishing will actually not take place, it all happens illegally within a nexus of contracted fishermen and that is what happens when you make the thing illegal like that. To then think that it is this same forest department that will then issue the forest permit is absurd because who will make the requisition and why is this method successful. It is successful because they are putting in the seedlings of the fish and ensuring a closed period during the breeding season of the fish. Now the question that arises is who is going to ensure that this process is continued. The CEC is totally silent on the matter. Although the CEC is granting

the individual permits. The question is where are these going to go? And the second thing is that this was the only venture in which the marketing was being done by the co-operative federation itself. Otherwise the involvement of middlemen will always be there. This is the sole experiment which has been successful. Now however the display of the recent attitude and power on the part of the judiciary, what happens here? The opinion of the Chief Wildlife Warden was taken here and he felt that sustained fishing should be done. The State Wildlife Board has passed a resolution saying that fishing should be permitted here. Despite all of this and the passing of one and a half years and the whole issue is still in total doldrums as to whether these will be if at all renewed. When I say that this whole thing is unreal I mean that the judiciary is doing what it is today because it has no practical idea of what the situation really is. They have no idea of what a fisherman's life is like. They are not aware of the effects that may emanate from the orders that they are about to lay down.

This whole thing about a big water body is now going to be imaginarily divided into two parts. I do not understand how it works, as far as fishing is concerned. First of all it will lead to tremendous disputes between the fishermen and between the forest department as regards the position of the line and whether or not they had crossed it. The question that also remains whether this process will work. The people who fish there say that, as a result of this boundary, the fish will all go from the side in which fishing is allowed to the side where no fishing is allowed. Most of it may not be viable at all. it remains to be seen. On paper it may look good that the water in this region is divided into two sectors but it has been made under the mere assumption that, at the point of time when the division was made, the area was mostly a reserve forest. However the entire assumption now seems to be such that the previous inhabitants of this place do not require the resettlement of rights. It is however in the face of such a situation that the Supreme Court has given the permission for the laying down of oil pipelines and optic fibres in these ecologically sensitive areas. The only sort of activity that should be allowed in these sanctuaries and other ecologically sensitive areas should be that of bona fide means and not those that are detrimental to the environment because of their commercial nature. It is absurd because the court thinks of co-operatives as commercial enterprises and in spite of this they are passing orders for laying down of oil pipelines. Atrocities like laying down of oil pipelines and optic fibres are allowed, but harmless activities like fishing, by the original inhabitants of the region for the purpose of their life and livelihoods, is banned.

PA Pouran *General Secretary, PUCL, Kerala*



The Coca-Cola factory started its operation somewhere in 1997 in a place called Plachimada in Paharganj district, an area with extremely fertile lands capable of being cultivated twice a year. The tribal population of that area has been using the land for the purpose of agriculture and cattle rearing and other purposes of sustenance. In 1999 the factory started its operations and since then we could see the quantity of the water that was used and enjoyed by the tribal population of the area slowly dwindle. In 2001 the tribals faced a tremendous shortage of water and they realised that the reason behind the acute shortage was the drawing of water by the company and as a result they organised

themselves and started agitations before the court. Earlier it was not even recognised by the political parties, it was given importance only by bodies like the PUCL and other such central commissions. Subsequently the then leader of the opposition and the present prime minister made a casual visit to the spot and announced that, if he comes to power, he will make sure that the factory is shut down and relocated so that the region can be protected from being completely destroyed. The tribal people put all their confidence in this statement made by him and subsequently when he came to power, nothing could be done by him because by that time there was already an order which had been passed by Justice KG Balakrishnan in The Supreme Court whereby it was stated by him that water tapped by this company in abundance is against the public policy and no such activity, which is undertaken by a company and is detrimental for the public, can be allowed. Thus he passed an order for the closure of the company. In the intervening period an application was filed by the company challenging the order of the court and Justice BN Kirpal, who had previously delivered a large number of good judgements, allowed the company to continue with its activities. In the meanwhile, the Supreme Court Monitoring Committee visited the area, Mr. Claude Alvares was there and at the site, under the instructions of the tribals, a local area environment committee was created and I am presently a member of that committee and we wanted the company to provide pure piped water to 438 families most of whom are tribals who were deprived of water as a result of the activities of the company. The committee, with the help of these experts, made suggestions to the company on how they should proceed and provide water to these families in a time bound program. In spite of this however their directions are falling on deaf ears. The company is supplying some water in the morning and the evening by way of water trucks and the local inhabitants cannot do much against that and this practice is still rampant. Even though those in power are incapable of doing anything. The Municipal Secretary T. Balakrishnan has, however, advocated for the scrapping of the Land Reforms Act in Kerala, which being the first enactment in India whereby the poor and the landholders get legal entitlement to their lands. Presently, The Supreme Court, in a case before it in which The Pepsi Company is a complainant or the petitioner, held that in an industrial area the panchayat cannot dictate any of its rules, norms and regulations. The Pepsi factory is located in Kanjicors which is also near Paharganj district and has tapped more water than the Coca Cola Company factory and was causing considerable damage to the local people. The inhabitants of that region marched against the company and undertook agitations against the company. They also filed a writ petition against the High Court and against that there was an appeal in the Supreme Court. The Supreme Court has recently held that the area in concern is an industrial area and the panchayat thus has no say in the workings of the company and cannot challenge the order of the court that has already been passed. The very same ratio will be applied in the case of Plachimada. There are steps that are being taken by T. Balakrishnan and other people in the LDF Government to ensure that the Plachimada area is also brought under the ambit of an industrial area, for which they are filing some excuses. There is a place called Mudalamada which is near Plachimada and it is characterised by an abundance of mango trees and the mango is being harvested, processed and exported and therefore the Kerala government is now planning to start a mango processing unit at Plachimada and it is likely that the entire area will be declared to be an industrial belt and certainly if it is declared to be an industrial area then the panchayat will have no say in the activities and they will not even be

able to implement the principle of lock and loss. Even the police lose their powers of being able to interfere with the crimes that happen in such areas. Thus as a result of this Plachimada will one day become an independent republic within the republic.

The question that still remains thus is of how to tame the judiciary? How can we do away with the judicial tyranny that has become so popular nowadays? I suggest an example which has been implemented by the people of Waipil, a small island group off Kochi. When the people of Waipil experienced scarcity of water they threatened that they would come to Kochin and block the water supply that was being used by the bureaucrats and they were actually targeting the pipelines that were going to the judges' quarters in Kochin. If the people actually implemented their threats then the judges, of that particular area, would actually have been deprived of water and as a result of these threats, by these people, the municipality stepped into action, the corporation stepped into action, the water authorities stepped into action and water was provided to the people of Waipil. So for the purpose of bringing the judiciary under control, I suggest that we increase the awareness of the people, we must go to the states, approach the different groups of people and consolidate them and make sure that they are also getting water, from the rural areas to the tribal areas in the middle of the forests. There should thus be a strict law governing the amount of water that can be tapped by a company from a particular resource, so as to ensure minimal damage to the environment.

The Periyar is the second largest river in Kerala and it is also considered to be a very sacred river because the river has taken its birth from the Dakshin Ganga. The river however has of late become highly polluted because of the industrialisation that is going on along its bank, most of the pollution of which is caused by the department of water itself and that is the irony of the whole situation and it is evident that the levels of cadmium, mercury and nickel pollution in the river is very high. Nothing is being done to salvage the situation by the Government, the water authorities, or the pollution control board. This present rate of pollution continues and I can easily say that about 50 lakh people from Kochin are making use of the water from the Periyar river and if the present rate of pollution continues the within a period of two or three years I can say for certain that Kochin will become completely deprived of water and if at all the people are consuming it then the water will be completely contaminated and unfit for consumption. The Supreme Court Monitoring Committee appointed a local area monitoring committee in the region and they had made a report and given it to the pollution control board and the government, however the government, as well as the pollution control board, are sleeping over the recommendations of the committee and the same process of pollution is continuing.

The way in which the pretence of democratic process has been sacrificed at the alter of the judiciary is evident in the judicial orders of the Supreme Court in the networking of rivers case. It is observed that the very premise of the existence of the judiciary is being redefined autocratically which in turn proposes to redefine the ecosystems. In the absence of any well defined international legal framework, although Nepal and Bangladesh have raised objections against the project, there is no time, space, or process which is indicated for the participation of communities whose riparian rights must be considered and who face upstream and lesser known downstream impacts. Transparency and accountability in this project is of enormous

significance. Negligence in the matter can well invite the law of unintended consequences. The Supreme Court is more a threat to the environment than it is a protector. The Supreme Courts orders, in the networking of rivers case, deserves not only the residents of India, Nepal, Bhutan and Bangladesh but also those of the rest of the world. The writ petition number 512 of 2002 is a historic case and has so far been listed sixteen times in the apex court, the matter is listed for the next hearing on May 9, 2008. The background, and the current status of this case, is of enormous importance to get a sense of this world's biggest project which is akin to what the new scientists have described as the re-plumbing of the planet. Is this mega project the only way of bringing clean water to all? The Apex court feels that this is the only way, while a majority if the people of the subcontinent, as well as the scientists, feel that this is a technological fantasy with irreparable disastrous consequences for the ecosystem. The case begins on September 16, 2002 and the intervention application number 27 of the writ petition 725 of 1994 was filed in the news item and the case was titled by the Hindustan times as "and quite flows the River Yamuna", The Supreme Court on behalf of directions for amicus curae by Ranjith Kumar and Mr. MC Mehta as petitioners. The respondents to the case included Union of India, National Capital region and others. The case came out for the hearing before the three-Judge bench and the then Chief Justice, Justice BN Kirpal, Justice KG Balakrishnan and Justice Arijit Pasayat presided over the hearing. Upon hearing the counsel in the court, it made the following order on September 16, 2002. This order is generally not talked about. The September 6, 2000 order, which said in the High Court, "Based on the speech of the president on the eve of Independence day, relating to the need for the networking of rivers, as a result of the paradoxical flooding of certain areas of the country while some other parts face drought at the same time, the present application is filed." It will be more appropriate to treat this as an independent public interest litigation, with the cause title as "Networking of rivers". The amended cause title was to be filed on 30 Septemeber 2002 and the notices were served to all the states involved so that they could submit their affidavits in the case. On September 30, 2002 the three-Judge bench of the then Chief Justice BN Kirpal and Justice KG Balakrishnan and Justice Arijit Pasayat heard the matter and made the following order: "The learned amicus curae has drawn to our attention to entry lease 56(1) of the Seventh schedule of the Constitution of India and contends that the interlinking of the inter state rivers can be done by the parliament and further contends that even now some of the states are concerned with the phenomenon of drought and as a result disputes are arising among the riparian egalitarian states as to the sharing of water". He submits that not only would these disputes come to an end but also the levels of pollution in the rivers would be decreased drastically once there is sufficient water in different rivers because of their interlinking. The response to this petition by the defendents on October 20, 2002 and the crucial order on the October 30, 2002 just two days prior to the retirement of Justice BN Kirpal, said, ... post the notice issued by this court to the states and the union territories in relation to the interlinking of rivers. An affidavit has been filed by the Union of India and also by the State of Tamil Nadu. No other state or union territory has filed any affidavit and the presumption therefore clearly is that they do not oppose the prayer that has been made in this writ petition and it must be regarded that there is a consensus amongst all of them that there should be interlinking of rivers in India and a majority of state governments have yet to concur with the view of the state. The Kerala government has besides rejecting the plan for interlinking,

questioned the constitutional validity of the actions of transferring water from one state to another in their resolution and subsequently they passed an act as well. The Bihar government has just two days back, by way of the sanyal committee report filed before the Bihar State assembly started its current session has said that they will link the rivers within the state, Maharashtra has in the meanwhile passed a resolution within the state assembly saying that they will interlink the rivers within their state but the October 31, 2002 order says that 'a Task force can be formed, which will go into the moralities of bringing about a consensus among the states', this is completely contrary to the previous statement where it says that they have presumed consensus and this presumption of consensus is further demolished by an order of the Government of India dated December 18, 2002 wherein the terms of reference of the task force says that the mandate given to the task force is to build a consensus among the states while the order itself is based on the presumption of consensus. The impact of the order, the creature of the order is the task force which says that we are infact in the process of building this consensus. After stating this order the court observed that, "it is difficult to appreciate that in this country with the huge amount of resources available that there will be a further delay of Forty Three years for completion of interlinking of rivers, to which no states have any objection and whose necessity and desirability is recognised by the Union of India. What is interesting is that nowhere inn this case does it become evident or clear as to who is the petitioner and who is the respondent. Just before I came here I was checking on the internet as to when the matter was scheduled for hearing again and I saw that an advocate by the name of Mr. Sanjay Hegde was named as both the advocate for the petitioner as well as the respondent. This case is actually a mess because the President of India, who has already expressed his view that networking of rivers will take place, so what is it that the prayer demands? The same issue was taken up in the case, the order says that, " The report of the National Water Development Committee refers to negotiating and signing of advertisements, this aspect is also shown by the Union of India in its affidavits when it mentions that the consent of all states affected by the interlinking of rivers has to be obtained." Now what happens is that Entry 56 reads as under, "Regulation and development of interstate rivers and valleys, to the effect of which such regulation and controls is declared by the Union and the Parliament by law to is to be expedient in public interest." Now the concept of public interest has again been added here and actually what this reminds us of is what Lewis Carrol said in his book, "Alice in Wonderland" is that a word has a meaning not which it has but a meaning which is given to it by the master. So the Public Interest doctrine can be observed in the same light and it was in fact observed by the judges that, "It is not open to this court to issue any direction to the Parliament to legislate but The Attorney General submits that the government will consider this aspect and if so advised will bring an appropriate legislation, so that The Environmental laws and The Forest Laws do not come in the way of this mega project. After the retirement of Justice BN Kirpal, it was the bench of Justice YK Sabharwal that heard the matter in between however a contempt petition was also filed by Mr. Prasshant Bhushan. Wherein after several hearings the court came to the conclusion that until the feasibility report of this project is put into the public domain, until and unless that it is done the court will consider it to be contempt. This order forced the Ministry of Water to put the project feasibility into the public domain and this to only with one component of the river linking project, which is the peninsular component. What is now emerging is that our Finance

Minister is now sensitised on the matter and he says that the study of the project will alone cost fifty million dollars and it will take three years to complete it. We have now a serving minister Mr. Jayram Ramesh who questions the feasibility of the project, citing the National Integrated Water Resources Management Report, which had rejected the report. While this wisdom existed within the government, with the change in Government, from the NDA to the UPA, nothing seems to have changed and I would conclude by again referring to what the Supreme Court says with regard to its Lakshman Rekha with regard to its matters of policy. It says, “While exercising the power of judicial review of administrative actions, the court is not the appellate authority and the constitution does not permit the court to direct or advise the executive in matters of policy or to sermonise on any matter which under the constitution lies under the sphere of legislature or the executive, provided these organisations do not transgress their statutory powers or constitutional liberties. It added that even if the court does not agree with the decision taken by the government, it could not interfere. In matters of policy decisions, the court should not substitute its own judgement for the judgement of the executive. It also ruled out the possibility of a review or the correctness of the reasons for the government in adopting a particular course of action. Saying, “ In assessing propriety of the course of action of the government, the court cannot interfere even if a second view is possible. The presumption of consensus by the Supreme Court, followed by the subsequent demolition of that consensus by the Government order has actually demolished the rationale for the interlinking of rivers case and if the case is still pending in the court then it is only because the executive seems to be hand in glove with the Supreme Court in the matter of networking of rivers.

Vikram Soni

Question 1: Both the Millennium and the Indian Penal Code reports, which are the only reports we have, indicate that 60 per cent of the world’s eco-systems are seeing terminal loss, be it at land or at sea. Given that, the constraints in India, with the population it has, are even greater. Given what Sanjay explained, in his small article, it is evident that we need a small law, we cannot have precautionary principles and the polluter pays principle will not work as it is enforced only when there is irreversible damage to the environment. So the point is that, if we have already lost so much of a natural resource, there can be only one kind of law which is of protection of valuable natural resources, or there will be nothing left for us to stand on or breathe. So I feel that maybe we should work towards this immediately.

Question 2: The owners of the dyeing factory are putting liquid pollutants into the ground. They are buying high pressure boiler liquid feed pumps and pumping pollutants into the ground. The people, who are living outside, get yellow water and blue water when they draw water from the hand pumps. The same is true of Sangane, where there is the printing industry, or Jaipur, or Ghaziabad.

Answer

Justice Kuldip Singh: So far as your suggestion goes, it has no over reach at all, what is the over reach? I do not agree with you because what is being done is still not sufficient, they must broaden their jurisdictions and be more judicious.

Sanjay Parikh: This question is often asked in many a seminar. In the Ratna Municipality case it was said that actually creating awareness at the district level and giving power to the ministers, as under article 133, to deal with the public nuisance, could well have been done. It was debated whether we should have adopted that kind of monitoring, at the district level, or whether the Article 21 and Article 226 and 32, enforcing writ jurisdiction, should have been enforced.

Justice Kuldip Singh: I think that can be adopted in addition to what we have already got.

Sanjay Parikh: But what has happened is that now the Supreme Court and the High Court have taken over the entire thing, therefore the district courts do not have any power in their hands.

Justice Kuldip Singh: As regards the district courts, you can give them the power of monitoring either way: either through a law direction passed by the Supreme Court or through legislation. Although there is legislation on the matter, it is not sufficient. This issue has to be addressed to the Supreme Court in any case for approval in the matter.

Claude Alvares

In the first session there were three presentations. The first was by Justice Singh who gave an insight into the issue of the environment being brought to Court which served the purpose of an introduction. Next was an excellent paper presented by Advocate Sanjay Parikh who dealt with the issue of the deviance of the Supreme Court from principles of Polluter Pays and Precautionary Rules. This was adumbrated through earlier decisions the Supreme Court and its utter disregard for these matters. Next was a special session on mining where the consensual view was very critical of the Vedanta judgement¹. Also a number of Goa cases came up during the course.

There was a session on Forests by Mr. Sanjay Upadhyay, Mr. Madhur and Mr. Ritwick. They discussed the dual perspective of some people being very happy with TN Godavarman and what it has achieved and others being very critical of it. The general context, in which Godavarman² orders came to be viewed, was that of people who had been termed as encroachers by a state which had originally encroached on their rights in forest areas. The issue suffers a contradiction from within the group where some are sympathetic towards tribal rights and others are not. It is, therefore, unlikely that the issue will be resolved in the near future.

There was a session on water rights where a paper on the interlinking issue was discussed. The general consensus was that the Supreme Court should not have intervened in the matter. The Yamuna river case³ (where judgement is reserved) was also raised. Issues like the Plachimada, the pollution caused by Coca Cola Company, the Supreme Court's Judgement on CRZ matters and Aqua Cultures were also discussed⁴.

1 AIR 2006 SC 8551, (2008) 2 SCC 222

2 TN Godavarman Thirumulpad versus Union of India (UOI) and Ors. AIR 2006 SC 8551

3 Delhi Development Authority versus Rajendra Singh 2009 8 SC 582

4 Indian Council of Enviro-legal Action (CRZ Notification) 1996 (5) SCC 281
S. Jagannathan versus UOI, 1997 (2) SCC 87

Finally there was a discussion about the Supreme Court's decisions on tourism and the impact on international financial institutions. The disparity, between what the "judicial reforms" were originally geared towards has actually been achieved, was discussed by the panel. It seems that judicial reforms have been that much more sympathetic to corporate houses and market-oriented network than they have been to the larger interest of the community. The issue was hotly debated.

The members were in consensus and voiced unequivocally their distaste for what was happening at the Apex Court. There was some admiration for the fact that High Courts today have done better work than the Supreme Court has. Some were of the view that these High Courts should be declared Supreme Courts for the matter of case law. At the same time the members realised that the history of the Supreme Court has seen many phases and realise that there is a cyclical trend to its pattern of achievement.

It was observed that the Supreme Court had been very erratic and inconsistent in its functioning and that there had been no uniformity to its decision-making process. As a matter of fact the earlier judgements of the Supreme Court had received widespread appraisal both from the civic society around the world as well as judges. For example, a lot of people from Malaysia and Singapore said, "What a Supreme Court you have, they are passing all these judgements and here on the other hand we have judges who are not bothered at all. But now since many issues have received emphasis they're reading what you are doing and it's a remarkable thing".

Justice JS Verma *Former Chief Justice of India*



There is no doubt that the entire judicial history of Justice Verma is filled with numerous epochal trends that were inaugurated in the Supreme Court. In a Writ Petition that came before him in 1997⁵, he passed an order regarding waste management. India was a signatory on the trans-border movement of hazardous wastes at the Basel Convention. On May 5, 1997⁶ Justice Verma passed an order pronouncing that he had pre-empted the Indian Government getting out of the Basel Convention. He said that no hazardous waste, that had been banned by the Basel Convention, would come into the country. The Basel Convention actually requires a certain number of parties to sign a banned amendment before it is internationally legally enforceable. The number is set at 75 but currently we are at 67. His order of May 1997 has made it mandatory for the Government to follow this agreement which it has been in force till date. Several efforts, of the Government, to get out of this treaty have been rejected on the basis of this order.

Justice Verma spoke at length about issues that agitate him. He feels agitated when he views the Akshar Dham temple. So much harm has been done the environment because half the river bed has been covered by the temple's construction. There was in fact a PIL filed for challenging

⁵ Research Foundation for Science, Technology and Natural Resource Policy versus Union of India AIR 1998 SC 3123

⁶ *ibid*, see also Almitra H. Patel and Anr. versus Union of India (UOI) and Ors AIR 1998 SC 993

the construction of the Akshar Dham temple⁷. It still got the Supreme Court's approval. This much-debated matter referred to the Interlinking of rivers.

This problem needs to be tackled. According to Ex Chief Justice Verma there is only one remedy for the matter. This strategy has received acclaim in being the most effective strategy in tackling the kind of problems faced by a democracy. Indian democracy is an inclusive democracy. This empowers people to have a participatory role in governance. People are allowed a role is monitoring the functioning of elected representatives. The burning need of the hour is to arrest the trends of the Supreme Court if it is deviating from its enunciated principles. The answer is very simple. Nobody is desired from commenting on judgements which are seen as aberrations. There is hardly any academic deviance shown in a judgement, but there is lot of argument and criticism in private. Very often people say "fear of contempt law" but in the first place a fair comment upon a judgement is not "contempt". If there needs to be a change there need not necessarily be a revolt to achieve that change. Mahatma Gandhi's method of civil disobedience need not be resorted to because the laws were arbitrary then. According to Justice Verma, what is needed is to build and mobilise more pressure. He says "In that situation for 26 years it is not that what people think about what you do is going to go un-noticed and when one is in the wrong it is bound to hit. Whenever there used to be criticism of any judgement of mine, I would make it a point to read it more closely next time, go through the judgement again to see if the judgement was justified and take note of it and try to thenceforth correct it and that's what judges should do [sic]".

Judges should be open to the probability of a mistake on their side. The criticism can justifiably be ignored only if the allegations are unjustified. Furthermore, we need to make the media more concerned right now.

Another issue that has bought widespread agitation is the controversial entry of the two ships Clemenceau and Blue Lady⁸. A very apt analogy would be that of a person who thrones his garbage at a neighbour's door, which is exactly what has happened in this case. Why can't people dismantle ships containing hazardous material in their own backyards? Is India a dumping ground of sorts? Why should we take the garbage of some one else? It does not need a law banning it. It is merely a matter of common sense. They are not permitted to do it in their own home country so they do it here. A news item in *The Times of India* on February 7, 2008 referred to dead ships being a prima facie threat to environmental security. Naval intelligence reports say that the Dawood Company has had a hand to play in the ship-breaking in Alang. This may also make it a route to dump contraband and explosives. High profit margins, cheap labour, a high degree of corruption and a large floating population have made Alang a breeding ground for the mafia. Cash buyers of ships operate by under-invoicing a deal and the unmentioned amount is transferred through the hawala route making almost 30-40 percent of the metal trade illegal. During his time Justice Verma had a hawala case before him. That case came into the limelight because two terrorists were caught with money unaccounted for and which offered a threat to national security. Ultimately it was noted that the major funding

7 Uttar Pradesh State Employees Confederation Versus Principal Secretary, Lucknow, UP, 2009 8 SCC 604

8 Research Foundation for Science Technology and Natural Resource Policy versus Union of India 2007 (11) SCALE 75

source for all corruption in every field, including terrorists, was from outside the country. The crew has the clandestine collection of data together with a survey of sea beds, coastal areas and other important information. They are also involved with dropping and picking up agents. At present there are 53 dead ships in contravention to the Supreme Court order. Apart from that, we have regulations that allow the safe passage of such ships without any scrutiny throughout the Indian waterways.

Another thing that has been bothering me is the Narmada case⁹. The human rights angle is well accepted and that has to govern all aspects of development and all development has to be rights-based and not merely cost effective. It is important to provide those who have been adversely affected with proper relief and rehabilitation. This is a matter of very wide general concern.

The matter of state's responsibility is pivotal to the issue of human rights violations. It is the State's responsibility to prevent crime and also to prevent a Human Rights violation.

Another matter which troubles me is that of the Bhopal tragedy¹⁰ in December 1984. It is now 2008 and people continue to suffer. Hospitals have been built but not too many victims have had access to them? Provisions should have been made for providing the gas tragedy victims – including unborn children and the generations to come – in the treatment facilities and medication. I had hoped that the Court would pass an order to that effect, but I am not aware it has.

Sanjay Parikh

There was some work done by the monitoring committee in the waste case but there is no order as to liability. There is an order by Jabalpur High Court but there is no payment¹¹. They have been lenient, but there has been no formal order as such.

According to me there is only one effective way and that is to mobilise public opinion. Such matters should not be confined to seminars and workshops alone, they should become larger areas of public interest. Most people are really not concerned.

When the Blue Lady¹² was sailing towards the Indian shore, Mr. Gopal and I filed an application that this ship not be permitted to anchor. The anchoring permit was granted in spite of this. After getting anchoring permission they sailed away to Dubai for one month after which they returned. We had filed a document to the effect from the Navy Intelligence. The reply from the Ministry of Environment and the Ministry of Home affairs said they were not aware that the ship had left and returned. I argued the matter again, but there was no response from the bench.

My second point is the 2003 judgement¹³. After referring to the Basel Convention, it was said that there should be prior decontamination. When we moved this petition, I clearly remember

9 Narmada Bachao Andolan versus Union of India AIR 2000 SC 3751

10 Union Carbide Corporation versus Union of India AIR 1992 SC 248

11 ibid

12 Research Foundation for Science Technology and Natural Resource Policy versus Union of India 2007 (11) SCALE 75

13 Research Foundation for Science versus Union of India (UOI) and Anr. (2005) 13 SCC 661

that Justice Verma said the same thing using a common sense approach. “We can’t deal with our waste how can we deal with the waste from outside”. On this basis the petition was admitted. The manner in which the petition went on was quite methodical, in that it was given to an expert committee and the expert committee then put its suggestions. This is exactly the method I wanted to apply to genetically engineered substances. My argument was that the 1989 rules had become outdated. The matter should be handed over to a committee be given to a committee and a report should be obtained. This should be followed by a discussion in Court. I have been saying this for the last 2-3 yrs and the debate continues.

I am not saying that the Court should have expertise in matters of genetic engineering, but they should appoint experts to see whether the rules have adequate precaution in them.

So prior decontamination was the pre-requisite and this is what was said in the 2003 judgement based on Professor MGK Menon’s recommendations, and the Basel Convention. Subsequently in the Blue Lady case an affidavit was submitted by the Ministry stating that the ship did not contain any hazardous or radioactive wastes. The gap can be seen from the figures of how much asbestos waste and radioactive substance was present. In fact the engineer, who was involved in the construction of the ship, said that he could locate the radioactive substances while the hearing was going on. The Ministry of Health made it a point to look into the matter and found radioactive substances in two places. Again we filed an application. So this is the level at which things are going on and this ship has entered our country with no prior decontamination.

Justice JS Verma

One more point is that even without radioactive substances the asbestos is in itself toxic. I remember that domestically we have dealt with the problem of asbestos pollution and its impact on the environment¹⁴ as also pointed out by the Gujarat High Court and the Supreme Court.

Also when the Channel ship came into this country, it was decided that since it contained PCB it would all be dumped here and incinerated. The Court said that it needed to be incinerated because it contained around 1 percent PCB. The Blue Lady, on the other hand, contained tons of PCB. The entry of the ship violated, the 2003 judgement.

We need to look at these things objectively and include academics who are interested and journalists who are prepared to highlight the issues. That is the only way. Another thing is that now judges are very much on the move and will have no option but to listen to what we have to say.

In some High Courts there are judges who are sensitive to this. I was at a Judicial Academy in Jaipur where there were about 25-30 judges and about 400 High Court judges out of which around 10-15 were sensitive to the matter. It is not a lost case.

14 Research Foundation For Science versus Union of India AIR 2007 SC 3118

Gopal Krishna *Convener, Water Watch Alliance*



Last week it was the 25th anniversary of the ship-breaking industry. The first ship came in on February 13, 1983. As a result of the Supreme Court order of September 6, and September 11, 2007¹⁵ there are 53 ships languishing on the shore of Alang.

The journey of the current case begins in 2003, a ship named SS Norway, which was later renamed the Blue Lady, had a boiler explosion at Miami. This cruise liner was owned by Star Cruise Limited. After the boiler explosion the ship was taken to the German port of Brimenhaven and the case was discussed in the German parliament. They knew the ship was in a dilapidate state and was not sea-worthy but the German port still allowed the departure of the ship because submissions were put forward that the ship was to become a training ship or a hotel. So the ship was allowed to go to Singapore. Instead of going to Singapore, the ship sailed to Malaysia from where it was supposed to go to Dubai for repairs. According to the Basel Convention, in both cases, this could be classified as fraudulent misrepresentation of illegal traffic. In May 2006, instead of going to Dubai, the ship went towards Alang, where the newspapers reported it. It was brought to the notice of the bench of Justice Arijith Pasayat and Justice Kapadia and it was they who asked the lawyers concerned to move an application so they could pass an order. An application was moved on May 12, 2006. Although it was a Sunday, immediate orders were issued by the Dhooratma Retirement Board and Gujarat Pollution Control Board on the entry of the ship. Meanwhile it was reported that Star Cruise Limited had sold this ship for 10 dollars to a Monrovia/Liberian based shipping company and that this company had in turn sold it to an Indian company called Haryana Ship-breaking Limited. This company then put in an application addressed to the Technical Experts Committee headed by Dr. Prodipto Ghosh. This application was heard by the Technical Experts Committee on hazardous waste relating to ship-breaking and it was this letter and the report of the Technical Experts Committee which was submitted as an affidavit in the Supreme Court. On World Environment Day, the ship was allowed entry on humanitarian grounds. The Ship-breakers, the Ministry of Environment and the Additional Solicitor General, Mr. Gopal Subramanian, felt that it was dangerous for crew members, given the paucity of food and the onset of the monsoon.

Following the permission of anchoring, the ship instead left for Dubai for reasons unknown. This was again reported and brought to the notice of the Court as well as the media. A United Arab Emirates newspaper reported the sighting of the ship in a city called Fizura. After 25 days it was anchored in the Pipuba port in the Amarelle District of Gujarat. We obtained a naval intelligence document which we again submitted to the Supreme Court confirming that the ship was a threat to national security. This document expressly stated that such ships should not be allowed entry and that a Ministry of Defense clearance should be obtained for these ships. The report also dealt with issues of environment security. Subsequently the ship anchored and while the Court said that anchorage was given with no equity on the owners, the ship was yet-

15 Research Foundation for Science Technology and Natural Resource Policy versus Union of India 2007 (11) SCALE 75

again sold to Priya Shipping Limited. The new ship owner said that it had been bought from the original owner, Star Cruise limited. Till date, the ownership issue remains unsettled. This case was later re-named “bullet”.

During the entire case, it seemed that the Solicitor General was that much more sympathetic to the Ship-breakers than he was to the Environment Ministry. Meanwhile, the ship was allowed to beach on August 15 without the Court's permission. There was an application by the Ministry of Environment stating that anchoring was not possible and that therefore beaching should be allowed. The Technical Experts Committee submitted an interim report. This report said that the anchorage was causing a problem so they had recommended a three-step procedure for dealing with the anchoring, beaching and dismantling of ships. The report stated that beaching was an irreversible process even though it is common knowledge that re-floating and sending ships back, when they are stuck in sand, are routine matters. This argument was accepted by the Court. The beaching had happened as the result of a decision of the Technical Experts Committee which had sought the advice of the Additional Solicitor General, Mr. Gopal Subramaniam. The Experts Committee, relying upon this advice, gave a green flag to the process of beaching which was again without the Court's consent.

Beaching again took place on the August 15, 2006. After this, the final report regarding blue lady, was submitted to the Court. When Senior Advocate, Sanjay Parikh, pointed out that beaching had already taken place, the Court said that this was not a matter of grave concern as only beaching, and not dismantling had been allowed.

A noteworthy point is that it was considered that beaching had occurred only subsequent to the August 30 report on the Blue Lady by the Technical Experts Committee. The Committee did not feel the need to inform the Court. Meanwhile there was yet another change in ownership. The new owner was Priya Blue Co. The Gujarat Maritime Board issued a letter to this company, listing all 18 conditions in the order of the Supreme Court dated October 2004, for compliance. The Gujarat Maritime Board was of the view that these directions had not been complied with. This manifest contempt of Court was condoned and an order passed in September 2006 that contaminated ships were to be banned. Subsequent to that order, there was a specific order made on September 11 allowing the Blue lady to enter without the pronouncement of any order which dealt with the illegality of the ship's entry. The legality of the ship remains undecided and the Blue Lady is languishing there despite the dismantling order of the Court. This is because the ship owners have argued that they do not need a certificate called the “gas free” (fee). It is an established fact, backed by documentary proof, that the casualties in the ship-breaking industries are devastating. The casualty rate is 2 workers per 1,000 in the ship-breaking sector; the worst mining accident rate is 0.34 workers per 1,000. The ship-breakers are still persistently arguing and have appointed Abhisekh Singhvi, an MP and spokesman for the Congress and former Additional Solicitor General, as their defense counsel.

Fifty-three ships have entered and beached at the docks. They rely on the fact that it is not the legality of the matter that is in question, but the argument that beaching is an irreversible process.

The order of September 11 stated that—“the concept of balance under the principle of proportionality applicable in the case of sustainable development...” and ruled that “It cannot be disputed that no development is possible without any adverse effects on the ecology and the environment, and the projects of public utility cannot be abandoned and it is necessary to adjust the interest of the people as well as the necessity to maintain the environment. A balance has to be struck between the two interests. Where the commercial venture or enterprise would bring in results which are far from useful for the people, difficulty of a small number of people has to be bypassed. The comparative hardships have to be balanced and the convenience and benefit to a larger section of the people has to get primacy over comparatively lesser hardships.”

The *Frontline* report said the delusion principle used by the Supreme Court, in permitting the dismantling of Blue Lady, replaces key milestones in environmental jurisprudence. The Blue Lady contains hazardous waste despite the clean chit given by the Supreme Court to the Company and therefore core environmental concerns remain unresolved.

Sanjay Parikh

Nearly 89 MOU's, have not been implemented for nearly 10 years. The dumping of waste, with regard to the hazardous waste case, that was taking place indigenously, did not have a remedy by way of any land fills within the country. Therefore all the municipal garbage, including toxic and hazardous waste, gradually began to seep into the ground water and the river. A petition was filed on the grounds that all waste that comes from outside is in violation of the Basel Convention and that it must be controlled or banned. The indigenous waste needs to be controlled and ultimately the toxic waste must go to the proper land fill site and be disposed of in an environmentally sound manner.

Ultimately the 1997 petition¹⁶, that took up this issue, led to appointment of a High Court Committee headed by Prof. MGK Menon which gave a number of recommendations and suggestions. Consequently, the Court passed a detailed order in 2003¹⁷.

There were certain issues with regard to ship and waste oil. In relation to waste oil, there was a judgement in 2005¹⁸ where they ordered the lethal substance, PCB, to be incinerated. As far as the ships are concerned there have been 2 orders by Justice Kapadia and Justice Pasayat¹⁹. The issues covered were the disposal of indigenous waste, land fills, incineration, import of waste and the method used to clean dump sites in the country. Remedial measures were raised and directions were given.

People feel that the process of land fills should not be undertaken because it harms the environment. There is an idea of having inventories (both State and National), to ascertain the amount of waste and the even bigger question of how to deal with it. It will also help to address

16 Research Foundation for Science, Technology and Natural Resource Policy versus Union of India AIR 1998 SC 3123

17 Research Foundation for Science versus UOI (2005) 13 SCC 661, Research foundation for Science Technology and Natural Resources versus Union Of India (2005) 13 SCC 186

18 Research foundation for Science Technology and Natural Resources versus Union Of India (2005) 13 SCC 186

19 Research foundation for Science Technology and Natural Resources versus Union Of India (2007) 11 SCALE 75(735)

the question of red alert i.e., the point in time when the country cannot handle more waste. The implementation of the Basel Convention shows how it becomes part of National Law.

A burning issue is that of hazards faced by workmen. There is a report by the Ministry of Labour about the kind of safeguards which should be provided to workmen engaged in hazardous professions. It is yet to be made an order. Another note-worthy fact is the need to make implementations within a set period of time. The directions have not been complied with.

The Morepool Convention has yet to be considered by the Courts. It needs to specify that the ships, that enter Indian waters, have been granted permission to be beached at any port for the purpose of changing oil. The waste oil, obtained from these ships, should be handled in an environmentally sound manner. There is grave concern over the possibility of it being recycled. The waste oil was seen taken to the market and mixed up with other oil. There are actually a number of issues that come under the parameters of this hazardous waste case.

Claude Alvares

If you're interested in gossip, I have circulated a small 3-page note. If it cannot be said in 3 pages then it cannot be said at all. That is to re-establish the principles on which there is general agreement.

The entire Petition²⁰ constituted two major issues:

- a) No hazardous waste should be allowed into India for dumping or under the garb of recycling, since India is a Basel Convention signatory. Moreover, as Justice Verma pointed out, it is a matter of common sense that Europe should not dump its waste in India.
- b) Acknowledge the presence of a large number of hazardous waste generating industries and devise a method for this waste. When we went with the Menon Committee for site inspections the Pollution Control Board selectively chose only those places that painted an acceptable picture. The intervention of NGOs made the picture more transparent and the discrepancies in the Pollution Control Board's tasks were *prima facie*. An example of this is when the authorities in Gujarat took us to the official industrial estates but the real picture was painted by the NGOs which took us to the places where the Hazardous waste was being dumped.

The petition was very detailed and dealt with issues ranging from the import of hazardous waste to the indigenous generation of asbestos. The Supreme Court took up the case with extreme care. The 300-page Menon Committee report took 9-days to read. Subsequently an order was made in October.

As long as judges like Chief Justice YK Sabarwal were on the bench, the matter continued to be taken very seriously. For example, when we went as a Committee to Gujarat and Bhopal we found that ground water had been contaminated. The prevailing conditions were submitted in the form of a three-monthly report to the Supreme Court. One of the reports detailed the

²⁰ WP 657 of 1995

communities which had been seriously affected by water contamination and the need for an order by the Court to regulate and direct the water supplies. The Court was generous and made an order based upon the recommendations of the SCMC. Subsequently this order was used to provide clean water for people in places like Kerala (where 4 Industrial estates were contaminating the water) and Kanpur.

But once YK Sabarwal retired the political scenario in the Court was very different. One bench said that order had been passed by another bench and others are not interested in it. It is a known fact that this petition, in hazardous waste, is a pending petition. The decision of September 24, 2003²¹ is not a judgement, but is an order by the Supreme Court that needs to be converted into a judgement. So it is not over. As far as the Supreme Court is concerned, only the ship-breaking matter is being given attention to whilst all other matters have gone into hibernation. The Government, being a master of manipulation, had ensured that all members of the SCMC had come to the same conclusion, which was to declare the matter over and that it should not be referred back to the Ministry of Environment. The conclusion was then sealed and guaranteed after the Chairman was moved on to another job. By the end, the only members left were Dr. Bhuralkar and myself. Finally they started harassing Mr. Bhuralkar, which continued even after he had retired. He is the top Environmental Pollution Control Board official in the country, a highly qualified and much recommended man. It is part of the politics being played that he has been grounded for the past few years. The main intention behind this is to stop him from becoming the Chairperson of the Maharashtra Pollution Control Board. The Government has been very shoddy in its approach and has incurred great loss in the accountability criterion by its misdoings to the Committee.

For the first 2 years, the Government observed that the Supreme Court Monitoring Committee had accomplished all their tasks. The real issue was the Clemenceau issue. During a meeting of the SCMC in Bombay, an order was passed that the ship would not be allowed entry into Indian waters until a report had been submitted by the SCMC to the Apex Court. This was a delaying tactic. The Court stated that a final order on the entry of the ship could only be proclaimed after the SCMC had submitted its report. It is noteworthy that the entire SCMC was against the entry of the ship. The final turn of the screw was the meeting held in Madras. The course of the proceedings gave a transparent view of the workings of the Committee. The Government had conveniently arranged for all the directors of the CSR industries, who stood at a strong 7 members out of the 11, to change their vote to permitting the entry of the ship. Their very drastic change in opinion between January 6 and February 6 was a move from strongly rejecting the entry to permitting it.

The report of the 3-member panel was 250 pages long as this was the original report of the Committee. During the discussions, the Chairman of the Central Pollution Control Board produced another report for circulation to the Committee which the 7 members read and signed. This report was just 12 pages long. There was not much to object in that report, as *prima facie* it was an incarnation of the Polluter Pays Principle as their strategy was to allow the ship entry upon payment of a few crores rupees. If the level of asbestos was higher than that claimed a

21 Research Foundation for Science versus UOI (2005) 13 SCC 661

fine would be imposed and the ship would be sent back to France. Therefore it was more about which strategy to take up which left no scope for objection. On the other hand, the ship's entry was resisted upon the mysterious nature of its ownership change and fear of the data that it might possess. The Supreme Court was confused on which stand to take, since both reports were manifestations of two well established principles of Environmental Law. The Court appointed a Technical Experts Committee to advise on the problems associated with bringing ships to India for destruction. However this Committee simply increased the number of conditions, to control ship-breaking, from 18 to 56. This unsuccessful move resulted in several applications including applications for clarification which made the process very long and tedious. This has led to problems in terms of the environment and traffic. Fifty-five ships are waiting for demolition. This is what happens when the Court violates its own orders. The simple order by Justice Sabarwal, that no ship be allowed without decontamination, should have been followed.

I am partly responsible for the entry of the Clemenceau. As part of the Supreme Court Monitoring Committee, I was given the task of going to Alang and preparing a report. Part of the report stated that the ship could be allowed into the country if all the asbestos or toxic waste was disposed of, along with some other conditions. The Ministry of Environment read the first line and applied to the Court saying that the Committee had submitted a report allowing the entry of the Clemenceau. The Supreme Court asked about the fulfillment of conditions to which the PCB said that it had not been apprised of the matter. This is the way the Government operates. The Government needs to be watched carefully and monitored through every affidavit or else they would do things that no decent civilised person would do.

Finally we have reached a position where the Supreme Court is no longer interested in the petition anymore. The Committee's two reports are still pending.

There are 209 containers of waste oil that are literally exploding and popping the JNPT Mumbai dock. About one and a half years ago an application was filed by the SCMC that this be attended to urgently. I understand that this, and other matters, are still pending with the Court. The report had described the hazardous waste situation in the country as "grim".

Radical changes have happened in the past 3 years. 2,500 crores have been spent for the rehabilitation of the land fill sites. These were cleaned up except for some like the Bhopal tragedy case where hazardous waste has been in the open for more than twenty years. There was an attempt to send it to Gujarat but the Gujarat Government did not let it enter. The irony was that Gujarat would allow foreign contaminated ships to enter but not allow domestic hazardous waste for disposal. The waste continues to lie in the open in Bhopal.

The Supreme Court's intervention has led to a significant amount of cleaning-up of the country. The Court has acted as a safeguard to the environment. Companies, who do not comply, are not allowed to function. The Court was of the view that land fills are not a solution as they are counter productive to the use of good land and, with the scarcity of land that this country faces, it is not recommended. So it was suggested that there should be heavy penalties imposed on people generating hazardous waste by way of a waste generation tax. Therefore when a company seeks authorisation it will have to show that it has done something to reduce the

waste that is being generated. This is so much more effective than land fills are. There was a burning need for land fills because the waste was lying in the open everywhere the method has not worked productively.

Sanjay Parikh

Land fills are clearly not an option and the question of waste disposal remains unresolved. As far as the industries were concerned, a board was set up to recommend that waste be recycled and then sent to a land fill or be incinerated. For future purposes it was said that a cleaner technology would be used to generate less waste and therefore there would be no need to resort to land fills.

With regard to the waste imported from outside, it was considered that a better option was, laboratory facilities for recycling to use. It was also felt that public participation be elicited to a particular land fill. The waste could then be sent. A register should be maintained to show that the waste has not been disposed of into the water and contaminated it.

Vivek Bhide *Activist, Ratnagiri Zilla Jagruk Manch*



Environmental Impact Assessment is a major thrust area for NGOs.

There were 2 Public hearings, the first of which was held on August 11, 2006 at the Collector's office. There was no EIA report presented nor was a summary made available to the public. The concerns of the public were not answered by the company's representatives. The meeting was then postponed to September 12, 2006. Again a full EIA report was not available and only a summary of the EIA report was made available to the public at the Gram Panchayat Office. The proceedings were arbitrary in that no-one was allowed to voice an opinion or raise questions. The politicians who had raised questions in the initial public hearing, backed the project up unconditionally. The hearing was hurriedly completed in 30 minutes. The only purpose the public hearing served was to draw in bureaucrats.

The report made no mention of important data such as the project layout map, status of endangered fauna, the status of corals and the importance of the water catchments area.

The reliability of the data presented in the EIA has well been subjected to scrutiny and many a discrepancy has emerged. The project location has been given as Guhagar in the EIA but it is actually in Ratnagiri town. The distance of the project has been given as 2kms whereas in reality it is only 500 meters. This could pose a major problem of sea water contamination due to the discharge. The report states that there are no sensitive eco-systems in the area. The company has very conveniently forgotten about the coral reefs and, more importantly, the domestically famous Alphonso Mango Orchards that are located in Ratnagiri.

The entire area of Ratnagiri and Sahiyadur is ecologically sensitive, yet the EIA report said there is no flora and fauna in the area. There was a letter sent by villagers seeking to be compensated for agricultural loss but they got no reply. A PIL was filed with the High Court and the Court

ordered MPCB to form a joint working group which was formed with 4 or 5 officers. In their report, they said that there was an urgent need to re-draw the EMP or there would be irreparable loss to the area. They also recommended a study regarding mango orchards and fisheries, konkan kushin vidyapeeth and fisheries colleges srigao as per the clearance condition in the MoEF, but no study was undertaken.

Ritwick Dutta

The Ministry of Environment clears the project by stating that it will be subject to the decisions of the High Court. Irrespective of that, the project still functions. So a pending proceeding in the HC does not impede the project's functionary. This time the application was filed before the National Environment Appellate Authority after the clearance. This was done because a matter cannot be taken to the High Court after the clearance comes through. The EIA before the public hearing was unrecognised by different from the EIA cleared by the Ministry.

NS Kuttiapan



The entire Truppur cluster is renowned for T-shirts, under garments and other hosiery items, that are exported mainly to the European Union. A lot of enforcement has come buyers regarding the banning of azotise. There are many such clusters major pollutants and generators of waste water. It is strongly felt that water and waste water cannot be treated separately and the Court sometimes has a problem recognising this.

Most importantly, the textile sector gives a very high salinity—the waste water will be a total of 8,000 mg/l of total dissolved solids. Any ground water, that is taken for human consumption, should have a TDS of 500 mg/l. This has become a premise for the Court to meeting regulatory requirements. The TDS requirement is not to exceed 2,100 mg/l. The whole process of treatment is through a carbon effluent treatment plan and an individual effluent treatment plan. The problem of this entire cluster is the Sodium Chloride salinity issue.

The cluster operates through a common effluent treatment plan. There were only 8 CETPs before the Court's intervention; there were 19 CETPs after the Court's intervention.

There have been earlier cases but the PIL was filed in 2003. The requirement from the PCB is 2,100 mg/ltr. Practically it cannot operate without a reverse osmosis system and the moment the reverse osmosis system is installed, it will be rejected. The Court had to steer through a very difficult path. Unless both are taken up, the norm of 2,100 mg/l is not going to be met. That is the framework of the entire environmental improvement case.

The PIL case came about because waste water was ultimately going into a downstream dam, called the Vorattipolam Dam, which was created for agricultural purposes. This dam was created by the Public Works Department primarily for the farming community but, within a span of 6 months, the entire dam was filled with colored waste water. This was proof of the Government not doing its job. The industry stated that the water treatment was being done, but

the presence of the color deposits meant that the water had not been treated effectually. It is extremely difficult to police this. So with the PIL came the formation of an expert committee by the High Court. The main aim of the committee was to give the industry a time frame. Parallel to the committee was the formation of a monitoring committee in which I was involved. We were a technical committee and were required to provide the inputs. The primary target was to monitor progress given the limited time-frame that we had.

The Court ordered that every unit should have an electromagnetic flow meter because the water was ultimately being consumed by the public. To our surprise, the consent to establish was the starting point with respect to the PCB. The actual consumption, that the infrastructure created in the industry, was more than double which means that the consent given had no meaning whatsoever. The industries don't even have the consent to establish. So we monitored the electromagnetic flow meter. The quantity and the infrastructure exceeded the adequate limit. The time limit was exceeded.

Subsequently, there was a landmark judgement in the High Court based on the Polluter Pays principle.

The industries claimed that the plants had not been functioning for the whole month. It was decided that, for the first 2-3 months, the fine would be 5 paise per litre which would be raised to 6 paise and then 8 paise per litre. The deadline was July 2007. In July 2007 the entire cluster, in the form of a Truppur industrial unit, moved the Supreme Court, taking the State Government into confidence about whether or not the project was feasible. There are other clusters like Eru, Preumbarai, Salom Bhavani and all these places would be routed through something called the Marine Disposal System.

T. Mohan *Environmental Lawyer*



An important component of environmental law is environmental justice. It is this issue that suffers the most in Court managed decision-making processes. I think nothing highlights this better than the issue of hazardous waste management and the setting up of land fills and incinerators in various parts of the country.

The MGK Menon Recommendations, which were presented before the Supreme Court, contained recommendations about the planning of industrial clusters and the citing of industries was a major issue. This is a matter that should be decided by scientific and not political considerations. It is widely recognised that the whole problem of hazardous waste management has come about because of wrong sites and wrong technology. There is therefore an urgent need for cleaner technology. It is also said that there needs to be a moratorium for hazardous waste-emitting industries. The age-old problem of historical waste in the country has to be dealt with. All this has been given a go-by and the end of the pipeline solution seems to be capturing regulatory and judicial space.

Most of the Supreme Court judgements, post the 2003 order²², have been talking about the movement of waste oil from the JNPT to the waste oil facility. There is much talk about the setting up of hazardous waste management plants throughout the country.

The first two steps—i.e., industries and ensuring cleaner technologies—are not being implemented. This is the reason why people, in different parts of the country, are very suspicious of the Government's order to set up hazardous waste management facilities. One reason is that the SCMC has been constantly pointing at the fact that they are going beyond their brief. Neeri, the prime member, was often in consultancy with the industries on clean-up. In the Kodai Kanal Hindustan Lever water issue, where tons of marketing waste was lying in Kodai Kanal, Neeri was not just supervising the clean-up process as part of the SCMC, but was also in league with a paid consultant appointed by the company. So you have this conflict of interest paradigm and probably this is why communities fail to establish confidence in such measures. The SCMC was also monitoring the clean-up of Bhopal.

Land fills are not a solution for all times to come. They are meant for historical waste and not for the current generation.

One has often to resort to Court and often the onus is unfairly on the environmentalists. The Courts talk to us like we all the repository environmental pollution and that we possess a magic wand to clean it all up. All Courts expect a positive approach. "Positive approach" means an attitude where one is happy with the way things are and with the harmonious working of agencies like the Pollution Control Board, industries and public interest litigants.

The problem therefore can be identified as the deficient dealing of the problem of environmental justice by the Court. In the case of Kumidipungi, a site was chosen without going through the full environmental impact assessment as required under the amendment to the Hazardous Waste Management Rules. These rules have undergone a radical change. Initially, in 1999, you only required prior environmental appraisal i.e., initial appraisal. Then, in 2001, a full environmental impact assessment was required; in 2003, it manifested into the pre-requisite of a full public hearing. The common problem that our country has faced can be termed as, "only policy and no enforcement". Whenever public hearings are conducted, they are not done with full access to information. Mostly one has access to an impact assessment report, or to an EIA. When it comes to obtaining regulatory clearance, there is an entirely different EIA, to which the public is unable to comment upon as they have not seen the report. Clearance is given to these projects on the basis of the EIA on which there has been no public hearing. The Courts are very reluctant to enforce the law as it stands. The Courts are not being asked to do any form of judicial activism; there are just fundamental demands that are being pleaded in the Court which are demands of a particular procedure and adherence to it which is the foundation to sustainable development. Most of the pleas to the Court aim to dilute the regulatory regime in the name of sustainable development. The Courts are only interested in whether there has been a public hearing and the presentation of an EIA, which becomes the end of the matter. That

22 Research foundation for Science Technology and Natural Resources versus Union Of India (2005) 13 SCC 186

is the limitation, because the Courts have not understood the regulatory process in its entirety and that is a grave gap in judicial understanding and we have to constantly fight against it. This results in a blinkered view of all environmentalists, who are termed as people who obstruct infrastructure development and public development projects.

I have been stuck in a committee for the past 7 years and I find that these committees are very limiting. The terms of reference cannot obviously extend to critiquing environmental choices. To take an example, there is a very clear rule position concerning industries in Tamil Nadu. The order clearly outlines that hazardous waste industries, or red category industries, cannot be located within 1 kilometer of any water SRC in Tamil Nadu. This order was given in 1989 and it was a radical step to evolve the law but industries have been set up all over in contravention to that order. This was the subject matter in the Vellore Industries case²³. In response the Supreme Court said, “We have set up a loss to the ecology authority, that authority will give a decision whether it should shift all these industries to another area or whether to retain them [sic]”. This happened in 1996. Today not even one industry has been told to shift. In 1998 the proximity limit was shifted from 1 km to 5 km in respect to the major rivers in Tamil Nadu.

The whole Court procedure is part of the monitoring committee. All CETPs have been set up in the prohibited area without the mandatory consent required. Although we have pointed out that consent should precede construction, the PCB argues that the Court sanctions construction activity in very clear violation of the law. The *prima facie* conclusion is a violation on a day-to-day basis.

The Courts need to be extremely proactive. In 1999 they had a draft site notification. Even today, despite the SC order and the MGK Menon Committee recommendations, there is no national judicial manageable standard as to where the industries must be located. In Andhra Pradesh and Tamil Nadu there are some Government orders on drinking water sources,²⁴ but there are no national orders on industry sites and there is an urgent need to address that as the matter comes up again and again.

Another example, of the initiative issue, is the Bhopal case. The Jabalpur High Court was faced with the issue of the reason for the movement of waste to Gujarat. The burden was once again put on environmentalists and they were asked to advise the Court on what should be done with this waste. Our reply was that they should ask Union Carbide.

Gopal Krishna

The Cabinet Committee on Economic Affairs holds both the Supreme Court and the Parliament in contempt, which can be proven with documentary evidence. There have been cases, which can only be found on a scrutiny of the minutes of the Parliament Standing Committee with the Environment Secretary. The Cabinet Committee on Economic Affairs is the sole deciding authority on everything from industrial sites to environmental law. What is surprising is that the judges dare not interfere in matters where the Cabinet Committee on Economic Affairs has

23 AIR 1996 SC 2715

24 Ramgopal Estates Pvt Limited case 2007(2) CTC 369, MANU/TN/7948

made a decision. This Committee has not been under the scanner and it is this Committee that has been in control, not the Industrial Ministry or the PCB, or the Environment Ministry.

With regard to the Supreme Court Monitoring Committee, the October 14, 2003 order, relating to land fills, says that the land fill policy has to be made within 3 months. Till date (after 5 years) there has been no land fill policy from the Monitoring Committee. The more important question is that, the Monitoring Committee, without having done its work, has ceased to exist. This is manifested as contempt of Court. Problems, due to lack of policy, were predicted and the issue of land fills has come up in Delhi in Najafgarh where 300 villagers have had serious objection to it in the Maha-Panchayat. The case is again filed by the Gram Vikas Samiti in the Supreme Court and the CM of Delhi cites some statements from the SMC saying that they have given consent to it. In the first case, the SMC had failed to comply with the National Land Fill Policy. The policy was endorsed by the report of the Menon Committee which had made some recommendations. The recommendations have not been taken on board and, until that policy comes in, there should be no land fills. Failing this, it would be nearly impossible to identify the sites.

PB Sahasranaman

The situation in Kerala is going from bad to worse. The dumping of waste, on the backwaters, was stopped for a while as no alternate site could be found. The only site was the one where the process was planned to be installed. After the public intervened, another site was found in an industrial area. During this time the labor union politicians raised objections. The Collector was forced to apply 144 and dump the waste just behind the High Court. Ironically then, the Court became interested in its disposal. It made an order to find a site for its disposal.

Sanjay Parikh

The 1989 rules deal with environmentally safe disposal of hazardous waste. Any company, dealing with hazardous waste disposal, is supposed to have consent by way of a certificate from the PCB. Despite this, there has been no implementation of these rules.

A lot of this waste has been dumped on the road side, into rivers and ponds along with the municipal waste. This has led to leaching into the ground water. So a big problem has been that of indigenous waste, non-compliance of rules and non-action of authorities. On the other hand, developed countries were dumping their waste here and there were no regulations in force. We moved the Court to ascertain what should be done. Thereafter a PCB notice was issued to the Ministry of Environment, the State PCBs and to the State Governments. Their reply was the same, "We do not know what to do". That led to the formation of the Menon Committee. When I was arguing the matter, I had made it very clear that land fills are not the solution. This would strike a death blow to the environment. Firstly, there should be absolutely scientific parameters; modern scientific parameters of any land fill. The Menon Committee recommended a land fill system not for all states a national or common land fill system. The CPCB issued regulations to monitor the management of the land fill. How is an indigenous industry to dispose waste in an environmentally sound manner. Right now the answer is to put the waste in a land fill or to have

clean technologies and not have third-grade technologies from other countries dumped into our country, on which we have sought a ban.²⁵

Then there arose the issue of clear industry. A report was prepared and issued to the Ministry which, as usual, has not been acted upon either by the Ministry or the Court. The incineration details were in fact about lethal substances. When I was arguing the case of Madhur it was suggested that I not bring in the issue of incineration. The fact is that there is no other alternative. If I had tried to put a ban on this procedure the Judge would have asked for an alternative and we would have had no solution.

With the waste oil (containing PCB) scenario there was a plea that the period should be more than that of 15 or 30 days so that the waste could be analysed and sent back. The Basel Convention had set it at 15 days. Incineration therefore was the only option and experts were asked to offer advise on the best technologies available.

In the process of implementation, the Supreme Court monitored a land fill and a proposed land fill site. It is for the people to raise objections and resist. So it is not that we are talking about an illegal waste disposal technique but about the authorities choosing a wrong place. The implementation becomes different solely due to the time that is given by the Supreme Court i.e., 10 years and, over that period of time, the performance slackens.

Question-: Why can't we just put on record that there is a problem, and then let the whole system respond?

Answer-: It is not the experts who came and told the Court but the Pollution Control Board that came and told the Court that the solution is land fill and incineration. At a particular point of time Mohan came and said that there is a technology of hydrocarbons by which one goes about. It is a noteworthy fact that, even in developed countries, it is not possible as it is a very costly alternative. But the question is how to deal with the waste oil in the country, or else it will go into the sea and spoil the ground water. How do we deal with it? So, in a given situation, we have to balance the two things.

Question-: We have to explain the situation on record.

Answer-: Then who will do it if we don't get a direction from the Court for a certain time frame

Question-: Can we put the issues and complications on record?

Answer-: If, after that, we don't have a solution then what?

Question-: What if we compromise?

Answer-: I am so sorry this is not a compromise because these questions were put to the ministry of Environment as well as to the Central Pollution Control Board, in fact to all Pollution Control Boards. Those are the agencies that give the recommendations. This shows it has to be done. We were there and asked NGOs about an alternative solution and none of them could suggest anything. So now saying that we should not have a land fill or we should not have incineration does not make much sense.

²⁵ Research foundation for Science versus Union of India and Anr 2003 (8) SCALE 118.

The implementation of proper land fills or proper incineration is in the hands of the authorities who are in collusion with the people. That is why I say that people should object to a wrong site for a land fill because it is harming the environment. We can take the example of Bhopal Ankaleshwar where tons of waste material, which was lying on the roadside, was put into a land fill.

T. Mohan

Land fills and incinerators are a departure from environmental law. In a recent order, the Supreme Court said that a failure to implement any of our orders is not limited to a High Court, so everything is not before the Supreme Court. Therefore we have to challenge the chosen site before the Supreme Court. And then we have to wait for the Blue Lady case to conclude before anything else is heard.

NS Kuttiapan

Two basic points need to be highlighted when it comes to the management of hazardous waste. The first thing to do is to subject it to the supervision of the State Pollution Board. When it comes to incineration, it is important to see that waste oil containing PCB, or PAH, should be subjected to a temperature of not less than 1600 degrees celsius. It is claimed that the CPCB and the TNPCB are together investigating a demonstration project where the waste is taken into the cementicle and the temperature ranges somewhere around 1800 degrees celsius. This has been practiced elsewhere as well, as my investigation reveals. They do some cleaning with the diesel and then they put that into the used oil and also repeat the same process with kerosene. As a result of the authority's actions, the waste oil cannot be re-processed because it is refineable. The question is, how many people are doing the re-processing as set out in the 2003 regulations. The incineration part needs to be divided into two—the normal incineration and the other one. There was a CIA, CIDA meeting in Canada which the Ministry of Forest and Environment attended. They discussed that Canada had opted for a centralised waste management system but felt that this was not the solution. On site management has been approved through remediation but bio-remediation is not being talked about in this country. India should learn from the mistakes of other countries.

PA Pouran

Mr. MC Mehta has made history with regard to the environmental rights of citizens. The main issues in this session are the Bhopal Gas case worker compensation, eco funds and compensation.

The Bhopal Gas Case²⁶, which took place nearly twenty-two years ago, still stands pending before the Courts. The main issue is whether the victims have been adequately compensated. Also the criminal trial of Warren Anderson, President of UCC, is still pending. He has yet to be brought to India and tried before a criminal Court. The Administration, the police force and the Indian Government have collectively failed to bring him here. As a result, the case is still pending.

²⁶ Union Carbide Corporation versus Union of India 1989 (1) SCC 674, Union Carbide Corporation versus Union of India and Ors 1989 (3) SCC 38

As far as compensation is concerned, I believe only a capitation has been paid to the victims. The total amount is still being estimated by the SC and the UOI so the victims are yet to receive compensation. According to the Supreme Court, adequate compensation has been given. They have totally ignored the fact that thousands of lives have been lost and many have been rendered useless due to the diseases contracted.

“Industrialise or Perish”, That is the slogan at work.

V. Venkatesan *Journalist, Frontline Magazine, The Hindu Group*



It is rightly said that the Bhopal litigation²⁷ has several dimensions. The two more recent issues are those of compensation and the litigation that is before the Supreme Court. Basically it says that, in terms of the Government's figures in 2007, the number of victims has gone up 5 times after the compensation was fixed. Logically, therefore the compensation should also have gone up 5 times as per the Court's own reasoning. In May 2007, the Supreme Court heard these contentions and rejected them. In the present case, the Court had *prima facie* rejected the petition without even hearing the arguments. It simply advised the aggrieved party to approach the Welfare Commissioner in Bhopal. It is a known fact that the Welfare Commissioner can only be approached if there are individual claims. In this case, the IA sought to open the entire issue of compensation which was fixed in 1989. Invariably there is an assumption by the Government which is endorsed by the Courts. It is said that the compensation of 70 billion US dollars is final and the civil claims stand extinguished. As it has been pointed out by the IA, the Supreme Court had given a window for more claims to be filed by the survivors victims. The 1989 judgement²⁸ clearly states that, “A settlement has been recorded upon material and circumstances which persuaded the Court that it was a just settlement this is not to say that the Court will shut out any important material and compelling circumstances which may enforce upon it the powers of review, as like other institutions this Court is human and fallible”. In another order dated December 27, 1989, the Supreme Court reiterated its earlier order and said that it would be only too glad to consider any aspects that may have been omitted in terms of the settlement. The Court admitted that the compensation paid was meager and inadequate. The problem with this litigation is that the Court does not really believe that the number of victims have risen over the past few years. The Government's reply stated that the facts were wrong mainly because the original award of compensation was not fixed according to the number of victims, or so the IA claimed. The contention, that the entire settlement of 470 million dollars was based on the assumption that there were only 3000 fatal cases and 1, 02,000 injury victims of various degrees, is baseless. The Government claims that the applicant's claim is entirely baseless as these facts were not the basis for fixing the compensation. There were various other claims, but the main claim was that the claim should be increased 5 times, mainly because the Union of India, in its own affidavit dated March 19, 2007, had submitted that the number of people had increased. They had stated that on February 17, 2007 that over 5, 73,000 victims had been duly compensated which

27 *ibid*

28 *Union Carbide Corporation versus Union of India 1989 (1) SCC 674*

includes 5,942 proven dead victims. 10,007 other dead case claims had been converted from death to injury. What is even more upsetting is that this was achieved using a fund meant for 1,05,000 victims.

Since the settlement fund was not augmented from any other source, in 1989 each victim received only one-fifth of their total award. Logic tells us that if the 470 million dollars had been distributed equally among 1,05,000 cases, each would have received a little over Rs 67,000 at the 1989 value of the rupee. However, if the same is divided over 5,73,537 victims, as per the Union of India's own statements, each person received only a little above Rs 12,000 at the 1989 value of the rupee. The basic argument, used in the contention, was that the entire settlement should be multiplied by five, which the Court rejected and instead said it was a matter for the Welfare Commissioner in Bhopal. The Government of India supported the decision and claimed that this had already been covered by an earlier order of 1995, which was a claim for individual victims. But the Court failed to note the distinction between the two.

Another important aspect of the Bhopal litigation is the question of accountability and responsibility for the clean-up of the area. This case shows a major loophole in the fact that the Polluter Pays principle was denied any recognition. Mr. Abhishek Singhvi, Counsel for the chemical company, opened that the company was not liable and this opinion found its place as a PMO document which was shared by the applicant of the Bhopal litigation in a recent RTI litigation. The opinion holds no bearing and no standard. One of the issues that Abhishek Singhvi writes about is whether the chemical company is in charge of the clean-up. The opinion states "No, the SCMC has already ceased this matter" and "the third quarterly report of the SCMC of July 2004 shows that the SCMC in the Apex Court has fully ceased the matter of plant site remediation in Bhopal in respect of Bhopal site". He also referred to the Writ Petition 657/1995 against the import of toxic wastes or the existence of toxic waste sites in India. My point is that if the SCMC has indeed ceased the matter, the question of liability of the chemical company has not been finally concluded and that is a viable ground for not allowing investment in India.

Abhishek Singhvi further states that the chemical company has not been held liable in any manner for any plant site remediation. It has not been held liable because the Madhya Pradesh High Court at Jabalpur has not investigated the matter even though it has given the go-ahead, for the remediation. It has not reached a conclusion but has just postponed a primary issue.

Secondly even the issue of liability of UCC plan for site remediation is at large and has not been conclusively decided by the US Courts where it is still pending. So when a matter is pending how can we conclusively say that the chemical company is not liable.

Sanjay Parikh

They were contaminating the ground water, therefore the Bhopal case also came under that purview. Since the problem of drinking water arose the recommendations here only deal with drinking water. The provision of drinking water was made by way of a tanker as in the case of Ankaleshwar in Gujarat. In these two cases the order from the Court was to set up a pipeline,

but this order has not been complied with. The discussion, before the SCMC, basically revolved around the Polluter Pays Principle. They debated upon whether to permit this to contaminate the ground water or whether to remove it in some contained condition so that the ground water would not be affected. During the course of this discussion many objections were raised and therefore, as far as that part was concerned, it was not argued further. The issue, regarding the removal of waste, was taken up by the Madhya Pradesh High Court. The only issue that remains sidelined is that of the supply of drinking water which was recommended by the SCMC. So what Mr. Singhvi says is totally misleading

Rohit Prajapati *Social Activist, Gujarat*



A joke has been made of the Polluter Pays principle. *Prima facie*, it can well be interpreted as pollute and pay if you can. This bitter truth is backed up by what happened in Bhopal and Gujarat. Turning to the Bhopal Matter²⁹ which is with the Jabalpur High Court³⁰, the judges are dealing with the shifting of waste, which has been grossly understated according to our estimates. The Court, as per the Supreme Court Monitoring Committee's, is dealing with the disposal of 386 tonnes but, according to our estimates, 8000 tonnes of waste is lying scattered around even today and has been

completely disregarded by the Courts. The Courts have constituted a small committee to deal with the disposal of small waste. The Committee recommends dumping the waste in a place in Ankaleshwar. The question of the costs of transportation was repeatedly raised in Court. The Polluter Pays principle has been presented to the Court but the Court has decided that it would be best to deal with it at a later date. Six months later the Court is still not ready to hear the matter because it is not considered a matter of grave concern. Moreover Mr. Abhishek Singhvi has successfully succeeded in maligning the Court by saying that these are anti-development people. He is Counsel for the chemical company and has not come up with a solution but has successfully managed to shift the burden of blame on us. The debate in the High Court is surprisingly centered on the fact that something should be done and not on who will bear the expenses, which is one of the most material issues in this case. Even the Gujarat Government has not dealt with the matter seriously enough. There has been an application by the people of Gujarat and with the pressure there has been a forced departure from the consent given to the Central Pollution Control Board. When this was produced in the Jabalpur High Court, it was shunned stating that one cannot go by press clippings alone. Then we filed an RTI and got a copy of the letter written by the CPCB to the Gujarat Government but still the Court refrained from taking it into consideration and pronounced that an earlier order, which required compliance, had already been given to the Gujarat Government.

I am not a lawyer but I asked the Court to consider the demands of the people. Moreover documents were provided to show that waste could not be dumped in Ankaleshwar as the canning capacity had gone beyond its limit. The Court did not pay heed to this plea. We also raised the issue of how an order could be passed and wanted the Government of Gujarat to file

29 *ibid*

30 *ibid*

a petition. The reality is that the Government of Gujarat is actually not interested at all. They have only made a political point to withdraw. Now the Government of Gujarat is bound, as the MP High Court says, to implement the order. This leads us to the conclusion that the Polluter Pays principle does not execute all chemicals. Similar is the case with Hannah Chemicals. The SCMC has issued detailed directions which include a fine of 17 crores on the company but even today the waste is lying there. There was another Committee appointed and the fine was raised to 75 crores. The people, who have to live on this waste, have been grossly neglected and their compensation has not been dealt with at all. In the case of Hannah Chemicals, out of 250 workers, more than 27 died of chromium toxicity. An MIOH report said that was 1000 times more Chromium in the blood of these workers than there would be in a lay person. The workers are still awaiting justice and the SCMC is saying that it cannot be handled by them. A problem of such magnitude makes it understandable but then no authority is willing to take up the case. One petition was filed in the High Court of Gujarat, where we quoted the judgement of Justice Kirpal and Justice Gokhale which states that an industry, shutting down due to an Industrial Pollution, cannot be closed under the Industrial Disputes Act. Ultimately it means that compensation should be paid to the worker. The outcome of this petition was a two-line order to go to the lower Court and file for recovery. It is the workers who get neglected when it comes to compensation for environmental pollution. It is obvious that when one is talking of hazardous pollution, the first affected victim is the worker. The Court has always misinterpreted it to be a separate matter. Examples of this abound. This gives a blow to the picture of judicial activism that we have today.

One last example of the Gujarat High Court is that in 2001 we discovered that an industry, which began in 1994 after EIA notification, forgot to get the required consent. So, in 2001, while the company was still in operation they sought clearance. The Chairperson considered it to be a mere formality. The Collector had to intervene and stated that all disputes would have to be dealt with in Court. The Chief Justice wanted to know why we were against the industry. I referred him to the petition and added that this industry, which had been running since 1995 was still seeking permission in 2001. He conveniently suggested that it was for the PCB to handle such matters and referred this matter to them. A notice to the Pollution Control Board was issued and, after lengthy, arguments, the matter was dismissed and the Court said that a better opinion would be to approach the Ministry of Environment.

The Ministry, when approached, simply issued a notification saying that the industries that had not applied for clearance, as per the 1994 regulations could do so by 2003 and imposed the condition of a fine. No explanation was given as to who had allowed the industry to carry on with production or what the punishment would be. When we got the notification, we once again approached the Gujarat High Court and again we were dismissed with remarks such as—“you are torturing the Court with your presence”. At the end of a 3-day long argument, the Chief Justice declined the matter and interim leave was not granted. Till date the company is working with a post facto EIA and public hearing.

Most of the time the relief that is granted is vague and philosophical. An example of this is the Hannah Chemicals case i.e., the 70 crore rupee fine which now is 75 crores. Yet the waste is

still lying there. The health of workers is not improving at all and industries are getting all the concessions. Moreover, UPL has filed a number of defamation cases against us.

The workers, or slum dwellers, are not considered. The best working example of this is the case of J. Subsi Baroda. It is a known fact that 50 lakh metric tonnes of hazardous waste material was piled high in the middle of Baroda. When the matter reached the High Court, the question asked was how much compensation was wanted and a settlement was reached. There were no further discussions and we felt compelled to file a case in the Supreme Court. Mr. Salve, who was counsel for J subsidiaries, submitted that we were opposing the Narmada project. The matter was dismissed on those grounds. Justice Kirpal asked us how much compensation had been demanded. We pointed out that a settlement had been reached in that regard but that there should be a cleaning of the waste from the area. No argument was put forward by Mr. Salve regarding the waste. Due to our intervention, SMC made it a point that the waste should be covered.

The Court is usually ready to deal with a compensation claim but not the aspect of cleaning waste.

Mahesh Pandya *Gujarat-based Environmental Activist*



There was a post facto public hearing which came out by a circular dated March 31, 1990. The issue was what is an EIA and what is meant by it. The point is that the impact on the environment needs to be disclosed and approval sought from the public. This is the ideal way to go about these affairs. After the public hearing clearance was not sought. This came under the scrutiny of the Ministry in 1999 and they issued a notification that clearance should be obtained by 2001. Finally March 31 was given as a deadline.

But there was such widespread protest that a post facto public hearing had to be held. In 2001, the Ministry issued a circular the people, who had come for a post facto public hearing, would need to deposit to the Ministry between 0.5 to 2.5 percent for community welfare. There was strong objection to this and a notice was issued saying that it should be deposited with the State Pollution Control Board. After that there was protest over the fact that the upper hand had been given to industries preparing the plan whereas it should have been given to the public. Then there was a petition in the High Court which questioned whether the system was correct because the issues of community and economic development should have been dealt with by the people who had caused the damage. Fortunately, the High Court ordered a stay on the matter. The matter is still pending and a division bench has been constituted to hear the matter.

The other issue that I want to raise is that of the Khargat Canal in Gujarat³¹. This canal has been constructed basically for irrigational purposes. Professor PJ Patel obtained a landmark judgement in this case in the High Court. The case, that was filed, included common affluent treatment plants and land fill sites. The judgement kept in mind 3 committees namely—Nema,

31 Pravinbhai Jashbhai Patel versus State of Gujarat and ors (1995) 2 GLR 1210

Bhanjan and Modi. The judgement proclaimed the damage already done, but the special part of this judgement was that the rule of the thumb was adumbrated. The rule said that 1 percent of the capital investment had to be deposited in order to take environmental measures and accordingly around 16 crore rupees had to be deposited with the State Government.

The matter was taken by the industry to the Supreme Court³². Their main issue was that they believed they were not responsible for the mess and therefore they should not be made to pay for it. The Court felt that, for future purposes, the thumb rule should not be taken as absolute for all circumstances and that the actual damage had to be assessed. The Supreme Court has erred in saying this about the present case. They considered that the damage assessment needs to be done for the present case and therefore there needs to be a review.

The main problem we had with the entire deal was that the damage had been done 20 years ago and it was difficult to assess the extent that damage. At the end of the judgement they said that the matter would be left to the High Court's discretion. This creates a contradiction. On the one hand they say it needs to be a case-by-case basis and on the other hand they say that the High Court's decision is final. A better option would have been to file a review petition on the matter.

The third issue is on carbon credit and LPV value. If one cuts the number of jungles and pays a small amount of the LPV value, along with the act of growing the plantation as per the Ministry's rule of green build, then one is entitled for carbon credit from the EUNCCC. So the pollution that you cause initially is incurred by society and later if trees are grown then carbon credits can be obtained. This entire procedure seems rather odd and unfair.

My concern is regarding the case that is pending before the High Court of Gujarat. This case is about the industries that are claiming reimbursement of the amount that has been deposited on the grounds that the Committee of Experts, appointed by the High Court, has been unable to conclusively ascertain the defaulter.

Now pursuant to the Supreme Court judgement, in the Tanneries matter, they have refused to zero in on the particular industries that have caused the damage. They have spoken about the damage caused to agricultural workers and the cost of remediation. They have then applied this figure *pro rata* to the industries based on the consented capacity of that industry coupled with the number of years they have stayed in production. This is a rough method of calculation. For example in the case of Truppur, compensation, for the farmers affected downstream, had been estimated at 40 rupees a hectare per year, which is ridiculous.

V. Venkatesan

There are some activists who are not happy with the settlement on the grounds that it is unfair. The issues have come up many times, but the judiciary does not pay heed. The argument, that was put forward in Court, was that if a thumb rule had been applied in the CETP case regarding land fills, then why had that rule not been applied in this case too. The Court in the CETP case, considers that there was a crisis that needed an immediate solution.

³² Deepak Nitrite Ltd. *versus* State of Gujarat and Ors, 2004 (6) SCC 402

Ranjan Solomon *Director, Alternatives, Goa & Equations, Bangalore*



There is a sense of frustration with the Judiciary. On the one hand, we have given up all hope that the Judiciary will actually support any struggle for justice and on the other there is a belief that the struggle to convert the Judiciary is not a lost cause. It is clear that we need to mobilise people in the struggle for justice. The people, who move here, should be vibrant and should be invigorated with passion. The fact is that it is the people's voice that should be heard in the Courts.

Praful Bidwai *Journalist, Political Analyst & Activist*



What I think has come up as one of the biggest issues of contention is the confrontation between the people's movement in defence of their fundamental rights and their livelihood on the other hand and the powerful forces of industry trade and enterprise on the other. The course of this confrontation is going to determine how destructive the force of future industrialisation is going to be. To what extent is society going to summon up the will to fight for the rights of the underprivileged and to what extent is the elite going to be shamed into providing some token measure of compensation for the destruction that is being caused. There are a number of issues.

The first issue is that of the Special Economic Zones (SEZ). There are already 195 SEZs that have been notified and have been or are being constructed. A rough calculation reveals that 71 percent of these zones are placed in 50 out of a grand total of 600 districts. It is estimated that one SEZ is about 600 hectares and is located mostly in the highly urbanised and highly literate states like Maharashtra, Karnataka and Gujarat. If the urban, and suburban ratio, is scrutinised then it is seen that it is above 10,000. In Bombay itself it is 30,000 people per hectare. Even in city centres like Indore a population density of 100,000 persons per kilometer has been recorded. So the number of people that will be displaced, according to the Governments own figures, will be close to 10 or 20 lakh.

The Government claims that they have taken this into account and that, parallel to those considerations, they have provided jobs for many of the displaced. However, on scrutiny, it is only a meager 59,000 compared to the number of people being displaced. So the ratio is 59,000:10,000,00. It is therefore easy to see why there are huge land grab operations happening in these areas. In short, the whole thing is a scam.

An example of this kind of activity is the huge project in Nagpur called the Multi-Modal International Hub Airport. It is referred to as Mihaan. To complement this there is a Mihaan colony and a Mihaan Nagar in the vicinity. This plan for the SEZ consists of a huge airport with a runway which is rumored to be the longest airstrip in the world at around 4 kilometers. The whole project is estimated to be a total of 5,800 hectares. The assumption behind this is that Nagpur could become a hub as it is in the center of India, that is, at the zero mile where the latitudinal and the longitudinal enters coincide. The Civil Aviation Ministry is trying to follow

the civil aviation model, called the Hub, which is known to be functioning in countries like the US, but has never been used in India. The Ministry has decided that Nagpur will be a hub and therefore its capacity needs to be increased. At the moment Nagpur handles around 60,000 passengers each month. The Ministry proposes that this be increased to 1.2 million a month; increase by least 2-3 times. The entire population of Nagpur would not be more than that of 2 million so to make such claims would be to indulge in fantasy.

This project involves the issue of land grabbing through compulsory acquisition under the Land Acquisition Act of 1894, where land is being sold at 1-2 lakh an acre. There are 13 villages of which 5 are within the corporation limits of Nagpur and are ripe for these developmental projects. Shopping malls, arcades, hotels and highways are being constructed. Land prices are Rs 2.4 crores per acre.

I have recorded a sales deal between the Bombay High Court and a Nagpur Bench Judge. The sales deed for his ancestral home prompted him and his brother to sell it for a whopping 2.55 crores after it was exempted from the project. That is how the Judiciary is functioning. A petition needs to be filed with the Court highlighting this example into Court because it is right in the centre of the whole project and the possibility of making runways and landing planes seems somewhat odd. Since this judge is very powerful and influential, his property has been exempted. People, in Chirungaon which is right at the center of this acquisition area, have been on hunger strike everyday for the past eight months as a protest against the project. There has been no response from the Government although they have not proceeded with the actual acquisition of land, but, if and when it happens, there is going to be blood shed. Ground zero reality is somewhat different. One cannot force a village—which is 95 percent literate, which has a history of involvement in the freedom struggle and a history of activism—to just give up. They know what is happening.

So this is the kind of confrontation that one is going to witness between the excessively dispossessing forms of new age capitalism. This form of capitalism has not been witnessed except during the Industrial Revolution in England when land, cultivated for years by peasants, has grabbed. There was consolidation of land monopolies and brutalisation. We see the same 350 years on in a state which is neither feudal nor backward, with no pretense of democracy and with no pretense to constitutional order. This matter needs to be resolved.

This assertion is of fundamental importance and, in many ways, different from what has been seen in the past. The Narmada issue was the bridge between the two. There was the earlier model—development for say irrigation projects and power projects. In the 50s and 60s these alone were responsible for displacing 38 million people which is exactly what happened in Germany, which happens to be the largest country in Europe today. This is a process of great ferocity, but what is seen now involves a greater measure of violation of people's rights. So whether it is mining, or it is SEZs, or industries, or hydroelectricity projects in the North East, or SEZs, it needs to be stopped. A good example is that of Vedanta University which was set up by Anil Agarawal of BALCO and Sterlite and was chased out of Goa by Claude Alvares and his colleagues. Mr. Agarawal, as many will know, has very bad ethics. The Norwegian

Government recently withdrew its pension funds from investing in Vedanta, as one of the main shares within the portfolio, on ethical and environmental grounds. So a University is being built with a cost benefit from the people of Orissa and 6,000 hectares of land directly off the Marine Drive coast. This coast also has a very posh hotel and is a large tourist area. An airport will be built, as will a new railway line, that will be dedicated to the University so it becomes a world class university with students from all over the world. The land is also being given almost free of cost and the rest has been bought at ridiculously low prices. It is imperative to devise a strategy of moulding the organisational, moral and political considerations of these struggles. In defense of fundamental rights, it is important to generate the kind of pressure that we need to put on society, on the media, on the Government and the Judiciary. I think it is very hard. There is much hostility towards the poor and the underprivileged. In fact a very recent judgement says that an employer is perfectly within his rights to retire as employee. There seems to be no scope for Judicial intervention in this matter. These matters are left to the role discretion of the employer. This is another nail in the coffin of labor rights.

It is going to be very difficult to influence the Judiciary directly and can only be done by taking up the process of litigation. It will also be problematic to find a sympathetic media. I have collected material on some of the scandals taking place in Chhattisgarh. One example is that of a man who has been in jail since May under the Chattisgarh Special Security Act. This Act denies you bail for a year. This man has had ludicrous charges framed against him—which involves conspiracy to overthrow the state and waging war against the Union of India—for which there is not even an ounce of evidence. The People's Union Civil Liberties office (PUCL) bearer's job is to meet prisoners of conscience to make sure that their human rights are not violated. The fact that he met up with a person charged with being the head of a Maoist outfit a number of times in the presence of the jailor is evidence of the fact that he is a Naxalite sympathiser. I have been there and spoken with him in that very jail. One can convincingly say that there is no way that anything can be said to Vinayak without it being cover dropped upon by policemen.

Praveen Sabnis

I am a trainer by profession and conduct programs for teachers and students.

When I got associated with the Goa Bachao Abhigyan, I started believing in another quote “Bada hua to kya hua, jaisay Paidh Khajoor, panhti ko chaya nahin phool nahin lagay athiroop” which means “What use is growth if it is like that of a tall dead tree, which can neither be plucked and eaten and not can it offer shade or respite to a number”. This is what is being done from the development angle in Goa. This prompted the Goa Bachao Abhigyan group to study what was happening in the name of development.

A draft plan was made in 2005. Objections were raised and a final plan was presented in 2006. There was a difference of at least 750 crore kilometers of land being converted from the draft to the new plan by way of destroying the natural resources of Goa. Another example is that of the Tata Housing Plan. This plan not only violates forests but is also in gross violation of the Planning Authority's orders that houses cannot be built on the slopes which are greater than

the one described. There has been a lot of illegal housing of this kind. In this particular case, one could see what it meant. Even though Goa is a small place that has comparatively lower property rates than that of other states, there has been a 20-30 times escalation in property rates even here. Goa Bachao Abhiyaan highlighted the problems that would be caused if the regional plan was undertaken because various hills or slopes had many settlement areas, which brings us to the last case.

“ALDE DI GOA” is the Portuguese term for the villages of Goa. This was a project that destroyed many villages of Goa, in particular its one at Banguli. This project started in the early 90s and went through many phases. In the later stages, the project became high profile. The violations began when the price of bungalows rose to as much as 2 crores. This marked the beginning of the film stars, politicians and cricketers becoming the owners of these bungalows. This marked the beginning of the problem. Hills were being cut without permission.

In one case there was a file, of Town and Country Planning Authority, in which an earlier project had been approved. Some changes were required in this particular project. On the very same day files with two separate plans were approved. One file was obtained through an RTI. As soon as this happened the files disappeared from the Town and Country Planning Department and a complaint was lodged at the police station. Subsequently, this complaint was withdrawn. This is now a big Court case. They have argued that, the people who have complained, have forged the documents for the Right to Information. They have completely changed the direction of the Court's thinking. The Court is now engaged in trying to identify which of the two files is authentic, rather than deal with the issue of the petition.

In terms of the data that is available—Google images, environmentalists and journalist information database, it is very clear that the cutting of hills has taken place without permission. The area also encroaches upon tribal areas. Another intention of the plan is a four-fold increase in the national sanctuary i.e., the mining and wildlife sanctuaries. There are still some places that have illegal mining sites. This is a clear violation of the Town and Planning Act and of the 73rd Amendment, Mangrove Regulations (as these areas were being treated as a settlement) and CRZ Regulations.

There is a Communitade Court in Goa which basically deals with matters of land. The law is very clear about land not being transferred for non-agricultural purposes. The Government acquires land supposedly for public purposes but then sells it to private developers. It is clear that private parties go hand-in-hand with the administrators of the Communitade Court and are in effect, partners in crime. The Wildlife Protection Act has been violated since mining areas are not shown on the map. After an intense campaign this plan has been de-notified. The amount of public support was unbelievable and the de-notification order was the result of the fact that it was prior to the elections. Subsequently another task force was set up and there is a process to create the next plan.

An industrial scam took place in an area called “Bethun”. There was a proposal for a footpath which was identified as not being in an industrial area. This project area, at that time, was sold in the UK and the project became a proposal for the SEZ.

Another violation is that of the Hotel Marriott Resort. The approval was given on the basis, that it was located on the banks of the river. However, it did not get permission as it did not have the proper access. This project was given a go-ahead by the Town and Country Management on the condition that a 20-metre road be built in the river. It is said that, since the hotel has come about, there are 2 eight-storied monstrosities that have made the road narrow and literally non-existent.

The same exercise is being tried out in Panjim. There is a road that has been created on the beach front with a view to control and regulate the traffic. However, on further scrutiny, it was realised that the construction of a road could well rule out the option of CRZ regulations which are operational between the water and the settlement area. So this road was already built and there has been a lot of construction as can be seen in the first image.

The Salesbidhyuji Manch was a people's collective movement from Keri. This was associated with the nylon 65 plant. People there feel that an amusement park or a garden will be detrimental to them. That was the first notified SEZ on the April 10; the second one was notified on the June 10; and the third one was not notified at all before its release in "Kherna". This happened without notification. Elections were underway and we were trying to create awareness. Initially only a few people attended but later the support grew. Everybody came to understand that what was being done was not anti-national. It was to create a country within the country.

In Goa only 35 percent of the SEZs were put into industrial activity which meant that 65 percent could be used to make residential complexes at 150 percent.

It was very interesting to note that the political formation that was created came to involve the BJP, during whose tenure the state SEZ policy was finalised. They also opposed the SEZs for their own convenience. They failed to realise that the SEZ Virodhi Manch was born on the day of their formation. The rationale behind its formation was very simple. These villages had already campaigned these SEZs under different names and the Virodhi Manch merely connected with them. One slogan that came out was "Amkanaka SEZ (we do not want SEZs) engukini, amkagyain PEZ" (People's Environment Zones) which was an embodiment of what we wanted.

I would like to present to you a clip that is representative of the kind of audio-visual images that were being shown by the GBA against the regional plan, which went on to be a big hit in the entire movement. This clip is symbolic of Goa being a beautiful deer that can run very fast and this includes the activists and the villagers of the place. It goes on to show the wild cats which range from the Government, to the Judiciary to the private players hunting down this beautiful deer.

We are meant to pick up and outrun the Government and others. We keep engaging with the Panchayats. We got members of the Panchayats to become a part of the committee that has been staging protests. Villages, like Kedi, have shown active participation in this movement. The people of this village have trusted us only because we are politically neutral.

Medha Patkar *Founder, Narmada Bachao Andolan*



It is clear today that when we talk of the role of the Judiciary it cannot be done in isolation without talking about the Executive and the Legislative. Development planning is pro-centralisation pro-corporatisation, pro-commercialisation and pro-marketisation. This brings into its purview all resources—both natural and human. With the changed face of the state, people's views their rights and resources are both marginalised and peripherised. When that happens people will hold onto whatever little space is available, or hold onto larger constitutional goals and values, or go

beyond constitutional value to human rights and human values. This whole positioning to that of *People v State*.

The role of the Judiciary comes to be an important one. I am not saying that say that the state should wither away after the revolutionary phase of the movement comes into power. This is in reference to Nepal and not India. We have been knocking at the doors of the Judiciary demanding justice. We assert justice in the context of the natural environment of human beings living beings, and the claims of the people and of the judiciary. To take an example, people say that they have been staying in a place for generations with the resources which have been a part and parcel of their life and are a part of their livelihood. It should be a source market based economy and this happens mainly from the Adivasi areas to the peripherised dalit communities and then trickles down to the rural areas in the plains which have been claimed by hill terrain people. This includes everyone, from the Adivasi to the fish workers, including the communities of farmers, labourers and artisans. So the people really are asserting their right to land, air, water, forests, surface and ground water too.

Since these communities have lived with these resources for generations, the forests remain in the areas where these Adivasis are located. They have not even sold out the river or polluted it. The Narmada is flowing unpolluted to date. This small community of industrious people are contributing to the value-added process of the land, water, forests etc. They make a choice of technology and of life style which are inter-related. So when these people are asserting their rights what should be our position? Are we granting to the communities all their rights? There needs to be a change in opinion and we must debate this issue before we go and knock on the doors of the Judiciary.

Since Independence the Constitution has been referring to village republics, but it was only in 1992 that the 73rd amendment was passed. The smallest communities, which are the Gram Sabhas and not the Panchayats, have the first right to the planning of those resources. Without the Gram Sabhas' planning, the rural part of the District Development Plan cannot be finalised. Similarly, in the metropolitan areas, the plan must come out first without which any five-year plan or district-level plan would not be complete. Yet this is not happening. Montek Singh Alhwalia wrote a letter to the Chief Secretary requesting him to send all Gram Sabha Plans as early as possible, so that the 11th five-year plan could be concluded. This was eventually concluded either without the plans or by using fake plans. It is imperative to file an RTI to find

out what kind of plans were sent. For example, whether they included the Special Exploitation Zones; whether they saw the clear felling of forests as necessary; whether the building of large dams on the river (which leads to the dividing of the river into upstream or downstream and catchment and command) would enable riverine communities to use the water and land resources of the whole river valley. It will only be applied as criteria of what the people have been asserting i.e., rights not only to forests but also land and water. The right to forests is not something granted by the State. They have done it with a view that the forests be privatised first in favor of the people and then commercialised in favor of the other private interests. This view, however, carries a grave risk. This is not easily possible under the present Act but we know that the new laws, that are outside the constitutional framework of values as well as processes, are being seized. It is not only the foreign territories that are coming up but all those enclaves will take over or or destroy the communities and the natural resources within. One kind of manufacturing will be supplanted by another kind of manufacturing because the SEZ Act includes agriculture, pisciculture, horticulture as well as other kinds of manufacturing. This can well be seen in the case of Kakinada, or in the Raigarh district of Maharashtra, or Andhra Pradesh, or Nandi gram in West Bengal. Evicting communities, or turning slums from horizontal communities to vertical communities (so that land is available to the so-called real estate developers) is something that is happening in a very strong force of the money market and the corporate power.

Resistance is about the right to resources and rehabilitation. The State is not responding. Rather the Court is responding to the case of SEZ. It is legitimate because it is legally approved. The procedure of approval is the first step of planning which should well be subjected to questioning from the point of view of centralisation its impact. The State, through whatever fake agency it is creating which is the board of approval for the SEZ, has looked into as many as 700 proposals and has approved more than 500 proposals to notify more than 150 proposals. The Board of Approval, which includes the Secretaries of Ministries, will look into the 5-page proposal, which will provides no proof for the claims, be they of employment (direct or indirect), or of compensatory measures. Everything finally comes down to the different sanctioning and planning authorities and what have they done. The quasi-judicial authorities and powers also give a verdict after the public hearing. When the PCB-led panel, or the CWC, or the CEC, gives a judgement, all these various committees invariably come under the same Ministry. So these authorities are not just weakened but are also made to give false judgements. They accept false data and provide false affidavits before the Court at various levels. This is a matter of serious concern because, without those, the Judiciary does not have the necessary resource base, human resources and infrastructure. Nor does it have the judicial or political will to investigate everything in detail. So, in a way, these agencies are confusing or misleading the Courts. It is imperative that we work on each of the agencies so that we can come to a resolution. Questioning or challenging through whatever means—like pen and paper research, documentation, internet or questioning the agency—has become a must and hence our coming together can show a way. Goa provides an example of the handling of the agencies of the State. However, there are other examples of the clear bullying of people's voice by the Government or corporate forces. Nandigram experienced the same in a much worse manner with the Bajrang

Dal and I do not wish to compare WB with Gujarat. This is because the Sena has resorted to the molestation and rape of tons of women which feels is justified.

Has documentation from the planning and sanctioning authorities right upto the Judiciary, helped? Should people resort to violence as a measure of self defence? Therefore whatever comes up, voluntarily or even after some planning, has to be in a certain framework and has to be based on long-term value. Vigil and violence per se will not help in the long run. Friends from Nepal say that compulsion alone can bring in transformation.

Is the Judiciary making biased decisions. The class bias is ultimately converted into a development bias, defining progress and development only from the one angle which is transparent and *prima facie*. Corporate interests plan development and educational policy. The JNURM's planning measures have not been fully assessed and the Judiciary does not feel the need to assess anything. Most of the judges are for development and they do not need to define anything. This is what we experienced in Narmada as well. At the same time there is much that has been achieved outside the Courts. Invariably we have asked the Court to reiterate that social and environmental measures be taken. The Sardar Sarovar Dam was stalled for one year because the corruption was exposed—the whole escalation of 15 times the original cost. The environmental impact assessment has gone wrong in a major way and the repercussions have been many. Compensation measures are based on faulty corruption-based documentation. We are now planning a status report which shows the trends. Gujarat activists on several environmental and social grounds and not just Sardar Sarovar. These *post facto* exercises have become an utmost necessity, which would expose the claims of development and the whole basic framework.

It is a known fact that there is no EIA carried out by the Planning Commission, except through the World Commission of Dams. So it is essential that these exercises form part of the larger resistance strategy mix. It is also clear that the Court is giving up some SOPs like rehabilitation and environmental impact management, which sometimes kills the implementation of whatever the Court has suggested. An example is that of compensatory afforestation. The gattas that are dug, the rate of survival, the species planted and the community and the species relationship must be closely supervised. So it is essential that with or without the Forest Rights Act, ground level mechanisms are created so that mass movements, such as that of the displacement issue, come together on these aspects. Otherwise it would be difficult to implement most Judgements. The Judiciary gross violation of laws such as in the case of the Vasant Kunj shopping mall.

It is very clear that resistance needs a micro-to-macro strategy of which we should all be a part. We should also have alternatives for the Court as the theme has a judicial process. Yesterday we were part of a Judicial Accountability Convention and someone commented that the People's Tribunal and the People's Commission are something that we all resort to. We find that the values of these reports is also diminishing. The Court does not give them any importance.

Going beyond that, the Court sometimes appoints commissions which enhance the para of the Court. People can also resort to it. They are merely seeking to make themselves omnipotent before taking a decision. Will Sectoral Courts function as quasi-judicial authorities? Green

Courts are one example, water Courts and land Courts etc are another. Justice Verma is known to have said that—"I had gone to that case to see when the 'Maalik' was arguing on one side and the 'Majdoor' was arguing on the other side and I found that the 'Majdoors' were right". Hearings by secondary authorities are not helping. It is time to question the whole procedure and *modus operandi* of the judiciary. It is very clear that respondents have no value as far as the Judiciary is concerned. Our 'Adivasis' have always asked why they had to fight there. The third organ of the State should intervene in the case of a conflict between the state and the people or in a case of communal riots, but that is not happening. So what alternative strategies do we have. Beyond the People's Tribunals and People's Commissions can we really have a solid group of lawyers that can show how lacking the judgements have been? There should be a body of lawyers armed to take this kind of action, but this is also not happening. Actually in most of the Courts legal aid is almost defunct. Also the Lok Adalats hardly work. So we should need to think of some revolutionary and immediate changes that can be brought about in the judicial set up. The imperative question, which needs addressing, is how struggle on the one hand and reconstruction on the other can be weaved together.

All this is happening to the fishing and organic farming communities. We should streamline our efforts with these community efforts and organise them into a single body. This is a matter of utmost concern as people are often killed in the name of caste, religion, development or are just peripheralised to politicians.

The resistance of that level is still very weak. There are those of us who cannot give that much time, value the work, or question the ability of all these forces because their intervention on the issue of water policies are not edging towards privatisation. Even the SEZs came up as a US-India common agenda in which Ratan Tata and Montek Singh Alhwalia are holding their positions. JNURM, and other development planning, has had several negative consequences like the death of several fishermen and the privatisation of airports. It is important to obtain information about these corporatists and money lenders. That strategy is also part of the resistance. It is necessary that, along with these strong mass movements, all these activities take the form of a movement.

Colin Gonsalves

Zack Yakub is a judge of the Constitutional Court of South Africa. He is also a criminal lawyer and used to defend members of the ANC. As a senior lawyer he has also been accused of conspiring to overthrow the State of South Africa. Ultimately the other party came to power and he was made a judge of the Constitutional Court.

We brought him to India and he went to 250 remote parts of the country. At the end of the visit, I asked him what he had observed. He remarked that India was a strange country as it has witnessed every conceivable movement that you can think of. It also has the best NGOs and practicing lawyers the world has ever seen, but the act has not been pulled together. The simple reason, that was pointed out by the learned judge, was the fact that there was no political party. Environmentalists talk environment; housing rights people talk housing; minority rights people talk minority rights; no one talks politics. He says that he does not see how they will

come together if there is no single movement. I think, with the way things are deteriorating in this country, we cannot afford to do this anymore. It's not as if in environment, the lawyers are going to come forward and put forward a perspective. We have been through three conferences on different human rights issues and the writing is on the wall. It is very clear that the mood is so tightly against us. They are going to take away your land, your resources, your water and there is nothing that can be done about it. We are doing a holding operation, which is entirely defensive in nature as the sword of justice has been taken away from us and only the shield remains to ward away the arrows. And if that is so then we need to think in a slightly wider manner.

The principle political force—representing the poor, the landless, and the resource dispossessed—is that of the Naxalites. There is the work of trade union and NGOs. So when you talk about resistance, you have to face two kinds of realities. One is that we don't have a choice and we cannot remain groups. The second is that we cannot avoid violence. Resistance is bound to be violent. The period has gone for those dreams. Although we will do what we can with the People's Tribunal we cannot ignore the fact that the use of violence is critical.

Raju Mimi *Journalist & Activist, Arunachal Pradesh*



The situation is complicated especially in Arunachal Pradesh. This is because the Prime Minister has recently given the green light for the installation of a 30,000 MW project. The Government says that it is part of national policy and therefore the message, that is being sent at the local level, is that any movement against the project is an anti-national movement. Therefore things are becoming a bit tough. The second point is that, especially in Arunachal Pradesh, the entire opinion is shaped up by political parties because Arunachal is entirely dependent on central funds. Therefore the general opinion is formed by the political party in power and the common people are dependent on political parties, especially the ruling parties. The situation has become so complicated that the local MLA, despite knowing that such large scale dams are really harmful for the people, have not started the agitation for the public. Political leaders are compelled to support large projects. Even when the Congress was ruling the State, during the INC meeting, the point made was, that the person going against the project, will be held responsible and his future political career will be at risk. This is the clear statement that the political party gives. So whoever rises up against the project is locked up in prison. About six months ago, an organisation started a movement where all activists were put behind bars in the area near the Devang Multipurpose Project. This is the largest multipurpose dam to be built in India and the protest in that area has not reached the Courts. That is basically because the people are lacking in awareness, and after coming here I can see that environmental law is a total failure in this state. The IPT, that was conducted (the public hearing in Itanagar), has been a failure. Even activists, like the NBA, have failed so ultimately, that compared to this even the history of the North East in armed rebellion has been more successful. Movements such as the Naga insurgency movement and the Bodo insurgency movement, have been successful and because of this the Centre is actually listening. It is unlike the case in Narmada, because the media has easy access

to Narmada and because of people like Medha Ji and the majority of the population is there. The situation is completely different in the case of the North East as the population is negligible.

Recently, I visited Shillong, where one of the members of the Planning Commission was present and his statement was that, in Arunachal, dams are to be built and it is the future powerhouse of our country. There is negligible impact on the population. This statement shows that policy planners in Delhi are not aware of the situation. I wanted to take this opportunity to make you aware of the very critical and confusing situation that is prevailing there.

Arunachal has 80 percent land which is under forest cover; therefore the question is where the deforestation will take place. It is a very serious situation. Another very serious issue is that of China claiming Arunachal. So, at a local level, we are arguing that the Government of India can well just show off to China. Recently they have announced 100 power projects. They have also announced the construction of 1,080 kilometers of trans-highway in the districts of Arunachal. The local people see it as a kind of a business venture to facilitate the movement of goods through Arunachal because there are so many dams. Whatever development institutes are created are part of regional policy. But they have not cared to take the opinion or consent of the local people and the Government of India's policy is not geared towards the larger interest of the people. The Government only wants to tell China about the great infrastructure development measures that have been taken in the country.

Medha Patkar

The time has come for the wider mobilisation in which judgements can be challenged as in the Polavaram Case. In SHRC we pleaded against the SEZ in Kakinada and we got the judgement. The SHRC and the NRC judgements have not been given much importance. It's not just that there is a lack of detail but it is also a political measure.

Gopal Krishna

One Problem is that of linguistic corruption which is present both in the Judiciary and in policy-making matters. I quote—"When you destroy something man-made and replace it we are called vandals and when we destroy something irreplaceable and made by god, we are called developers". We are facing a situation where waste is being defined as non-waste; forests as non-forests; and rivers as non-rivers. Some people, who have always been on the wrong side of the environment, are actually called environmentalists. One example is that of Mr. RK Pachauri who is a well-known supporter of the interlinking of rivers.

When we talk about public interest it is interpreted as something else in the context of what Colin was saying about violence. Sanjay Baru, author of *The Strategic Consequences of India as an Economic Power*, says that the political economy is actually being run under the national security system. It becomes apparent that it is not human security, it is national security. This is why any act, which seeks to oppose a government project or proposals is considered to be against that national security. This is because there is a conflict between national and human security and this linguistic issue also has to be addressed in some way.

Colin Gonsalves

I just wanted to say something in clarification: I did not mean to join an existing political party. What I mean is that there is much stagnation in our thinking politically, namely because of the dearth in man-power and resources. People are bitter and angry over lathi charges, closing down of factories, denying of wages. Are we even thinking of an adequate political response to whatever is against us?

We will go from this seminar and we will make our compilation and present it to the Judiciary. The point is when so much violence and so many resources are being taken away in a political fashion it is not happening ad hoc. As institutions—the Judiciary, Executive and Legislature—are taking away vital resources. The response to all this is that we need more IPTs, more publications, more training. Why is it that NGOs have not dealt with this issue? Can we avoid violence? The only political movement of the poor is that of resorting to violence. An arms struggle is going to recover the resources. It is a successful political tendency. Although I do not endorse this view, but it is more than obvious that this is a response to state repression. We just need to look around us. Maoists attack and are killed. It is like a vicious cycle. It is a political tendency, the struggle over resources. They represent the poor. We have to confront it in some way and there is an urgent need to find a way to address this.

The IRA was an arms struggle movement which ultimately overthrow Shinn Fein and it became impossible for the UK Government to crush them. So in a way there was a political dialogue and there is peace in Northern Ireland. Politically, we are in the 80s in terms of our thinking.

Consider the Naxalite movement. The Government says it will never finally be able to defeat the Naxalities and a better policy would be that of negotiation. That's when you will get your rights back and that's when the Judiciary will get back on track.

Do environmentalists, trade unionists, criminal lawyers, right to education groups want to become a part of it or are we happy to carry on for another 10 years with nothing done. Then again there will be another meeting held and yet another discussion will take place and the world will eventually pass us by. Why are we not confident as lawyers? When I went to Kashmir, they said Mr. Gonsalves we do not want your type.

We are not advocating violence. Should people choose to use armed rebellion, as a weapon against the state and POSCO, it must be entirely within the constitutional framework of self-defense.

Sanjay Parikh

If the Maoists or Naxalites are charged and put in jail, we will appear for them. It is well known that we have appeared for a number of them. The first case was in Manipur where people were called anti-national; a charge that was proved wrong. It is a dangerous to talk about the Gandhian way on the one hand and violence on the other. The problem may be that of the means which used.

Praveen Sabnis

Villages are leading the way in these movements. They know how to do it and they do not believe in violence. In Goa, and elsewhere, I have seen there can be solidarity. We can get people to participate in the Gram Sabha emphasising their right to safety. The question is who supports this violence. So let the people decide. I would advocate, what I call, militant non-violence.

Commodore Sinha



The thing is that we have not exhausted Satyagraha. The fault here lies solely with the middle class. Has the middle class ever been ready to rub shoulders with the masses? There are some who are ready to take up these measures but there are many who are not. Now when the Government breaks the Constitution then we too can break the law and this has been shown by Mahatma Gandhi. Until we exhaust this method we cannot take up arms. I am an ex-army man and I am prepared to take up arms if I find the Government doing unlawful things.

But yet I think we have not exhausted it. The problem is that the middle class has not joined the struggle. Now we are drafting a water policy for the nation because the Government has done nothing about it for the last 5-6 years. So we have at least started it. If we cannot handle the situation, we will move out. Either we can form a green party or something like that, but certainly we can take our efforts to the streets and apply pressure.

Prof. Desarda *based in Aurangabad*



Even in the case of Palestine and Israel it has been put forward that the law has never been enough. There is a lot of stuff that is unconstitutional and to find this out we have the PIL which has been almost exhausted by us. The other thing we have is the “chetna” of people. This is a fact that we have tried to work on repeatedly for the sake of the state and its institutions. I think that if, in the case of Gandhi, so much salt was gained and the whole world was shaken by the achievement, why can we not use the same weapon on the current government. This way we are destined to success.

Ranjan Solomon

Would apartheid have still been existent in the absence of an armed struggle in South Africa? I think the answer is yes! The Palestinians would have been crushed out of existence had they not fought for survival. So I think this whole thing of violence is completely contextual and one has to look at how victims are responding to the situation. Then there is the question of solidarity. I think it is quite black and white.

Simpreet Singh *Activist, Janhit Manch*



The issues of people's rights, the assault on resources and the environment, have been taken up. So how does one question and challenge these resources? The Mihaan example shows how this assault is escalating. In Mihaan thousands of acres of land was taken away. An example is that of the judge of the High Court who has been able to get several times more for a piece of land than what the farmers are being paid. It clearly shows what we are to witness today. But it is unprecedented to the extent that, today, there is not a single case or exception to be witnessed anywhere. The

hardcore reality is that this is happening everywhere in the name of the Special Economic Zones. Another example is that of the 100 or so dams in the North East and the mining projects in Jharkhand and Chattisgarh. This is something that needs our urgent and grave attention and it has to be challenged. There are people leaving their political parties be it the left front, the BJP or the Congress. It is only the non-political formations—be it the people's movements, NGOs, or Alliances—that can save us and take position in our favor. So how does one offer resistance? It is said that rather than thinking of highways, the need is to go into the by-lanes of resistance. One can have new strategies of resistance measures.

In the case of the Planning Commission, the movement needs to be from the local Courts to the Supreme Court. The participation of people is very important.

Activist from Jharkhand

Ever since Jharkhand became a separate entity from Bihar, there has been a long list of MNCs. The state of Jharkhand is a mineral waste land. There have been 64 MUs which encompass MUs of Iron and Steel plants worth 52 million tonnes, for 28,000 MW of power. There has been a 12 million ton MU of Bauxite and there is a proposal of 5 dams. All the historical places, that are present in the state, have been given as lease to three Big World Banks for the purpose of Priyaktak. There are three projects for coal mining and, after the separation from Bihar, a lease in a Santhal Paragana which has been undertaken without the permission of the Jharkhand Government and this has clearly gone against the law that has been set up for the Santhal Paraganas. The law and the judgement have been clearly violated. There are so many people's movements in Jharkhand but the law is nowhere to be seen. One of our efforts is to make these movements reach the Courts. The nature of our movement there is scattered in the sense that there are movements in different areas. These resistance movements are directed against the steel plant, against the dam and power generation and against all the industries that have been established in the name of globalisation and progress. They have polluted the environment and the main Damodar river. No tribunal has been set up for it and yet this has been done for Yamuna and a few other rivers. There are many people's movements but they are dying out as there no action has been taken against them and there is no Court to adjudicate the matter. We want to ensure that there is confluence of the people's movements and the Courts. This is our main concern and we are trying to work out an approach.

Medha Patkar

What is happening in Chattisgarh, and in other states, is a matter of grave concern. One has to strategically define politics. There are examples throughout history and across the world and I think the time has come to evolve radical alternatives. Essentially radical does not connote with what was meant by the term during the Azadi period, i.e. jahal and mawal or naram and garam. We have to have a multiple front but still remain allied. We must remain a part of the movement and be involved. Fifty Adivasi organisations have come here today. One cannot reach every aspect of the struggle and taking these activities to only be a part of the resistance is not the best option. I am suggesting that all these peripheral exercises be made part and parcel of the movements. Let us decide how we can hold such consultations and conventions in the areas that the resistance is found. We should break the barriers and plan every action and dialogue in such a way as to be political and thereby influence and challenge the parties. Many things happen through documentation and data compilation. So I agree that the politicisation of our actions, on a mass basis, is the key issue.

Bharat Jairaj *Activist, Citizen Consumer and Civic Action Group, Chennai*



As we know, the primary focus in cities today is for those who contribute to the whole growth plan. More than 60 percent of the cities contribute to the growth plan. In Chennai not even 60 percent is seen contributing to the export growth model or LPG and the result is conflicting priorities and conflicting interests. We keep talking about making Chennai a Capital destination. Hence the focus is on making Chennai a city for certain target people. There are clearly three kinds of citizens: Citizen A, which the administration of the city, the IT sector want to attract; the tourism sector;

Citizen C who serves nothing but a functional role. So we want vegetable vendors and cobblers for their services. Then there is Citizen B who is in the middle and is very much like citizen C in some way but wishes to be citizen A. In fact they are treated differently. Citizen A is given incentives like relaxations in FSI and FAR which extend to those who work for them. For example, Hotels, required for the IT sector, will also get some concessions that are available for the IT sector.

The second Chennai plan is in draft form and is still under construction. It refers to new information technology corridors, 24-hour power and water supply for the IT sector. It talks about air conditioned workplaces and new housing societies for those who are working in the IT sector. Whilst there are rules relating to buildings, IT buildings are allowed to be built in any area. It is a known fact that citizen C has almost no incentives; is termed an encroacher; and is to be relocated at the least level of inconvenience. For example, in the Loyola College incident, the Goldflake Open Tennis Tournament was scheduled and therefore the slums, near the area, were moved 50-60 kms away. The Mass Rapid Transport System was responsible for the shifting of all residents on Buckingham Canal. So Citizen C can well be relocated at will. Citizen B is generally governed ad hoc rules, commissions and sanctions and extensive conflicts. The Marina beach offers an example of conflicting interests and the livelihood rights

of fishing communities and the recreational rights of beach walkers city's beautification plan to attract tourists. The Chennai Corporation has created several new public parks which are always locked and fenced and are meant for the sole use of certain people and not that of others. These parks are not accessible to all. Chennai has a fetish for advertisement boards. Earlier it was a traditional art but now takes the form of computerised sheets. There are about 75,000 of them and are the cause of extensive conflicts between hoarding owners and other road users. As a result of the traffic congestion, people are forced to walk on the road. A dispute resolution mechanism is imperative. Participatory city planning is a first step, but there is no evidence of a development or master plan. Also space is unavailable and the authorities, that draft these plans, continue to be ineffective. So the Courts are called upon to resolve these disputes.

One case we worked on was in 1993. CAG had challenged the Tamil Nadu Housing Board's plans to construct housing colonies in lake beds. The rationale was that lake beds had not received the water that was due and had been dry for a long period time. The Housing Board did not see any reason for why the land should be wasted and the project was backed by the World Bank, HUDCO and several others. We opposed the proposal but the Court refused to order a stay at that stage. Private builders and the Housing Board moved in soon after. From 1993-2005 we have increasingly seen flooding in these areas with resultant loss of life and of property. However, in 2005, the Court gave its decision on the removal of encroachment on water bodies

The second case is in relation to the two buildings that are lined along the beachfront. These two buildings are heritage buildings and, in 1996, a group of citizens went to Court when the Government sought to demolish them. The Court decided in favour of the citizens. In 2004, the Government attempted to yet again demolish not just the heritage building but also a school for girls from economically weaker sections. Thankfully there was enough public pressure on this case and the Court did not issue an order.

A third example is that of a creek area in South Chennai which we have been wanting to protect for many years. Chief Minister Jayalalitha wanted to construct a wedding hall there in Dr. Ambedkar's name. We challenged this and the Court ordered the restoration of the creek. In 1997, a 7-storey luxury apartment block was erected next to the creek. We challenged it yet again but this time the Court did not agree with us. We went from a single to a division bench in the Madras High Court and then to the Supreme Court. Between 2000-08 buildings have been erected on the entire flood plain. New apartment complexes, 5-star buildings and Chennai's first 7-star and commercial buildings have come up in that area. In 2005, the Corporation of Chennai wanted to construct an eco-park in the wetland and the Court agreed to this proposition.

The last issue is that of the regularisation scheme. As you know, this scheme caters to illegal buildings and when the scheme was introduced we challenged it. We argued in particular, fire safety, FSI and parking norms. This case went on to the Supreme Court. In theory, the Supreme Court agreed with us and allowed this scheme as a one-time measure in 2003. The Government introduced further schemes. We challenged these schemes together and in 2006 there was a landmark judgement by the Madras High Court directing the demolition of all illegal buildings, particularly multi-storied commercial buildings. The High Court showed

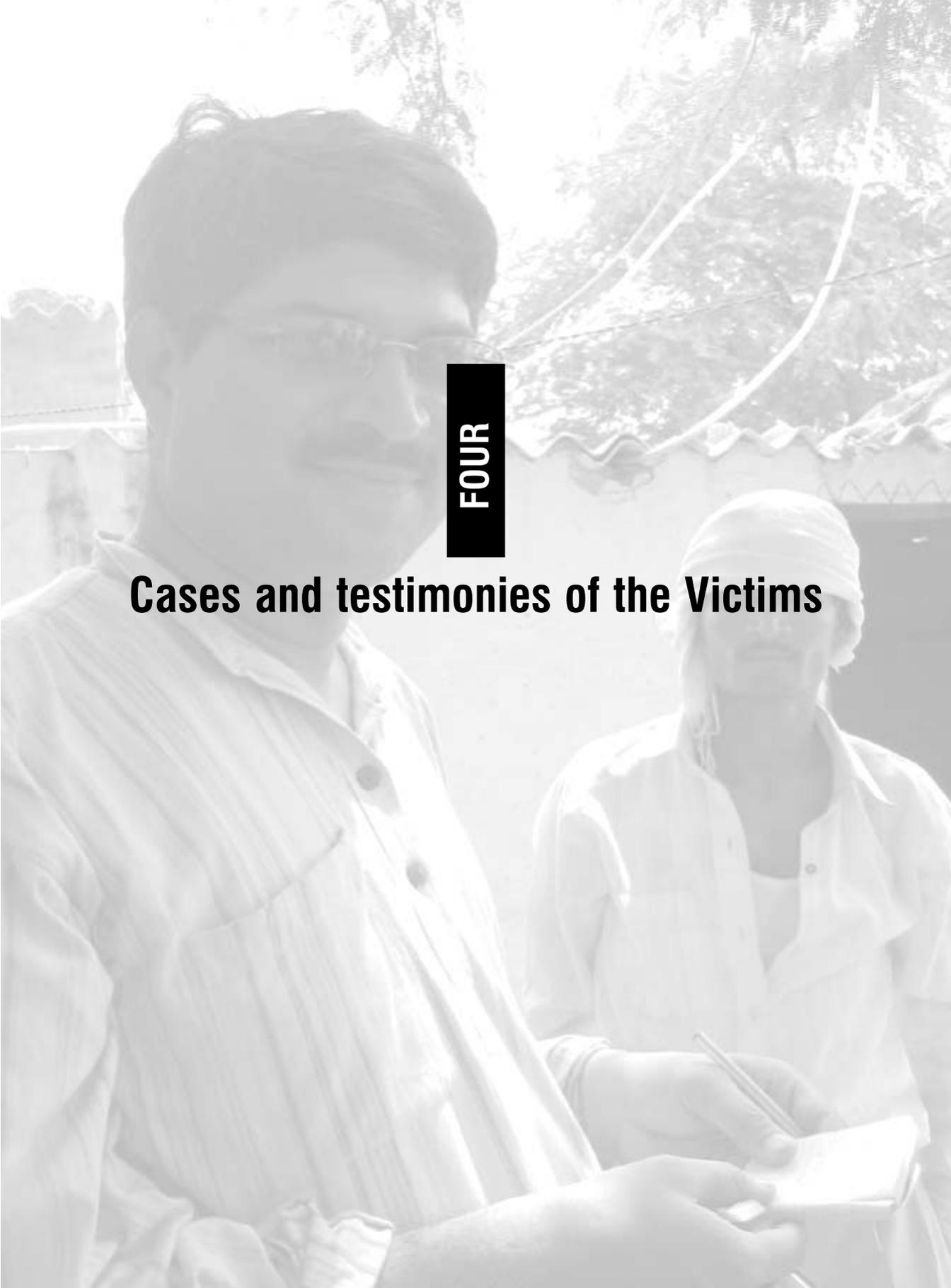
leniency for residential buildings. The State Government appealed to the Supreme Court but did not succeed. The State Government then passed an ordinance against multi-storied buildings. We challenged the ordinance and the High Court agreed with us. The State Government then passed an act replacing the ordinance and again the High Court struck it down. The appeal went to the Supreme Court. The State Government has bent over backwards to protect commercial multi-storied buildings.

The Courts have not been able to provide much legal protection to wetlands. That is to say, there is no clear definition of what constitutes a protected area and the issue is therefore open to interpretations by the corporations. The first step they took was to build a wall around this park. The rest of the areas have been converted into large luxury apartments and hotels. Illegal buildings are protected by the State.

In 1993, in a bed-grabbing case, the Court refused to intervene when we challenged the actions. In 2005, the Court directed the removal of Citizen C the encroacher. They felt encroachments must be removed from water bodies to maintain the ecological balance. They referred to Article 48A of the Constitution, which is a Directive Principle for the Government to protect the environment and Article 51 (1) (g) which makes it the duty of citizens to protect the environment. By using these Articles, they remove all the illegal encroachers. In 2008, the High Court accepted the plea, by the Collector, that encroachments are so rampant that alternative sites cannot be provided. The Court's response is that it is not necessary to do that and to first clear them out. So there are two types of encroachers: the legal encroacher, the one we are trying to remove; and the illegal encroacher. If one looks at the regularisation scheme, the challenge is quite clear. The Supreme Court allows this but the State continues to repeat the schemes. Contrasted with the speed with which the Government supports and enforces Court orders, the kind of trend that emerges is clear.

So the Court, through its trends, suggests that the only true encroacher is Citizen C. Citizen A and B make these encroachments but there is no issue because they will find ways to regularize it.

The last point is related to Tsunami. Fishing communities were told that they needed to move out of their homes for their own safety and if they did not do so, they could not be protected. In fact the State Government and the Housing Board went on record to say that they would not be responsible for people who refused to relocate. The situation continues. Recently a new bungalow was constructed on the beach front for the Governor. This is his third property, which escalates him to the position of citizen A+. When we objected to this, Governor said that the house was only being touched-up even though the pictures showed the construction of a new house. This indicates that the Courts can only provide specific remedies. Careful consideration is required before approaching the Court upon larger, generic issues. The Courts must be the last resort or part of a larger strategy.



FOUR

Cases and testimonies of the Victims

गैस पीडित निराश्रित पेंशन भोगी संघर्ष मांचा भापाला



Bhopal Gas Case

The History of Litigation in the Bhopal Gas Leak Case

This is the history of litigation in the Bhopal Gas Case:

- December 2/3, 1984:** Tragedy strikes killing over 3,700 persons and affecting about half a million others.
- December 7, 1984:** First compensation case filed by American lawyers in US Courts.
- December 22, 1984:** A writ petition, filed in the Madhya Pradesh High Court at Jabalpur, seeking interim relief for victims.
- March 29, 1985:** Parliament passes the Bhopal Gas Disaster (Processing of Claims) Act 1985, ensuring that the Union Government becomes the sole representative of the victims.
- April 9, 1985:** Union of India files a complaint before the US District Judge, Justice Keenan, for 3 billion US dollars compensation for victims.
- June 28, 1985:** Union Government moves before the US Court for consolidation of all cases pending in various Courts.
- July 31, 1985:** Union Carbide Corporation (UCC) seeks dismissal of consolidation action.
- May 12, 1986:** United State district Justice Keenan dismisses claims of the Union of India.
- September 9, 1986:** Union of India files a representative suit against the UCC in the Court of District Judge, Bhopal, claiming three billion US dollars as compensation.
- January 14, 1987:** US Court of Appeal dismisses petitions of 145 individual plaintiffs and cross appeals of the UCC.

Has the Judiciary abandoned the environment?

- May 1987:** Union of India files appeal in the US Supreme Court against the dismissal by the US Court of Appeal.
- October 1987:** The US Supreme Court declines to grant the writ moved by the Union of India.
- December 17, 1987:** After hearing both parties, the District Judge, Bhopal, directs the UCC to pay an interim relief of Rs 350 crores.
- January 18, 1988:** UCC files a revision petition in the Madhya Pradesh High Court.
- April 4, 1988:** Justice SK Seth, of the MP High Court, reduces interim relief from Rs 350 crores to Rs 250 crores.
- September 8, 1988:** UCC files a petition in the Supreme Court challenging the power and jurisdiction of the District Judge, Bhopal, to grant interim relief.
- October 1988:** Union of India files a petition in the Supreme Court against the MP High Court order, reducing the amount of interim relief from Rs350 crores to Rs 250 crores.
- February 14, 1989:** The Supreme Court mediates a 470 million US dollar (Rs715 crores) settlement in the case.
- February 15, 1989:** Settlement is opposed by the Bhopal Gas Victims.
- December 22, 1989:** Constitutionality of the Bhopal Gas Act challenged and upheld by a constitution bench with the rider that the victims should have been heard before arriving at the settlement.
- It is important to note that the Supreme Court upheld the Constitutionality of the Act after a settlement according to how it was announced.
- April 14, 1990:** Supreme Court orders interim relief of Rs 200 per month to the families of victims.
- September 1990:** Chief Justice Sabyasachi Mukherjee, who presided over the bench which has reserved judgement, dies necessitating a re-hearing of the petitions.
- December 18, 1990:** A five-judge constitution bench, headed by Chief Justice Ranganath Misra, reserved the judgement on review petitions.
- October 3, 1991:** The Supreme Court, in review, upholds the validity of the settlement. However, clauses of the settlement, which deal with setting aside criminal prosecution, were deleted.

[Source: *The Hindustan Times*, October 14, 1991.

Updated and comments added by editors.

Ironically, the Bhopal series starts with the horrifying decision of Judge Keenan of the United States District Court of the Southern District of New York. First of all, the Court considered the issue of the most convenient forum. It was argued, by UCC, that it was not convenient to have the cases heard in America.

The Court considered various factors before deciding upon which forum was the most convenient. First, since the sources of proof were largely in India, it would be most convenient to have the trial in India. However, this is doubtful. Given UCC's dominant control and supervision of the operations of the Indian Company, it was equally possible that many of the sources of proof existed in America. But since the District Court had wrongly concluded that the Indian Company was from UCC, in terms of operations and management, it therefore also concluded that the proof required, during trial, would largely lie in India. The presumption itself being erroneous, the conclusion is also doubtful.

The Court also held that the necessary witnesses and the records also lay in India. In view of these factors, the Court concluded that India would be the proper forum. Both conclusions are doubtful. Even assuming this to be true, there was no real difficulty in appointing a Commission to take evidence of witnesses in India and transporting records to America.

The real reasons, however, for the shifting of the cases to India lie elsewhere. The American judge was trying to make the point that the Indian company was liable and responsible for the accident and therefore the Indian judicial system should be burdened with the trial. American Courts should not be bothered with this kind of litigation. Judge Keenan said:

The American Courts which are already extremely attractive to foreign plaintiffs would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded Courts.

The American interest, in keeping litigations away from American Courts, is clear. Perhaps the India should have had the same attitude towards American companies. It is perfectly alright for American companies to pollute the Indian environment and cause harm to its people but, when it comes to litigation, the Indian litigants are not permitted to sue in American courts!

In order to achieve his end, Judge Keenan took advantage of the affidavits filed by NA Palkhivala and Dadachanji and attacked the position put forward by Professor Marc Galanter, in whose opinion Indian Courts were not competent to handle the Bhopal litigation. He said so for a number of reasons:

- (a) That the Indian system still reflected its colonial origins in terms of a lack of broad-based legislative activity, inaccessibility of legal services, burdensome Court fees and limited innovativeness with reference to legal practice and education.
- (b) That India had approximately 1 judge per 10 citizens, as compared to the United States, and therefore delays are widespread.
- (c) That there is no tort law relating to disputes arising out of complex product or design liability and a complete absence of tort law relating to high technology and complex manufacturing processes.
- (d) That India's pre-trial discovery is inadequate.

Has the Judiciary abandoned the environment?

Galanter was right on all of these grounds. In retrospect, seeing how shabbily the Supreme Court has dealt with the victims, it is clear that Indian Courts were indeed not competent to handle the Bhopal litigation.

Galanter was opposed by Palkhivala and Dadachanji who argued that Indian judicial system was marvellous. In particular, Palkhivala argued:

there is no reason to assume that the Bhopal litigation will be treated in an ordinary fashion.

Eight long years have elapsed and victims have still not received compensation. Given this backdrop, Palkhivala's measure of confidence in the Indian legal system seems strangely misplaced. Judge Keenan however accepted the arguments of Palkhivala and Dadachanji and held that the Indian system was more than equipped to deal with the Bhopal case.

The Court held that the agreement, entered into between UCC and its Indian Company had been negotiated at "arms-length". This implied that the Indian company was independent of UCC. This, in hindsight, turned out to be totally wrong, as the discussions of the Indian Court, reproduced in this section, will show.

The only thing that is correct in the judgement is a reference made by the Court regarding the liability and responsibility of the Indian Government and various departments and officials such as the factory inspectors who were responsible for the safety the plant. There is absolutely no doubt that the Indian Government, and its officials, was in collusion with the management of the Indian plant and are therefore also liable for the accident.

But the real reason for sending the Bhopal case to India lies elsewhere and was revealed by Judge Keenan himself when he said:

this Court is situated in one of the busiest districts in the country, and finds as matter within its experience, that this is a 'congested centre'... A Court in Bhopal rather than in New York should bear the load... Continuation of this litigation in this forum (New York) would tax the time and resources of citizens directly... The administrative costs of this litigation are astounding... Tax payers of this State should not be compelled to assume the heavy financial burden attributable to the costs of administration the litigation contemplated when their interest in the suit and in its subject matter... is ... ephemeral.

Thus we are told that the American people are not interested in what has happened in Bhopal even though an American corporation has caused the problem. We are sure that this was not the view of all Americans. But it was certainly and unfairly the view attributed to them by Judge Keenan. Then the Court used anti-imperialist language to secure a precisely imperialist. Since the Indian Government had less exacting standards than American transnationals did, it was perhaps implied that the latter should be allowed to do as they please. If bribing was necessary they should bribe and if accidents occur and people get killed, they could always get away by paying a penny here and a penny there. Thus, according to Judge Keenan, the American people, and the American judicial system, had no interest whatsoever in compelling Americans to do abroad what they would be required to do in their own country.

The Court held:

It would be sadly paternalistic, if not misguided of this Court to attempt to evaluate the regulations and standards imposed in a foreign country.

Referring to an earlier drug case it quoted:

Each Government must weigh the merits of permitting the drugs use... Each makes its own determination as to the standards of degree of safety and duty of care. The United States should not impose [sic] its own view of the safety, warning and duty of care required...

The Court was well aware “of the moral danger of creating a double-standard”... “Should we impose our standards upon them in spite of such differences [in standards]? We think not... [We] should avoid imposing characteristically American values [sic] on Indian concerns... Moreover, the purported public interest of seizing this chance to create new law is no real interest at all.”

Answering the argument, that the proceedings in an American Court would result in higher levels of compensation and that this would deter American corporations from palming off outdated technology and using the lowest standards of safety abroad, the Court held:

Certainly, there is a real possibility of a substantial Indian Judgement against defendant, which would serve an identical deterrent function, and prevent a rush of multinationals to foreign locations.

The Court then continued with the anti-imperialistic rhetoric:

In the Court’s view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, standards and values on a developing nation. This Court declines to play such a role. Union of India is a world power in 1986, and its Courts have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgement on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged.

With this double-edged language the United States packed the entire litigation off to India thus adding insult to injury. The first was the accident itself; the second, that it had set precedent for foreign investors to capitalise on cheap labour and environmental damage in the Third World. Slyly the Court, while sending the case to India, still retained, for the American Courts, the right to not abide by the decision of Indian Courts if due process had not been followed. Thus American Courts retained the right of appeal over the decision of the Indian Supreme Court and the status of the Supreme Court was effectively reduced to that of a trial Court.

The Bhopal cases in India began with the outstanding decision of Judge Deo who held that civil Courts have jurisdiction in tort actions to grant interim compensation. (Previously it was thought that interim compensation could be awarded only in cases based on contracts and not in negligence cases). The Court ordered Union Carbide Corporation (UCC) to pay a sum of Rs

350 crores by way of interim compensation. UCC advanced the shameful argument, through counsel, that there was no need for interim relief.

This decision was challenged in the Madhya Pradesh High Court at Jabalpur. The Court estimated the overall liability of UCC at approximately US\$ 3 billion. It accepted the proposition, laid down in the Oleum gas leak case, and held that UCC was absolutely liable without exception. It upheld the decision of the Civil Court to the effect that interim awards could be made in negligence cases. It held that it was necessary to lift the corporate veil in order to determine that UCC had real and substantial control over the Indian company. UCC controlled more than half of the total voting power. It had full authority to act for the Indian company. The Indian company was at the receiving end as far as the technical know-how was concerned and was fully dependent on the expertise and personnel training provided by UCC. The foreign collaboration, between UCIL and UCC, was essentially a foreign domination agreement. Even after FERA was passed in 1973, UCC continued to exert control over the Indian company with the permission of the Reserve Bank of India.

The third Bhopal case (AIR 1990 SC 273) relates to the so-called settlement arrived at between UCC and the Union of India (UOI). It was accepted by the Supreme Court as reasonable and adequate. Under this agreement UCC was to pay US\$ 470 million. This was a pathetically small amount. The Madhya Pradesh High Court had estimated the ultimate liability of UCC at US\$3 billion. The settlement resulted in the Supreme Court quashing all criminal cases, both present and future, against UCC. The Supreme Court found the settlement “manifestly reasonable”. It extinguished all present and future claims. It extinguished all claims in respect of the deaths that may have taken place or illness that may manifest in the future. The Court gave four reasons for accepting the settlement as fair and adequate. The first was the compelling need for urgent relief. The second was the possibility of delay in the Courts. The third was that the UOI had, in any case, wanted only \$500 million and UCC was willing to pay \$430 million. Therefore the Court came to an in-between figure of US\$ 470 million. The fourth reason was that a sizeable number of claims were either exaggerated or lacking in basis.

The reasons given by the Court, for accepting the settlement of US\$470 million, were pathetic and untenable. It was always open to the Court to grant substantial interim relief. Delay, in the courts, curiously only takes place in human rights cases. When it comes to important property matters, the courts, in India, have dealt with them expeditiously and it is not rare to find a case sorted out in about two years. The famous Escorts case, for example, went right up to the Supreme Court and was disposed of in a year or so. There was no reason why the Bhopal case also could not have been completed in a couple of years. Thus, delay, in the Courts, is only further evidence of the unwillingness of the Judiciary to give human rights issues the importance they deserve. The Court took a very wrong decision in accepting the minimum claim, of the UOI, of \$500 million when the ultimate liability of UCC could well be as much as \$3 billion.

Thus the settlement, of US\$470 million, was accepted by the Supreme Court in a most casual manner causing grave injustice to the victims.

To make matters worse, the Supreme Court, in this decision, criticised social action groups saying that their loyalties were divided and that it was difficult to kind credence to what they were saying.

Thereafter, in Charan Lal Sahu's case (AIR SC 1481) the Supreme Court upheld the Bhopal Gas Disaster Act, 1985. The Court held that the Act was valid and that the State had rightly taken over the exclusive right to represent an act in place of every person entitled to make a claim. Thus, the victims were denied a voice in the hearing of the case and were represented by the UOI which had colluded with UCC against the interests of the victims. This was like being represented by a lawyer who had been bribed by the other side.

The Union of India controlled 22 percent of UCIL shares through the Unit Trust of India and LIC. Thus the UOI had a sizeable material stake in the well-being of UCC and should not have been allowed to represent the victims against the Corporation. However, the Court held that there was no conflict of interest in the UOI representing the victims.

This decision is to be seen in light of the role played by the then Prime Minister Rajiv Gandhi, along with President Bush, believed that the Bhopal litigation would be kept under wraps. This virtually made the UOI the United States and UCC partners in crime.

The Supreme Court held that it was correct for the UOI to be the sole representative of poor and illiterate victims. It was also proper that the victims be totally excluded from filing their own cases. This is a startling conclusion. One cannot help but feel that poverty and illiteracy have been used to victimise and hurt people. The Act ought to have allowed individuals to opt out. Secondly, the Court failed to realise that it is precisely the poor and illiterate people who have the most astute understanding of what would be in their best interests.

The Supreme Court further held that the Act was necessary because a number of foreign lawyers had come to India on a fee contingency basis. Now this is a disputable point of view. When the issue first arose, as to whether the case should be heard in America or in India, it was argued, by certain progressive lawyers in India, that the case should be heard in Indian courts because it would help them prove their competence and ability to the world. The same position was also argued by other not-so-progressive lawyers but with a different motive. These lawyers basically acted on behalf of UCC by arguing that the case be sent to India. They said that Indian Courts were marvellous. UCC naturally wanted the case out of American Courts because it knew that, in America, the compensation would be much higher as the law was much stricter and the judges perhaps not likely to be influenced.

The central issue in the whole debate over the forum of litigation is this: Should transnationals be permitted to have double standards, i.e., should they be permitted to have higher standards of safety for their operations in America and reduced standards for the same in the Third World? Should they be permitted to bribe officials, hide important information and run completely unsafe plants with total disregard to the health and safety of the local population?

It is stupid to say, as many apologists do, that the settlement provided, of Rs 1 or 2 lakhs, is a larger sum of money than the victims have ever seen. Compensation is paid, not on the basis of the poverty or well-being of the victims, but on the wrongdoer's ability to pay.

The Madhya Pradesh High Court lamented that the UOI had made its Judiciary the butt of ridicule before Judge Keenan in America. The anger of the Madhya Pradesh High Court was grossly misplaced. Nationalistic fervour is unbecoming of a body that functions badly and makes no attempt to improve. What is of utmost importance is the welfare of the victims. It is obvious that the Indian judiciary has not measured up to the standards required for the handling of such litigation.

Had the case been tried in American Courts, one important issue would have been automatically settled, namely that double standards are not permissible and that transnationals, in any part of the world, will be held responsible and liable in American Courts for wrongdoing. By this one possible decision, environmental safety, throughout the world, would have improved dramatically.

As far as the delay is concerned, one cannot help but feel that it was due to the fact that poor and illiterate people were involved. In the Oleum Gas Leak Case the affected persons were people of social importance and moreover it was in the capital city and not some “backward” area like Bhopal. Therefore the final orders of the Supreme Court were delivered in a very short while. The tragedy of Bhopal lies in the fact that toxic gas, instead of going in the direction of the Secretariat, turned and went in the direction of the places where the poorer people lived. This allowed Arjun Singh, Chief Minister of Madhya Pradesh, to get into his helicopter and decamp. Had the accident affected bureaucrats and politicians, the litigation would have proceeded much faster and the levels of compensation would have been much higher.

Fee contingency litigation may perhaps not be such a bad idea. According to this system, lawyers ultimately take a certain percentage of the ultimate decretal amount but work free of cost in the meanwhile. If the ultimate percentage, to be paid to the lawyers, is reasonable and regulated by law it may in fact be of benefit to the victims. The fee contingency system is criticised in India perhaps without understanding that the system does not permit advocates to take an unregulated or excessive amount from the client.

In the worst part of the decision, the Supreme Court held that even though under the Act it was implied that the victims should be given notice and heard prior to any settlement being entered into; nevertheless, the omission in the Bhopal case was not total. This was, according to the Supreme Court, because even if hearing was given to the victims, they would have no additional material to produce. There existed plenty of material available, by the victims and social action groups, that could have been placed before the Supreme Court to show that the number of victims had been grossly underestimated; that the severity of the illness had been underplayed; and that the data, presented by the UOI, was both erroneous and misleading. In any case it is a well-settled law that no Court or authority should ever decline to apply the principles of natural justice on the presumption that the affected party would not, in any case, be able to say anything. Thus the Supreme Court has not only gone against its own decision, but it has also erroneously concluded that, were the victims to be given notice, they would not have anything further to say. The other reason, given by the Supreme Court, was that, in any case, the judgement of the Court was subject to review and that the victims could be heard at that stage. This is again contrary to the several decisions of the Supreme Court where it has been held that due notice and a hearing must be given at the initial stage itself and not at subsequent hearings

at a later stage. The language, used by the Supreme Court, is deplorable. In different parts of the judgement, the Supreme Court characterised the victims as dumb, pale, meek, impoverished, poor and illiterate. It is quite clear that the Supreme Court did not see the victims as human beings who are perfectly capable of rational decision-making.

To make things worse, the Supreme Court bitterly criticised the social action groups who had played an active part in mobilising people and collecting data. These groups were lathi-charged by the police and the data, they had carefully collected, was taken away and destroyed. The State thus managed to effectively destroy the evidence collected by social activists. The Supreme Court called these groups “misinformed” and said that attempts had been made to shake the confidence of the people in the judicial process and to undermine the credibility of the Supreme Court. The credibility of the Judiciary was as important as the alleviation of the suffering. Thus the Supreme Court felt threatened by the very democratic process through which social action groups mobilised people and, as a result of which, the victims received the little that they were ultimately allocated.

There is no doubt that if the people had not been mobilised, against the deplorable approach of the Supreme Court, victims would have received even less than the little they got. It is devious that if there is a majority subjective feeling of injustice then there must be, in fact, injustice. Proof is asked for in order to substantiate the allegations. In these cases, it is not possible to establish, by photographic evidence or the like, “proof” of corruption. But the very fact that the majority of the people feel that the judiciary is corrupt is itself an “objective” and not a “subjective” feeling.

Nevertheless, this decision remains the worst ever in the history of the Court. The last decision, in the Bhopal series (AIR 1991. IV SVLR. Page 22), is a review petition wherein the settlement, under the auspices of the Supreme Court, was challenged. The first ground was that the settlement was arrived at without notice to the parties affected. The Supreme Court rejected these arguments and agreed with the reasoning of the Court in the above case. It was then argued that the proceedings had been quashed contrary to section 320(9) of the Cr PC (compounding of offence) or contrary to Section 321 of Cr PC (withdrawal of proceedings). The Court rejected the argument that it had no power to withdraw to itself the criminal proceedings and to quash them. The Court held that the power to withdraw and quash existed but, in the present instance, there was no justification for the exercise of this power. As there were no grounds or criteria to justify the withdrawal or compounding of the criminal cases, the Court, in review, set aside that part of its earlier order quashing the criminal cases. Further, the UOI, which had actively colluded with UCC in the quashing of criminal cases, reversed its stance and claimed it was not party to the quashing of criminal cases. This is because, by the time of the review, the Congress had been replaced by the Janata Dal and therefore the UOI was anxious to disassociate itself from the stand taken by the earlier Advocate General.

Since the Court had set aside the quashing of the criminal cases it also set aside the prohibition that all future criminal cases could not be filed. The Supreme Court also rejected the argument that the settlement was not fair and adequate because the Court had failed to take into account important heads of compensation and had closed the scope for a “re-opener” clause. (A “re-

opener” clause means that, if the effects of the gas leak are observed later, it would be open to the victims to ask for additional compensation). The Supreme Court also rejected the argument that the Court ought to have made a breakdown of the amount that was to be paid the various victim groups. UCC put forward the shameful argument that US\$ 470 million was in fact an overpayment and that, in any case, this amount covered all the claims, including future claims and the quashing of criminal cases.

The Court further held that a “Fairness Hearing” was not necessary and that the only thing required, of the Government, was that it should have “due regard” for the victims. It held the settlement to be fair and adequate. It rejected the argument that about 40 percent of the victims had been completely excluded because they either did not go in for treatment, or did not have medical documentation. It was shocking that the UOI claimed that there were only 40 cases of total permanent disablement. The Court accepted, as true, the contents of affidavits filed by UOI and the Claims Director. The Court further held that, if there were any future claims or if the ultimate claims exceeded US\$470 million, the UOI would have to make good the excess amount. Ranganath Mishra, the then Chief Justice of India, bitterly attacked social activists and the Press for what he called a “tirade against the Court”. He criticised them for “bringing victims to the Court, shouting slogans”. He called this “mud-slinging”. Then, in the most damaging part of his decision, he held that the decision of the Supreme Court in the Oleum Gas Leak Case, wherein strict liability was laid down, was only obiter. This implied the undercutting of the principle of strict liability in environmental cases.

The Supreme Court finally explained why the settlement was pushed through. Had the Court moved on the basis of strict liability, the decree that would ultimately have come up for execution in American Courts, would have been quashed. According to the Chief Justice of India, strict liability was contrary to American law (this is not correct) and that, were the decision to be taken on the basis of strict liability, American courts would not permit realisation of the decretal amount. This is totally wrong as there is absolutely no reason to believe that the decree would not be executed on this ground.

In any case, it is interesting to see how the politics of the Bhopal case operated. Judge Keenan sent the case to India on the condition that, once a decision is taken everything goes back to the American Court which would act as a final court of appeal. Thus the Supreme Court of India was put in the awkward position of functioning like a trial Court subject to judicial review by the American Court.

The decision ends with the tirade against the social activists group once again. The Supreme Court said that those, who wanted judgement on the merits of the case instead of the settlement, did not understand that, if the American Court declined to execute the decree, the victims would not get any money at all. The Court said that social action groups were “misleading” the poor victims and that people, with nothing at stake, were trading in the misery of others!

Only history will tell whether the people were right or the Supreme Court, in all its “majesty” and “wisdom”, was correct.

The Bhopal Conspiracy

Colin Gonsalves

Overview

The paltry payments made to the victims, the escape of Anderson on a government plane, the neglect of the babies born subsequently with terrible deformities and ailments, the inability of the state to clean the contaminated soil, the petty sentences rendered and the 26 long years in the trial court, all seem separate instances which though regrettable are treated as issues of governance and not one of politics, conspiracy and betrayal. Let's not look at the past, we are advised, let's look to the future to ensure that such an incident does not take place again. But unless we understand the treachery of the past it is impossible to change things for the future.

Indira Gandhi's death and the appointment of Rajiv Gandhi as Prime Minister of India marked the end of the era of the Indian version of social democracy started by Jawahar Lal Nehru and the beginning of American style globalisation. Rajiv Gandhi started off well with Ronald Reagan, the then President of United States. It is said that the understanding between these two leaders ultimately led to the pitiable settlement being agreed to by India, the quashing of all criminal liability and the removal of Anderson from Indian soil. Arjun Singh, naturally, will be made the scapegoat as if decisions of this magnitude could be taken without the Prime Minister's approval.

In the power play of globalised politics all this is understandable though it may make us angry. But the inability of the Supreme Court of India to stand firm and side with the people of India against UCC and the government of the United States of America left many Indians confused and frustrated. The long line of decisions starting from 1989 ultimately left them bitter.

It was in the interests of the victims to have the cases tried in America where substantial damage would have been awarded. In the Exxon Valdes oil spill case, where no one died, \$507 million was awarded. In the Vioxx drug case where 47,000 consumers suffered heart attacks, strokes or death, \$ 4.85 billion was paid on an average of \$103, 000 per plaintiff. In asbestos litigation, jury verdicts range anywhere from \$1 million to \$20 million in compensation per person. In the Lockerbie bombing case, Libya paid \$ 2.7 billion or \$ 10 million per family.

Legal luminaries flocking to represent Dow Chemicals was understandable. Nani Palkivala made a strenuous attempt by filing affidavits in the American courts to have the litigation

brought to India. The then Attorney General, Soli Sorabjee, argued against giving the victims a hearing and justified the quashing of criminal proceedings. What was inexplicable was the attitude of the judiciary. In February 1989, in a cryptic three-page order containing no reasons, the Supreme Court accepted the settlement of \$ 470 million as “just, equitable and reasonable” and quashed all criminal proceedings. In May, reasons were given after an afterthought. Chief Justice RS Pathak then resigned on being nominated by India to the World Court at The Hague. After indignant protests in the country, in 1991, the Supreme Court reinstated the criminal proceedings. In 1996, in a decision likely to have far-reaching consequences, the Supreme Court quashed the charges of culpable homicide not amounting to murder and voluntarily causing grievous hurt and introduced the criminal negligence charge carrying a maximum sentence of two years. The hands of the trial court were tied.

Background

On the night of December 2, 1984, there was a massive leak of methyl isocyanate (MIC), a highly toxic gas, which resulted in the death of 20,000 persons and disablement of more than 200,000 persons.¹ The gas affected not only those living but even the generations that came thereafter. As a result of a high level conspiracy between Union Carbide Corporation (UCC), the American government, the union government and government of the state of Madhya Pradesh, the Chairman of the Union Carbide Corporation (UCC) Mr. Warren Anderson was secretly taken away from Bhopal on a government plane and allowed to leave the country.

Thereafter 3500 cases were filed by victims claiming damages of a total of \$150 billion. These claims were made on the pleading that the UCC Corporate Policy Manual, testimonies available and documents gathered demonstrated “pervasive decision-making presence of UCC in all vital matters relating to the location of the plant, the designing of the plant, the production and storage of ultra-hazardous substances, toxic chemicals and gases, the designing of safety systems and the monitoring of accidents review of the operational safety systems”.²

Later, Morehouse and Subramanian did a sophisticated analysis of compensation and rehabilitation costs and worked these out to about \$4 billion.³

Litigation in America

The Union of India filed a suit on April 8, 1985 in the US District Court (Southern District of New York) against UCC for compensation and punitive damages.

A few days earlier on the February 20, 1985, the Parliament enacted the Bhopal Gas Leak Disaster (processing of claims) Act, 1985 purporting to speedily, effectively and equitably securing all claims arising out of the Bhopal gas leak.

UCC then filed a motion to dismiss the Union of India’s suit pursuant to the doctrine of *forum non conveniens*. In this Nani Palkivala filed an affidavit in the American Court saying that

1 See Ward Morehouse and M. Arun Subramaniam, *The Bhopal Tragedy: A Report for the Citizens Commission on Bhopal* (1986; Council on International and Public Affairs, York)

2 Mass Disasters and Multinational Liability, *The Bhopal Case*: (iv)

3 *Supra* 2

the Indian Courts were competent to effectively handle tort litigation of this magnitude. Marc Gallentar filed an affidavit to the contrary. Palkivala was wrong then and was proved wrong by subsequent developments in the Indian courts. Marc Gallentars, stand was vindicated. Palkivala said that there was “no doubt that the Indian judicial system can fairly and satisfactorily handle the Bhopal litigation”.⁴ “The charge of inordinate delays” he said, “is wholly inapt and inapplicable as regards the Bhopal case.”⁵ He was confident that “the unprecedented Bhopal case will receive unprecedented treatment in India”⁶. He ended with a demeaning and degrading observation that the “\$9.5 billion which I believe represents that total aid given by the USA to the Indian Republic over the last 35 years is exceeded by the aggregate claims made on behalf of the Bhopal victims”.⁷

Marc Gallentar argued in his affidavit⁸ that India “has only incompletely emerged from the heritage of colonial rule...the Indian system is characterised by massive backlogs of cases and enormous delays...(which) can be considered a permanent feature of the Indian system...tort law in India is undeveloped...(and of the few tort cases) none deal with the problems arising from complex technologies...the Bar in India does not presently possess the pool of skills, the fund of experience or the organisational capacity to effectively and efficiently pursue massive and complex litigation...and the Indian legal system contains a paucity of devices to promote timely resolution of complex cases.

On May 12, 1986 judge Keenan allowed the application of UCC but imposed three conditions:

1. That UCC shall consent to the jurisdiction of the courts of India and shall continue to waive defenses based on the statute of limitation;
2. That UCC shall agree to satisfy any judgement rendered by an Indian court against it and if applicable, upheld on appeal, provided the judgement and affirmance “comport with minimal requirements of due process”; and
3. That UCC shall be subject to discovery under the Federal Rules of Civil Procedure of the US after appropriate demand by the plaintiffs.

UCC filed an appeal before the US Court of appeal for the Second Circuit, and the appellate court set aside the second and third condition.

In the Bhopal District Court

In the meanwhile on September 5, 1986, Union of India filed a suit for damages in the District Court of Bhopal being regular suit no. 1113 of 1986. In that suit, UCC gave an undertaking to preserve and maintain unencumbered assets to the extent of \$3 billion. Pursuant to this undertaking the District Court lifted the injunction against UCC’s selling assets. This perhaps was a mistake we will come to regret. On December 17, 1987 the district court ordered interim relief of Rs 350 crores. This was reduced by the high court on April 4, 1958 to 250 crores.

4 Mass Disasters and Multinational Liability: The Bhopal case: 225/8)

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In the meanwhile a charge sheet was filed under section 304, 324,326,429, read with section 35 IPC against Warren Anderson and others.

Supreme Court lets down the victims of Bhopal

On February 15, 1989, in a cryptic three-page order containing no reasons at all a constitutional bench of the Supreme Court of India, headed by the then Chief Justice RS Pathak, quashed “all criminal proceedings related to and arising out of the disaster”. Without any discussion on the “mass of data” placed before the Supreme Court and the extensive pleadings filed by the parties, the Supreme Court abruptly closed the case with the observation: “we are of the opinion that the case is pre-eminently fit for an overall settlement between the parties covering all litigations, claims, rights and liabilities related to and arising out of the disaster”. The Supreme Court found the settlement sum of dollars 470 million “just, equitable and reasonable”.⁹

Pitiable damages upheld

A couple of months later, the Supreme Court woke up to the need to provide reasons for its rather dismal decision. On May 4, 1989, reasons were set out in a separate decision.¹⁰ it was “the compelling need for urgent relief” which prompted the Court to make the initial order, Union Carbide Corporation, through Counsel, offered \$350 million. “Shri Nariman stated that his client was of the view that the amount was the highest it could be up to.” the Attorney General of India “submitted that any sum less than 500 US dollars could not be reasonable”. The victims were excluded from these proceedings. In this casual, per functionary manner, the final compensation package was decided. It may be remembered that in the Exxon Valdez oil spill case, the jury awarded \$2.5 billion which was later reduced by the Supreme Court of the US to \$507 million. Moreover, no one died in this case. Perhaps more comparable is the 2008, Merck & Co. Inc. case which settled claims by 47,000 consumers who suffered heart attacks, strokes, or death from using the pharmaceutical product Vioxx. The company agreed to pay \$4.85 billion, representing an average of \$103,000 per plaintiff.

An even larger public health disaster in the United States has been the use of asbestos as an insulation material. Asbestos exposure has been proven to cause mesothelioma, a rare and highly deadly form of lung cancer. In asbestos litigation, jury verdicts can range anywhere from \$1 million to \$20 million in compensation per plaintiff. However, where a settlement is reached, these amounts are substantially lower. Legal analysts have estimated that asbestos litigation in the United States has cost over \$250 billion and has involved more than 730,000 plaintiffs.

The 1988 bombing of Pan Am Flight 103, or “the Lockerbie bombing”, is another example of a large class action settlement. In a private agreement reached in May 2002, Libya committed to pay approximately US\$2.7 billion to resolve wrongful death claims by the families of those killed, representing US\$10 million per family.

⁹ 1989 1SCC 674

¹⁰ 1989 3SCC 38

Sadly, there is no reference in the Supreme Court order to any international norm or standard or practice regarding damages, paid in similar or comparable circumstances. The calculations done by the Supreme Court show that it compared the Bhopal disaster with motor accident cases. “It is well known”, said the Supreme Court, “that in fatal accident actions where children are concerned the compensation awardable is in conventional sums ranging from Rs 15,000 to Rs 30,000 (\$500 in 1989).

The Court then awarded Rs 2 lakhs (\$4000) in each case of death and total permanent disability and Rs 1 lakh (\$2000) in each case of permanent partial disablement. This judgement ends prophetically with the sentence “those who trust this Court will not have cause for despair”.¹¹

Apart from the paltry amounts awarded the hurtful part of the decision was the quashing of all criminal cases.

The Act upheld as constitutional

On December 22, 1989 the constitutional bench of the Supreme Court in *Charanlal Sahoo versus Union of India*¹² looked into whether the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 and the Bhopal Gas Leak Disaster (Registering and Processing of Claims) Scheme, 1985, were constitutionally valid. The Court decided to look into whether “the act has been worked in any improper way”.¹³ The Supreme Court upheld the right of the union government to be the sole representative of the victims even to the exclusion of the victims themselves. Reference was made to the *parens patriae* doctrine which obliges the state to protect its citizens. But the Court failed to recognise that the Union of India was, on the contrary, colluding with UCC and compromising the interests of the victims. After observing that “if the victims had been given an opportunity to be heard, they would, inter alia, have pointed out that the amount agreed to be paid by UCC was hopelessly inadequate and that UCC, its officers and agents ought not to be absolved of criminal liability, and that the central government itself was liable to have been sued as a joint tortfeasor”,¹⁴ the Supreme Court inexcusably upheld the exclusion of the victims, on the specious argument that “no useful purpose would be served by giving a post-decisional hearing...having regard to the fact that there are no further additional data and facts available with the victims which can be profitably and meaningfully presented to controvert the basis of the settlement.”¹⁵ This was entirely incorrect because as revealed subsequently, there was a gross underestimation of the number of deaths and injuries and the lasting nature of the ill-effects of the gas leak on individuals, life stock and the environment. Therefore, said the Supreme Court, “though settlement without notice is not quite proper, to do a great right after all it is permissible sometimes to do a little wrong”.¹⁶

To meet the argument repeatedly made that the Union of India was a joint tortfeasor as, inter alia, as its agency and instrumentalities (the LIC and others were shareholders in UCIL), and

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12 1990 1 SCC 613

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that the plant was permitted to operate by the Indian authorities close to a heavily populated area, the supreme Court brushed aside these objections holding that “the circumstances that financial institutions held shares in the UCIL would not disqualify the Government of India from acting as *parens patriae*.”¹⁷ The Supreme Court recognised that “perhaps, theoretically, it might have been possible to constitute another independent statutory body...entrusted with the task of agitating or establishing the same claims.”¹⁸ The Court observed that “the question whether there is scope for the Union of India being responsible or liable as a joint tortfeasor is a difficult and different question. But even assuming that it was possible that the central government might be liable in a case of this nature, the learned attorney general was right in contending that it was only proper that the central government should be able and authorised to represent the victims”.¹⁹

The then Attorney General Mr Soli Sorabjee, made a series of unfortunate submissions, urging “that the allegation that a large number of victims did not give consent to the settlement entered into, is really of no relevance...”²⁰ Hearing the parties after the settlements would also not serve any purpose...”²¹ “Quashing of criminal proceedings was done by the Court in exercise of plenary powers under articles 136 and 142 of the constitution.”²²

On the quantum of damages, though the Supreme Court recognised “that the measure of compensation in these kinds of cases must be correlated to the magnitude and capacity of the enterprise... not on the basis of actual consequences suffered...because such compensation must have a deterrent affect”²³, nevertheless the Court concluded, “we are of the opinion that justice has been done to the victims.”²⁴

The majority decision ended on an ominous note with the Supreme Court referring to “the atmosphere that was created in the country”. “Attempts were made” said the Supreme Court “to shake the confidence of the people in the judicial process and also to undermine the credibility of this Court. This was unfortunate...the credibility of the judiciary is as important as the alleviation of the suffering of the victims...we hope these adjudications will restore that credibility.”²⁵

In a separate concurring decision Singh, J warned that, “if the act was declared unconstitutional, the settlement under which the UCC has already deposited a sum of Rs 750 crores...would fall and the amount of money which is already in deposit with the registry of this Court would not be available for relief to the victims.”²⁶ This was a wrong conclusion. Even if the settlement was set aside, it was open to the Supreme Court to impound the amount deposited by way of interim payment for the victims. The whole tenor of this decision suggests an unwarranted

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helplessness on the part of the Supreme Court firstly, because “it is difficult to foresee any reasonable possibility of the acceptance of ... the observations made by this Court in MC Mehta’s case²⁷ (according to which damages) would be much more than normal damages... (and) must be computed on the basis of the capacity of a delinquent made liable to pay.”²⁸ A second unwarranted observation was made to the effect that if the Government did not assume monopoly of the litigation the victims would be helpless to proceed. “Because of the situation”, said the Supreme Court, “the victims were under disability in pursuing their claims.” Thus the tenor of all the Supreme Court judgements is to the effect that the Government of India and the judiciary were doing the victims a favour by acting on their behalf in the manner in which they did.

The notion that the victims were incapable on acting on their own was wrong then, and with the rich experience of history, has been proved totally wrong even today. Many NGOs gathered around, collecting extensive data which the state of Madhya Pradesh and Union of India refused to look at. Many lawyers both in India and America offer their services pro bono to support the victims. Suits were meticulously drafted and had they been allowed to proceed, evidence would have been elaborately led to establish the claims of the victims against UCC, UCIL, Union of India and state of Madhya Pradesh. All that the Supreme Court had to do was to ensure that the cases proceeded on a fast track and that all technical impediments and objections were brushed aside. Instead of this the state of Madhya Pradesh, the Union of India, Union Carbide and the Government of USA entered into unholy alliance to undermine and sabotage the efforts of the victims to obtain compensation comparable to the damages awarded in similar mass tort actions in the US and to have the accused prosecuted speedily in India. Instead of seeing through this unholy alliance, the Supreme Court let down the people of Bhopal by clearing a settlement that was patently paltry and by allowing the litigation in the Trial Court to drag on for 26 years.

Returning to the concurring but separate decision of Singh J, a pious sermon on the role of multinational and transnational corporations follows. “Multinational companies in many cases exploited the underdeveloped nations and in some cases they influenced political and economical policies of host countries which subverted the sovereignty of those countries. There have been complaints against the multinationals for adopting unfair and corrupt means to advance their interests in the host countries”.²⁹ Referring to the UN Code of Conduct on transnational corporations, Singh J held that “a transnational corporation should be made liable and subservient to laws of our country and the liability should not be restricted to the affiliate company only but the parent corporation should also be made liable for any damage caused to the human beings or ecology. The law must require transnational corporations to agree to pay such damages as may be determined by the statutory agencies and forums constituted under it without exposing the victims to long drawn litigation”.³⁰

Ranganathan and Ahmadi JJ made a separate decision partly dissenting, regretting that the Supreme Court had put an end to all litigation without first considering the issue of validity of

27 1987 1SCC395

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the statute. The Court found it “unfortunate”³¹ that though the writ petitions impugning the Act were pending before the Supreme Court these petitions were not decided and the settlement was approved and all the litigation closed in the 1989 decisions of the Supreme Court.

The Court then found itself “in somewhat of a predicament”³² as it has to pronounce on the validity of the provisions of the Act in the context of the implementation of its provisions in a particular manner and, though we cannot express any views regarding the merits of the settlement, we are asked to consider whether said settlement can be consistent with a correct and proper interpretation of the Act”.³³

Then in a startling display of unawareness of the principles of natural justice particularly in the context of mass tort actions, Ranganathan and Ahmadi JJ compared the situation to a Karta of a Hindu undivided family. The union of India in its *parens patriae* position qua the victims was similar to that of a Karta qua the junior members of a family who “are not to be consulted before entering into a settlement”!

Scolding the victims

The two judges then went on to berate the victims and their supporters for being “apparently not alert enough to keep a watching brief in the Supreme Court.”³⁴ Despite the vehement protests repeatedly made regarding the paltry amount of the settlement throughout the country in the national media the two judges assert “no attempt appears to have been made to put forward a contention that the amount of settlement was inadequate”!³⁵ Then comes the most startling statement that “there was a day’s interval between the enunciation of the terms of the settlement and their approval by the court”³⁶. By this the court meant that 24 hours after the disclosure of the terms of the settlement was adequate for persons to protest and the approval given by the court a day after the disclosure of the settlements was justified.

All in all, a reading of the majority decisions and the two minority decisions show how out of touch the Supreme Court was with the suffering, grievances and demands of the victims and how the Court proceeded quite regardless of the views expressed on behalf of the victim families.

Restoring the criminal cases

Once again “a hue and cry was raised against the settlement by victim groups.”³⁷ “Considerable heat was generated throughout the court hearing and the press was also none too kind on this Court”.³⁸ A series of review petitions were filed in the Supreme Court once again seeking a “fairness hearing,” inclusion of additional victims in the list of persons to be compensated,

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37 1991 4 SCC 584

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higher compensation amounts and the restoration of the criminal cases. The Supreme Court noticed the pleadings to the effect that “toll of lives has since gone up to around 4,000 and the health of tens of thousands has come to be affected and impaired... though it was initially assumed that MIC caused merely simple and short term injuries...it has now been found by medical research that injury... is to the entire system including nephrological lymphs, immune and circulatory systems...and has mutagenic effects and that the injury... is progressive... Indeed the effects of exposure of the human system to this toxic chemical have not been fully grasped. Research studies seem to suggest that exposure to these chemical fumes renders the human physiology susceptible to long term pathology and the toxin is suspected to lodge itself in the tissues and cause long term damage to the vital systems... The potential risk of long term effects is presently unpredictable”.³⁹ Despite this the Court concluded that “as of now, medical documentation discloses that there is no conclusive evidence to establish a causal link between cancer incidence and MIC exposure.”⁴⁰

The Court then noticed the pleadings in the review petitions to the effect that UCC, holding 50.9 shares in UCIL, “retained and exercised powers of effective control over its Indian subsidiary in terms of its corporate policy”.⁴¹ It was pleaded that UCC established and maintained the Bhopal Chemical Plant “with defective and inadequate safety standards which compared with designs of UCC’s American plants, manifested an indifference and disregard for human safety.”⁴² Despite this the Court warned that the settlement ought to be accepted as “we should not proceed on the premise that the liability of UCC has been firmly established.”⁴³ Thus the whole approach of the Court was pessimistic and diffident. The Court appeared unsure as to the liability of the UCC and the connected inability of UCIL to pay substantial damages.

The positive aspect of this decision was the direction to restore the criminal prosecution in the following terms: “we hold that no specific ground for withdrawal of the prosecutions having been set out the quashing of the prosecutions requires to be set aside...The memorandum of settlement... leaves no manner of doubt that a part of the consideration for the payment of \$ 470 million was the stifling of the prosecution and, therefore, unlawful and opposed to public policy.”

Then the Court rejected the “fairness hearing” argument as well as the argument that the settlement was vitiated because it did not contain a “re-opener” clause to take into consideration those injuries that were not anticipated earlier. This conclusion came after the Court admitted that “what was transacted with the Court assistance between the Union of India one side and the UCC on the other is now sought to be made binding on the tens of thousands of innocent victims who had a right to be heard before the settlement could be reached or approved...Any paternalistic condescension that what has been done is after all for their own good is out of place.”⁴⁴

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Dealing with the argument that if the settlement were to be set aside, the money deposited would have to be returned to UCC, the Supreme Court held that while this may be true, UCC would be required to abide by the earlier interim order requiring UCC to maintain unencumbered assets of the value of \$3 billion during the pendency of this suit. The Supreme Court also directed the Union of India to stand guarantee to make up the deficit in case the settlement sum deposited proved for any reason to be inadequate.

Ahmadi J wrote a dissenting judgement. "I find it difficult to persuade myself to the view that if the settlement fund is found to be insufficient, the shortfall must be made good by the Union of India."⁴⁵

Continuing litigation

In May 1996, a public interest petition was filed in the Supreme Court on behalf of the victims complaining that from 1994 onwards instructions were issued to the deputy commissioners adjudicating claims not to continue with the adjudication and to direct all claimants to go to the Lok Adalats. The grievance was made that since adjudication has come to a grinding halt the victims were compelled to go to the Lok Adalats where "payments were restricted to the bare minimum of Rs 25,000 in a large number of cases".⁴⁶

Quashing the charges

In September 1996, a Bench of the Supreme Court quashed the charges against the accused persons⁴⁷ overriding these submissions of the additional solicitor general appearing for the Union of India who submitted that "there was ample material produced by the prosecution which clearly indicated that all the accused concerned shared common criminal knowledge about the potential danger of escape of the lethal gas."⁴⁸ Such was also the finding of the Vardarajan Committee, which was appointed by the Government of India to look into the causes of the accident. The evidence on record showed "that these accused even though stationed at Bombay shared the criminal knowledge of the other personnel of the company who were actually handling the Bhopal plant... had criminal knowledge regarding the defective working of the plant and... were no longer interested in its safe keeping... (so that) no remedial steps were taken."⁴⁹ Without going into the extensive evidence on record pointing in the direction of criminal culpability the Supreme Court quashed charges under 304 Part II (culpable homicide not amounting to murder which is attracted if the act done is with the knowledge that it is likely to cause death but without any intention to cause death), 324 (voluntarily causing hurt) and 326 (voluntarily causing grievous hurt) of the Indian Penal Code (IPC). These sections were quashed on the questionable reasoning that there was no evidence on record to show that the accused had knowledge "on the fateful night" that "they were likely to cause death".⁵⁰ This phrase "on that fateful night" is found repeatedly in the judgement. What the Court is saying

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46 2000 10 SCC 507

47 1996 6 SCC 129

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therefore is that although the accused generally understood that they were storing a highly toxic chemical in an inappropriate manner and in a dangerously defective plant and knew generally that the leakage of gas could cause death, nevertheless they were liable to be exonerated of these charges because there was no evidence to show that they knew that the gas was likely to leak “on that fateful day” causing death. After quashing all the charges thus the accused would have been discharged. To avoid this the Supreme Court introduced the charge of criminal negligence under section 304 - A.

The decision of the Chief Judicial Magistrate, Bhopal

By order and judgement dated June 7, 2010, the trial court convicted all the accused persons under section 304 – A, 336, 337 and 338 r/w section 35 of the Indian Penal Code 1860 and sentenced them to two years, imprisonment and a fine of Rs 100,000 each.

The trial court noticed that industrial licensing relating to the pesticides was granted by the Director General of Technical Development. Licenses were provided by the Industrial Department of the Ministry of Chemicals and Fertilisers, Government of India for manufacturing 5000 tons of MIC-based pesticides. Government of India also approved a foreign collaboration between UCIL and UCC on the assurance given by UCC “that the company have technical knowledge of several years of manufacturing MIC in USA successfully.”⁵¹ UCIL acquired the Bhopal plant from UCC, USA, which was a 50.9 percent shareholder in the company. A Design and Transfer Agreement and a Technical Services Agreement were entered into between the two companies. The Court records that “both these Agreements categorically record that UCC was a global leader in the field of MIC-based pesticides, having been engaged in this field for many decades prior to these Agreements. The accused Company made every efforts to acquire the best possible technology and design that was then available. The whole technology was imported from UCC, USA.⁵² The entire plant was set up by the UCC personnel under control and supervision and start up procedure was done by Mr Warren Woomer, who is a specialist in MIC.⁵³ This is how the manufacture of MIC started at the Bhopal plant in 1979. The Court also noted that “in 1980’s an American, Mr Warren Woomer came to India and remained here for two years in the capacity of General Works Manager”.⁵⁴

The Court elaborately set out the “major design defects brought to the notice of the Court”.⁵⁵ Also that “the problem was made worse by the plant’s location near a densely populated area, non-existent catastrophe plants and shortcomings in healthcare and socio-economic rehabilitation,”⁵⁶ and concluded that the parties responsible for the disaster were UCC, Government of India and government of Madhya Pradesh.⁵⁷ The Court found that there was a storage failure, in that huge quantities were stored with all the safety systems “either out of

51 State of Madhya Pradesh through CBI versus Sir Warren Anderson; in the Court of the Chief Judicial Magistrate, Bhopal, MP; Criminal Case No. 8460 of 1996, para 25

52 Para 34

53 Para 34

54 Para 34

55 Para 37

56 Para 38

57 Para 38

order or shut down”.⁵⁸ MIC is required to be stored preferably at 0 degree centigrade, but the Court found that the refrigeration system had been closed down and that “the directions for shut down was given by the Production Manager, SP Choudhary and by Mr Warren Woomer, overall in-charge of the plant”.⁵⁹ The Court also found that the Vent Gas Scrubber and Flare Tower were not in working order and were “kept shut down”.⁶⁰ “No explanation is there on the part of the accused persons why it was kept shut down/inoperational.”⁶¹ Though the MIC was to be stored under pure nitrogen pressure of 1 kg / cm² the pressure was 0.25. That the plant was “running negligently”⁶² was reported by “a team of experts headed by Mr Poulson from UCC, USA, who came to Bhopal after the death of an employee of UCIL in 1982.”⁶³ Reports were sent from Bhopal to UCC about the rectification of defects.⁶⁴ The Bhopal plant was at the time of the incident “running in loss of near about Rs 5 crores.”⁶⁵

The Court then records the defence of Mr Keshub Mahindra to the effect that “he only used to chair the meeting of the Board. He was not concerned with the day-to-day business. He was not concerned with the safety aspect.”⁶⁶ None of the matters were ever placed before the Board of Directors.⁶⁷ These arguments were rejected. Referring to the role of a non-executive director, the Court observed that “she is usually involved in planning and policy making... are expected to monitor and challenge the performance of the Executive Directors and the management and to take a determined stand in the interests of the firm and its stakeholders. They are generally held equally liable as executive directors...”⁶⁸ The Court concluded that the present case was “not a case of vicarious, but a personal liability. In the modern times, there is an ever increasing awareness and expectations of the duties and responsibilities of large corporations in matters of health and safety.”⁶⁹ Then followed the conviction and the sentence.

In concluding the chief judicial magistrate observed “the tragedy was caused by the synergy of the very worst of American and Indian cultures. An American corporation cynically used a third world country to escape from the increasingly strict safety standards imposed at home. Safety procedures were minimal and neither the American owners nor the local management seemed to regard them as necessary. When the disaster struck there was no disaster plan that could be set into action. Prompt action by the local authorities could have saved many, if not most of the victims. The immediate response was marred by callous indifference.”⁷⁰

The Court ended by declining payment of compensation under section 357 (3) CrPC on the grounds that the compensation settlement had been entered into. This is an interesting point.

58 Para 53

59 Para 56

60 Para 64

61 Para 64

62 Para 78

63 Para 78

64 Para 80

65 Para 115

66 Para 118

67 Para 135

68 Para 137

69 Para 184

70 Para 216

Damages were awarded in the settlement for injuries caused in civil proceedings. Compensation in criminal law proceedings is awarded “to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system.”⁷¹ In that case the Supreme Court regretted Courts not exercising “their salutary powers under this section as freely and liberally as could be desired.”⁷²

Lessons of Bhopal

After 1985 judicial activism went into a tailspin. Bhopal hastened the decline in the standards of judicial decisions on the environment more than any other case. It taught industrialists a memorable lesson. If you can get away with Bhopal you can get away with anything. If after thousands of people died in Bhopal, Union Carbide and its Board of Directors could get away with petty compensation and no criminal liability (under the 1989 judgement), then one need not fear the law.

Poor people don't count. This was the second lesson. The tragedy of Bhopal was that the gas leaked into the quarters where the poorer people lived. Had the toxic cloud drifted in the direction of the Secretariat, the Bhopal litigation may have taken a different turn. As things turned out the wind direction changed and Arjun Singh, then Chief Minister of Madhya Pradesh, was able to board his helicopter and decamp.

Poor people died like flies and the litigation dragged on for years. Advocates made fools of themselves in American courts arguing with fawning patriotic zeal that courts in India were upto the mark, and Judge Keenan took advantage of this to disguise his basically pro-business attitude with patronising sweet-nothing. Who are we to tell the third world what that they should be doing? They have their values, they have their courts, they have their standards. Who are we to decide what compensation is payable? With words of this kind the litigants were banished from American Courts, with their strict liability and high levels of compensation and low levels of judicial corruption, into the labyrinthine mess of the Indian judicial system.

Thus with Keenan's judgement double standards for trans-nationals became the norm. American corporations were required to follow higher standards of safety in America and also abide by the right to information laws and the higher level of compensation. But operating in the backwaters of the developing world they were free to work in secrecy, bribe officials and lie in court. Were trans-nationals to be prosecuted in American courts according to American law for disasters abroad, the occupational health and safety scene in the developing world would have improved dramatically.

The undue haste with which the full Bench of the Supreme Court pushed through the settlement and quashed the criminal proceedings was later partially corrected when the court reversed itself and restored criminal liability. This haste to push through the settlement was in sharp contrast

71 Manish Jalan versus State of Karnataka (2008 9 Scale 814)

72 818

to the manner in which the judicial proceedings went on for years. The court's performance was a fitting answer to Nani Palkhival's grand arguments that the Indian judicial system was competent to handle the Bhopal litigation.

And when Chief Justice Pathak went to the World Court at Hague soon after criminal liability was quashed and then tried to hang on for a second term by unusual means eyebrows were raised. The result of all this was a clear signal to the lower judiciary that the environment was taboo and to industrialists that it was business as usual.

So many years later when an inflammable gas leaked and ignited causing an explosion that shook the IPCL factory at Nagothane in Maharashtra and killed 50 workers it was history repeating itself. The management was hopelessly unprepared. The hospital within the complex, in which thousands resided, had beds for only seven patients. The doctors said that they were not surgeons. They did not know how to give an intravenous drip. They claimed that they had neither the equipment nor the medicines and that they were never informed of how to deal with victims of chemical explosions. The hospital had only two ambulances with two beds each. One was so old it broke down at the gate. The workers' bodies were therefore taken to hospital in contractor's trucks. Panic-stricken, the doctors evacuated the factory without first treating the injured and dying. They were taken northwards towards Alibag over roads pitted so badly that some of the workers died on the way. After hours they reached Alibag only to find the civil hospital without medical supplies. The trucks then turned around and came south to Bombay. At Sion Hospital the doctors found all the workers dead. They said that had elementary emergency aid been provided by spraying the workers with cold water immediately after the explosions and then by covering them in light cotton clothing and had intravenous drips been administered it would certainly have been possible to save lives. As in Bhopal, transnationals were involved in the fabrication of the IPCL plant and these foreigners were working in the premises when the explosion took place. They immediately left the factory and caught the first flight home. Thus even after Bhopal no industrialist had learnt that a disaster management plan was necessary. Not very different is the story of the recent hazardous chemical leak from Century Rayon, Thane.

Government attitudes in Bhopal sent a similar signal down the line to all the expert bodies. When on behalf of the government, the Tata Institute of Social Sciences sent a team to Bhopal to document the number of persons affected and the degree of injury, much work was put in but the records are mysteriously missing. Voluntary groups doing similar work had their offices raided, their activists arrested, their records seized by the police and later destroyed so that documentation of the nature and extent of injuries was deliberately done away with leading ultimately to only about one-third of the victims getting compensation. From the top came the warning to zealous officers that the environment was not to be taken seriously.

The courts and the government repeated this performance when activists of the Narmada Bachao Andolan were routinely beaten up and arrested and treated as anti-nationals and anti-development. Despite the failings of Narmada Project, the high court refused to entertain the petition and the Supreme Court in this matter of national importance passed a one-page order directing the construction to proceed apace with perfunctory remarks regarding rehabilitation.

As with the Amnesty report on torture in India, it sometimes takes a foreign committee's report to make India sit up and take notice. There could not be a more scathing indictment of the Narmada Project than the Morse Committee Report. Yet, in a situation where the governments of Gujarat, Madhya Pradesh, and Maharashtra have no intention of rehabilitating anyone, according to the Narmada Water Disputes Tribunal. Award and the supplementary agreements, all that BD Sharma the intrepid excommissioner for scheduled castes and tribes could get from the Supreme Court in his public interest petition was a direction against him, for the work on the dam to go ahead.

The casual attitude of the courts has taught the pollution control boards a thing or two. Steeped in corruption and headed by politicians these boards fabricate anything for anybody at a price. At the center of the putrefaction of social life the pollution control boards, themselves cesspools of corruption- have become a law unto themselves. Reports are fabricated, investigations stage managed, approvals granted fraudulently and accidents covered up. And the position of the Minister for the Environment, once a punishment posting, has become the most lucrative Ministry. Crores of rupees in bribe money flow through the corridors of Paryavaran Bhavan.

The pollution control boards, get away with this because courts do not question their reports. In property matters affidavits, reports and other documents are scrutinised closely by the writ courts, but in environmental matters even the most outrageous, causal or contradictory reports would pass muster. When expert bodies act independently and fearlessly then it is understandable that courts not substitute its eclectic knowledge of the subject for the scientific reasoning of the expert body. But when the pollution control boards act malafide should the courts keep their eyes shut?

The obsession judges have with the amount of money spent on projects is another misplaced concern. What law-breakers routinely tell the courts in effect is: "perhaps we have broken the law and harmed the environment but we have spent so much money let us continue with the construction. Otherwise we stand to lose so much money." And the court succumb. Because of their property and profit orientation judges rarely calculated the enormous costs in terms of environmental destruction.

It takes courage to condemn a mega project that will harm the environment. But it must be done, and in clear terms. Judicial pronouncements on the environment in India tend to appear to say much more than they do. The Sriram case, for example, used wonderful language and several quotations and relied on many precedents and is said to lay down the principle of strict liability. The casual reader might believe that strict liability now exists in India. But when read carefully the judgement is otherwise. Subsequently decisions of the Supreme Court have not taken the Sriram case as laying down strict liability. We are told that one of the judges who delivered the decision- a prominent public interest litigation proponent- has after retirement in opinions given to industrialists said that the doctrine of strict liability as laid down in Sriram's case was obiter.

Thus after Bhopal the separation between what judges pretended to say and what they actually said grew. Grand judgements were not uncommon but they had little effect because the operative

Has the Judiciary abandoned the environment?

part of the orders were like little pipsqueaks as compared to the lions roar of the quotations and lofty ideals. By these techniques the judiciary caused the public to believe that the judiciary was receptive whereas quite to the contrary judicial decision-making was characterised through this period by timidity and domination by industry.

As the judiciary went into decline the movement grew and took on the dimensions and characteristics of a mass movement. Now we are truly on the threshold of a second national movement. Public life has become so corrupted, standards are so abysmally low and looting the exchequer has become so much a national pastime that nothing short of a national cleansing of the rot that pervades Indian society will do.

The environment movement once stood on the fringes of the human rights movement as just another issue. Today it stands center stage. The nexus between environment issues and life itself indicates that the struggle for a healthy and sustainable environment is a struggle for changing the whole of society itself. Basic values, attitudes, approaches, priorities and lifestyles are called into question and the environment has transited in the people's minds from being just another issue to being the subterranean strata of all movements. It is not simply an issue of forests or water or the air, but the living together in harmony of all people and their harmony with nature.

Bhopal Gas case⁷³

In the Bhopal case, it was apparently necessary that victims of the gas disaster hold sit-in protests and an indefinite hunger strike in turns from June 10, 2008 onwards, after having walked 800 kilometers (500 miles) from Bhopal to Delhi. It was only on August 8, 2008, twenty-four years after the disaster and after the tireless activism of the victims themselves, that the Government accepted most of the demands of the victims and their representatives. The Courts of India, having considered the Bhopal case in countless petitions, failed to play a role in awarding justice to victims.

It was in a statement made on August 8, 2008, by the Minister of Chemicals and Fertilisers and Steel in New Delhi, that most of the victims demands were accepted. The demands were the very minimum that the victims could have asked for. Accordingly, the victims were granted a Plan of Action amounting to Rs 982.75 crores. Secondly, the Group of Ministers, constituted to superwise matters related to the Bhopal Gas Leak (GoM), decided that the Government of Madhya Pradesh (MP) may decide “to allow free treatment and availability of medicines to the people of the 20 unaffected wards, in the Government Hospitals, without prejudice to the benefits and entitlements of the recognised gas victims in 36 ‘gas affected’ wards [sic].”⁷⁴ Thirdly, the Department of Chemicals and Petrochemicals would prepare a Draft Proposal—on the Terms of Reference, modalities, functions, powers, headquarters and other related requirements—for setting up an Empowered Commission—for the rehabilitation of Bhopal gas victims. Fourthly, the ICMR (which stopped its research work in 1994) would resume its research work and “give its recommendations for the right line of treatment for different medical problems faced by the gas victims and their families.” The fifth demand concerned the role of the Judiciary. To be precise, the Application of the Department of Chemicals and Petrochemicals, Ministry of Chemicals, filed in the High Court of MP in WP No. 2802 of 2004 (Alok Pratap Singh versus Union of India and Others), to deposit Rs 100 crore as an advance for environmental remediation of the former UCIL plant site at Bhopal. Regarding this application, the GoM decided that the Department of Chemicals & Petrochemicals “would not withdraw its application filed in the High Court of Madhya Pradesh requesting the Court to direct Respondents No. 4 to 6, in the Public Interest Litigation filed in WP No. 2802 of

⁷³ This piece was written in 2008

⁷⁴ *Formally* the victims’ demand has not been accepted, as the request of the Govt. of Madhya Pradesh (MP) was to declare the remaining 20 wards of Bhopal as Gas affected. This request was not agreed to by the Group of Ministers.

2004 ... The outcome of the matter pending before the High Court of Madhya Pradesh may be awaited in this regard.” In the sixth clause, the GoM agree that the offer of Shri Ratan Tata, to set up a Site Remediation Fund to clean UCIL Plant site, is “not acceptable in its current form, as it is a conditional offer to absolve Dow Chemicals Company from the liability for environmental remediation of the former Union Carbide India Limited plant site at Bhopal.” In the seventh clause, the GoM concurs that “the legal pursuit for the extradition of Warren Anderson may be expedited by the Ministry of External Affairs with the US Authorities.” The eighth demand was about Cancellation of Registration of Pesticides of Dow obtained by payment of bribes. The Minister of Chemicals and Fertilisers and Steel promised that the CBI will “expedite its report on the investigations into the alleged payment of bribes to the officials of Ministry of Agriculture by Dow for obtaining the registration of four pesticides, including Dursban.” Considering the ninth demand, the Minister stated that the Government of India and the Government of MP “may go ahead with the implementation of the Roadmap for the environmental remediation of the former UCIL Plant site at Bhopal.” The last demand of the victims and their representatives was, however, not accepted. This demand was to review the approval of Federal Trade Commission (FTC) between Reliance and Dow Global Technologies Inc. The Minister stated that the GoM “deferred a decision on the issue.”⁷⁵

* Source: Ajoy Ashirwad Mahaprashasta and V. Venkatesan, *Frontline*, Volume 25 - Issue 16 : August 02-15, 2008. Available at: <http://www.bhopal.net/bhopalinthenews/> (last consulted August 17, 2008).

75 Source: Official Statement made by the Hon’ble Minister of Chemicals and Fertilisers and Steel on August 8, 2008 at Jantar Mantar, New Delhi before the representatives of Bhopal Gas Victims, available at <http://www.bhopal.net> (last consulted August 17, 2008).

The Supreme Court Case on Medical Effects of the Bhopal Gas Disaster

Margreet Wewerinke

In 1998, three groups, representing victims of the gas tragedy, filed a petition. The counsel for the petitioners was S. Muralidhar. The basic point of this petition was that, during the time of the settlement made before the Supreme Court, there was recognition that the gas disaster would have long-term medical effects and that the State would be responsible for dealing with these effects. Indeed, as part of the settlement, the State would deal with all additional claims that came up the settlement.

At the same time, medical care was not made available by the State and people incurred huge debts to pay for the costs of basic health care. Subsequently, at the time people got compensation, the money people got was often insufficient for paying off the debts that people had accumulated.

At this point the Supreme Court was asked to intervene and to ensure that the right to free healthcare, under Article 21 of the Constitution, was being enforced. The Court decided to deal with the case under the mechanism of “continuous mandamus”, meaning that the Court “keeps a case alive”, as in a continuous follow-up. When dealing with public interest litigation, the Supreme Court has used this mechanism, of “continuous mandamus”, in a few other cases as well. It is a very effective mechanism. It allows the Court to keep on dealing with the case, even after more than ten years have elapsed.

Notably, there is another case related to the Bhopal gas disaster, that has also been dealt with under continuous mandamus, namely that of the Research Foundation for Science & Technology v UOI. The case largely deals with the issue of disposal of hazardous waste. The Supreme Court has set up a Monitoring Committee in this case, which, in turn, has issued a report saying that the groundwater, around the plant, is still polluted. From this report it became clear that the Government has to supply water for people. Now, tanks come every day to provide people with water. This is however insufficient. And strikingly, there exists technology that could clean-up the groundwater. Union Carbide has not taken responsibility for this clean-up. It is clear that Dow should be held accountable at this stage, but the Indian elite is opposed to such corporate accountability. It is therefore not clear how this case will proceed.

Has the Judiciary abandoned the environment?

In the case on the medical impact of the disaster, the Supreme Court is still monitoring the Government closely. It wants to know what efforts have been made to help victims. The Court has played a significant role in getting the six-state hospitals functional. Notably the State Government has been resistant all the way. Even if they do set up a hospital, they would fail to appoint doctors, or fail to provide medicines.

From a legal point of view, an important development took place in 2004 when the Supreme Court set up two bodies. The first body was an Advisory Committee that proposed treatment protocols and conducted research into the long-term medical impacts of the gas disaster. Such research is important since the impacts of MIC on the human body have not been fully explored. Consequently it is almost impossible to find adequate treatment for MIC and the treatment of victims remains symptomatic.

One of the practical problems, faced by the Advisory Committee, is that the medical histories of victims are not kept together in one place. Although the State Government recently facilitated a computer system at some of the hospitals, which could potentially keep track of people's medical history, this system is not being used for this purpose. Therefore medical histories continue to be rather fragmented and only hardcopies of files are available. Moreover, in many cases, people have to take care of their files themselves and many people have lost data or have lost their medical records altogether. So much valuable information has simply been lost due to lack of medical documentation. On the positive side, due to the Advisory Committee, these kinds of problems are at least being addressed.

The second body set up by the Court was a Monitoring Committee, mostly consisting of doctors but also including some NGOs. This Committee makes more than 50 visits and sends reports to the Supreme Court approximately every six months. It deals with questions such as: How should medicines be made available for victims? What kind of medicines should be made available and for whom?

For lawyers fighting on behalf of gas victims, it remains a challenge to get the Supreme Court to collaborate in meeting needs and in dealing with new problems that keep coming up. At the moment, one problem victims face is that the State Government is trying to establish – and has already done so in some cases – hospitals in order to earn money. Although there are still 5.5 lakh gas victims, hospitals, meant solely for these people, are opened out to non-gas-victims on the payment of a fee. Thus, victims are being sidelined.

We now have data showing that in these hospitals, the number of non-gas-victims, that is paying patients, has gone up to more than 50 percent! Theoretically, if a hospital has the capacity to treat 4,000 patients per day, it can well take up an additional 1000 patients, but certainly not more than that. In fact, we have found that the number of patients, that receive treatment per day actually remains 4000. So now, only 2000 of these patients are gas victims! The other victims have no choice but to go to private doctors and pay for the treatment themselves or receive no treatment at all. The number of gas victims, in need of treatment, has certainly not come down.

This problem must be seen in the larger context of liberalisation. As part of this process, welfare facilities, in the state, have been dismantled with amazing speed. Consequently, arguments like “free medical care” are met with nothing but ridicule. “What’s wrong with opening hospitals up for paying patients?”—is a question that even judges can easily come up with. Generally speaking, articulation of any kind of rights has become very difficult. This means, in the Bhopal case, that merely preserving the gains that twenty-four lawyers have made in the last 10 years, has been very difficult. At the same time, people have been fighting for the last years and they are exhausted at the end of the day. How long can this go on?

Indeed, the compensation paid to victims has been very low, compared to compensation, in countries such as the United States or Europe, in tort cases. Although the number of victims turned out to be five times higher than initially estimated, the Supreme Court did not direct the Government to allocate a greater amount of money than what was reserved earlier for victims. Instead, the Supreme Court told each victim separately to turn to a Welfare Commission. Looking at this judgement, you can see how the Court has denied people their basic human rights. In the meantime, the number of victims continues to increase and people are still dying of MIC.

Testimonies of the Victims

Abdul Jabbar *Activist and Gas Victim*



Being a gas victim myself, I have been committed to the fate of gas victims from the very first moment. I was living in the area that was worst hit by the disaster (close to the railway station) and lost both my parents and my brother in the tragedy. Our land was severely damaged. In 1986, I founded an NGO, Bhopal Gas Peedit Mahila Udhog Sangathan. From 1986 onwards we have been meeting, every Saturday, in a park in Bhopal and are still going on with our struggle. We have been demonstrating on the street regularly and went to the Supreme Court to claim the right to compensation and medical care. In 2004 we went to Court with yet another petition, which included the latest figures of deaths and injuries, but we did not win the case. After a week [from August 7, 2008, red.] we tried again and filed a case in the Welfare Court for more compensation.



Graffiti by Bhopal Gas Peedit Mahila Stationery Karamchari Sangh (BGPMKS)

Gas victims have been dealt with in a very unjust manner. In the name of development, it is always the poor who are the worst it. Since India's crucial policy change, in favour of free trade and liberalisation in 1991, the main message, that India seeks to communicate to multinationals, is that they can come and invest. They can come and invest even at the cost of human rights and the environment.

In my opinion, the Government deliberately sided with Union Carbide instead of with the predominantly poor victims, who were and are still fighting for a clean environment and compensation. The first month after the disaster, the Government took victims' corpses and threw them in the Narmada River. What's more, large numbers of human bodies were buried in just one grave. These bodies were burnt quickly with kerosene. This was done to keep the officially recorded number of victims low. Of course, 90 percent of the victims were poor. They were ordinary people, not those who have white-collar jobs.

So, as we all know, the Government took the legal case against Union Carbide on behalf of poor people, which ended up in the 470 million dollar settlement before the Supreme Court. Here, the Supreme Court merely acted as a broker. The Court firmly allied itself with the powerful. The role of the Judiciary is not different on the local level, where a criminal case, against the company and company officials, is still pending. Money rules. And the injustice being done to Bhopal still continues. This toxic and dangerous substance is still lying in the factory and is slowly but surely spreading into surrounding areas. The impact turns out to be much more serious than one could have ever thought it would be in 1984. Such damage is unnecessary, yet nobody has stood taken responsibility for this waste. The excuse is that Union Carbide merged into "Dow Chemicals". Because of such legal arguments, some 10,000 families continue to drink contaminated water. Although the Government placed water tanks in the area two years ago, this does not provide sufficient water as the area is densely populated. It might provide one bucket per family per day. In Bhopal, you have no option but to use polluted water.



Ahmad Ali (62) *Gas Victim and Watchman, Bhopal*



I have been living right next to the factory for more than twenty years. A year or so ago, I began working as a watchman for the residential side at the other side of the factory. I am paid by Shyama factory. Until two years ago, we have been drinking and using the water here, as no other water was available. The water here has a strange, reddish color and does not taste like water at all. We know that many people have become ill or have even died as a result of this. But only two years ago, the Government has provided tanks so that we do not need to drink and use contaminated water anymore. But this does not suffice.

I have had breathing problems, continuous headaches, body pain and sleeplessness since the disaster. And I faint every now and then. My eyes are reddish and sore. All members of our family live here and have these problems and it has become normal. Sometimes the problems are worse. Some have very bad joint pains. And the children, they are also weak. It might be due to the water, I do not know. I own a small plot of land here, so where else does one go?

Gas Victims and Widows, Bhopal



We have lost our husbands as a result of the gas leak. And we have been living with health symptoms like stomach ailments, breathing problems, joint pains and skin diseases. We received little or no compensation. The problems become worse as we are getting older. We were promised adequate financial assistance, yet the money we received is negligible. We are old and poor. We demonstrate to demand the money that has been promised to us, so that we can sustain ourselves and fulfill our basic needs.

Farha Tabassum *Gas Victim and Patient, Bhopal*



I am here at the Sambhavna Trust Hospital for the treatment of symptoms that result from the air pollution caused by the gas disaster.

I have been living, ever since I was born, in the proximity of the factory. I remember that, when the tragedy happened, my eyes were watering and, was vomiting. I stayed for two days in-house; the third day I left for the village, around forty kilometers away from the factory. After ten or fifteen days I returned. I think there was no option of not returning, as we never discussed moving to another area. I was, of course, only a school girl then.

I have been called a typical gas tragedy victim, plagued by breathing problems, joint pains, pain in my hands and legs, sleeping problems and itching eyes. Although born many years after the disaster, both my children have similar health symptoms. Especially the health condition of my second child, who is one-and-a-half years old now, has been critical since her birth. Most disturbing are her breathing difficulties and thyroid disorders. These symptoms were so serious that doctors have advised me against another pregnancy.

Ever since the disaster, I have had eye problems and persistent headaches. My husband, Aqeel Muhammed, who is 32 years old and also affected by the disaster, is not able to work full-time due to comparable health symptoms. He feels tired all the time and most people singly feel he is lazy.

My husband and I received Rs 25,000 each as compensation for the overall damage. Only, the treatment of our second child has cost more than Rs 45,000. The child needed oxygen the first few days after birth, having the type of breathing problems that are well-known to Bhopal gas victims. After these few days, we had to take her home as we ran out of money for her treatment. Fortunately, she has survived so far. The child of our neighbors, who had similar problems, was brought to a public hospital for treatment where she was not given oxygen. She died. Our daughter has lucky in the sense that we had saved money for an emergency and thus she was admitted in a private hospital.

The capacity of health care systems in Bhopal is limited, whereas demands for health care remain extraordinarily high. Like most gas victims, we depend on health services—such as the Sambhavna Trust Hospital that has been established especially for gas victims—for the structural health problems we all have. We are grateful for this care. But the

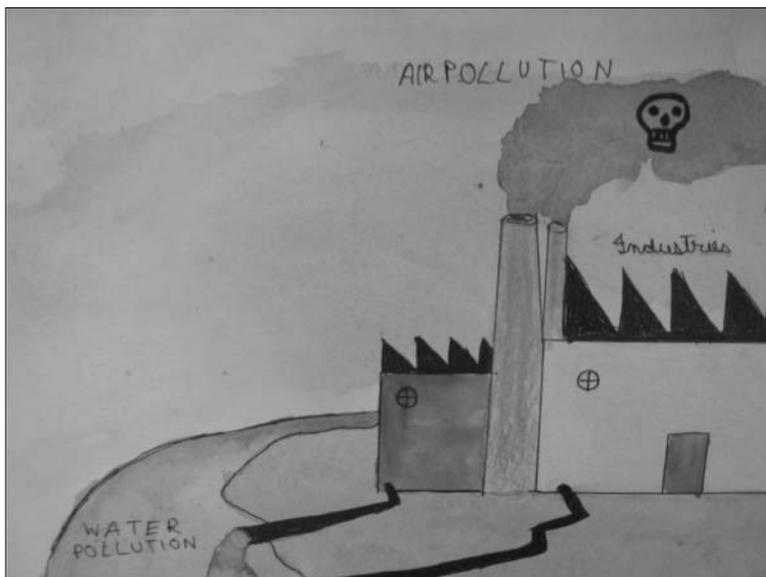


Patients at the Sambhavna Trust Hospital

Has the Judiciary abandoned the environment?

hospitals are always overcrowded and there are long waiting times. Practically speaking this means that we have spent a large part of our lives in hospitals: on average about four half-days a week. This would mean that all four of us arrive at 9:30 am and leave at around 1:15 pm, from Monday to Thursday or Friday. This limits our freedom to do other things. Most of all we would wish our children to be at school at such times instead of in hospitals.

Education is almost a luxury. Our main concern remains that of survival. We are anxious that our youngest child may pass away all of a sudden, as she is structurally weak and doctors see no scope for improvement. We do not know what kind of future she will have, or if she will have a future at all. Our son is a bit stronger. He is 7 years old now. Still he needs to take his medicines on a daily basis and will have to do so throughout his life. In spite of these medicines he is incontinent, structurally tired and does not know whether he will ever be “normal”. Because of this, and because he has missed so many classes over the years, we are getting increasingly worried about whether he will ever find a decent job. Sometimes I feel angry that our children’s futures have been marred by a tragedy that was caused by mere carelessness and total disregard for our bodies and environment.



Child's artistic expression of the Bhopal Gas disaster

Bombay Dyeing Case

Testimonies of the Victims

Datta Iswalkar *General Secretary of GKSS*



My father was a mill worker. He was working as a clerk for Modern Mills. I joined my father as soon as I was old enough to do so. I had been working for Modern Mills for a large part of my life when it suddenly closed down. At that point, I became an activist. Everything had been taken away from us. We were not skilled enough to do other jobs and many of us were simply too old to find something else. Together, we fought many struggles and we are still carrying on.

Let me explain our history. Bombay developed around the mill industry, just as Manchester did in the United Kingdom. In 1846 the first mill was opened in Bombay. At the end there were fifty-eight flourishing mills (all of which have closed down by now). All other industries, in Bombay, have developed around the textile industry. The presence of mills has triggered large industrial growth.

But in the 80s things started moving backwards and unfortunately the textile industry did not recover from this. The downfall of the industry is often said to be due to the 1982-83 textile strike, in which 2.5 lakh mill workers participated. This strike was not only for increased wages but also for ballot voting for a representative labour union. After the strike, 1 lakh workers were not allowed to come back to work. They had simply lost their jobs. The rest had to compromise at work, as workers' demands were not accepted.

Then, after 1982, mill owners went to the Government to ask for the sale of surplus land. They started to see the real estate value of the land. But the Government didn't give immediate permission for the sale.

In reaction to this, mill owners went on strike. Ten mills were closed down with no prior notice given to workers. Consequently, 25,000 workers were jobless. This was in 1987. I was one of the many workers who became jobless after the illegal closure of mills.

As we were without work, and not supported by anybody, we formed an organisation called the Girmi Kamgar Sanharsh Samiti (GKSS, or the Closed Millworkers Action Committee). We

strategically started on October 2, 1989 (the birthday of Gandhi). Three years later, on the same day, we held a march, in our undergarments, towards Gandhi's statue at the August Kranti Maidan, where the Government had planned an event. On that very day, the police beat us up badly.

Yet everybody knew that mill owners wanted to create vacant plots. They wanted to benefit from policy changes and from the liberalisation of the economy. So they just sent many workers home, randomly, without compensation. Thousands of mill workers did not get wages and two of them, who had not received any payment for many years, committed suicide. Some workers had to sell everything they had in order to survive. Many of us were literally starving. In 1997, around 1000 mill workers went on indefinite fast, with the aim to get the mills re-opened. The fast lasted for nine days.

Soon afterwards, mill owners were asked, by the Government, to pay full salaries that were due. After the High Court confirmed that mill owners would have to pay salaries, most workers received their salaries or part of it. There were two mills—the Swadeshi mill, owned by the Tata Group and the Srinivas mills—that still have not paid the dues to many workers. This is due to internal disputes, they say.

At the same time, mill owners kept trying for permission to sell their land. The Government was sensitive to the demands of the mill owners. In 1991, the Government amended Development Control Regulation (DCR) 58, which allowed mill owners to sell 15 percent of the land for commercial/residential use, as long as the acquired funds were invested in mill revival. What happened, in fact, is that mill owners started to sell their land, stroke after stroke, without making any attempt to modernise the mills. All kinds of commercial establishments started popping up on the mill lands. This was done supposedly to benefit the workers. A bowling centre on Phoenix mill land was labelled “workers’ entertainment”, while a McDonalds restaurant, on the same land, was called a “canteen”! We saw this happening and protested, but the Government simply turned a blind eye.



Core group members of GKSS

In DCR 58, it was provided that mill land could well be sold, provided that it was divided into three parts: one-third would be made available for open spaces; one-third for working class houses; and one-third for the owners. The Government itself decided to implement this. Although we wanted the mills to stay open, we supported the plan of making land available for public housing. However, we demanded that one-third of the mill land would be allocated to mill workers as compensation. We

also demanded that those mill workers, who were staying in tenant chawls, should be allowed to stay there.

The Government initially accepted these demands and decided to set up a special monitoring Committee. Ex-High Court judges would head this Committee, which would have powers similar to those of a civil Court.

But in 2004, the government sent a clarification, of its Government Regulation, to mill owners. In this clarification the Government said that, if structures of a similar size as those of the original structures are built on a similar build-up area, this build-up area will not be counted as open space. This would mean that with a simple trick, there could be a sharp decrease in the land to be devoted to public green and housing, with all of this land becoming available for the development plans of mill owners. Consequently, on the basis of the Government's clarification, many mill owners went ahead with their development plans.

It took a while before we noticed this trick. Soon after we did, we partnered with the Bombay Environmental Action Group and went to the High Court, which ruled in favour of us, the petitioners. The Court recognised that the city needed more open spaces. The Court recognised that public greenery is important for the quality of life of the workers and their families.

The Supreme Court took the case up after mill owners and the Government appealed. The government sided with the mill owners! The Supreme Court was also biased in favour of mill owners. Or perhaps it was just misled by their strong advocates. Anyway, the Court upheld the legality of the government clarification of 2001 and overruled the High Court decision. Our victory established by the High Court ruling, was a short-level one.

The Supreme Court ruling was truly disastrous. According to the original Regulation 58 and, according to the High Court ruling, 200 acres of land should have been made available for mill workers. This would be one-third of the available land. After the Supreme Court ruling, which upheld the amendment and the Governments "clarification", less than 50 acres is available for us! Similarly, the land, available for public greenery, was reduced to almost nothing. The Supreme Court simply said: "this is the lawmakers' interpretation and we do not interfere with it." The consequences are ominous.

One good thing for us is that the employment scheme, that we asked for, has been set up. At least, we hope to benefit from this scheme, as mill lands are still undergoing development and we have not yet benefited from it so far. The mills, that have commercial activities on their land already, were set up before 2000. One example is that of Phoenix mill. Therefore they are not bound by this regulation and they do not need to offer us jobs. But the mills, that are currently undergoing development, will have to abide by that rule.

We also demanded training for workers who are not skilled to do anything other than millwork. Without training, they would only get jobs such as those of a watchman or cleaner. This would hardly account for more than one-fifth of what workers used to earn. It is crucial that workers are reasonably paid. We can only hope that, once the jobs are created, training will be provided to workers. But so far there are no signs of training programmes whatsoever.

Has the Judiciary abandoned the environment?

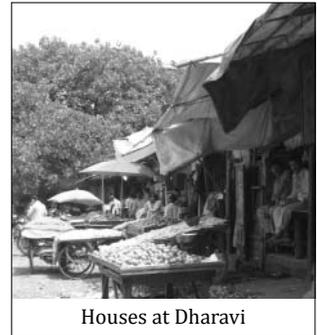
Interestingly enough, throughout the years, the struggle of mill workers has developed into a struggle for the whole city. The struggle is no longer about workers alone. Instead, we have been, and are still fighting, for a better quality of life for the whole city. We fight against the persistent tendency of the powerful to sweep the interests of the poor, of the common man, easily under the table. Mill owners do not care about public interest. The Government and the Supreme Court do not care either. So, with a core group of workers we still gather every week and see how we can defend our rights as workers and citizens.

Khader Bi (52)



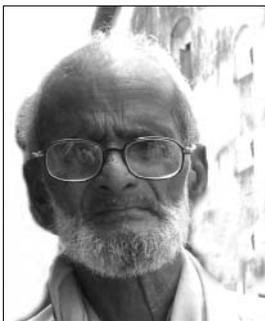
I live in Dharavi and I earn a living by selling garlic, potatoes and onions. My parents were born in Dharavi as well, and I was born and grew up here. I have three daughters and no son. We stay in a small hut with ten people. My daughters are young adolescents. One is married. She also stays in Dharavi with her husband and his family and children. Their house is too small also.

I wish my children could have permanent jobs. It does not matter what they do, as long as it is permanent. But it is difficult, really. There is no help from the Government. I would have served the poor people had of been a Government functionary. Because now, the government does not provide facilities and we stay poor. I would also want to make better, permanent shops and permanent houses so that we can develop. Now, there is no security to develop.



Houses at Dharavi

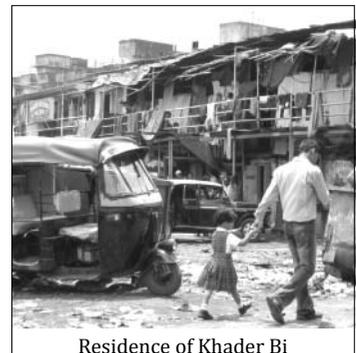
Mumtaz Ahemad (70)



I live in a village near Bombay. I go to Dharavi for medical assistance alone. There are no medical facilities in the village. So I go to Dharavi. But I would not want to live here. It is too congested and there are too many people living here. The village is much better.

I come here by train and I know many people here. I have been coming here for many years. The people, who live here, have no choice but to stay here. The work is in the city, not in the village. This is

why there are too many people here. Everybody has to earn a living. Where else would they go?



Residence of Khader Bi

Neera Adarkar *Architect Planner*



The Supreme Court ruling, in the Bombay Dyeing case, is part of a bothersome trend, which in fact destroys the city and displaces the poor. From the 90s onwards, the Government has used all kinds of tricks to make room for “development”. The aim is to exploit the real estate value of land.

The 2001 amendment of Regulation 58 established that 50 percent of the land would go to mill workers. As I was involved in fighting for the rights of mill workers, this initially appeared to me as a favourable change. However, the State Government did not mention that the amended Regulation significantly decreased the entire amount of land available. When this became clear, the Environmental Action Group went to Court to challenge the amendment.

So after the Supreme Court upheld the amendment, very little land has been made available for open space and affordable housing, including housing for mill workers. Most mill owners still haven’t surrendered the land for housing and open space, even though the amount of land is almost negligible now.

Government mills have come out with the proposal that they would calculate the land for open space and housing on the basis of the totality of the mill land end at for each mill separately. Then, the Government pretended to make more land available for housing, but only increased the Floor Space Index (FSI). The FSI initially was 1,33; now they would make it 4.

Workers organisations were okay with this proposal. As a planner, I was opposed to it, as we also have to keep in mind the density in residential areas. This is particularly important in areas where poor and working class people are residing. The density, the number of people per acre, is much higher at locations where workers live. Those areas easily become much too densely populated to be lived in. It also seriously affects the state of the infrastructure. On the other hand, increasing the FSI, for commercial areas or expensive housing, is acceptable on the condition that there is sound infrastructure in place already.

It is also important to note that, under Regulation 58, only part of the mill land would be awarded to workers, that is, they would have to pay for the construction themselves. Higher FSI also means higher construction costs in relation to what workers would actually get.

With regard to the Supreme Court judgement, and the position of the government, it can well be said that there



Development at a Mill land



is no justifiable reason for reducing land allocated for housing and for open spaces. The land, that was originally awarded to mill workers, would really be only a miniscule of the damage to the loss of lac income and property millworkers and their families. In addition, if the Supreme Court had followed the line of the High Court, instead of siding with the mill owners, precious land would have become available for other disadvantaged groups as well. Only 50 percent of the land would go to mill workers. The remaining 50 percent could be used for slum rehabilitation.

In the heart of Bombay is Dharavi, which is said to be the largest slum in Asia. There are several plans to “re-develop” Dharavi, many of which raise the question of where people will stay during or after these developments. Space in Bombay is scarce. This is yet another issue. The government is planning, in cooperation with developers, to increase the FSI on this land from 1 to 2.5. The idea that only part of the land would be needed to house people who are currently living there. The rest of the land would become available for sale so that the developer can actually make profit out of it. The developer would get the land for free and the FSI would need to be increased so that housing for the poor can be subsidised.

But these poor people are not consulted about these plans and do not benefit from them. Many slum dwellers have their businesses at home. People sell goods, make pottery, leather, recycle goods, and so on and so forth. Being forced to live on the twentieth floor of a block of flats would deprive many slum dwellers of their income. It is clear that such plans give all the benefits to the developer above. Those who care about nothing, but the real estate market, factually dictate the plans.

Yet, as I have already indicated, the trends we face now contradict this insight. This means that poor and working class people will increasingly leave the city, before or after having tried to live in forms of storage housing without sufficient open space or ventilation. People, who now live in Dharavi, would be forced to live in such an environment. Eventually they would sell the place that is being given to them. Thus the takeover of the city, by so-called developers, will lead to massive displacement.

We have been running after the government for the last many months. From what we see, it is increasingly becoming clear that what they want in fact is to give money to the poor and ask them to go away. If the poor don't leave, developers cannot build their fancy buildings on this valuable land. And of course, those who can regulate them, both Government and Judges, are from the higher strata of society. Thus, developers win the bid with empty phrases like—“Bombay is becoming a global city.” Judges, who do not see the reality on the ground, simply believe that. As a result, the interests of the poor are being downplayed even more.

Rajan Dalvi *Ex Millworker*



I have been working in Khatau Mills as a technician since 1977. Once upon a time this was the biggest mill in Bombay. We were famous for producing vaile sarees and torcosa, textiles of a very good quality. Initially, the then director – Dhramsi Khatau – had good relations with workers and was more than willing to provide the necessary facilities. His death was followed by a family, property dispute. Then, Sunit Khatau was appointed Director.

Sunit Khartau had no control over the business or the staff. He was always much too busy to work. He had the habit of avoiding paying taxes. The other officers and some staff members took advantage of his ignorance and filled their pockets with business money. It did not take long for the mill to go into losses. Then, after the mill went into losses, he declared the mill a sick unit. He went to the Board of Industrial Finance & Reconstruction, asking for permission to sell the surplus land.

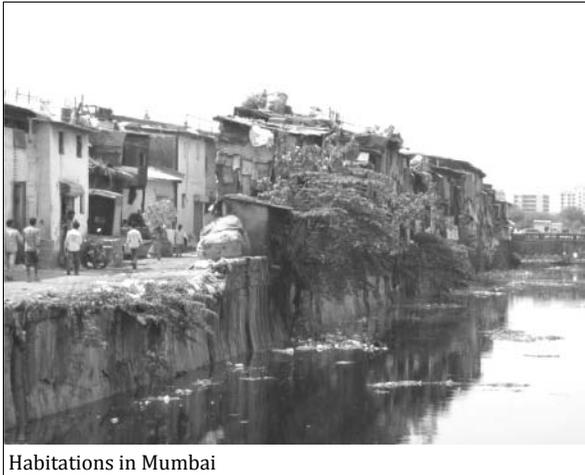
As workers, we were fully aware of what was going on every level. There was no care for the mill. We saw the situation worsen. But we could not acquire control over it. As a technician, I saw the purchasing officer buy and use machinery of unacceptably low quality. This was done because he took commission from the company that supplied these low-quality parts. The quality of our products went down and the demand for our products decreased as well.

The Director then started a procedure for the lockout of the mill. The Board had granted permission to sell the surplus land, which was sold at the rate of 15 crores, to run the mill. But the Director did not abide by the decision of the Board. Instead of 15 crores he only used 1 crore to run the mill. The rest of the money he used for personal problems. We, as workers, can only guess at that.

Khatau Mills was however not unique in doing this. Many mill owners followed suit. There was no further work for substitute workers. Khatau Mills closed in 1997. No notice was given to workers. We just went to work and saw a notice saying that the mill had been closed. And there were still two months of dues outstanding.

After the lockout, we, as workers, sent a proposal to the Board suggesting we run the mill ourselves. But the mill owner would not hear of this. After these proposals there was still no progress in the case and it remained pending in the Board for ten years. During this period, workers sent many proposals to the Government requesting intervention. The Government only said that the owner was not willing to come to terms with workers.

When we went to the High Court, the Court passed a judgement in favour of us. The Court directed the owner to pay all dues since the lockout was illegal. The mill owner was murdered soon after and the the issue of salaries went to his wife. She took control of the business but failed to implement the directive of the High Court. The High Court punished her with a one-month imprisonment period and a fine.



Habitations in Mumbai

After this we started pressuring the Government by fasts, demonstration etc. the new owner sent a proposal to the Board saying would run one unit out of a total of three. These three units together had 6000 workers. In the proposal, the owner declared to give the 6000 workers, including me, voluntary retirement. This meant that we would get some money and he would be easily rid of us. Apparently we were not useful to him anymore. He then ran unit with the help of 150 workers who worked on a contractual basis. They did not intend giving us livelihood again.

Now, the only opportunity we had was to get a small piece of land, which would be accredited to us as part of the 1/3, 1/3, 1/3 deal. We had lost our incomes and had sold a large part of our possessions. By promising us that we would get 50 percent of the 1/3 mill land, that was meant for public housing, the Government gave us a new perspective. It looked like we could start again, with a small piece of land only, but at least we could stay somewhere and give the land to the children later on. The children's education had suffered as well. After I lost my job, we had no money to support them anymore. Thus our children were forced to start working because there really was no money. So now they have low-paid jobs only.

It seems we are really left with empty hands. It is difficult to see how the Government could let this happen as we always worked hard and we helped Bombay develop into what it is now.

As an Indian, I see the larger picture as well. With the Government supporting the mill owners, so many people lose affordable housing. And everybody loses the public green that would otherwise be freely accessible. There would not only be parks but also hospitals, schools, etc. There is such a lack of public space in this city. Like everybody, we want our children to develop in a healthy city. Yet this is unaffordable may be impossible. Soon there will be buildings everywhere. There are too many buildings already. More public green would raise the standard of living so much.

Still, I would not want to leave Bombay. But only the richest, those who earn more than 1.5 lakhs, can settle in Bombay and own their own piece of land. Everything is so expensive in this city and it will become even more so. At the same time the Government does not raise salaries but it does raise taxes and the prices of basic commodities are also rising exponentially.

7 or 8 months ago, they have started breaking down the structures on the mill land where I used to work. We do not know what the future will bring, but it is clear that nobody stands up for us. This is why we still continue fighting for a little piece of land even though, after the Supreme Court ruling, it is probably reduced to almost nothing.

Vasil Ali Shaiekh (58) *Worker for Mukan Company (Steels Work) and Resident in Dharavi*



I have been staying in Dharavi for the fifty years. 7 years ago, we started making many improvements in the area. Still, sometimes there are roadblocks when there is heavy rainfall and no one can enter the area.

The Government is not assisting us. I don't know why this is so. It may be because the government does not consider us citizens of Bombay. But we see ourselves as citizens of Bombay! Yet, the Government does not provide facilities for us, as they do for any common citizen.

The Government has provided latrines though. There is a sewage system. But it is totally open, you can see everything and it is not clean. We do have some facilities for drinking water. These we have developed ourselves.

We have heard that the Government is planning to reconstruct the area. We are staying here for so many years with our family. And my work is here. I have no idea where I could go otherwise. Also, I do not understand the plans or the implementation. What do they want?

I cannot imagine that they want to help us because they never have so far. So they might as well leave us here. At least, we have a roof and we are staying together. But we are with too many others.

Yet, I do believe there is enough space in the city. There are many people and the city must be built accordingly. The problem is that politicians make their own plans. Thus it is congested. The entire city is congested. And the less money you have, the more congestion you face.

Testimonies of the Victims

Narainee (60) *former Resident Lalkhet Camp*



I have lived in Delhi for twenty-five years now. My family used to live in Rajasthan. We were not rich, so we had to work hard to earn our livelihood. Sometimes we couldn't get any work. We decided to go to Delhi in search of a livelihood. We ended up living in Lalkhet.

I came here with my husband. When we came here, we only had one child. He is called Ram Awatar, "rebirth of God". Here in Delhi, two girls and a boy were born. But the boy died. Our daughters got married and also live here in Kusumpur.

Both my husband and I have been working in the mines that used to be in the ridge area. Men would break big stones into smaller pieces, while women would break these pieces into even smaller pieces. Our wages weren't fixed as our contractors paid us according to the end products, the crumbled stones. We had to load these stones in trucks. We were usually working in teams of 8-10 people to load the stones in trucks. The work was physically very heavy and each person earned about twenty-five rupees on an average. So together we earned about fifty rupees per day.

However, life was good in Lalkhet. We were living very happily as a family. We had come from the village, where we only had a small piece of land. For the growth of our crops we were dependent on the rain. Sometimes it was almost completely dry for two or three years. Also, we did not have drinking water in the village. In Lalkhet, everything was there: sufficient drinking water, space and our own hut. We were sure that we had worked and earned a living.

But twenty-four years ago, my husband died. From then onwards the financial burden was on my shoulders. The children were still very small. Yet, I worked hard and managed to earn a living for myself and the children. Somehow I also got a Ration Card. Life became easier when the children grew up and started supplementing the family income. All my children got married as well.



Narainee's family in front of their rented house at the rehabilitation site Bawana in North-West Delhi

Then, in 2004, Lalkhet was demolished. We lost everything at once. Formally, my name was included in a list of residents because I had a Ration Card and a token given by, the then Prime Minister of India, VP Singh. And because I had been included in that survey, the DDA asked me to pay 7,200 rupees to acquire legal ownership of an eighteen-yard plot at Bawana. But our family failed to get this amount. Instead, we had to borrow money from a moneylender to rent a new room. The moneylender would lend us the money on the condition that we buy the land in Bawana and sell it to him afterwards. So this is what we did and how we managed to rent a room.

Still, I am not so happy with the situation. We are living here as tenants now. I can't work anymore because I'm too old and my health does not allow it. I would have wanted to move to Bawana so that we would have our own hut again. Due to lack of money, this could not happen. We have also lost all our belongings in the demolition. The Government did not give us time to save our belongings. So we had to buy everything again: pots, utensils, clothes... everything.

Prakash Kumar *Social Worker*



When the Supreme Court banned illegal mining in the ridge, it did not take the DDA long to forcefully demolished three settlement camps. This deprived more than 10,000 people of their homes. This happened in July 29, 2004.

The four main camps in this area—Kusumpur, Bhagwan Singh, Lalkhet Camp and Master Camp—arose some forty years ago with the development of mining activities in the ridge. You must know that the ridge area is replete with certain types of stone as well as sand (badarpur) of a good quality. This sand is used for buildings, and is usually combined with cement. In order to extract these resources, contractors—from Rajasthan, Bihar, UP and several other states—have recruited people to work for them as labourers. The contractors have provided small huts for people, or have allowed people to build huts for themselves near the mines.

At the time of the demolitions, most people had been living here for at least ten-fifteen years. There was no way they could go back to their villages. People did not know where to go. People, who got documents from before 1990, could theoretically get an 18-square yard plot of land from the Government; those with documents, from up to 1998, would get a plot of 12.5 square yards. Apart from the fact that many people couldn't afford to take this offer, the allocated land was in Bawana, far away from the city. It is very difficult to earn a living over there. So many people felt that staying here, in a small rented room in Kusumpur or another slum, was the only choice they had. Right now, most women have started to work as domestic helpers in nearby posh colonies, while men try to earn a living as daily wage labourers.

As social workers we have been fighting to prevent demolitions. We organised a campaign and held a number of meetings during which we discussed, with slum residents, what could possibly happen and what we could do against it. We planned a strategy to contact political leaders and seek their help so that they could intervene and save people's houses. We actually

went to Sonia Gandhi's residence. However, she wasn't much interested in supporting our cause. The Congressmen weren't of much help either. We went to the then Prime Minister, VP Singh's house and although Mr. Singh was very supportive he didn't really have the power to do anything. So on 29 April 2007, the demolitions did take place.

Of course, the Supreme Court's move to protect the environment is praiseworthy. But there was no concern expressed for the people, who suddenly lost their livelihoods and their homes as well. Poor people were simply thrown out.

Added to this is the fact that the State maintains double standards in protecting the environment. The government has recently sold more than two-thirds of the ridge to billionaires, businessmen, builders and Mafiosi. There are malls being built on the ridge; there's the Grand Hyatt hotel; and ironically, there is now an Environmental Institute being built in the ridge area. But poor people, who actually had a life here, have been set aside without any compensation.

Murpal (40) *former Resident, Lalkhet Camp*



I am originally from Rajasthan, Dhosa district, near Jaipur. I was living in a village there. Because it was not easy to earn a living in the village, some people moved to Delhi to work for contractors. Some of these people told me to join them and work in the mines also. It is now thirty years since that I came here with my fellow villagers.

When I started working in the mines, I was earning between thirty and thirty-five rupees per day. I was working as a labourer and my main duty was to break big stones into smaller pieces. I was working 8 hours a day.

I soon started building a hut for my family, near the mine where I was working. The camp was called Lalkhet Camp. After some time, in 1980, I managed to get a Ration card with the help of some politicians and activists. So all the details of my family members were recorded and we did get not only food grains on Subsidised Rates, but we also had legal proof of residence. I did not pay a single penny as bribe because at that time there was no corruption in India.

However, about eighteen years ago, the Supreme Court banned the mining and all mine workers lost employment. So I started working as a daily-wage labourer on construction sites. My wife also started working with me, doing the same work. This earns on average sixty rupees per day for each of us but we manage to find work fifteen or sixteen days per month only. The other days there is no income.

Time passed rapidly, until four years ago, when we lost our house. It was demolished after we had lived there for about fifteen years. I had constructed the house myself and two of our children were born there. I did not get an optional plot by the Government, even though I had a Ration card. This is because the Government asked me to pay Rs 7,200 for the plot. I tried hard, but failed to get the money. Then, some family members, who live in Kusumpur, helped us find a room that we could rent.

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Life has become tough ever since we lost our home. My wife and I earn Rs 2,000 per month if we are lucky. And we have 6 children, 5 of whom are studying in government schools. One child is physically handicapped. But the hut was our own property. We lived there as the owners. It was much easier to meet family expenses. We had much more space also. Our main expenses are foodgrains and education. We stay together in one room, with 8 people. We rent this room for 1,200 rupees per month.



Murpal's family in front of their rented house

Testimonies of the Victims

Manoj Mishra *Yamuna Jiye Abhiyaan/Peace Institute Charitable Trust*



The Peace Institute Charitable Trust focuses on issues of environment, forestry and wildlife. Peace is actually an acronym: we believe that successful environment protection leads to a peaceful world. Since 2006, the public campaign, related to Yamuna River, has become our main activity. This is because, in our view, nothing, related to environment in Delhi, can be more important than this river, which is really the “lifeline” of the city.

So, until February 2007, we have been conducting thorough research on the Yamuna River to figure out what the main problem that the river faces is. We have documented the entire river. Our initial presumptions were rather naïve. We thought the main problem of the Yamuna was its water quality. The actual problem is related to the floodplain of the river, which is as much an eco-system as the water is. It also has become clear that the main problem we face is the effort of the State to commercialise the floodplain.

As soon as we came to this conclusion, in February 2007, we invited around seven NGOs and a few interested individuals for a meeting where we presented our findings. All attendees agreed that the facts we presented were alarming and that a citizens initiative should be started to try and stop these trends. Thus, Yamuna Jiye Abhiyaan (“Yamuna Forever”) was born and the Peace Institute Charitable Trust is running as the secretary.

We have made use of the Right to Information Act in our research on the river, its floodplains and the constructions there. We have investigated what kind of permissions had been undertaken, what happened and what was planned. By using the Act, we found that the encroachments, of the Government, had been planned as early as in 1998. Among these encroachments is, first of all, the Delhi Metro, which developed its depot and headquarters on the riverbed. Secondly, there is a commercial IT park there. Thirdly, a number of residential quarters have arisen there, which are multi-storied flats. Altogether, the constructions take around 50 hectares of the riverbed. The DDA got this 50 ha without any problems whatsoever.

¹ Delhi Development Authority versus Rajendra Singh 2009 8 SC 582

Then, in 2000 the then Central Government prevailed upon the DDA to hand over around 40 ha of the riverbed to a private religious trust, which then started to build Akshardam. Apparently, we were asleep when these plans were made and we slept right through the first phase of the construction. But, we have woken up now. So in August 2007, we organised a campaign, named “Yamuna Satyagrah”, in which many farmers were involved. It was a sitting protest during which one person remained on fast. All these constructions, on the riverbed, are killing the river, as the floodplain of the river is an essential part of the river eco-system.

Moreover, once every ten years or so, the river floods. The floodplain is needed to deal with these floods. It is also needed for the re-charge of the groundwater on which 50 percent of the water supply to the city depends. Last, but not the least, the riverbed is lying on an earthquake fault line. The city of Delhi lies in zone four, which means that a huge amount of damage can be done in the event of an earthquake. Therefore it is highly dangerous to build any kind of high-rise building on the riverbed.

The Supreme Court and the High Court of Delhi have repeatedly directed the Government to revive the river. More than 1,500 crores have gone down the drain, without impacting the river’s water quality in any manner. It is clear that the concerned state agencies have failed to take approval for the construction that they were planning in the riverbed. It is important to know that the riverbed is currently being used by a large number of farmers to raise vegetables, flowers and fruit. This is all that is required of the citizens of Delhi.

Throughout the months, we have made around sixty powerpoint presentations all over the city for different audiences, pointing out the importance of respecting the Yamuna River and its eco-systems. We presented the facts to bureaucrats, ministers, college students, various policy-making bodies, resident welfare associations, schools etc. Between February and October 2007, we were particularly focused on making the State understand what the problem was and how important it is to preserve the floodplain of the river. We just presented the bare facts, as all the information, we presented, was from governmental or published resources. Although none of the authorities ever contested any of the facts we presented, the State didn’t agree to stop the construction of the Commonwealth Games Village or the Yamuna Metro Depot.

Triggered by the irresponsible attitude of the State a group of people—including Rajendra Singh, Sanjay Kaul me and representatives of the Indian National Trust for Art & Cultural Heritage—went to the High Court of Delhi for Public Interest Litigation, on October 8, 2007. In our petition we demanded that the construction of the Games Village and the metro depot be declared illegal and be ordered to be removed from the riverbed. We also demanded that, in the future, no such constructions be permitted. Thirdly, we demanded that the Government come up with a legal plan that ensures security of the floodplain of all rivers in the country. Finally, we require that the Delhi Development Authority (DDA) is suitably fined under the polluter pays principle for the damage that has already been caused.

We were heard by a double bench headed by Justice Sikri and we went to Court on a weekly basis until February 23, 2008, when the judgement was reserved. As of today, we are still waiting for a judgement. And frankly speaking, we are confused and perplexed by this delay.

Initially, we ascribed this delay to the information overload in our petition. Maybe, it was taking too much time to read all that data up. The Court showed so much interest when we filed the petition. However, as a matter of fact, they are not doing anything right now to put the construction of the Games Village, or any of the other constructions, to a halt. Therefore, one might wonder if the delay was being caused by political pressure, on the Court, to postpone any kind of ruling. In the meantime construction could well continue unabated till the tide can no longer be turned back.

Sadly, the only “polluters” that could be stopped, were the slum dwellers of Yamuna Pushta. The demolition of the Yamuna Pushta slums was an extremely tragic event, which happened in the name of cleaning the river and riverbeds. But the pollution of the river, caused by this slum, was only an excuse. In fact, the pollution caused by the slum was less than 1 percent of the river’s pollution. We have made this point in all our presentations. These slum demolitions clearly show the hypocrisy of state authorities. They remove slums in order to raise structures that are much more polluting. The manner in which people’s homes were removed was most inhuman. It is in the interest of people’s safety to not live on the Yamuna riverbeds. Yet, the inhumanity, with which people were enacted, made it clear that a commitment to people’s safety was not a concern at all. This becomes even clearer with the construction of Akshardam and the Commonwealth Games Village which face the same risk of flooding, as the slum dwellers did, and which are nevertheless allowed to be there. Obviously, these construction projects also cause much more pollution than many slums together could ever do.

Nazima (35) *former inhabitant Yamuna Pushta*



I have been living here in Sawda Ghevra for 3 years. We live with people—my husband and me and our 6 children. Before that, we lived in Yamuna Pushta for about twenty years. I had come there because it was difficult to survive in my native place. But, in 2005, our house in Yamuna Pushta was demolished.

All of our children were born in Yamuna Pushta. Life in Yamuna Pushta was good. All the basic commodities were available. Now my son is suffering from Dengue Fever. He vomits several times a day and we don’t even have water to clean his face and body properly.

There is no fresh drinking water apart from a tap that we share with many people. There are toilets available, a few hundred meters from here, but you have to pay a rupee for each visit.

The markets are far. And the city is very far. There is a festival going on right now in the Masjid, which we normally always attend. But now it takes around 3 hours to get there and there are no affordable transport facilities for us. Similarly, if goods come from the market, we trade these goods in the shops for whatever we need. Now this is not possible anymore, as there is no market and no goods to trade in.

Ali Ahmed (42) *Husband of Nazima*



The main issue is that employment. In Yamuna Pushta that of, and in the city, plenty of jobs were available. I have always been doing casual labour such as that of construction work, or the loading and unloading of goods that were used for construction work. I earned around 100-150 rupees per day and it was never a problem to find work. But around here, jobs are very scarce. For survival we now depend on food grains that we get from a public distribution system. If we need some goods from the shops, I have to borrow them. So we actually live on credit. I will repay our debts whenever I get a job. The only problem is that jobs are rarely available.

For the last twenty days, I have not been able to find any work. What I do is to go to a nearby road, Nangloi Road, and sit there. It takes me about half-an-hour to get there and I sit from 8 to 10 in the morning to see if anything comes up. I do any type of labour.

Another issue is that of education. At Yamuna Pushta the children were studying. But as they came here there was no school, due to which they have lost 2 years of education. Now only the boys have picked up their education again. One is going to secondary school, while another is going to become a carpenter. They have gained admittance only recently. In the colony, there are two primary schools and one secondary school now. We don't pay any fee, but we have to pay for uniforms and books.

The girls however are not doing anything right now. They used to go to school in Yamuna Pushta. The problem now is, apart from the expenses, that the school, they were previously attending, is not issuing the transfer certificate. There is also more work in the household as we don't have facilities, such as drinking water, for which there are always long queues. So the girls haven't continued their studies.

The girls face extreme insecurity. The surroundings here aren't good for them. They fear to walk around alone right here because people tease and harass them. At Yamuna Pushta they did not face any such problems. It was a much safer place to be in.

Life here is tough in comparison with life in Yamuna Pushta. Yamuna Pushta was a good place, and we got attached to it after living there for so many years. We had a nice house and we could live there peacefully without too many problems. This was until 2005, when our house was demolished because of a Government decision. I remember it very clearly. The bulldozers came as a nightmarish surprise. It was in the month of May. We were all at home. No notion whatsoever had been given beforehand. It all happened so that we hardly realised what was happening.



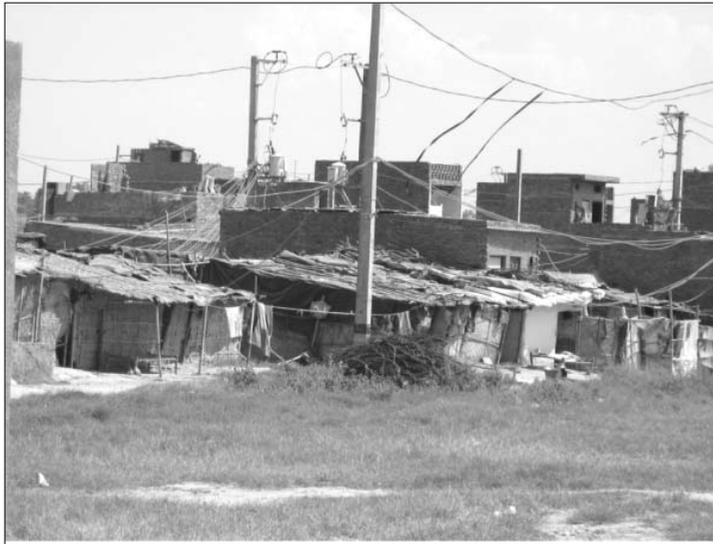
Family members of Ali Ahmed

Yet, we were lucky, because our house was at the inside of Yamuna Pushta and not at the roadside. So we saw the bulldozers coming in to crush the first couple of houses. We could at least take some things from our house. Those families, who were living near the roadside, lost all their belongings. They were not given an opportunity to remove the goods from the house, so they could only flee.

We did not have much time before the bulldozers reached our home. So we made the wrong decisions as to what to take. In hindsight, we should have taken the sheets of our house, since our current house does not have a proper roof and are left unprotected in the monsoon season. This is because we only used bamboo mats for constructing our new house.

At that same day in May, we went to a rented house to store the goods that we had saved from our earlier home. This house was near Yamuna Pushta, in Mula Colony. After the demolition, a survey was conducted to determine who would get new land allocated. It was the first survey of its kind. We had to show proof of residence and election and identity cards issued by VP Singh. Some of our neighbours, who could not issue these documents or who were simply not at home, were left out of the survey and thus did not get compensation for the demolition of their homes. We stayed at Mula Colony until we were relocated to Sawda Ghevra. We first needed to collect money to move to Sawda Ghevra as no transport was provided and the place is many hours away.

Once we arrived here at Sawda Ghevra, we found nothing but a barren piece of land. This was all the compensation we got for the demolition of our home in Yamuna Pushta. Yet we did not complain, as more than 3000 families have still not been given alternative plots. They are still being kept on pending lists. Only approximately 2500 families got alternative accommodation.



Self made Houses built up at the rehabilitation sites in North West Delhi

Vikram Soni *UGC Professor, National Physical Laboratory*



In February this year, I attended the meeting organised by Manoj Mishra and Diwan Singh and others and which resulted in the foundation of Yamuna Jiye Abhiyaan. At this meeting we discussed how excessively polluted the Yamuna River actually is. The river literally functions as Delhi's sewage system, which comes out, via Mathura and Agra, in Etahwa where it gets some relief as it is joined by the much cleaner Chambal River. Only treated water should be allowed into the river. The necessity to avoid more damage to the river ecology is one reason why forbidden constructions on the riverbed such as the Akshardam temple and the Commonwealth

Games Village should not be there.

The other reason is that Delhi is always in a water crisis, which will only get worse as population continues growing. Currently, a significant part of Delhi's water supply is imported from agricultural river basins. This is totally unsustainable. And it is unaffordable to recycle water, as is being done in some countries.

Now, at the same time, the Yamuna riverbed has an enormous potential to supply the city with fresh water. In fact, due to the recharge capacity of riverbed sand, the Yamuna floodplain, which is a natural storage, can provide two-thirds of the supply to the city. Indeed, during the monsoon enough water is discharged to the riverbed, which functions as a natural storage for fresh water. The stored water can be used to meet the growing need for water. This is not only an environmental issue but also a potential economic opportunity.

To exploit this potential, it is necessary to protect the floodplains of the river so that the sand can be "recharged" by a regulated low-level inundation for a day or two using the monsoon discharge water. This water can be withdrawn from the sand at any time by using tubewells. Notably, the Yamuna floodplains are protected under the Delhi Master Plan. In violation of the Master Plan, it was decided that the Commonwealth Games Village would be built on the floodplain. It is also against earlier Court orders and against the river authorities.

All in all, it is extremely difficult to understand that the National Environmental Engineering Research Institute has, after withholding permission, finally granted a go-ahead to these constructions. Like the Akshardam temple, these constructions will kill the floodplain aquifer, destroy the entire eco-system of the floodplains and stand on ground that will be adversely affected by floods at some point in the future. It also means that Delhi, and surrounding areas, will have to deal with increasing water scarcity, while the obvious solution, to this problem, is actively being destroyed. Ultimately the actual riverbed will become so small that no water recharge will be possible anymore.

To oppose the plans we (with Rajinder Singh, Diwan Singh, Manoj and others) organised a Satyagrah, which started on the last day of July last year and is still going on. Together with the Yamuna's Farmer Cooperative Union, we also went to the riverside and planted trees there,

after which the police arrested one of the activists for no reason at all. It must be noticed that the Yamuna Farmer Cooperative Union has already filed a case against the Akshardam temple before the Supreme Court, which they unfortunately lost. As a result, we can no longer challenge the legality of the temple before the Court, even though the temple is actually illegal.

The petition, eventually filed by Yamuna Jiye Abhiyaan, challenges the legality of the Commonwealth Game Village and the other structures to be built.

I work mostly on the scientific basis, for the case, to show the huge value of this floodplain aquifer (over \$2 billion a year).

On the non-legal side, together with a Diwan Singh, I laid emphasis the economic value of the river's water eco-system, as we thought this might be the only way to stop the ongoing construction on the riverbeds. We presented our findings before several authorities—including Governor Tejinder Khanna, the Lt. Governor and Chair of the PM's committee on the Yamuna—who seemed convinced by our arguments. In general, all experts and the Governor who saw our evaluations, agreed with our ideas. The Governor has asked the Central Groundwater Board to prepare a blueprint of our scheme and conduct field trials.

Yet, the city is not exploiting the potential of this non-invasive scheme. The potential is decreasing with the ongoing constructions. Indeed, water, for the city, keeps on being imported.

On the legal side, there is similar ignorance. The Court is now reserving judgement. In fact, this means that nothing is going to happen.

Indeed, the argument is that it is now much too late to bring the constructions to a halt. The apartments, for athletes that will be built on the riverbeds, are going to be sold at a high price. Then, the price, for the entire land on the riverbeds, will go up, which in turn will trigger even more constructions. The apartments will also need infrastructure. Water will be supplied from the river, roads will be constructed, sewage will end up in the river, etc. It is sad that our Government has such myopic policies. However, after our efforts and several meetings, the Governor has ordered a stop to any further construction on the floodplains till its value is scientifically evaluated after field trials.

Abbreviations

AIADMK	All India Anna Dravida Munnetra Kazhagam
AIR	All India Reporter
ANC	African National Congress
BALCO	Bharat Aluminum Company Ltd.
BCM	Billion Cubic Metres
BIFR	Board for Industrial and Financial Reconstruction
BJP	Bharatiya Janata Party
CAG	Comptroller and Auditor General
CETPs	Central Effluent Treatment Plants
CIDA	Canadian International Development Agency
CM	Chief Minister
CPCB	Central Pollution Control Board
CPI (M)	Communist Party of India (Marxist)
CrPC	Criminal Procedure Code
CRZ	Coastal Regulation Zone
CSD	(UN) Commission on Sustainable Development
CZMP	Coastal Zone Management Plans
DCR	Development Control Regulation
EIA	Environmental Impact Assessment
EMPs	Environmental Management Plans
FAR	Floor Area Ratio
FERA	Foreign Exchange Regulations

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FSI	Floor Space Index Act
GBA	Goa Bachao Andolan
GDP	Gross Domestic Product
GEC	Gujarat Ecology Commission
GIDC	Gujarat Industrial Development Corporation
GMO	Genetically Modified Organisms
GoI	Government of India
GPCB	Gujarat Pollution Control Board
HTL	High Tide Line
HUDCO	Housing And Urban Development Corporation
IA	Intervention/Interlocutory Application
ICZM	Integrated Costal Zone Management
ICZMP	Integrated Coastal Zone Management Plan
INC	Indian National Congress
IPCC	Intergovernmental Panel on Climate Change
IPT	Indian Peoples Tribunal or Independent Peoples Tribunal
IT	Information Technology
IUCN	International Union for Conservation of Nature
JFM	Joint Forest Management
JNPT	Jawaharlal Nehru Port Trust
JNU	Jawaharlal Nehru University
LIC	Life Insurance Corporation of India
LPG	Liquefied Petroleum Gas
MDGs	Millennium Development Goals
MIC	Methyl Isocyanate
MLA	Member of Legislative Assembly
MNCs	Multinational Corporations
MoEF	Ministry of Environment and Forests

Abbreviations

MP	Madhya Pradesh
MPCB	Maharashtra State Pollution Control Board
MTPA	Million Tons Per Annum
MU	Mega Unit
MW	Mega Watt
NBA	Narmada Bacho Andolan
NCERT	National Council for Education, Research and Training
NDA	National Democratic Alliance
NDTV	New Delhi Television
NDZ	No Development Zone
NEERI	National Environmental Engineering Research Institute
NEP	National Environmental Policy
NGOs	Non-Governmental Organisations
NPV	Net Present Value
NSDS	National Strategies for Sustainable Development
OECD	Organisation for Economic Co-operation and Development
OPEC	Organisation of Petroleum Exporting Countries
PCB	Poly Chlorinated Biphenyl
PCBs	Pollution Control Boards
PIL	Public Interest Litigation
PMO	Prime Minister's Office
RDED	Rio Declaration on Environment and Development
RTI	Right to Information
SC	Supreme Court
SCC	Supreme Court Cases
SCMC	Supreme Court Monitoring Committee
SEZs	Special Economic Zones
SHRC	State Human Rights Commission

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SICA	Sick Industries Companies Act
SPCB	State Pollution Control Board
UCC	Union Carbide Corporation
UCIL	Union Carbide India Limited
UGC	University Grants Commission
UN	United Nations
UNCED	UN Conference on Environment and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UOI	Union of India
UPA	United Progressive Alliance
UPL	United Phosphorus Limited
US	United States
WB	West Bengal
WSSD	World Summit on Sustainable Development
WTO	World Trade Organisation

Glossary

Coastal Regulation Zone (CRZ): Via the Coastal Regulation Zone Notification of February 1991, the Government of India declared the coastal stretches of seas, bays, estuaries, creeks, rivers and backwaters within 500 metres from the High Tide Line and the land between the Low Tide Line and the High Tide Line as protected or regulated areas.

Environmental Impact Assessment (EIA): One of the ten environmental and social Safeguard Policies of the World Bank, it is used to examine the potential environmental risks and benefits associated with Bank lending operations.

Gross Domestic Product (GDP): Measure of the total value of all of the goods and services produced within a country within a given time period, regardless of the producer. As opposed to Gross national product (GNP) which is the value of all goods and services produced in a country in one year, plus income earned by its citizens abroad, minus income earned by foreigners in the country.

Globalisation: Most generally it refers to the creation of a global economy through opening up goods and capital markets. A process that has been ongoing for some 500 years, it has accelerated since 1945, and then again (although less significantly) since the fall of the Soviet Union. Detractors of the push to create global markets insist on the importance of local markets and the dangers of the global economy which disproportionately benefits the countries of the North. It is also known as 'corporate globalisation'.

Indian People's Tribunal (IPT): Indian People's Tribunal on Environment and Human Rights (IPT) was formed on June 5, 1993 to conduct fair and credible investigations focusing on issues concerning human rights and environmental justice. Positioned as an alternative People's Court that gives voice to the struggles of grass-roots organisations and affected communities, IPT conducts investigations on issues concerning human rights and environmental justice. (www.iptindia.org)

Intergovernmental Panel on Climate Change (IPCC): The leading international scientific body for the assessment of climate change. It was established by the United Nations Environment Programme (UNEP) and the World Meteorological Organisation (WMO) to provide the world with a clear scientific view on the current state of knowledge in climate change and its potential environmental and socio-economic impacts. It reviews and assesses the most recent scientific, technical and socio-economic information produced worldwide relevant to the understanding of climate change. It does not conduct any research nor does it monitor climate related data or parameters.

Kyoto Protocol: The Kyoto Protocol is an international agreement adopted in 1999 and entered into force in 2005, linked to the United Nations Framework Convention on Climate Change. It has set binding targets amounting to a 5 per cent reduction in greenhouse gas emissions over 1990 levels for thirty-seven industrialised countries and the European community. To date, 182 Parties of the Convention have

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ratified its Protocol, including India. Despite the very low targets, the United States has not signed the treaty at the time of this writing.

Millennium Development Goals (MDGs): A United Nations General Assembly resolution adopted in September 2000, which is known as the Millennium Declaration, laid out specific targets for reducing extreme poverty by 2015. The targets are referred to as the Millennium Development Goals. The eight chapters/key objectives outlined in the Millennium Declaration are: (i) Values and Principles; (ii) Peace, Security and Disarmament; (iii) Development and Poverty Eradication; (iv) Protecting our Common Environment; (v) Human Rights, Democracy and Good Governance; (vi) Protecting the Vulnerable; (vii) Meeting the Special Needs of Africa; and (viii) Strengthening the United Nations.

Organisation for Economic Co-operation and Development (OECD): Intergovernmental organisation founded in 1961 with thirty members largely from Europe and North America (plus Japan, Australia and New Zealand) committed to open markets and democratic principles. The organisation's mission is to promote a stable global economy by focusing on economic growth, trade, finance, scientific innovation and development.

Polluter Pays model: Principle where the polluter pays the full cost of the pollution it causes.

Public Distribution System (PDS): Founded in 1939, India's PDS provides subsidised grains to the poor and minimum remunerative minimum support prices to farmers. Initially a universal PDS which gave every citizen of India access to the same entitlement of food grains in 1997, it was changed to a targeted distribution which provided grain to those the government decided were poor, or below the poverty line (BPL).

Right to Information: The Right to Information Act 2005 permits citizens of India to inspect and obtain information, including documents and samples, held by the central government and by the state governments.

Rio Declaration: United Nations Conference on Environment and Development, at Rio de Janeiro from 3 to 14 June 1992

Stockholm Declaration: United Nations Conference on the Human Environment, having met at Stockholm from 5 to 16 June 1972

United Progressive Alliance (UPA): At the time of this writing, the ruling coalition of political parties of the government of India. The Alliance is led by the Indian National Congress (INC) or Congress party.

World Trade Organisation (WTO): International institution made up of member governments, which establishes and enforces the rules of global trade in goods and services and intellectual property rights. Closely associated with corporate globalisation due to its focus on eliminating global barriers to trade. The WTO replaced the General Agreement on Tariffs and Trade (GATT) in 1995 and transformed it into an enforceable commercial code.

United Nations Framework Convention on Climate Change (UNFCCC): International treaty to consider what can be done to reduce global warming and to cope with whatever temperature increases are inevitable.

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The environment movement once stood on the fringes of the human rights movement together with other issues as just another issue. Today it stands centre stage. The nexus, between environment issues and life itself, indicates that the struggle for a healthy and sustainable environment is a struggle for changing the whole of society. Basic values, attitudes, approaches, priorities and lifestyles are called into question and the environment has transited from being just another issue of note to the subterranean strata of all movements. It is not simply an issue of forests, or water, or the air but the living together of people in harmony with nature.



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