

## **ANALYSING COUNTER HEGEMONISM AND GLOBAL LEGAL PLURALISM: THROUGH THE LENS OF NARMADA VALLEY STRUGGLE**

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### **Abstract:**

The international norms-municipal framework nexus is of prime importance in this globalization era. The brawniness of such nexus is directly proportional to extent of compliance of international norms in domestic framework and the proliferation of this nexus at international, municipal, and local levels involves challenging intricacies and debates of multi-level governance, global constitutionalism, amongst others. There are few important aspects that need attention. Firstly, the recent past has witnessed an upsurge in questioning the percolation of international norms into domestic conditions or, in other words, it questions the extent of internalization of international norms in domestic legal order. The groundwork of this inquiry is based on the transitioning “global legal pluralist” order. Also, second important analysis arises from the “norm-mediator” role of the courts, especially the Apex Court. The form in which international norms internalize within the nation depends on deployment method chosen by these norm mediators, which can, ironically, hamper the interests of the very same individuals for whom they were made. For instance, the larger public utility of building a dam could hold priority over the human rights of several displaced people for the “norm-mediators” given the circumstances. Thirdly, how this interpretation of norms affects the perception of justice for development induced displaced section. And, lastly, how far the above factors affect the “bottom up” process underlying the counter hegemonic globalization. Thus, the present article dissects this discussion through the lens of Narmada Valley struggle.

**Keywords:** global legal pluralist, norm-mediator, development induced displaced, domestic framework, bottom up

### **Introduction**

Social movements, strikingly in the third world, represent a dichotomous view of the law, either as a force to raise the voice of the weaker section or as a monopolistic tool in hands of few powerful, for instance, the administrators, legislators, against the common masses. At the same time the same law allows resistance to breathe, especially in a globalized world laws profilers

different levels and thus the counter hegemonic resistance does not boundary itself to national elites, but also covers global MNCs within its ambit, especially in cases of developments involving huge funds. These social movements also draw their strength from rising sensitization of international norms in areas of human rights, environment, indigenous people's rights. But, irrespective of the existence of these factors, the outcome of the social movement gets affected by a myriad of influences and the role played by various stakeholders. This research is a modest attempt to understand the interplay of these factors in the instance of Narmada Bachao Andolan. It does not and cannot conclusively establish the path followed by social movement but just highlights an instance of the nuances involved in making counter hegemonic globalization a reality.

The Andolan was a reaction to dam construction on Narmada River. It resisted both the displacement and consequent rehabilitation as well as the construction of dam itself. The displacement and environmental concerns adorned the movement with a transnational cloak. Its propounds included MNCs, Indian local corporations, World Bank. The formulation of the resistance, its institutional framework, and finally its proliferation all had a transnational influence.

### **Social Resistance in the era of Counter Hegemonic Globalization**

Theoretically line of distinction between domestic and international sphere obliterates in several instances of social resistance.<sup>1</sup> But, practically, at the same time the extent of success of these movements depends on formulation of demand in ways that does not frustrate state sovereignty<sup>2</sup>, whose nationalism ideology is also shared by other state actors. Also, the extent to which adjudication is divested from administration in turn determines the emancipatory character of law for this social resistance because sometimes the ideological cover cloaks private ends in apolitical veil of law<sup>3</sup>. For instance, when the inter-state water dispute operates under exclusive jurisdiction of the dispute tribunal barring even the judicial review by higher courts, it takes both the administration as well as social resistance out of adjudication domain. Secondly, the court may decide the matter to be falling exclusively in executive domain, interference with which would disturb the separation of power as recognized under Indian federation. Irrespective of how this boundary is carved, when it does exist it distances the tool of law away from social resistance.

Also, while legitimacy of law traces its roots in traditional concept of sovereignty, social movements, on the other hand may question the validity of the *grundnorm* itself<sup>4</sup>, yet they represent aspirations of certain sections in the society, which counters developmental ideology of state in several instances and ubiquitously forms part of almost all legal systems. The domestic and international NGOs work then in close consonance to fuel up this social resistance but the trickling of such pressure at the domestic level cannot ignore the norm interpreters. The attitude of the domestic actors gets governed largely by the idiosyncrasies of a particular society which vary across various societies in time and space. For example, the courts in South Africa which are vivid example of transformative constitutionalism, pay utmost importance on domestic laws being interpreted considering international norms, which is unlike US or the non-uniform trend under Indian courts. Thus, the domestic-transnational network might weaken even when

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<sup>1</sup>B.Rajagopal: International Law and Social Movements : Challenges of Theorizing Resistance, Col. J.Trans. L 41,397 (2003)

<sup>2</sup> B.Rajagopal :International Law From Below: Development, Social Movement & Third World Resistance (2003)

<sup>3</sup> D.Kennedy :A Critique of Adjudication; Fin de Siecle (1998)

<sup>4</sup> R.B.Siegel : Gender and the Constitution from Social Movement Perspective, U.Penn L.Rev. 150,297 (2002)

optimistic trends are displayed by the domestic rulings with human rights aspect under counter hegemonic globalization. Another important aspect is that the structural transformation taking place towards a global society where focus is on individuals cannot ignore the present system of international law which as a norm governs inter-state relations and is based on upholding the sovereignty of state as was consolidated since the Westphalian legal order<sup>5</sup>. Thus, despite the protection of basic civil liberties being the utmost concern of global community, the Narmada Valley Andolan is a vivid instance of how even the focus on structural transformation, growing sensitization of international community of human rights and transnational- domestic NGOs vigorously putting in efforts, the andolan failed in its efforts.

### **The genesis of the Andolan and Subsequent Developments**

There was a proposition to build dam on Narmada, which traverses boundaries of Madhya Pradesh, Maharashtra, and Gujarat, for drinking, power, and irrigation purposes, since the year 1863 and specifically post 1940s. This was a facet of Western style envisioned nationalistic developmental goal of the leaders back then, where dams were expected to play a pivotal role<sup>6</sup>. A.N.Khosla Committee on feasibility of Narmada dam submitted its report in 1959 and post the dam inauguration in 1961 dispute arose between the 3 states on water sharing with Rajasthan for which Narmada Water Dispute Tribunal was constituted in 1969, chaired by J.V.Ramaswami and other technical experts but there were no environmentalists or socialists on the panel. Later, in 1972 Rajasthan and Madhya Pradesh moved to the Apex court over the river valley project dispute<sup>7</sup>.

But the petitions were withdrawn, post political deliberations regarding height, depth of the dam, course of canal, etc. The matter came back before tribunal which gave its final award in 1978. The Tribunal was subjected to criticism, due to the dispute being presented as inter-state water dispute without representation from displaced people, majority of whom were tribals, who have special status under the constitution but little say in democratic process of the nation. International community's sensitization on human rights and rights of indigenous people acquired great vigor In the recent past but when the Tribunal was established in 1956, it was in its initial stages. Also, the finality of the award given by the Tribunal<sup>8</sup> presented significant structural barriers in proceedings of the andolan before the apex court. The award was progressive to the extent it provided for irrigable land where more than 25% of 'outsee' family's land was acquired and cash compensation<sup>9</sup> but it overlooked the interest of displaced section of tribals who were looked upon as encroachers under the Indian Forest Act, 1972.

Government claims showed the project to be very promising in terms of drinking water, irrigation facilities and hydroelectricity generation. On cost side, over 40,000 families were affected as per the official figures., which excluded non-agricultural people, people displaced via canal construction, drainage construction; fishing families and tribal people in the catchment area. The environmental costs on flora, fauna and fisheries were also calculated to be huge.

The three stages of Narmada Valley struggle from 1979 to 1994, has resettlement as the key issue

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<sup>5</sup> J.Hisashi Owada & Theodor Menon: Some Reflections on Justice in a Globalizing World, Proceedings on the annual meeting 9American Society of International Law), Vol 97 (April 2-5, 2003), pp.181-192

<sup>6</sup> N.G.Jayal : Democracy and the State ; Welfare, Secularization and Development in Contemporary India, 153-4 (2001)

<sup>7</sup> Ibid, at 155

<sup>8</sup> The Constitution of India, 1950, Article 262; Inter State Water Dispute Act, 1956, S.11

<sup>9</sup> Narmada Water Disputes Tribunal, Report (1978)

from 1979 to 1988, more stressful relations of domestic-transnational resistances with the state from 1988-91 especially in aspects of environmental concerns, with little role of domestic courts and ultimately the shrinking of international role and rise in involvement of apex court in 1991-93. Several of the Colonial era land laws applied in the instance like the Indian Forest Act, Land Acquisition Act, 1894, saw tribals as encroachers and only formal title holders were given cash compensation and the common law public trust doctrine came to be applied only post 1997<sup>10</sup> were not valuable to them. Additionally, 1976 amendment of the Indian Constitution withdrew fundamental right status of property rights. Thus, the so-called watershed award of the Tribunal failed to include certain sections especially the tribals within its ambit. Also, Crpc and Official secrets Act paralyzed certain claims from being made and the absence of land rights, relevant information, made violent protests the government inevitable.

The transnational character of dams came from World Bank (and UNDP) funding <sup>11</sup> with its active involvement till 1993 via approving foreign investments, for instance Japanese OECD, German KfW, UK's ODA<sup>12</sup>, inciting human rights, environment related movement of transnational NGOs against the bank and foreign nations, along with soft law standards of international norms provided via Bank's Operational Manual Statements. Immediately, post tribunal's award Narmada Bachao Andolan was short lived but main impetus to the resistance came in 1983 for villagers in Gujarat displaced in violation of Tribunal's award, with local NGO in Gujarat funded by UK's Oxfam. Subsequently, tribals of Gujarat moved to Gujarat High Court, since they were displaced without recourse to rehabilitation and resettlement rights. Consequently, the NGOs moved to Apex court in 1985 where court issued injunction but did not stop the dam work from continuing.

At the same time, Prof. Thayer Scudder's India mission greatly affected revision of World Bank's rehabilitation and resettlement policy, which was already pressurized for India's violation of tribal rights <sup>13</sup>. Despite apparent international support, ultimately a loan agreement for project rather than upholding rights of tribal people, was the outcome of these efforts. The establishment of Forest Conservation Act, 1980, several domestic environmental NGOs at the national level and Stockholm Conference of 1972, at international level impacted the struggle immensely. At the heart of all these processes the Andolan was taking rigorous form.

The main outcry of displaced individuals was absence of trust in elite stakeholders connected with developing huge dams and not compensation packages, and they refused to move out of valley till all their suspicions were cleared and this led to birth of the Andolan in 1989, mainly comprising NGOs of Maharashtra, Madhya Pradesh, and Gujarat. Medha Patkar with US Congressional hearings pressurized World Bank for having signed the alleged loan agreement, which lacked environmental clearance and anti-project investment drive was led by Narmada International action committee, which led to withdrawal of foreign investments in the project. The political lobbying and media calling agitators as anti-nationals, intensified and so did the agitation question now the basis of project itself. Meanwhile, the suppressions in the valley received criticism from Asia Watch, an American NGO, as well. The Narmada International Human Rights panel had 16 countries on board which issue report on atrocities in the valley.

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<sup>10</sup> M.C.Mehta v Kamal Nath (1997) 1 SCC 388

<sup>11</sup> S.Khagram : Restructuring the Global Politics of Development : The Case of Narmada Valley Dam, also in Khagram, Riker & Sikkink, 210

<sup>12</sup> W.F.Fisher :Towards Sustainable Development? Struggling over India's Narmada River, 175 (1995)

<sup>13</sup> ILO, Article 107

Resultantly, World Bank walked out of the project.

Despite the strong international support, the Supreme Court's decision on interlocutory appeal concerning tribal rights did not tune well with the support since it remained silent on question of the project itself. This was followed by deaf ear being tuned to petitions filed in Bombay High Court on continuing police atrocities and forced evictions. The water levels in the dam rose but people remained unmoved and willing to go for *jal samarpan*. Despite Gujarat High Court rulings that prohibited further work, the dam construction continued and ultimately the victim's knocked doors of Apex Court, despite the constitutional bottlenecks, in 1994, when they saw no other alternative when the Gujarat government acted in open defiance of High Court's orders. The five-member panel set up by the court reported against construction of the dam on its findings and even Chief Minister of Madhya Pradesh, Mr Digvijay Singh campaigned against further construction of dam and ultimately Apex court injunctioned dam construction in 1995 but the constructions continued against these orders. The differences between the states on cost-benefit analysis made any sort of settlements unworkable. The andolan sought resurrection of transnational alliances via NAPM which took up issues like Enron, anti-WTO resistances in 1997 and via international conferences, and via formation of World Commission on Dams. But, in 1998, the Supreme court reserved itself to deciding questions of resettlement and rehabilitation without seeing the viability of project as a whole and allowed construction to proceed in 1999. In retaliation human rights march, jal satyagraha, and other counter hegemonic actions fell weak in front of counter hegemonic political winds with the apex court lashing at Arundhati Roy's book openly criticizing the construction. In a huge blow to the andolan Apex court in 2000 allowed work to continue keeping virtues of large dams over social and environmental costs.

### **The Nexus of Struggle, the Law and the Political Unfolding:**

It was alleged that the earlier andolan-sympathetic bench of the Apex court was revamped and the 2000 decision was fashioned by individual ideology of judges. But the court had to judge on basis of established facts along with alleged facts brought up by the government which shifted contours of the case away from human sufferings to cost benefit analysis of the dam where court justified displacement on grounds of "betterment and progress"<sup>14</sup> of the displaced people with their gradual amalgamation with the society. But rehabilitation measure did not show this silver lining. The nationalist benefits of the dam, as per the court, also included border protection from Pakistan and thus any resistance was seen as anti-national and sedition charges followed workers who demanded sound wages<sup>15</sup>. The jingoistic fervor in nationalist chorus along with looking at other traditional ecstatic developmental benefits of dam, including greater civic amenities, medical facilities, rise in living standard of displaced tribals, and the environmental benefits assertion, raised the construction on greater public good pedestal at the cost of few displaced. Additionally, the court took statist stand asserting its faith in state instrumentalities on substantive nuances, despite concrete comprehensive rehabilitation measures lacking. Also a narrow legalist stand of abiding by the law of the land, namely absolute jurisdiction of the Tribunal in inter-state water dispute (though the interpretation of fundamental rights was in issue which was the same reason for which petition was allowed in 1994), and the doctrine of laches which questioned the petitioners for delay in approaching the court( contrarily, the agitators did approach lower courts

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<sup>14</sup>Narmada Bachao Andolan v. UOI (2000) 10 SCC 664

<sup>15</sup> N.G.Jayal :Democracy & the State :Welfare, Secularism & Development in Contemporary India 195 (2001)

and finally to apex court as a last resort). The Supreme court used adjudicatory reasons as its weapon to not intervene in this crucial developmental policy making issue which, ironically, involved important fundamental rights issue.

The court's decision bore veil of partial cosmopolitanism where the court definitively talked of seeing the grievances from a universal stand but the court, in rejecting andolan's plea on article 107 of the ILO read with Article 21 of the Constitution shows the difficulty in transcending international norms into domestic laws. The narrow interpretation of ILO provision and selective application of international environmental norms on one hand while holding universal principles on water to justify dam's construction reflect the startling partial cosmopolitanism stand of court which favored dam construction and thereby upheld hegemonic arguments of Gujarat government, which ironically rooted in counter hegemonic grounds. The enforcing of strict contempt provisions in 2000 showed the defensive stand of court taken in later stages of its judgement, point to how media led social resistances may not meet a good fate when individual ideology of judge's creep in taking such decisions. We come back to the initial proposition that law does provide space for resistance to breathe. Here the interplay of private laws, international norms and constitutional rights was well evidenced which shows broadening of the traditional ambit of law at all levels though its ultimate impact itself gets governed by myriad of factors, including the huge role played by judiciary.

### **Conclusion**

The Narmada Valley struggle did see initial successes via the stay order by the Apex Court but the 2000 decision was a death blow to the andolan. The initial positive outcomes in form of pulling out of the World Bank, were overpowered by the later overall outcome. The international value change is witnessed by foreign investors being reluctant to invest in projects having huge social and environmental costs but the same enthusiasm at domestic level gets trapped in various bottlenecks. The expansion of globalization and huge outcry of cosmopolitan ideal cannot ignore the idiosyncrasies of a particular society where the transition of these ideals into domestically enforceable standards sets out interplay of various factors with "norm-interpreters", especially the apex court playing a pivotal role where the crucial question of how much of displacement is justified by development is closely knit with the vital issues of internationally recognized human rights, existing national legal-political and socio-economic framework.