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S. G. Sreejith

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ABSTRACT

The Mullaperiyar dam dispute between the South Indian states of Kerala and Tamil Nadu, which pertains to the safety of a 126-year-old dam, despite a ruling by the Supreme Court of India to retain the dam, keeps on reappearing before the Court in one way or other. The primary reason for such a recurrence is the fear of 4 million people of Kerala living downstream the century-old dam. Yet the Court has been reluctant to make a final settlement to the dispute and keeps on encouraging the states to find a solution through the political process.

The reluctance of the Supreme Court to deal with this issue, prompts this article to inquire into the dam jurisprudence of the Supreme Court of India. The inquiry which is based on the Court's approach to two major dam disputes in India—the Narmada dam dispute and the Tehri dam dispute—informs that the Court has been a victim of its own analytic which the Court has developed from India's post-independent developmental ambitions.

Every time the Court sits on a dam dispute, it falls into this analytic and rules for the dam, against other submissions for the protection of environment, culture, livelihood, or even the lives of people. This article argues that if the Court wants to settle the Mullaperiyar dam dispute, it should transcend its analytic. Towards this, the article builds an alternative analytic on dams and situates the Mullaperiyar dam dispute within that analytic. The article argues that the Supreme Court is the only potential site and effective means for the settlement of the Mullaperiyar dam dispute.

> "You were once a river, meandering gently through the jungles, gurgling noisily along the woods and splashing relentlessly against the rocks—untamed, restless and swanky, Weren't you? . . . Tell me, please, how it felt to become placid, quiet, calm and serene all of a sudden? . . . And, are

you still a river at heart"?

—Mary Swarnalatha Rabindran, Forget-Me-Nots of Mullaperiyar: An Autumn Dream (2015).

TABLE OF CONTENTS

INTRODUCTION: THE MULLAPERIYAR DAM DISPUTE

The Mullaperiyar Dam has been a bone of contention between the South Indian states of Kerala and Tamil Nadu. Constructed under the supervision of Colonel John Pennycuick of the British Government in 1895, the Dam, which was supposed to have a lifespan of 50 years, has outlived its age to turn 127 years on October 10, 2022. What is problematic about the Dam is its age, posing the threat of a breakage, which is a cause of deep anguish and concern for the people of Kerala as it is the downstream state. If the Dam breaks, 4 districts of Kerala, and all living and non-living things thereof, which includes 4 million human lives, will be washed off to the Arabian Sea. Hence, there has been widespread demand in Kerala for decommissioning the Mullaperiyar Dam. Tamil Nadu, to where the waters of Mullaperiyar are diverted, is the beneficiary of the Dam. Five districts of Tamil Nadu rely on the waters of Mullaperiyar for irrigation. Hence, loss of the Dam or its waters or both would result in severe draught in the region, which is otherwise poor in water resources.[1]

The Mullaperiyar Dam is situated in the Idukki district of Kerala, although Tamil Nadu has the operating rights of the Dam based on a lease agreement signed between the ruler of erstwhile Travancore and the British Secretary of State for India for a period of 999 years.[2] Although the lease became invalid after Indian Independence, it was given a fresh life by the Government of Kerala in 1970. But the first dispute between the states apropos of the Dam had arisen in 1900 when the erstwhile Government of Madras wanted to generate hydroelectric power from the Dam.[3] Following the objection by the Travancore State, the Periyar Arbitration Tribunal was constituted.[4] Although the Tribunal ruled that the lessee had no right to use the waters other than for irrigation purposes, subsequent negotiations between the states would lay foundations for granting absolute right to Tamil Nadu for the use and exploitation of the water resources of the Dam.

The first concern regarding the safety of the dam arose in 1925 when the *Times of India* reported that the great floods of 1924 have damaged the

1. On the respective claims of both states, *see* A.J. Thatheyus, Delphin Dhanaseeli & P. Vanitha, *Inter-State Dispute Over Water and Safety in India: The Mullaperiyar Dam, a Historical Perspective*, 1 AM. J. WATER RESOURCES 10,18 (2013).

2. Anirrudha Ghosal, *Mullaperiyar Dam, 999-Year Lease at the Heart of Acrimony between TN and Kerala*, NEWS18 (Aug. 25, 2018), https://www.news18.com/news/india/mullaperiyar-dam-999-year-lease-at-the-heart-of-acrimony-between-tamil-nadu-and-kerala-1856279.html.

3. PRADEEP DAMODARAN, THE MULLAPERIYAR WATER WARS: THE DAM THAT DIVIDED TWO STATES 43 (2014).

4. *Id*.

Dam and rendered it unsafe.[5] This concern subsided after the report by Superintending Engineer C.T. Mullings that the dam is safe and that the concerns are unfounded.[6] Although there were many disgruntled murmurs about the safety of the dam, the concerns mounted to a sizable proportion in 1979 with the collapse of the Morvi Dam in Gujarat.[7] A subsequent study conducted by the Centre for Earth Science Studies informed that the Mullaperiyar dam cannot withstand a massive earthquake of a magnitude of 6 in Richter scale and more.[8] Following this, an inspection held by the Central Water Commission (CWC) of the Government of India, observed that the Dam is safe, although the CWC suggested a series of measures—emergency, medium, and long-term—to further strengthen the Dam and to keep the water level at 136 feet.[9] It took 20 years for Tamil Nadu to complete the recommended strengthening measure.[10] Yet, no consensus could be reached among the states as to the maximum water level. Kerala held that safety measures would be complete only if the water level is maintained at 136 feet, whereas Tamil Nadu argued that considering the safety measures taken, water level should be raised to at least 142 feet.[11] Thenceforth, courts became the battle ground for both the states.

In 1998, Dr. Subramanian Swamy, an Indian parliamentarian from Tamil Nadu, filed a writ petition before the Madras High Court to give directions to raise the water level to 152 feet, which was opposed by the Government of Kerala citing the safety of the people living downstream.[12] Around the same time, a writ petition was filed before the High Court of Kerala to allow the Government of Kerala to maintain the water level at 136 feet. These petitions triggered the filing of a series of writ petitions before both Madras High Court and the High Court of Kerala.[13] However, due to

5. Shenoy Karun, *Mullaperiyar Dam: Interstate Row Started with TOI Report*, TIMES OF INDIA (May 8, 2014), https://timesofindia.indiatimes.com/india/mullaperiyar-dam-interstate-row-started-with-toi-report/articleshow/34795705.cms.

6. DAMODARAN, *supra* note 3 at 24.

7. *Two States and a Dam: Let Technical Assessments Find a Solution to Mullaperiyar Stand-off*, BUS. STANDARD (Jan. 2, 2013), https://www.business-standard.com/article/opinion/two-states-and-a-dam-111120800035_1.html.

8. *Id*.

9. M.P. Ram Mohan and Krittika Chavaly, *The Supreme Court of India and the Inter-State Water Dispute: An Analysis of the Judgments on Mullaperiyar Dam*, 17 WATER POC'Y 1003, 1008 (2015).

10. DAMODARAN, *supra* note 3 at 27.

11. *Id*.

12. James Wilson, *Mullaperiyar: In Search of Truth*, BLOGSPOT (Nov. 26, 2011), http://jamewils.blogspot.com/2011/11/litigation-history.html.

13. *Id*.

the conflicting nature of these petitions, the matter was transferred to the Supreme Court of India. As per the orders of the Supreme Court, the Minister of Water Resources of the Government of India convened the meeting of both states on May 19, 2000.[14] However, the meeting did not obtain any "positive result" and hence, the Ministry of Water Resources constituted an expert committee to examine the safety aspect of the Dam and submit a report to the Supreme Court.[15] The Expert Committee submitted its final report to the Ministry in 2001, "recommending the raising of water level to 142 feet without delay and consider raising it to 152 [feet] after strengthening the baby dam" adjacent to the Mullaperiyar Dam.[16] Subsequently, through its decision in *Mullaperiyar Environmental Forum v. Union of India and Others*, the Supreme Court acknowledged the recommendations in the report and sanctioned the raising of water level to 152 feet after necessary expert approvals.[17]

Subsequent to this ruling, in 2006, the Government of Kerala amended the Kerala Irrigation and Water Conservation Act of 2003, by which the water level of Mullaperiyar Dam was fixed at 136 feet "from the deepest point of the level of Periyar river at the site of the main dam".[18] This amendment has prompted Tamil Nadu to file an original suit in the Supreme Court against the State of Kerala.[19] The Supreme Court held that the Kerala Irrigation and Water Conservation (Amendment) Act, 2006 "passed by the Kerala Legislature is unconstitutional in its application to and effect on the Mullaperiyar dam".[20] The Court also upheld the water limit of 142 feet and to assuage the concerns of Kerala, it created a framework for constantly monitoring the safety of the Dam.[21]

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14. MINISTRY OF JAL SHAKTI, MULLAPERIYAR DAM ISSUE [hereinafter Mullaperiyar Dam Issue], http://mowr.nic.in/Previous-site/ImpIssues/PenRiver.pdf.

15. DAMODARAN, *supra* note 3 at 28.

16. MADHUSOODANAN C.G. & SREEJA K.G., THE MULLAPERIYAR CONFLICT 14 (Narendar Pani ed., 2010).

17. Writ Petition of Supreme Court of India at 17, Mullaperiyar Environmental Protection Forum v. Union of India & Ors (2006) (No. 386 of 2001).

18. The Amendment Act inserted Section 62A by which in all dams (including Mullaperiyar Dam) in the State of Kerala listed in Schedule II of the Act,

> [N]o Government, custodian or any other agency shall increase, augment, add to or expand the Full Reservoir Level Fixed or in any other way do or omit to do any act with a view to increase the water level fixed and set out in THE SECOND SCHEDULE. Such level shall not be altered except in accordance with the provisions of this Act in respect of any Scheduled dam.

19. State of Tamil Nadu v. State of Kerala and Anr, (2014) 12 SCC 810 [hereinafter Original Suit)

20. *Id.* at ¶ 221.

21. *Id.*

During the pendency of the matter before the Supreme Court, studies were conducted by the Indian Institute of Technology (IIT) Delhi and IIT Roorkee as commissioned by the State of Kerala. They found the Dam to be unsafe hydrologically and seismically.[22] The Kerala Cabinet also approved a preliminary study on the feasibility of a new Dam at the disputed site.[23]

Altogether, the matter was heard, and orders were passed by the Supreme Court in 2001-2014, 2017-2018, and 2021. However, despite all these efforts, the matter remains unsettled and both states continue to have their respective woes and grievances apropos of the Dam.

The Supreme Court's failure to settle the matter is certainly not the sole reason for the continuation of the dispute without resolution, although it is one among the few. Lack of political willingness and determination, improper assessments of the safety of the Dam, conflicting but genuine nature of the concerns, the failure of both states to see each other's point, and the missing focus on human and other relevant factors in all efforts to address the dispute, also contribute substantially to the issue. However, what this article is interested is in the Supreme Court's role only. It is not just the Mullaperiyar Dam, but whenever there was a Dam-related dispute before the Apex Court, it found itself in an ambivalence, as if fallen in a trap. This article argues that the said ambivalence is caused by the Supreme Court's own "dam analytic" which has been motivated by the Nehruvian perspective, and that which the Supreme Court has been upholding, that "Dams are temples of modern India." This imagery of a dam etched in the memory and consciousness of the Supreme Court has led to a "dam jurisprudence" which gives primacy to the developmental aspirations of India over everything else.

By way of examining the said hypothesis, Part II of this article analyzes the positions, often conflicting, taken by the Supreme Court of India on the Mullaperiyar issue. It problematizes the prolongation of a dispute and the failure to give a right-based decision on the matter. In Part III, the article presents the dam jurisprudence of the Supreme Court through the Court's positions on two other dam-related disputes heard by it—the cases concerning Narmada dam and Tehri dam—and confirms that the Supreme Court is a victim of its own analytic. Part IV suggests a paradigm approach which can help the Supreme Court transcend its analytic and advance the dam jurisprudence. It is hoped that such a paradigm shift will have the Mullaperiyar dam issue getting resolved amicably and with positive and optimal outcomes.

22. MADHUSOODANAN & SREEJA, *supra* note 16, at 15

23. *Id*.

I. MULLAPERIYAR DAM DISPUTE BEFORE THE SUPREME COURT

"I sign this Agreement with the blood from my heart"

—Maharaja Visakhom Thirunal Rama Varma

A. Mullaperiyar Environmental Forum v. Union of India and Others

The first major case brought before the Supreme Court was *Mullaperiyar Environmental Forum v. Union of India and Others*.[24] This writ petition was filed in 2001 in the wake of the CWC's recommendation to increase the water level of the Dam to 142 feet. This recommendation was challenged by the Petitioner. The Petitioner's concern was centered on the safety of the Dam which was, at the time of the dispute, 106 years old. Hence, any raise in the water level above 136 feet jeopardizes the safety of the Dam. Supporting this contention, the Petitioner had drawn the attention of the Court to the primitive technology used in the construction of the Dam, the two failures of the Dam during its construction, the devastation its breakage might cause in Kerala, the seismological vulnerability of the region, and the exclusion of Kerala from the inspections of the CWC.[25] The Petitioner also questioned the technical competency of the CWC. The State of Tamil Nadu rebutted these contentions as "ill-founded," "baseless," and "incorrect."[26] It submitted that, considering the recommendations of the CWC and the safety measures taken by Tamil Nadu, the State should be allowed to raise the water level to 152 feet.

It was at this juncture that the Ministry of Water Resources constituted the Expert Committee as per the orders of the Court, which although recommended for the raise of the water level to 142 feet and later on to 152 feet, recommended extensive safety measures and repairs wherever needed.[27] The State of Kerala, however, continued to resist to raise the water level.

In the Writ Petition, the Petitioner subsequently relied *inter alia* on questions about the constitutional validity of the Lease Agreement signed between the Maharaja of Travancore and the British Government in the light of the States Reorganization Act of 1956 which created the State of Kerala. The State also questioned the jurisdiction of the Supreme Court on the dispute. On the substantive part, the Petitioner pleaded that the increased water level would result in the submergence of the Forest area in breach of

24. *Supra* note 17 at 1.
25. *Id.* at 2.
26. *Id.* at 3.
27. *Id.* at 3-4.

Section 2 of the Forest (Conservation) Act of 1980, which imposes restrictions on the deforestation of forests for non-forest purposes. The Petitioner also flagged the potential breach of the Wildlife (Protection) Act of 1972, which requires prior permission of the Central Government for altering the boundaries of a sanctuary and tiger reserve, such as the Periyar basin where the Mullaperiyar Dam is located.[28]

The arguments advanced by the Petitioner to highlight the potential damage to the flora and fauna of the region was dismissed by the Court on both technical and substantive grounds. The Court found that the no boundaries of the 777 square kilometers of the Periyar sanctuary—of which only 8,000 acres is of the dam project— gets altered by the raise in the water level. This position of the court is technically correct in terms of the language of Article 26(A) of the Wildlife (Protection) Act of 1972, but it stands in contradiction to the philosophy of the Forest (Conservation) Act of 1980, which aims to prevent, "breaking up or clearing of any forest land or portion thereof for any purpose other than *reafforestation*" [emphasis added].[29] The Court, however, reasoned its position by stating that the Dam has been in existence since 1979 and that the water level used to be 152 feet. Hence, the strengthening efforts of the Dam and the raise in the water level cannot be considered as non-forestry activity and a threat to the flora and fauna.[30]

On the substantive part of the Petitioner's contention about the damage to flora and fauna and loss of biodiversity of the Periyar region, the Court informed that things are, rather, to the contrary—

> [T]here will be improvement in the environment. It is on record that the fauna, particularly, elephant herds and the tigers will be happier when the water level slowly rises to touch the forest line. In nature, all birds and animals love water spread and exhibit their exuberant pleasure with heavy rains filling the reservoir resulting in lot of greenery and ecological environment around.[31]

The Court, drawing on the report of the Expert Committee, waxed eloquent on the ecosystem improvement the water level raise can make.

> The most productive habitats in terms of forage availability to ungulates and elephants are these vayals. This habitat is of even greater significance to wildlife since the green flush of protein rich grasses appears at a time when nutritive quality of forest forage is lowest. This is so since water is likely to be released from the Dam during the dry months for irrigation.

28. Wild Life (Protection) Act, 1972, §§26(A), 38(W), 51.
29. Forest Conservation Act, 1980 §2.
30. Writ Petition, 2001, *supra* note 17 at 9-10.
31. *Id.* at 10.

> Thus, this nutrient rich biomass is critical for maintaining condition of herbivores and their populations during the pinch period.[32]

The Court did not find any "substance" in the argument of Kerala that "there will be adverse effect on environment," but did find that the apprehensions of the Petitioner and the people of Kerala are "baseless."[33] Disposing the petition, the Court directed the State of Kerala to not create any obstructionist measures in Tamil Nadu while carrying out maintenance of the Dam.

The entire reasoning of the Supreme Court in this case is based on expert reports. But was there no reason or cause for the Supreme Court to look beyond what was submitted before it? Since the Expert Committee had found a 106-year-old dam to be safe to store 152 feet of water with proper maintenance, the Court had let the matter to be so. Yet, some level of evaluation of the expert opinion was warranted from the Court, as expert opinion before a judge is not conclusive, at least from a judicial perspective; rather, it is a material to be analyzed and examined.[34] It is the judicial engagement with the expert opinion which gives the parties a sense of trust in the court's reliance on expert opinion.[35] The State of Kerala, the aggrieved state, had chosen to question the credibility of the expert committees inside and outside the Court, which is due to the uncritical overreliance of the Supreme Court on expert opinions.[36]

Further, it was not an environmental concern (the loss of flora and fauna) which had prompted the Petitioner to approach the Supreme Court, but the apprehensions and fears of 4 million people living downstream in Kerala. Ironically, when establishing its jurisdiction on the Mullaperiyar Dam dispute, the Court held that the matter in question is a not a "water dispute" and the issue is about the "safety" of the Dam. Yet, it is debatable whether the safety dimension, and the related apprehensions thereof, received a proper examination by the Court. Perhaps the Petitioner did not present their motivation well before the Court; instead of laying emphasis on the safety of the people and their right to lead a life without the fear of a Dam collapse, they relied on environmental concerns which have greater appeal,

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32. *Id*., and *see also* R. Sreenivasan, *Historical Validity of Mullaperiyar Project*, 49 ECON. & POL. WKLY. 22 (2014).

33. *Id*.

34. *See generally* Marcello Gaboardi, *How Judges Can Think? The Use of Expert's Knowledge as Proof in Civil Proceedings*, 18 GLOB. JURIST. (2001).

35. *Id*.

36. Ramaswamy R. Iyer, *Mullaperiyar: A Matter of Judicial Overreach*, THE HINDU (May 16, 2014), https://www.thehindu.com/opinion/op-ed/mullaperiyar-a-matter-of-judicial-overreach/article6013138.ece.

which had the Petitioner losing the case.

B. State of Tamil Nadu v. State of Kerala and Another

This original suit was filed before the Supreme Court by the State of Tamil Nadu, having been provoked by the Kerala Government's amendment to the Kerala Irrigation and Water Conservation Act of 2003, by the Kerala Irrigation and Water Conservation (Amendment) Act of 2006, which fixed the limits of the water level of the Mullaperiyar Dam to 136 feet. This amendment was subsequent to the decision of the Supreme Court in *Mullaperiyar Environmental Protection Forum*.

The State of Tamil Nadu questioned the constitutionality of the Amendment and prayed to the Court to declare it null and void. It also sought a decree of permanent injunction restraining Kerala from obstructing Tamil Nadu from increasing the water level to 142 feet.[37] The State of Kerala, while defending their legislative rights to amend the Kerala Irrigation and Water Conservation Act of 2003, also invoked the legality of the 1886 Agreement which led to the construction of the Dam. The State of Kerala also submitted that "a dam could never have been intended to remain for long years without decommissioning at some point of time. For this background, people in Kerala living in the downstream region of the Mullaperiyar dam have raised serious apprehensions against the safety of the structure."[38]

Due to the involvement of the constitutional questions, the Suit, which was originally heard by a three-judge Bench for 4 years, was transferred to the Constitution Bench of the Supreme Court.[39] This move by the Supreme Court would soon shift the focus of the Suit from the safety and sustainability element to the constitutional questions, as it is the primary mandate of the Constitution Bench to address the "question of law as to the interpretation of the Constitution."[40] In a survey on the performance of Constitution Benches of the Supreme Court of India, Nick Robinson *et al.*, present that most of the decisions of the Constitution Benches are "convoluted" to the extent of them becoming "increasingly difficult to even determine the winning party."[41] Additionally, in this case of the Suit in question, the extensiveness of the

37. State of Tamil Nadu v. State of Kerala & Another (2014) 12 SCC 810,10.

38. *Id*, at ¶ 25.

39. *Id*. at ¶ 35.

40. The Constitution of India 1949, art. 145(3) (Ind.).

41. Nick Robinson *et al*., *Interpreting the Constitution: Supreme Court Constitution Benches Since Independence*, 46 ECON. & POL. WKLY. 27, 27 (2011). *See also* Virendra Kumar, *Statement of Indian Law: Supreme Court of India Through Its Constitution Bench Decisions Since 1950—A Juristic Review of Its Intrinsic Value and Juxtaposition*, 58 J. INDIAN L. INST. 189 (2016).

judgment, which has to be understood as resulting from the zealousness of the Court to clarify legal questions, has resulted in "adding confusion rather than clarity" apropos of the subject matter in question.[42]

Under the Constitution Bench, since the safety of the Dam, strangely, had become part of the legality of the 1886 agreement and the constitutionality of the Kerala Irrigation and Water Conservation (Amendment) Act of 2006, the Supreme Court was left with no means to assess the safety aspects of the Dam. Hence, it constituted an Empowered Committee (EC) comprising of three former judges of the Supreme Court and two technical experts with the mandate to study the safety aspects of the Dam.[43] In its Order dated February 18, 2010, rationalizing the need of the EC, the Court stated that there shall be a separation of the real issues from the thickets of legal issues:

> [A]part from the legal and constitutional issues, inter alia, the *real grievance* that concerns the State of Tamil Nadu is of not being able to increase reservoir level of Mullai Periyar Dam to 142 feet. The concern of the State of Kerala, on the other hand, appears to be relating to the safety of the Dam.[44]

In the Suit in question, the Constitutional bench clubbed the issues relating to the legality of the 1886 Agreement with the sustainability of the Suit and its own jurisdiction over it. After extensive analysis of the facts, relevant legislations, and precedents, the Court, in its characteristic judicial eloquence and ingenuity, made some well-reasoned observations, highlighting many flaws in the practice and arguments of the State of Kerala, then upheld the 1886 lease agreement as valid and established its jurisdiction on the Suit.

Then the Court clubbed the issues relating to the constitutionality of the Kerala Irrigation and Water Conservation (Amendment) Act of 2006, with the raising of the water level to 142 feet and then to 152 feet. Upon examining a rich array of Indian and foreign judgments, particularly the decision on *Mullaperiyar Environmental Protection Forum*, the Court held that the Kerala Irrigation and Water Conservation (Amendment) Act of 2006, was "unconstitutional and *ultra vires* in its application to and effect on the Mullaperiyar dam."[45] The Court also pronounced that the judgment in *Mullaperiyar Environmental Protection Forum* would operate "as *res*

42. *See* Write Petition, 2001, *supra* note 17, at 9-10.

43. Mohan & Chavaly, *supra* note 9 at 1010.

44. Transcript of Order, State of Tamil Nadu v. State of Kerala & Another, 12 SCC 810 (2010).

45. Original Suit, 2006, ¶ 199 (i).

judicata on the issue of the safety of Mullaperiyar dam for raising the water level to 142 feet and ultimately to 152 feet."[46]

While the Supreme Court has delivered a judgment good in law, the judgment did not lead to the settlement of the dispute. Tamil Nadu dubbed the judgement as a "sweet victory", and Kerala as "unfortunate" to the people of the State.[47] The sentiment in Kerala was that a "just" demand was by rejected by the Court, as its stance was "water for Tamil Nadu and safety for Kerala".[48] Opposition Leader of the Government lamented that the Supreme Court, by its decision, has only heighted the fear of 4 million people living in 5 districts of the State.[49]

In fact, if the dispute is analyzed on its merits, the Kerala's demands are for the lives of its 4 million people and Tamil Nadu's for the livelihood and survival of its people. Kerala is willing to give the entire waters of Mullaperiyar and all the benefits accruing from the waters to Tamil Nadu. Why then is the dispute hovering around raising and/or lowering a few feet of waters from the Dam? Assuming that Tamil Nadu is skeptical about the curious turn things might take if a new Dam is constructed, then why is the State of Kerala not giving the assurance that the waters of Mullaperiyar will continue to flow to Tamil Nadu from the newly constructed Dam as a matter of Tamil Nadu's ownership and right? Indeed, these are political problems, and the states probably do not want this to be debated in court. Hence, they have chosen other legal imaginations which are not directly relevant to the main concerns.

The State of Kerala, whose sole purpose of fighting the dispute is actually the protection of the lives and safety of its people, has chosen to address the matter through an unconstitutional act and to claim constitutionality to that act. Earlier in *Mullaperiyar Environmental Protection Forum*, the State had chosen to raise environmental concerns about the existence of a Dam which had been in its territory for more than a century. In both the original suit and in *Mullaperiyar Environmental Protection Forum*, Kerala had also asserted the lack of jurisdiction of the Supreme Court. It is this course of action which had the Supreme Court ruling against the State of Kerala and not finding a permanent solution

46. *Id*. at ¶ 199(iii).

47. *Dam Height Hike Allowed: Tamil Nadu Pleased, Kerala Unhappy (Intro Roundup)*, BUS. STANDARD (May 7, 2014), https://www.business-standard.com/article/news-ians/dam-height-hike-allowed-tamil-nadu-pleased-kerala-unhappy-intro-roundup-114050704158_1.html.

48. *Id*.

49. *Id*.

satisfactory to both the parties.

Indeed, the State of Kerala relied on the "precautionary principle," a fundamental principle of international environmental law, incorporated in Article 15 of the Rio Declaration on Environment and Development, which declares that "lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures," especially when and "where there are threats of serious or irreversible damage."[50] However, instead of using the Principle to highlight the safety of the Dam and construction of a new Dam or any other alternatives, the State used the precautionary principle to justify the Kerala Irrigation and Water Conservation (Amendment) Act of 2006. And quite obviously, the Supreme Court found the use of the precautionary principle to justify a legislative decision on a matter which has been judicially decided as unconstitutional.

It is true that the State of Kerala has misplaced its arguments, whatsoever be the reasons for that, however, the Supreme Court should not have missed the point and, while upholding constitutional values, should have separated the safety element in Kerala's arguments (and of course, the sustainability and wellbeing of the people of Tamil Nadu) from the submissions of Kerala. However, it is not the case that the Court absolutely did not pay any attention to the safety aspect—it did frame the issue as "*[w]hether the offer of the first defendant [State of Kerala], to construct a new dam across River Periyar in the downstream region of Mullai Periyar Dam would meet the ends of justice and requirements of plaintiff.*"[51] But the Court did not pay deserving attention to the idea of decommissioning of the existing dam, which was constructed using primitive technologies, and construction of a new and safer dam using the most advanced dam technology.[52] Instead, the Court uncritically, and with a pinch of "admiration", relied on the report of the EC, which suggested better means for repairing the Dam and for better water evacuation in case of a breakage and rebuffed the issue.[53] The Supreme Court also did not adequately engage with the study report submitted by IIT Delhi and IIT Roorkee and the depositions of Dr. A.K. Gosain, Professor at IIT Delhi about the hydrological

50. WORLD CONF. ON ENV'T & DEV., *Rio Declaration on Environment and Development*, U.N. Doc. A/Conf.151/26 (Vol. 1) (June 1992).

51. State of Tamil Nadu, 12 SCC 810 at ¶ 32(9).

52. The court dismissed this issue in the following limited words: "In this view of the matter for the construction of new dam, there has to be agreement of both the parties. The offer made by Kerala cannot be thrusted upon Tamil Nadu. Issue No.9, therefore, has to be decided against Kerala and it is so held". *Id.,* at ¶ 213.

53. *Id.* At ¶ 198. ("The EC, we must say, has completed its task admirably by thoroughly going into each and every aspect of the safety of Mullaperiyar dam").

vulnerability of the dam, and Dr. D.K. Paul and Dr. M.K. Sharma, Professors of IIT Roorkee about the seismological vulnerability of the region and the threat they pose to the Dam. The Court decided to let the EC's findings prevail over all other scientific reports without proving the respective findings of the IITs wrong.

It is true that the Suit did not transpire well in the Supreme Court, primarily due to the incorrect approach of the parties. Or perhaps, as the prominent water policy expert Ramaswami R. Iyer observed, that the Supreme Court "has allowed itself to be embroiled into the politics of the dispute which was meant to be settled through 'mutual agreement,' or through the Inter-State Council, a constitutional body."[54] This article, however, does not subscribe to the latter view, as it would assert that the Supreme Court has the potential to settle this dispute, provided it transcends its orthodoxy in its Dam Jurisprudence and adopts a modernist approach.

C. Russel Joy v. Union of India and Others

The third case was filed before the Supreme Court in 2017 by a "public spirited person" as a writ petition to direct the "Government of India to appoint an international agency with the technical expertise to study and to adjudge the lifespan of Mullaperiyar Dam and ascertain the date/period on which the said dam must be de-commissioned".[55] The Petitioner also requested the Court to direct the State of Tamil Nadu to "make financial provisions for damages to life and restoration of environment in the eventuality of a burst of Mullaperiyar Dam before it is de-commissioned." The Petition, unlike the original suit, directly addressed the safety of the people of Kerala. It stated,

> [B]ecause of the efflux of time and the safety of the dam being doubtful, fear remains embedded among the people who reside downstream of the Mullaperiyar dam. That apart, the residents of the area in proximity do not feel safe. In such a situation, as set forth, precautionary steps are required to be taken to protect the life without waiting for a disaster to happen in the form of a dam burst which can be triggered due to multiple reasons.[56]

The Petition further urged,

> [T]hat safety and security of the people and that of the nation are of paramount importance and, therefore, the respondents are obligated in law to have concrete safeguards so that there is [sic] no irreversible

54. Ramaswamy R. Iyer, *Mullaperiyar: A Plea for Sanity*, 46 ECON. & POL. WKLY. 12 (2011).

55. *Russel Joy v. Union of Indian & Ors*, Writ Pet. 878.

56. *Id*. At ¶ 4.

> environmental consequences and the fear that affects the bones and brains of the citizens gets vaporised.[57]

Letting the people in the 4 districts of Kerala to live in constant fear and apprehension, as per the Petitioner, is a failure on the part of the state to fulfil the guarantee of life in Article 21 of the Constitution of India.[58] Since unlike in the original suit the safety aspect was directly brought to the attention of the Court, it took cognizance of the matter in most eloquent terms and with earnest concern for the people, which is worth quoting at length for its sheer elegance:

> It is to be borne in mind that life without basic needs of life and liberty replete with fear, is like a concept without structure, a house without a plinth, a metaphor not conveying an idea, a sea without waves or, for that matter, an idea constantly remaining in the realm of speculation. Life and liberty are to be understood, projected and protected in concrete terms. It is because fear brings numbness to passion of purpose and converts an active individual a quitter who resigns himself to fate. History records with sorrow and agony how civilisations have perished mostly due to fear. Citizenry growth stands still, for culture and creativity take the back seat when fear reigns. Some may say that there is no fear but the man who is so told, may appear to be consoled though his heart or mind may not be convinced. Therefore, it is the duty of the States involved to create a sense of confidence in the real sense of the term and ensure that adequate measures have been taken so that in any event safety of the individuals shall not be affected and well preserved and their life and liberty remain protected. To speak differently, steps taken should reflect convincing and concrete perceptibility and not merely a consolatory shadow.[59]

In pursuit of safety, the Court emphasized on disaster management, which also includes "prevention of danger or threat of any disaster."[60] Invoking the Disaster Management Act of 2005, the Court directed the Central Government and the states of Kerala and Tamil Nadu to constitute sub-committees to prepare "to face any disaster occurring from Mullaperiyar Dam."[61] The effort of the Supreme Court was to see how best to alleviate the fears of the people living downstream. But did the Court understand the nature of their fear properly or further investigate into it? Perhaps not, as the Court, relying on the EC Report, reiterated that all these efforts at disaster management "does not anyway remotely suggest that there is any doubt

57. *Id*. At ¶ 5.
58. *Id*. At ¶ 8.
59. *Id*. At ¶ 22.
60. Disaster Management Act, 2005, §2I.
61. *Russel Joy*, at ¶ 23(1), 23(2).

about the safety or life span of the dam, as is alleged in the writ petition. We have said so only keeping in view the consequences of unpredictable disaster, which have astutely been canvassed before us."[62] Most of the concerns raised by the Petitioner remained unaddressed, leaving some uncomfortable questions: Why did the Court not approve investigation of the Dam by an international agency? Should the silence of the Supreme Court on all other questions raised by the Petitioner, including questions on the decommissioning of the Dam and indemnification to the people in the event of a disaster, be treated as the Court's conviction that the Dam is safe and all fears are misplaced? The much larger concern, which would be verified in the next part of this essay, is that apropos of dams—a concept which advanced countries of the world have left behind for effective alternatives—the Supreme Court is not able to appreciate their life-span and look beyond their sustenance.

D. Beyond Russel Joy v. Union of India and Others

In August 2018, the State of Kerala witnessed one of its worst floods due to abnormally high rainfall followed by landslides, which resulted in severe flooding in 13 out of 14 districts of the State.[63] The calamity caused the death of 339 people and severe damage to housing, land, agriculture, fisheries, animal husbandry, power, irrigation, and water sector, and to public infrastructure.[64] The intensity of rainfall and the rising water levels in the dams in the state prompted the Government to open the shutters of 22 dams in the state, including the shutters of the super massive Idukki dam. A study conducted by the South Asia Network on Dams, Rivers and People (SANDRP) observed that, dams and the unscientific dam management, including breach of rule curves, in Kerala had contributed to the 2018 floods, which is contrary to the report submitted by the CWC.[65] The calamity repeated in 2020, although with a lesser intensity, but killing 104 people and severely damaging land and infrastructure.[66] Again in 2021, Kerala witnessed high-intensity floods causing severe landslides which killed 26 people.[67] Learning from the disaster in the past, the Government of Kerala

62. *Id*. at ¶ 24.

63. Memorandum, State Government of Kerala State Relief Commissioner, Disaster Management (Additional Chief Secretary), Kerala Floods - 2018 (Sept. 13, 2018).

64. *Id*. at 20-29.

65. *See* Himanshu Thakkar, *Role of Dams in Kerala Flood Disaster*, 53 ECON. & POL. WKLY. 20 (2018).

66. Situation Report, Ministry of Home Affairs Disaster Management Division National Emergency Response Centre (Aug. 18, 2020).

67. HUMANITARIAN AID INT'L, *Situation Report on Kerala Floods and Landslides* (Oct.

had timely opened the shutters of the Idukki dam when its water level reached full-capacity. The spillway shutters of the Mullaperiyar dam were also raised when the water level had crossed the rule curve of 138 feet.[68]

These developments ignited the fear of the people of Kerala and new writ petitions were filed before the Supreme Court in October 2021. However, the petitions only sought to maintain the water level at 139 feet. The Petition also brought to the attention of the Supreme Court a joint study report of the United Nations University (UNU) and the Institute for Water Environment and Health (INWEH) which has Mullaperiyar dam in the list of aged dams which should be considered for decommissioning.[69] Interestingly, the Government of Kerala in its note, submitted that the Dam, considering its age and the recent climatic changes in Kerala, has become highly vulnerable and must be decommissioned to build a new dam.[70] However, before passing any verdict, the Supreme Court again sought the opinion of the Expert Committee.

In the entire Mullaperiyar dispute before it, the Supreme Court has shown reluctance to engage with ideas alternative to the sustenance of the Dam. The Court has also been indisposed to settle the dispute; it has been advising and encouraging the parties to settle the dispute mutually. And whenever it did attempt to deal with the dispute, its starting point has been that "the dam is safe, what next?" This presumption of safety has restrained the Court from exercising its mandate to guarantee the right to "life," in all its true sematic broadness, both of the people of Kerala (life) and Tamil Nadu (livelihood), despite having deep sympathies and strong feeling to protect their rights. This could be due to a subconscious awareness of the Court about its own approach to dams that it has a historical mandate to support and sustain dams. The next section verifies this hypothesis.

II. THE ANALYTIC OF DAM JURISPRUDENCE

Emerging from the shackles of colonialism, post-independent India had developmental ambitions to become self-sufficient at many levels.[71]

18, 2021).

68. *Kerala: Mullaperiyar Dam Shutters Raised After Three Years*, TIMES OF INDIA (Oct. 30, 2021).

69. Duminda Perera *et al*., *Ageing Water Storage Infrastructure: An Emerging Global Risk*, UNU-INWEH, 9-20 (2021).

70. Aaratrika Bhaumik, *Mullaperiyar Dam Must Be Decommissioned, New Dam Needed: Kerala Govt Tells Supreme Court*, LIVELAW (Oct. 28, 2021), https://www.livelaw.in/top-stories/kerala-govt-tells-supreme-court-that-mullaperiyar-dam-must-be-decommissioned-new-dam-constructed-184502.

71. *See* Smruti Koppikar, *In Charts: Six Challenges India Faced in 1947—And How Has*

Motivated by the goal of self-reliance and in the spirt of modernization, which was the national philosophy of independent India, Prime Minister Jawaharlal Nehru declared dams as "temples of a new age."[72] By the 1960s and 1970s, dam-building in India assumed maniacal proportions. For India, asserts Kathleen D. Morrison, dams were not just a sign of modernity, or a concept inspired by the Western science, but they were also continuation of a legacy of dams which existed in the ancient and medieval *Dharma* tradition in India.[73]

The Supreme Court of India, as the apex court of the Country, has the responsibility to uphold national philosophies. As the nation, the Court too cherished the ambition to promote national philosophies and lead India to modernity—and it did participate in the national narrative on science. Confirming this propensity of the Court and its faith in scientific modernism, Nupur Chowdhury, writes, that

> [T]he court seems to have shown an unusual deference to the vision of national development which the state has held to be synonymous with the development of specific technologies. This deference has even extended to the disregard and attempts by the Court to delegitimize civil society voices that have pursued public interest litigations in their bid to shape technology development. The Supreme Court therefore stands today as an actor that has consumed and is therefore subsumed by the national narrative.[74]

Since dams were part of India's narrative on modernization, the Supreme Court too had internalized that narrative. The dam jurisprudence, which unfolded from the Supreme Court, starkly evidences this proposition.

A. Sardar Sarovar Dam Project Over River Narmada

> "Sustainability is not just ecological sustainability. It has to be also popular sustainability"

It Fared in Battling Them, SCROLL.IN (Aug. 16, 2017), https://scroll.in/article/847255/jawaharlal-nehru-set-india-on-the-path-to-prosperity-but-is-it-the-noble-mansion-he-dreamed-of.

72. David Arnold, *Nehruvian Science and Postcolonial India*, 104 ISIS 360, 368 (2013). *See also*, Bhikhu Parekh, *Nehru and the National Philosophy of India*, 26 ECON. & POL. WKLY. 35 (1991).

73. *See* Kathleen D. Morrison, *Dharmic Projects, Imperial Reservoirs, and New Temples of India: A Historical Perspective on Dams in India*, 8 CONSERVATION & SOC'Y 182 (2010). Dams in ancient and medieval India, according to Morrison, were considered "little oceans", to the extent of naming a dam "ocean of Dharma."

74. Nupur Chowdhury, *Role of the Indian Supreme Court in Shaping Technology Development*, 19 SCI. TECH. & SOC'Y 57, 73 (2014).

—Medha Patkar

The Sardar Sarovar Dam Project (SSDP) was conceived within the post-independent development policy of India, impelled by the obsession for big dams, to benefit the states of Gujarat, Maharashtra, and Madhya Pradesh.[75] Disagreements started to arise with the launch of the Project itself—the earliest disagreements were about the height of the Dam and then about the site of the Dam.[76] The Khosla Committee, headed by A.N. Khosla, appointed to prepare a Master Plan for the project, recommended a higher and bigger dam, which was not acceptable to the states of Maharashtra and Madhya Pradesh, as they were concerned about an equitable allocation of waters.[77] The failure of the Khosla Committee report to find consensus among the three states, prompted the Government of India to constitute the Narmada Water Dispute Tribunal (NWDT).[78] After 10 years since its constitution, the Tribunal gave its verdict in 1979, which went far beyond finding a formula for sharing of water and power among the states and recommended *inter alia* for "30 major, 135 medium, and 3000 minor dam projects to harness the waters of the Narmada basin."[79] The Tribunal also made a resettlement plan for the project-affected families.

The implementation of the rehabilitation plan was ineffective, people were ousted from their land without compensation, resettlement and rehabilitation. The construction of the Dam, however, commenced in 1987.[80] As the construction progressed, the resettlement and rehabilitation issues became intense and many environmental concerns also started to develop.[81] At that juncture, the social movement against the Project, Narmada Bachao Andolan (NBA)—the Save Narmada Movement—was initiated under the leadership of social activist Medha Patkar.[82] The movement, which started to assert the rights of the project-affected people for resettlement and rehabilitation, would soon become a total opposition to the SSDP, given the many potential costs to the people and irreparable damage to the

75. THE SARDAR SAROVAR DAM PROJECT: SELECTED DOCUMENTS 2 (Philippe Cullet ed., 2007).

76. *Id*. at 4.

77. *Id*. at 4-5.

78. M.S. Menon, *Sardar Sarovar Project: Another Perspective*, 38 ECON. & POL. WKLY. 4095, 4096 (2003).

79. *Id*.

80. *Id*. at 4096.

81. *Id*.

82. Mathew John, *Interpreting Narmada Judgment*, 36 ECON. & POL. WKLY. 3030, 3030 (2001).

environment.[83]

In 1994, the NBA filed a Public Interest Writ Petition—*Narmada Bachao Andolan v. Union of India and Others*—before the Supreme Court of India to restrain the Government of India from constructing the Dam.[84] The primary contention of NBA was that there were many irregularities in the environmental clearance obtained for the SSDP.[85] Other matters on which NBA based its submission include, resettlement and rehabilitation, threat to the ecology of the region including submergence of land-area, health hazards, and uprooting of culture.

The NBA quite vehemently highlighted the environmental issues. However, the Court's response to such concerns were in the form of restating the language in the reports of the expert committees which the Court considered as scientific proofs. For example, responding to the NBA's submission that "extensive deforestation of the submergence zone had taken place, as also part of the area had been submerged," the Court responded that a "number of studies were carried out and reports submitted" . . . and that the reports "indicated that a well-balanced and viable eco-system existed in the Shoolpaneshwar Sanctuary. Moreover, with the construction of [a] dam, water availability and soil moisture will increase and support varieties of plants and animals."[86] Further, when NBA submitted that as per the precautionary principle, the burden of proving that the Project would not lead to environmental degradation is on the Respondents, the Court replied that such a burden is only on the Respondent when the impact of the Project is not known.[87] However, in the case of SSP, the environmental impact had been assessed by expert bodies and therefore the Respondent only needs to adopt sustainable development which would include all necessary mitigating steps.[88] In both these cases, the Supreme Court considered expert opinion as "pure reason" by which the Court equated "technical facts" to "social facts" and drew conclusions based on that.[89]

83. *Id*. On the counter-hegemonic role played by the Narmada Bachao Andolan, *see* Balakrishnan Rajagopal, *The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India*, 18 LEIDEN J. INT'L L. 345 (2005).

84. *Narmada Bachao Andolan v. Union of India and Others*, (2000) 10 S.C.C. 644, 654 (India).

85. *Id*. at 656-657, 663-665.

86. *Id*. at 681.

87. *Id*. at 683-84.

88. *Id*.

89. *See* Shiv Visvanathan, *Supreme Court Constructs a Dam*, 48 ECON. & POL. WKLY. 4176, 4176 (2000).

The Court did not hide its enthusiasm for dams—a Nehruvian developmental legacy, which has completed a meaningful life—in its many observations and in the judgment. Addressing the environmental concerns apropos of SSP, the Court emphasized that dams do not pollute because, the dam is "neither a nuclear establishment nor a polluting industry."[90]

> The construction of a dam undoubtedly would result in the change of environment but it will not be correct to presume that the construction of a large dam like the Sardar Sarovar will result in ecological disaster. India has an experience of over 40 years in the construction of dams. The experience does not show that construction of a large dam is not cost effective or leads to ecological or environmental degradation. On the contrary there has been ecological upgradation with the construction of large dams. What is the impact on environment with the construction of a dam is well-known in India.[91]

Responding to the contention by the Petitioner of mismanagement of the resettlement and rehabilitation plans, and the non-fulfilment of the obligations thereof by the states responsible, the Court made a rather innocent reminder that the Petitioner and the people represented by the Petitioner should have faith, as much as the Court, "in the process of research and trust in the existence of administrative machinery."[92] The Court also explained to the Petitioner that administrative machineries like the R&R Sub-Group of Narmada Control Authority did take "adequate" measures, and the state governments concerned, as per the Central Government reports, had taken measures to implement the Master Plan.[93]

Uprooting of cultures, especially tribal cultures, as alleged by the Petitioner, in the view of the Court, is a negative concept which is antithetical to progressivism. The Court was left wondering about prioritizing "oustee preferences" to the state-chosen conditions for them. How could the state's rational choice be ignored by the oustees? Instead, the oustees, according to the Court, "should have improved or regained the standard of living that they were enjoying prior to their displacement and they should have been fully integrated in the community in which they were re-settled."[94] Why couldn't they see that the Dam is a means to their progress to modernity? With a real estate mentality, perhaps prompted by an ignorance of the relationship

90. *Narmada Bachao Andolan v. Union of India and Others*, (2000) 10 S.C.C. 644, 684 (India).

91. *Id*.

92. Visvanathan, *supra* note 89 at 4179.

93. *Narmada*, *supra* note 90 at 644, 695.

94. *Id*. at 697.

between culture and geography, if not prompted by the vexation at cultural uprooting becoming an excuse to resist a project like the Dam, the Court absurdly measured tribal life in terms of the quantity of land: "[i]t may be that the grazing land was inadequate but this problem will be faced by the entire State of Gujarat and not making such land available for them does not in any way violate any of the provisions of the Award [of the NWDT]".[95]

The Court also took great pride in the system—institutional structure and administrative machinery—in place. It reviewed the workings of this system in extensive detail. The Court also left no possibilities at amelioration untouched, e.g., it reviewed the functioning of systems on health, safety, environment, agriculture, and education, set up for the project-affected people. It did find all these measures, and expressed happiness over them, as steps leading to greater progress—all roads ultimately lead to the Dam. The anxiety is whether this unabashed faith of the Supreme Court in the machineries based on governmental reports is misplaced or not. Whatsoever, the Court at least looked contented by all this, except that a project leading to a dam was being challenged.

The Court in the end held that the Dam shall be constructed, and it shall be as large as the Sardar Sarovar Dam; if not, there will not be adequate supply of water, as water "is one element without which life cannot sustain."[96] Then, the Court assured that it will also oversee the construction of the Dam "to see that the system works in the manner it was envisaged," but it "will not transgress into the field of policy decision."[97] "It is for the Government to decide how to do its job. When it has put a system in place for the execution of a project and such a system cannot be said to be arbitrary."[98]

This article does not mean to problematize the decision taken by the Supreme Court, which is built on, and motivated by, the concept of sustainable development. But it intends to examine closely the approach of the Court to dams. The "balancing" of development with other social concerns, which the sustainable development doctrine requires in its profoundest imagination, did not happen well in *Narmada Bachao Andolan* due to the Court's enthusiasm to facilitate the construction of the Dam.

Exploring the epistemology of the sustainable development doctrine, Judge Christopher Weeramantry in *Gabčíkovo-Nagymaros Project*

95. *Narmada*, *supra* note 90 at 644, 698.

96. *Id*. at 712.

97. *Id*. at 713.

98. *Id*.

(Hungary v. Slovakia) before the International Court of Justice (ICJ) observed that the sustainable development doctrine aims to prevent a free reign of development (sum total of human happiness) over the environment (integral to sustenance of life) and *vice versa* and requires a reconciliation.[99] He explained that the principle has ingrained in it notions of equity, economy, conservation, equality of all creatures, and a right to life.[100] The doctrine also has developmental elements aiming to maximize human happiness and well-being, however, they shall not be used as a pre-commissioning test of developmental projects; rather, the doctrine should be used for continuous assessments and evaluation of projects that have been considered to be advancing human condition, both natural and social.[101]

Indeed, the Supreme Court in *Narmada Bachao Andolan* has followed the project implementation requirements of the doctrine, and most effectively at that. However, when it came to examining the environmental and human elements involved in the project, the Court, instead of taking an ethnographic perspective, relied on the expert reports of pro-dam agencies with development as their primary objective or those agencies with a structural bias towards developmental projects. And, this is obvious from the Court's statement—"[t]he impact on environment should be seen in relation to the project as a whole."[102] Instead of balancing between environment and development, the Court has used development to become the tool to evaluate environmental concerns and made the dam the means for environmental projection, as is obvious from the following statement: "[w]hile an area of land will submerge but the construction of the Dam will result in multifold improvement in the environment of the areas where the canal waters will reach".[103] The Dam appears to be larger than life in the Supreme Court's judgment and everything else is but a flicker from the peripheries. Critiquing the Dam-bias of the Court, Shiv Visvanathan, gives a few manicures to the Court's overall approach to the Narmada dam

> Narmada becomes a river of social science clichés. Environment and human rights exist in the package but as peripherals. What defeats the movement [NBA] is a formal idea of law and a plethora of bad social science. The ghosts of Comte, Herbert Spencer, McClelland live in our

99. *Gabčíkovo-Nagymaros Project* (Hung. v. Slovk.), Judgment, 1997 I.C.J. 88, 91, ¶ 2 (Sept. 25) (Separate opinion by Weeramantry, Vice-President).

100. *Id.*

101. *Id.* at 111. The idea of Environmental Impact Assessment, which is part of the doctrine of sustainable development, "is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences."

102. *Narmada, supra* note 90 at 644, 714.

103. *Id.*

> court judgments threatening our poor, our marginals, our dissenters in the name of the very values we cherish democracy, rule of law, justice.[104]

B. The Tehri Dam Project Over River Bhagirathi

"This dam is built with our tears**"**

—Sunderlal Bahuguna

The Tehri Hydro Power Project and the Tehri Dam Project (TDP) were approved in 1972 by the Government of India.[105] The construction works commenced in 1978.[106] As in the case of every dam project, in the case of TDP too there were serious concerns relating to the safety of the dam which is in a high seismic zone, there is potential for destruction of the environment, displacement, and rehabilitation. Prompted by these concerns, a social resistance under the aegis of the movement, *Tehri Bandh Virodhi Sangarsh Samiti* (TBVSS)—Tehri Dam Opposition Struggle Committee—was started.[107] The TBVSS filed a suit in the Supreme Court of India in 1985 which was rejected on technical grounds.[108] In 1988, Sunderlal Bahuguna, an environmentalist and social activist (also known as the father of the "Chipko Movement"—a non-violent movement to protect the trees), joined the struggle.[109] He brought in the values of Gandhian *Satyagraha* to the movement and fought against the four evils of the TDP, which he comically named as "the four gifts of Tehri dam"—"atrocities, displacement, corruption, and genocide."[110] The movement under Sunderlal Bahuguna drew the public's attention to the impending threat of the TDP. Mukul Sharma summarizes the threats highlighted by TBVSS:

> Fear from the Tehri dam has been a strong element in the movement. Fears regarding safety, geology and hydrology are based on a comprehensive and technical analysis of the project. It is said that the mountains on which the dam is being built are crisscrossed with geological faults. The region

104. Visvanathan, *supra* note 89 at 4180.

105. *Tehri Dam, IRN Fact Sheet*, 1 (Oct. 2002), https://archive.internationalrivers.org/sites/default/files/attached-files/tehri_dam_fact_sheet.pdf.

106. *Id*.

107. Shekhar Pathak, *Submersion of a Town, Not an Idea*, 40 ECON. & POL. WKLY. 3637, 3638 (2005).

108. Vimal Bhai, *The Tehri Dam Project: A Saga of Shattered Dreams*, in WATER CONFLICTS IN INDIA: A MILLION REVOLTS IN THE MAKING (K.J. Joy, Suhas Paranjpe & Biksham Gupta, eds., 2008).

109. *Id*.

110. Mukul Sharma, *Passages from Nature to Nationalism: Sunderlal Bahuguna and Tehri Dam Opposition in Garhwal*, 44 ECON. & POL. WKLY. 35, 36 (2009).

> is seismically too active to site such a large dam, that the dam is not designed to withstand the intensity of an earthquake which may strike the region, that the project can place at great risk many cities and their population downstream of the dam.[111]

This was, of course, in addition to the concerns surrounding destruction of the environment and displacement and rehabilitation of the people living in the region.

While the social movement and collective resistance continued through all peaceful means, in 1990, the TBVSS filed a writ petition before the Supreme Court—*Tehri Bandh Virodhi Sangarsh Samiti v. State of Uttar Pradesh and Others.*[112] The Petition, pointed out that the "safety aspect" had been completely ignored by the Government of Uttar Pradesh in envisaging the TDP. It stated that the Dam "will pose a serious threat to the fife, ecology and the environments of the entire northern India as the site of the dam is prone to earthquake; and that the Government of India had not applied its mind to this very important aspect in preparing the project."[113] The Court, however, rejected the petition that there is expert opinion contrary to the submissions of the Petitioner. In its 2-page judgement, the Court held that it is not correct to say that the Government "has not applied its mind or has not considered the relevant aspects of the safety of the Dam."[114] The Court also pre-empted itself from all safety-related issues by reminding the Petitioner that it "does not possess the requisite expertise to render any final opinion on the rival contentions of the experts."[115] Rather, it will only "investigate and adjudicate the question as to whether the Government was conscious to the inherent danger as pointed out by the petitioners and applied its mind to the safety of the dam."[116]

The Court has equivocated on the actual issue before it. It showed a judicial ingenuity that is at a high school level, by being to-the-point of what has been semantically presented before it. Did the Court not understand that the answer to the question—*whether the Government had applied its mind on safety or not*?—is not what the Petitioner had sought? Was not judicial ingenuity sharp enough to pierce the semantic minimalism in legal questions to see human concerns which prompted that question? Did not the Court

111. *Id*, at 39.

112. *Tehri Bandh Virodhi Sangarsh Samiti et al., v. State of U.P. et al.,* (1990) 44 SCC 1, 1 (India).

113. *Id*.

114. *Id*. at 2.

115. *Id*.

116. *Id*.

reduce all concerns to terms of legal speech? Did it not thus create a sham of semantic formalism to conceal its vexation at the Petitioner for daring to question a national priority like a dam? The subsequent and final decision by the Court would confirm that the Court had a vision and an analytic to which it is most loyal to.

Subsequent to the Supreme Court's pro-dam ruling in *Tehri Bandh Virodhi Sangarsh Samiti*, construction continued on the TDP. Social resistance to the Project too continued.[117] At that juncture, a new writ petition was filed before the Supreme Court in 1992 as *N.D. Jayal and Another v. Union of India and Others*.[118] The Petitioners requested the Court to order for further "safety tests" so that fear about the project is assuaged. The Petitioner based this submission on the allegation that "the concerned authorities have not correspondingly complied with the conditions attached to the Environmental Clearance."[119] The Court was also requested to examine rehabilitation-related issues.

The Court gave its decision only on September 1, 2003. By then it had clarified and established its position on dams in *Narmada Bachao Andolan*—what the Court could do and could not do and hence, what it would do and what it would not. The Court reminded the Petitioners of its dam jurisprudence and that it would not rule on the construction of the dam which is a matter of policy for the government to decide, but the Court would monitor the construction of the dam to guarantee that the project is sustainably executed.[120] In the language of reassurance, the Court stated that it has the duty "to see that in the undertaking of a decision, no law is violated and people's fundamental rights as guaranteed under the Constitution are not transgressed upon except to the extent permissible under the Constitution."[121] But does it not imply that the duty of the Court to guarantee fundamental rights—in the context of a developmental project like a dam—starts at the project execution stage? Irrespective of whether the project itself is in breach of the fundamental rights (even if of the right to "life"), is it correct on the part of the Court to presume correctness of the part of the government and get involved to oversee that the project does not violate any rights of stakeholders? Mind it, the case in question is a writ petition under

117. Armin Rosencranz & Kathleen D. Yurchak, *Progress on the Environmental Front: The Regulation of Industry and Development in India*, 19 HASTINGS INT'L & COMP. L. REV. 489, 510-12 (1996).

118. *N.D. Jayal and ANR., v. Union of India,* (2003) 3 SCR 1.

119. *Id*. at 1.

120. *Id*. at 3.

121. *Id*.

Article 32 of the Constitution of India which provides the fundamental right to approach the Court for constitutional remedies, that is against the violation of any of the fundamental rights of the citizens.[122] In the words of B.R. Ambedkar, the architect of the Constitution of India, Article 32 is "one of the greatest safeguards that can be provided for the safety and security of the individual."[123] When a "move" to the Supreme Court is made as per Article 32(1), can the Court choose to exclude—that too, based on a presumption of correctness of a democratically elected government by the people—the primary breach of fundamental right and to include breaches, if any, which happen subsequent to the primary breach?

Whatsoever, the Court did not deviate even a bit from *Narmada Bachao Andolan* and stated that the benefits of dams outweigh the costs: "[t]he impact has to be examined on the project as a whole and at the same time it should also be noticed that the construction of a dam would result in multifold improvement in the environment of the areas where the canal waters will reach".[124] Not only in terms of substantive matters, but also in terms of the discursive patterns, the Court followed *Narmada Bachao Andolan*, which it would also later on follow in *Mullaperiyar Environmental Protection Forum* and in the Mullaperiyar original suit. That is to say, reacting to the evidence of hydrological and seismological risks of the TDP submitted by the Respondents, while dismissing the same, the Court said that it did not find the matter within its remit, and decided to rely on the expert opinion sought by the Government of India, surprisingly, the respondent in this case.[125] The Court considered the respondent's wisdom as "mature wisdom" than the wisdom of the Court—"[t]he consideration in such cases is in the process of decision and not in its merits."[126]

In the same vein and in the same fashion as that of *Narmada Bachao Andolan*, even liberally drawing on it, the Court emphasized on the doctrine of sustainable development—again emphasized on the essential balancing—and reviewed the safety measures, including disaster management and rehabilitation plans, taken by the Government of India.[127] The Court also made an allusion to the insensitive dictum on rehabilitation in *Narmada*

122. India Const. art. 32, cl. 2.

123. Sadaf Modak, *Explained: What Have Been the Supreme Court's Recent Observations on Article 32?*, INDIAN EXPRESS (Nov. 19, 2020), https://indianexpress.com/article/explained/article-32-and-supreme-court-fundamental-rights-7055040/.

124. *N.D. Jayal*, at 4.

125. *Id*. at 7

126. *Id*.

127. *Id*. at 10-28.

Bachao Andolan that rehabilitation is a civilizing mission of the uncivilized by integrating them into modernity. In the case in question too, the Court found that integration to modernity has to be performed as a moral duty of the state by way of "properly look[ing] after" those who were being displaced.[128]

The Court did not stop the TDP. [129] It disposed the writ petition by stating that the onus of monitoring all mitigation measures is with the High Court of Uttarakhand for it is familiar with the local conditions.[130] But in his separate opinion, Dharmadhikari, J., explained the need for setting up fully functional systems in place. His separate opinion is not much relevant in terms of the merits of the case, but it is quite an eye-opener to the dam jurisprudence of the Supreme Court of India. Dharmadhikari, J., pointed that on a development project like a dam, there will always be claims and rival claims with their own respective merits—that's inevitable.[131] The Court cannot prioritize one over the other. Hence, a sustainable approach would be needed. Although Dharmadhikari, J., too took the same route as the Court in *Narmada Bachao Andolan* to arrive at sustainable development, he did raise the point that within the doctrinal spaces of sustainable development, "care has to be first given to the needs and demands of the people who live in the hills and valley and face ouster."[132] His approach that all relevant considerations including environmental protection, safety, and rehabilitation shall precede the project was a step in the right direction, although within the limited spaces. Beyond that extent of sustainability—that is, of suggesting for necessary pre-construction environmental, safety, and rehabilitation measures—Dharmadhikari J., did not go into the safety of the dam. But he did endorse the continuance of all tests for ensuring the safety of the TDP.

N.D. Jayal was a victory of development, as the Court approved the continuance of the TDP. If the Petitioner wanted a feel of victory, they could have also felt it, as Dharmadhikari, J., had ruled for the continuance of safety measures. But it was a battle-loss for social movements like TBVSS which considered the impoundment and the destruction of the ecosystem surrounding the dam area as a stagnation of the soul, and of the spontaneous

128. *Id*., at 20.

129. *Tehri Dam Achieved its Full Potential for the First Time on 24th Sept. 2021*, TEHRI INDIA LIMITED PRESS RELEASES (Sept. 24, 2021), https://www.thdc.co.in/content/tehri-dam-achieved-its-full-potential-first-time-24th-sept-2021.

130. *N.D. Jayal*, at 28.

131. *Id*. at 32.

132. *Id*. at 34.

flow of life energies.[133]

Both the *Narmada Bachao Andolan* and *N.D. Jayal* are representative cases of the dam jurisprudence of the Supreme Court of India. For the Court, its own dam jurisprudence has become an analytic from which the Court could not find an escape. Perhaps it does not want to escape, as the Court finds a comfort in the illusory sense of justice delivery which the analytic offers. Such is the utility of sustainable development—it can liberally bestow on people discourses on culture, safety, protection of environment, and human dignity, and can give the approval for developmental projects like a dam, championing the journey of the nation to modernity.

The Mullaperiyar dam dispute, which followed both the Narmada and Tehri dam disputes, has been so far subjected to the same analytic. But in the case of Mullaperiyar dam, the dispute cannot languish in the analytic of the Court, as the concern goes beyond environmental protection and is not based on any spiritual understanding of the connection between human and nature. Rather, it is about life—4 million lives—as it is understood in its ordinariness. And, when the question is of human lives, high-end discourses or assurances about the safety of a 126-year-old dam do not assuage the fear and anxiety of the people living downstream. Mullaperiyar is a test of the Court's willingness and courage. Making a choice is inevitable, as it is not the environment versus development debate that can be moderated by discourses on sustainability. The choice is between a dam or lives of the people. The Supreme Court understands this conundrum; it wants to break it. But for it, the Court has to break the analytic of its dam jurisprudence.

III. TRANSCENDING THE DAM JURISPRUDENCE: A NEW ANALYTIC FOR DAM DISPUTES

A. Reimagining Dams: A Holistic Approach

Dams have a special place in India's developmental imagination. Indeed, this is often attributed to a Nehruvian vision, which this article has also done partly. This is for the reason that the Indian tryst with dams, as many believe, was born out of a desire for modernization. But dams becoming part of the said imagination has historical and political reasons beyond the Nehruvian vision. That is to say, Dams existed in pre-modern India and during the colonial reign. The oldest dam in India—the *Kallanai* Dam in the State of Tamil Nadu dates back to the 2nd Century and is still

133. *See* GEORGE ALFRED JAMES, ECOLOGY IS PERMANENT ECONOMY: THE ACTIVISM AND ENVIRONMENTAL PHILOSOPHY OF SUNDERLAL BAHUGUNA 205-25 (2013).

functional.[134] Dams continued to be built in India under many provincial kingdoms. For the Kings, dams were not just signs of their planning and development, but also artifacts of their legacy and culture. The cultural element of dams also made them constituents of the cultural memory of the Indian society, such that they remain etched in India's historical memory.[135]

During the colonial period, dam construction continued in a similar pace but in a different vein. Then, the British Government of India not only kindled the cultural and historical memory; but they used, for the first time, the developmental (irrigation) and environmental (flood-control and famine-prevention) perspectives to dam-building. But there were complex political motives and histories behind such perspectives and the discourses which created them, some of them are known whereas some of them remain puzzles. For example, dams were part of the "selective modernization" of the British in India which used the semiotics of large dams due to the "gigantism" of dam-structures and their ability to gift the essential water.[136] The idea that civilization and modernization come in a "big way" was synonymized with, and symbolized through, big dams.[137] But what remains a puzzle of colonial era development motive is the 999-year lease agreement for the Mullaperiyar dam, the lifespan of which was estimated to be 50 years, between the Secretary of State for India and the Maharaja of Travancore.

Nehruvian post-independent developmental ambition on dams had partly been influenced by a pre-modern idea of development and partly by the sense of modernity of the British. But the Nehruvian vision on dams cannot be understood in simplistic terms. He considered large dams and hydropower as means to modernity, not in a cultural or temporal sense, but in a scientific sense, since he considered modernity as part of a "technological age."[138] The many complex considerations that have become constituents of the Nehruvian vision on dams are put together and succinctly stated by Hanna Werner:

> The technocrat Nehru depicts large dams as a visual landmark embodying the successful mastery of nature, which then enables the establishment of

134. *Tamil Nadu's Ancient Kallanai Dam: An Engineering Marvel*, FIN. EXPRESS (Sept. 25 2019), https://www.financialexpress.com/lifestyle/travel-tourism/tmail-nadus-ancient-kallanai-dam-an-engineering-marvel/1717252.

135. *See* Morrison, *supra* note 73 at 192-93.

136. *See generally* Maria Kaika, *Dams as Symbols of Modernization: The Urbanization of Nature Between Geographical Imagination and Materiality*, 96 ANNALS ASS'N AM. GEOGRAPHERS 276, 278 (2006).

137. *See* HANNA WERNER, THE POLITICS OF DAMS: DEVELOPMENTAL PERSPECTIVES AND SOCIAL CRITIQUES IN MODERN INDIA 34-43 (2015).

138. *Id*. at 69.

> a modern society in India. The dam, it has to be remembered, does not only represent a political symbol of modernity. As an architectural artefact it also incarnates its aesthetics. Large-scale water works reflect, like hardly any other infrastructural intervention, a 'modernist engineering aesthetic' that not only signifies the modern quest for human control over nature, but also visualized its achieved success.[139]

Later on, Nehru Indianized this vision by calling dams temples of modernity, thereby linking pre-modern ambitions of India with his modernist vision.[140] Dams were not the "everything" of Nehruvian vision; in fact, deeming so would be undermining his modernist ambition and his penchant for science. Dams are only symbolic—of a merger of science, human potential, gigantism, and marvel—of Nehruvian modernism.[141] But instead of understanding Nehru in the right of his imaginations, he has been narrowly understood and interpreted by the institutions in India which turned his adage on dams as everything about dam-related imaginations.

The Nehruvian vision has lived quite a meaningful life which had India developing and laying foundation for further economic advancement. But Nehruvians lived within the fragments of his dream—they believed that since dam signifies development, there shall be more and more dams, which has resulted in India building 5202 large dams, most of them were built after independence.[142] Commenting on this dam construction spree, Ashok Swain reminds,

> Mega dams are not anymore in fashion in most part of the world. Popular protests have now made it almost impossible to build these dams in democratic countries. North America and Europe have stopped building these dams for decades. Even China and Turkey have stopped building large dams in their heartland.[143]

This prompts the question; has India been correct in its stance on dams? Perhaps developmentally yes; but certainly India has erred on the side of dam science and dam studies. The dam, as it is conceptualized by the World Commission on Dams (WCD) is a holistic project comprising of many

139. *Id*. at 81.

140. *Id*. at 82.

141. *Id*. at 82-3.

142. Ananda Banerjee, *How many dams does India need?*, MINT (May 25, 2015), https://www.livemint.com/Politics/J5HAuWKfAUFVX5UyMWFtYN/How-many-dams-does-India-need.html.

143. Ashok Swain, *Mega Dams are a Trend that the World Stopped Following Long Ago, But What Hasn't India Yet*, OUTLOOK (Sept. 20, 2017), https://www.outlookindia.com/website/story/mega-dams-are-a-trend-that-the-world-stopped-following-long-ago-but-why-is-india/301976.

essential parts, rather than a monolithic development project that can be judged in terms of the super-structure of a dam wall and the benefits accruing from it.[144] A narrow view based on the later conception of dams often lead to parochial considerations in decision-making, which renders the process of decision-making political.[145]

The Report of the WCD entitled, "Dams and Development: A New Framework for Decision-Making, 2000" (herein after WCD Report, 2000) states that the idea of the dam cannot be confined to the dam's design, construction, and operations, but it includes "the range of social, environmental and political choices on which the human aspiration to development and improved well-being depend. . .At the heart of the dams debate are issues of equity, governance, justice and power—issues that underlie the many intractable problems faced by humanity." [146] Accordingly, in its holism, a dam project comprises of "planning, design, appraisal, construction, operation, monitoring, and decommissioning of dams."[147] All these stages of a dam project have equal importance, however, in terms of the extent of reliance on them, it may vary from dam to dam. For example, a dam under construction should give primary focus on planning, design, and appraisal such that the social costs of dam construction are taken into account and the dam is hydrologically and seismologically safe; a dam constructed through proper planning and which has strategic designs should focus on the operations part for generating optimum results, while continuing with regular and rigorous safety monitoring; and an age-old dam should proceed towards decommissioning, aiming to restoring the river and its resources, and if safety is a matter of concern, the dam should be scientifically decommissioned in the interest of safety.

B. A New Analytic: The Supreme Court and the Dams

The above said holistic approach is relevant for the Supreme Court of India, as it would help the Court to distil some of its biases towards dams by moving away from its moral and ideological commitment to dams *to* a more pragmatic, science-based, democratic, and humane approach. The WCD

144. *See generally Dams and Development: A New Framework for Decision-Making*, REPORT ON THE WORLD COMMISSION ON DAMS (Nov. 2000) [hereinafter WCD Report, 2000].

145. In the *Chair's Preface* to the WCD Report, 2000, Professor Kader Asmal underlines the need for separating the above said perspectives on dam in the following words: "The dam embodies ambitions of statement, but when politicians approach with their ambitious plans, apprehensive peoples hold signs that say 'Save our beloved river'". *See* WCD Report, 2000, 1v.

146. WCD Report, 2000, at xxvii, xxviii.

147. *Id.* at xxviii.

Report, 2000, provides a framework for decision-making, planning, and compliance apropos of dams. This is an effective framework that has integrated all constituents of dam projects for deliberations and decision-making at various levels of the projects. But this process needs judicial oversight. Many a times when dams are commissioned, politics enters with hidden motives to rob dams of all their ideals, values, and welfare which the state had intended when sanctioning projects. The Court—the guardian and custodian of justice—can therefore become the monitor of dam projects to uphold the true values behind the construction of dams.

The Court should internalize the holistic perspective to dams. When there are voices of dissent and opposition to dam projects, the Court should go beyond perceiving them as anti-development voices; rather, it should see dissent as a fight against ulterior politics and not against the state or the government. It is no big sin to rule against a dam project if the project is not in the interest of people. Even such ruling should also be seen as part of the decision-making on dams. The question which the Court should ask is not who is correct—state or the dissenters (mostly environmentalists and people's groups)—but *what* is correct. And, correctness need not always be in building dams. The concept of dams have lived past the prime of its life, and considering the social and environmental costs, not to discount the hydrological and geological risks and damage associated with the dams, many developed countries have advanced towards alternative means of energy generation and water-supply.

One of the most important considerations with regard to dams is safety. While the Court has shown great sensitivity towards the safety of people living downstream, it has not had the will to make a ruling against dams in the interest the safety of the people. Out of the said sensitivity and empathy, the Court has stretched to the maximum and suggested effective monitoring measures and preparations for disaster management. But its imagination on safety did not go beyond such minimum precautionary measures, which is understandably due to its moral commitment to dams. If there is a threat to the safety of dams, which further poses a threat to the lives of people, safety has to be ensured through dam decommissioning. As per the holistic approach to dams, dam decommissioning is also part of dam projects.

The WCD Report in 2000, which advanced the holistic approach, included decommissioning as part of a dam project. It explains that, "[d]am decommissioning may be necessary due to safety concerns, dam owners' concerns about lower profits, or concerns about social and environmental impacts. Decommissioning can mean actions ranging from stopping

electricity production to dam removal and river restoration".[148] Reviewing the WCD Report in 2000, Kader Asmal, empirically confirms the losing relevance of dams and the increasing numbers of dam decommissioning:

> The number of large dams commissioned fell from a high of 5,418 in the 1970s, to 2,069 in the 1990s, and the downward trend is continuing. Dams are no longer seen as the proud symbols of progress they once were, and some countries, such as the United States, decommission more large dams than they currently build. The debate now focuses on the practicality of removing more dams and the cost of compensating those harmed. Dams have become intensely controversial; the pendulum has swung to the other extreme.[149]

In India, due to the involvement of politics and the cultural image of dams—often associated with national pride and prestige—no dams have been decommissioned. But many dams have broken, causing devastation and destruction, including loss of life.[150] If the Supreme Court is willing to look beyond the political relevance and cultural image of dams, and to look at dams from a scientific perspective—and to a certain extent, socio-economic—it would realize that dams have "failed to deliver on their promises."[151] Asmal appropriately points out that "[i]n the end the issue is not dams, and [shall not be]. Eliminating poverty and deprivation, helping to meet human needs and bettering human prospects is what the process of development must address."[152]

Hence, the judicial test of assessing a dam should not be motivated by history, culture, myths, and imageries, nor it should be based on unevaluated scientific reports. Rather, it should be based on the conditions of the people and their needs. But assessment of such needs should not be prejudiced. That is to say, if one set of people is benefitted by a dam, the other set might be in grave danger due to the dam. Certainly, human life shall have priority over everything else, be that life in the physical sense or life as it is constitutionally guaranteed. But if a decommissioning becomes necessary, the state has the responsibility to provide the same benefits of the dam through alternative means to those who are affected by the decommissioning. The state cannot evade this responsibility by making the rational choice of

148. *Id.* at 185.

149. Kader Asmal, *Introduction: World Commission on Dams Report, Dams and Development*, 16 AM. U. INT'L L. REV. 1411, 1418 (2001).

150. Arnab Roy Chowdhury, *Decommissioning Dams in India: A Comparative Assessment of Mullaperiyar and Other Cases*, 23 DEV. IN PRAC. 292 (2013).

151. *Id.* at 298.

152. Asmal, *supra* note 149 at 1433.

becoming defenders of a dangerous and destructive dam. The Court should remind the state of this duty and ensure that the state fulfils that duty. Arnab Roy Chowdhury points out that, "[i]t is high time that the Indian state consider moving in the direction of selectively identifying and dismantling those dams that are unproductive, as it embraces, in policy, the global paradigm of sustainable development."[153] Necessary policy guidelines for the states in the said direction should have the legitimacy of judicial orders.

The Court should also re-evaluate its approach towards social movements against dams. In the United States, after the Supreme Court's ruling in *Brown v. Board of Education*, social movements became a major catalyst of social change. Social movements thenceforth were seen as "contentious politics," which is an opportunity to participate in the decision-making process from "outside" of the formal corridors of politics and centers of formal power.[154] It has also enhanced the social trust towards the judiciary and transformed the image of the court, especially the US Supreme Court, as a potential site for contestation and social change. However, more than the actual change, it was sense of representation and the presence of rights which prompted social groups to take to the courts—it was a faith that the core concern, which could even be a constituent of a larger cause, which could not get a representation elsewhere otherwise, would be heard and addressed.[155]

The Supreme Court of India had also shown empathy to social movements and acknowledged the constitutive role of such movements in social production—e.g., in *Nandini Sundar v. State of Chhattisgarh* ("protection of civil liberties, by this Court is a far, far more sacred a duty") and *Navtej Singh Johar v. Union of India* (Constitution is an expression of *inter alia* assertion of many social movements).[156] However, in disputes on dams, where development issues were at stakes, the Court did not honor its commitments to social movements. In *Mullaperiyar Environmental Forum*, *Narmada Bachao Andolan*, and in *Tehri Bandh Virodhi Sangarsh Samiti*, the petitioners, who represented social movements, approached the Court having been motivated by a spirit similar to that which prevailed in the United States after *Brown*. In *Mullaperiyar Environmental Forum*, the Court did not even

153. Chowdhury, *supra* note 150 at 297.

154. *See* David S. Meyer & Steven A. Boutcher, *Signals and Spillover: Brown v. Board of Education and Other Social Movements*, 5 PERSP. ON POL. 81 (2007).

155. *Id.*

156. *Nandini Sundar and Others v. State of Chhattisgarh*, Writ Petition (Civil) 250 of 2007 (July 2011); *Navtej Singh Johar and Others v. Union of India*, Writ Petition (Criminal) 76 of 2016 (Sept. 2018).

sense the social force and public anxieties behind the petition. In *Narmada Bachao Andolan*, the Court considered the dispute as a problem between the Central Government and a fraction of the populace—the politics of contestation—and was reluctant to get involved in it. By stating that it will not question the wisdom of dams, the Court had failed to recognize the concerns of the people represented through NBA.[157] In *Tehri Bandh Virodhi Sangarsh Samiti* too, the Court did not see the presence of a social movement; rather, it looked at the case as dispute between the developmental ambitions of the government and anti-development stance of less-informed groups. In fact, the protest against TDP was a major social movement driven by ecological concerns and a Gandhian model of non-violent *Satyagraha*. The move to the Court by TBVSS was driven by a deep-seated environmental consciousness which dates back to the Chipko movement of the 1960s.[158]

In the case of the Narmada dam, NBA drew more public and scholarly attention before and after the Court's judgment, than the judgement itself. Balakrishnan Rajagopal considers NBA as a counter-hegemonic force that used the medium of courts to create a dialectic between law and social movements.[159] It is this presence of the dialectic which the Court missed in *Narmada Bachao Andolan.* The failure of the Court to see it being a dialectic ground has cost NBA the case, although not the cause. The Court could have facilitated this dialectic to yield better deliberations and outcomes, rather than recusing itself from the matter. And, by such a recusal, what the court did was to shift the dialectic to the domain of politics, which does not offer the dialectic objectivity that courts do.

The TBVSS, at least during the leadership of Bahuguna, relied on the "aesthetic" and the "spiritual" for its resistance. The social movement focused on the ontological connection between self and the surroundings. It viewed nature as an ontic projection of the self and destruction of the nature as destruction of the self. There was also a mythical content to TBVSS's social activism due to the spiritualization of the Himalayan geography and river Ganges by Bahuguna. Although this approach of Bahuguna had been criticized for its vulnerability to ideological misappropriation, it had huge public support in the region.[160] Whatsoever, the Court's failure to sense this environmental consciousness, irrespective of whether one shares it or agrees

157. *See* S.P. Sathe, *Supreme Court and NBA*, 35 ECON. & POL. WKLY. 3990 (2000).

158. *See* Meghaa Gupta, *Mahatma of the Mountains*, 56 ECON. & POL. WKLY. 80 (2021).

159. *See* Rajagopal, *supra* note 83.

160. For the argument that there is in fact such a misappropriation, *see* generally Sharma, *supra* note 110.

with it, points to the deep-seated commitment of the Court towards dam projects. The point is not that the Court knowing the TBVSS's perspective would have made a big difference in the outcomes. But had the Court engaged with the motivation of the social movement, it could have become wary of its own analytical traps.

The holistic approach to dams includes many phases, e.g., clearance, rehabilitation, compensation, planning, construction, operation, and decommissioning. Even such a holistic approach only attends to the development part of sustainable development. But these are not all about dams—there are many social and cultural considerations at play which may not always come to the forefront. The Supreme Court needs to take seriously the voices of dissent and the silences of the deprived, including suppression of voices by the political forces. If the Court examines deeper into the causes, goals, and functions of social movements, which most often is a consolidated representation of the developmental periphery, it will create a safeguard against developmental prejudices leading to outcomes. The holistic approach will help the Court transcend its own analytic of dam jurisprudence.

CONCLUSION: SITUATING THE MULLAPERIYAR DISPUTE WITHIN THE NEW ANALYTIC

As natural calamities hit Kerala in 2018 in the form of a devastating flood and in 2019 in the form of massive landslides, concerns on the safety of the Mullaperiyar dam were raised again. In January 2020, a new writ petition was filed before the Supreme Court as *Dr. Joe Joseph and Others v. State of Tamil Nadu*. Since the original suit had settled the case in favour of Tamil Nadu, and mindful of the *res judicata*, *Dr. Joe Joseph* has only expressed apprehensions "about the lack of proper supervision of water levels in the dam."[161] The initial few orders passed by the Court showed no signs of deviation from the analytic which the Court has been used to. The Court passed many daily orders on the rule-curve for water levels and instructed the Supervisory Committee, constituted based on the ruling in the original suit, to continue examining gate operation schedule and reservoir operation plan.[162] The Court also allowed the State of Tamil Nadu to raise the water level to 142 feet through another order.

Even so, these daily orders cannot settle the dispute. For that, as this article has submitted, the Court has to transcend its dam jurisprudence and

161. *Supreme Court to Hear Mullaperiyar Dam Case on Dec.10*, THE HINDU (Nov. 22, 2021), https://www.thehindu.com/news/national/sc-to-hear-mullaperiyar-dam-case-on-dec-10/article37622414.ece.

162. Mullaperiyar Dam Issue, *supra* note 14.

adopt the holistic approach to dams. Although that can help the Court break its notions of dam-science and outmoded sense of modernity, that alone cannot obtain a resolution. This is for the reason that in the case of Mullaperiyar dam, there are people with rights—right to life in its general and particular sense—on both sides of the Dam. If, for the people of Kerala, it is their lives which are at stake, for the people of Tamil Nadu, their livelihood is at stake. Strictly speaking, dependence on the waters of the Dam for 126 years has created a river-valley culture for generations of people in the 4 riparian districts of Tamil Nadu. The dam and the river are part of their cultural production—they have been both adaptive and neutralizing agents, and they have generated a sense of kinship and community among the farming population on the banks of the river. Hence, loss of the dam would be the same as the loss of their lives. For the people of Kerala, especially those living downstream in the district of Idukki and the other three districts, the dam is a ticking water bomb. Official statements from Tamil Nadu and elsewhere about the safety of the Dam did not alleviate their fear. Their fear has a constancy which not only numbs their right to exist in joy, but also paralyzes their involvement in social production.

While the fear could be unfounded and the dam could be safe, things cannot be let to be as they are, for a 126-year-old dam threatens the possibility of a sub-optimal outcome in case of a breakage—that is, the loss of 4 million lives and the permanent loss of water for a populace—making people on both sides of the dam worse off. Public institutions other than courts have their structural biases which could only prompt them to see things parochially and by taking sides. But courts' structural objectivity and its hermeneutical imaginations on law can lead to contextualized models of recognition by both parties. However, the first step towards a resolution has to be the Supreme Court coming out of its dam analytic to look at things through a modernist lens—of development, conservation, and sustainability. Once it develops a holistic perspective to dams, the Court could overcome the idolization and veneration of dams and look at them as perishable human artifacts.

If the Court takes the causes and considerations of the various social movements seriously, as much importance as it could attribute to social movements like Save Kerala Brigade (SKB), Mullaperiyar Samara Samiti, and Mullaperiyar Environmental Protection Forum, which demand for decommissioning of the Dam, it should heed to similar social movements in Tamil Nadu, e.g., the Periyar-Vaigai Farmers Association, which has been opposing the construction of a new dam, and those movements which may possibly arise out of the concerns from a dam decommissioning. However, social movements can be instructive for the Court in that their actions will

educate the Court on the reality and provide information on the contemporary cultural orientation of society, so much so that they provide "alternative cultural model and moral order that both defends normative standards against the strategic, utilitarian, and instrumental goal seeking and decision making of elites and points in the direction of a more democratic formulation of collective needs and wants within society."[163] However, in case of conflicting social movements, the Court has to synthesize their narratives and causes. But social movements can only be used for a value-orientation on the dispute. Since the Mullaperiyar dam dispute is a conflict of cultures as contested through the notion of existence—the culture of sustenance (livelihood) and a culture of survival (life)—the Court should heed to the social movements.

Retention of a 126-year-old dam is unscientific, whereas decommissioning of the dam will have immense social cost. Hence, the Court has to take measures to mitigate the costs by decommissioning and recommissioning the Dam (with a plan up to its further decommissioning). Dam decommissioning is a global practice which is gaining traction for many developmental projects including dams.[164] However, re-commissioning of a de-commissioned dam would be a rarest of the rare incident, especially when decommissioning is due to the threat for human safety and lives. Further, the process of decommissioning and recommissioning will have major ecological impacts; but they can be mitigated through proper, timely, and continuing Environmental Impact Assessments (EIA). The decommissioning can restore ecology and habitats, whereas re-commissioning can cause further damage to the ecology.

This does not mean that the Court should not think in the lines of decommissioning and recommissioning of the Mullaperiyar dam. This has also been the motto of the Government of Kerala and the slogan of social movements like SKB—"Safety for Kerala, water for Tamil Nadu."[165] However, prior to that, there should be a court-monitored mediation between both the governments, including leaders of social movements from both sides, in order to instill the spirt of humanism and good neighbourly-ness behind the above said motto. The Court's oversight in the process will help prevent parochial political considerations, vested interest, and voices of

163. Steven M. Buechler, *New Social Movement Theories*, 36 SOCIO. Q. 441, 448 (1995).

164. *See* Mathew D. Manahan & Sarah A. Verville, *FERC and Dam Decommissioning*, 9 NAT. RES. & ENV'T 45 (2005).

165. *Will Never Take Any Decision That May Harm the Safety of Mullaperiyar Dam: Kerala Govt*, THE WEEK (Nov. 8, 2021) https://www.theweek.in/news/india/2021/11/08/will-never-take-any-decision-that-could-harm-safety-of-mullaperiyar-dam-kerala-govt.html.

extremism from becoming part of the mediation. Many polemical components of the dispute can become part of the mediation, e.g., the Lease Agreement, Terms and Conditions of the New Agreement (with operating rights for Tamil Nadu and equitable revenue sharing with Kerala), uninterrupted water supply to Tamil Nadu during the decommissioning and recommissioning phase, and management of ecological sustainability during and after the recommissioning. The EIA and similar mitigation measures prior to the decommissioning and recommissioning processes should start only after successful completion of mediation. The very purpose-orientedness of such mitigation measures will prompt governmental machineries to act judiciously and engender larger cooperation from the parties.

The Supreme Court, instead of recusing itself from the matter (which has been the case so far), should own it, as the Court is the only potential site and effective means for settling the Mullaperiyar dam dispute. However, the Court cannot sense its own potential and proficiency, unless it transcends its analytic which is historically embedded in its post-independent developmental imaginations. But once the Court does that and establishes its authority over the matter, the Mullaperiyar issue and the Court's engagement with it, would become one of the finest experiments in the judicial implementation of the doctrine of sustainable development.

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