

SARDAR SAROVAR: AN EXPERIENCE RETAINED?

Ruke na jo
Ruke na jo, jhuke na jo,
dabe na jo, mite na jo,
Hum who inquilab hein,
julm ka jawab hein.

Those who will not stop,
Those who will not stop, will not bend,
will not be crushed, those who will not be erased;
We are those revolutionaries,
the answer to injustice.

Controversy over the dam projects on the Narmada, a river running through central India and the axis of life for countless rural and tribal communities living on its banks, erupted in the nascent stages of planning and shows little sign of receding. Affected communities, with the assistance of the Narmada Bachao Andolan (Save the Narmada Movement, "NBA"), have organized themselves to prevent further construction on the dam and to demand rehabilitation for those already displaced by dam projects. Songs like the one above, sung at community gatherings protesting the dams, underscore the defiance, resolution, and anger of a people forced to live in uncertainty for decades. The government of India pursues its plans to construct not only the Sardar Sarovar Project ("SSP"), the tallest dam planned for the Narmada, but also thirty other major, and thousands of minor, dams and canals along the river in an effort to provide a low-cost source of energy, irrigation, and drinking water for communities living in desert-prone regions of central and western India.¹ The balance between these contesting ideals of government aid and tribal displacement has been the subject of a number of judicial opinions, including one issued by the Supreme Court of India in March 2005 highlighting the responsibilities of the government to families affected by the SSP.

BACKGROUND

Planning for construction of dams on the Narmada River began in 1946, one year before India's independence.² In April 1961, India's first Prime Minister, Jawaharlal Nehru, laid the foundation stone for the SSP at Navagam in Gujarat.³ From its inception the project was mired in controversy, as the ripar-

1. The Sardar Sarovar Dam, <http://www.narmada.org/sardarsarovar.html#intro> (last visited Jan. 25, 2006); AMITA BAVISKAR, IN THE BELLY OF THE RIVER 200 (1995).

2. BAVISKAR, *supra* note 1, at 199.

3. List of Dates and Events: Sardar Sarovar Project, http://www.sardarsarovardam.org/date_events.pdf (last visited Feb. 28, 2006). Construction of large dams was one element of a larger vision Nehru had for

ian states were at odds over the final height of the dam and the allocation of costs, water, and power generated by various projects on the river. In order to settle differences, the government established the Narmada Water Dispute Tribunal ("the Tribunal") in October 1969. After reviewing relevant data on environmental, social, and economic impact, the Tribunal declared its Final Order and Decision ("Award") in August 1978.

Among decisions over allocation of water, power, and costs, the Tribunal also detailed the obligations of the states to families affected by SSP.⁴ In particular, the Tribunal's Award guaranteed every displaced family losing land as a result of submergence five acres of irrigable land at least "a year in advance of submergence."⁵ Taking into consideration the cultural norms of affected communities and the need for generational sustainability after displacement, the Award required resettlement of villages as units and made "major sons"—male children of affected families attaining the age of majority at the time of submergence—eligible for rehabilitation as individuals separate from their families. The Tribunal further emphasized the importance of timely and appropriate resettlement of the displaced by stating that "[i]n no event shall any areas . . . be submerged under the Sardar Sarovar unless all payment of compensation, expenses and costs as aforesaid is made for acquisition of land and properties and arrangements are made for the rehabilitation of the oustees therefrom in accordance with these directions and intimated to the oustees."⁶ Gujarat was required to bear much of the burden of rehabilitation because it was the primary beneficiary of the dam's output, even though this included the possibility of resettling communities in an unfamiliar state.

In 1985, the World Bank entered into a credit and loan agreement with the government of India to fund a significant portion of the SSP.⁷ Construction on the dam accelerated, and with it came countless unanticipated challenges of rehabilitation. In addition to the logistical challenge of identifying the vast number of affected families and major sons in the extensive submerged areas, many of the riverbank residents living in secluded villages and hamlets did not possess official titles for their land and were therefore left out of the rehabilitation process.⁸ While these challenges slowed the process of resettlement, the height of the dam continued to grow and flood increasingly larger areas. Mounting frustration and resentment from affected communities and their supporters gained international attention.

an industrialized India and for becoming a globally competitive economy. See BAVISKAR, *supra* note 1, at 20–22.

4. Clause XI, Final Order and Decision of the Tribunal (1979), http://www.ncaindia.org/forms_pdf/nwdt_finalorder.pdf.

5. *Id.*

6. *Id.*

7. BAVISKAR, *supra* note 1, at 199.

8. Thomas R. Berger, *The World Bank's Independent Review of India's Sardar Sarovar Projects*, 9 AM. U. J. INT'L L. & POL'Y 33, 41–42 (1993).

As the stories of human rights and environmental violations achieved global notoriety, and in light of harsh allegations that the dams could not deliver the projected water and energy outputs estimated by planners, criticism also shifted to the World Bank.⁹ Pressure mounted, and the World Bank was forced to take an unprecedented step in establishing an Independent Review to assess the SSP.¹⁰ Investigators traveled through affected areas, spoke with stakeholders and officials, attempted to fairly assess both sides of the issue, and ultimately submitted a highly critical report of the project, recommending that the World Bank step back from the project to assess the project's "profound difficulties,"¹¹ as the "problems besetting the [SSP] are more the rule than the exception."¹² In particular, the report denounced both the failure of the government and the Bank to complete a comprehensive social and environmental impact study of the project and the lack of community participation in the planning process.¹³ The Bank officially withdrew funding in 1993.

Encouraged by the success of the Independent Review, local struggle and international outcry against large dam projects fueled a movement that resulted in the World Commission on Dams ("WCD"). Initially coordinated by the International Rivers Network and the NBA, they were joined by hundreds of nongovernmental and intergovernmental organizations worldwide to call for "an independent comprehensive review of all Bank-funded large dam projects to establish the actual costs, including direct and indirect economic, environmental, and social costs, and the actually realized benefits of each project."¹⁴ The twelve commissioners of the WCD, including Medha Patkar, founder of the NBA, released a final report in November 2000, which found large dams generally unfavorable as means for development due to the high levels of associated environmental and social risk. The WCD noted that most large dams fall short of their intended targets, whether in terms of irrigation, power generation, or water supply.¹⁵ Addressing impacts on people, the report notes, "the negative effects were frequently neither adequately as-

9. *Id.* at 36.

10. It was not only the first time the World Bank had created an Independent Review, but also the first time any international aid organization had established an investigatory body with such a broad mandate. The Independent Review motivated the creation of the Bank's permanent Inspection Panel. *See id.*

11. *Id.* at 46.

12. Lori Udall, *The International Narmada Campaign: A Case Study of Sustained Advocacy*, in *TOWARD SUSTAINABLE DEVELOPMENT? STRUGGLING OVER INDIA'S NARMADA RIVER* 201, 216 (William F. Fisher ed., 1995).

13. Bradford Morse & Thomas Berger, *Findings and Recommendations of the Independent Review*, in *TOWARD SUSTAINABLE DEVELOPMENT? STRUGGLING OVER INDIA'S NARMADA RIVER* at 371, 371-80 (William F. Fisher ed., 1995).

14. Manibeli Declaration, <http://www.irn.org/basics/ard/manibeli.html> (last visited Jan. 25, 2006). For a complete history of the WCD, see Patrick McCully, *The Use of a Trilateral Network: An Activist's Perspective on the Formation of the World Commission on Dams*, 16 *AM. U. INT'L L. REV.* 1453, 1455-56 (2001).

15. World Commission on Dams, *DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION MAKING* (English) (2000), available at http://www.dams.org/docs/overview/wcd_overview.pdf.

sessed nor accounted for," though the "range of these impacts is substantial, including on the lives, livelihoods, and health of the affected communities," and enumeration and compensation programs for the displaced are "often inadequate."¹⁶ The WCD report stressed the need to fully and accurately consider the costs to society and the environment when assessing current and future dam projects, particularly through consultation with affected parties.

While accurately estimating the number of affected families and major sons in the Narmada Valley has proven nearly impossible, the NBA's findings show at least 10,000 families were living in submergence zones as late as March 2005 and awaiting rehabilitation as planners prepared for the next stage in construction.¹⁷ Upon completion, the dam is estimated to displace at least 100,000 people along the river and an additional estimated 140,000 farmers will lose land due to canals and irrigation systems.¹⁸ As previously undocumented families and major sons are added to the official roles, the number of affected families threatens to increase sharply, possibly doubling. Numerous studies have found the anticipated drinking water and irrigation benefits of the SSP are highly exaggerated, and that the dam will provide little, if any, energy benefits.¹⁹ Setting aside environmental impacts, there is little doubt the SSP would have proceeded this far had the WCD's guidelines been applied during the planning phase.

LEGAL RESPONSE

Withdrawal of Bank support did not slow construction for long, as the national and state governments gathered resources to continue work on the SSP, fueling demands by affected communities and the NBA to execute a comprehensive analysis of the project. In 1995, the Supreme Court of India ordered a halt in construction to facilitate investigation, but subsequently allowed further construction in 1999.²⁰ The Court issued an opinion on the future of the dam on October 18, 2000, immediately approving an increase in the dam height conditioned upon approval of the Relief and Rehabilitation and Environmental Sub-groups of the Narmada Control Authority.²¹

16. *Id.*

17. Medha Patkar et al., Open Memorandum to the Government of India: Suspend Raising Height of Sardar Sarovar Dam (Mar. 15, 2005), <http://www.irn.org/programs/india/index.php?id=050331narmadamemo.html>.

18. William F. Fisher, *Development and Resistance in the Narmada Valley*, in TOWARD SUSTAINABLE DEVELOPMENT? STRUGGLING OVER INDIA'S NARMADA RIVER 3, 13 (William F. Fisher ed., 1995).

19. For one such independent study, see Ashvin A. Shah, *A Technical Overview of the Flawed Sardar Sarovar Project and a Proposal for a Sustainable Alternative*, in TOWARD SUSTAINABLE DEVELOPMENT? STRUGGLING OVER INDIA'S NARMADA RIVER 319 (William F. Fisher ed., 1995).

20. The Sardar Sarovar Dam, *supra* note 1.

21. The dissent in this 2-1 decision prescribed much stricter conditions for further construction on the dam. *Narmada Bachao Andolan v. Union of India*, (2000) 10 S.C.C. 664; see The Order of the Supreme Court in the Narmada Case, <http://www.narmada.org/sardar-sarovar/sc.ruling/nba.comments.html> (last visited Jan. 25, 2006).

In the 2000 Supreme Court decision, the Court held that displacement of affected families was not a per se violation of their rights; in fact, they asserted that rehabilitation sites provide a relatively better quality of life than affected villages could afford their residents.²² Noting “considerable slackness” in rehabilitation efforts by state governments, the court directed “the State of Madhya Pradesh, Maharashtra and Gujarat to implement the Award and giv[e] relief and rehabilitation to the oustees in terms of the packages offered by them” before proceeding to the next stage of construction.²³ The majority opinion garnered much hostility from affected communities and activist groups, because it failed to direct states to make any real alterations in their approach to rehabilitation, merely slapping state governments on the wrist for not properly following the terms of the Tribunal’s Award.

The Supreme Court released its latest opinion on the case on March 15, 2005, in response to allegations that Madhya Pradesh was again overdue in its rehabilitation efforts. In early 2004, the residents of village Pichhodi and Jalsindhi, on their own behalf and on the behalf of all those in similar situations, filed a writ petition requesting the state to cease construction until the displaced received their rehabilitation packages.²⁴ The case initially went before the Grievance Redressal Authority (“GRA”) of the Narmada Control Authority. Upon presentation of land available for rehabilitation, the GRA ordered the state to distribute that land as required. However, only five of fourteen applicants from Jalsindhi and five of the twenty-three applicants from Pichhodi were allotted land. The decision was appealed to the Supreme Court.

The Supreme Court acknowledged entitlements of the petitioners by reiterating and emphasizing the definitions and terms of the Tribunal’s Award, as well as the Court’s own previous decisions. The Court noted the origin of much of the dispute arose when families chose to remain in Madhya Pradesh instead of resettling in Gujarat, the option preferred by the Madhya Pradesh government.²⁵ The majority of the decision lifts language almost directly from the Award itself, restating the importance of timely and appropriate rehabilitation. Allegations against the Narmada Control Authority of manipulating, falsifying, and simply failing to create records of affected families and major sons were met with demands for a higher level of care in the future. Although it recognized the difficulty of meeting the requirements for an expo-

22. *Narmada* (2000) 10 S.C.C. at 702. *But see* BHAVISKAR, *supra* note 1, at 200 (“Several recent studies have shown that resettlement has considerably worsened the lives of the few families that have shifted so far; there is every indication that satisfactory rehabilitation is impossible even for those officially classified as ‘project-affected people.’”).

23. *Narmada* (2000), 10 S.C.C. at 769.

24. These villages were considered affected when the dam height was 95 to 100 meters. Land in the village Jalsindhi had been acquired under the Land Acquisition Act in 1991 and in the village Pichhodi in 2000. *Narmada Bachao Andolan v. Union of India* (2005) 4 S.C.C. 32, 37–38, available at <http://www.ielrc.org/content/c0503.pdf>.

25. *Narmada* (2005), 4 S.C.C. 32 (“It is evident that the State took a different stand at the earlier state of the proceedings on the assumption that these oustees would go to Gujarat . . . but as soon as they made clear that they will prefer rehabilitation in the State, their rights are being denied.”).

nentially growing number of affected families, the Court remained firm in requiring the total completion of these requirements before further construction.

The most interesting aspect of these decisions is perhaps what they do not include. The 2000 decision dismissed allegations that the Narmada Control Authority and its subgroups, charged with monitoring the implementation of the SSP and rehabilitation, could not maintain independence from the influence of government officials, some of whom were members of the administrative body and had interests in seeing the completion of the dam.²⁶ In both the 2000 and 2005 decisions, the Court failed to penalize states for not rehabilitating families before raising the height of the dam, in direct violation of the Award and the 2000 order. The Court's inability to place weight behind their decisions seems to stem from shortcomings of the Tribunal's Award in establishing effective enforcement and judicial review mechanisms or penalty provisions.²⁷

Organizations representing the interests of the displaced have generally responded favorably to the 2005 decision, noting that "[t]here is no doubt that the dam cannot be raised beyond the 110 meters at this point in time."²⁸ Those supporting the completion of the dam have also interpreted the decision favorably, as it does not preclude the dam's completion. At least in the short-term, the demands of the displaced have been met, but future compliance by Madhya Pradesh and other state governments, tenuously supported by their record in rehabilitation, shall be determined by their response to the continuing demands of community groups as well as national and international pressure. While these forms of protest and agitation have forced the Supreme Court to take notice of affected communities' plight in the past, the Court hesitates to flex its full authority to cease construction as it did in 1995.

Although campaigning against the dam persists, the communities of the Narmada Valley, exhausted by years of struggle and yearning to restore normalcy in their lives, are increasingly settling for government rehabilitation packages. Waning international interest—reflecting shifts in local attitude—is motivated in part by a reduction, if not elimination, of international forums in which to lobby their cause, essentially leaving the Indian legal system as the sole viable venue for recourse. However, as evidenced by the tentative decisions of the Supreme Court, this may be no solution at all. Despite a decrease in global attention, the international community continues to be engaged by the discourse on social justice in the pursuit of development, which is often instigated by the struggles over the Narmada.

26. The Order of the Supreme Court in the Narmada Case, *supra* note 21.

27. Other aspects of the Tribunal's Award, such as providing land rather than monetary compensation, were considered revolutionary.

28. Medha Patkar, Sardar Sarovar False Reports and Claims on Rehabilitation Stand Exposed: The Latest Judgment Proves It All (Apr. 4, 2005), <http://www.im.org/programs/india/pdf/050404narmadainter.pdf>.

WHAT NEXT?

The struggle of the affected communities represents only one side of the issue; on the other side are communities in western Gujarat and Rajasthan facing annual drought, severe shortage of drinking water, and high costs of energy, waiting for the promised benefits of the SSP.²⁹ The ultimate issues raised by projects like the Sardar Sarovar include questioning the extent of sacrifice one community must make for the benefit of another, determining whether the fundamental and arguably inalienable rights of Narmada communities can be balanced against mere development progress,³⁰ and establishing the availability of alternative, and possibly superior, solutions. The search for alternatives, especially for indigenous and small-scale technologies, is ongoing and vigorous throughout India,³¹ but support for large dams is also persistent. The World Bank has recently decided to invest again in large dam projects in India, approving a loan for the construction of a dam on the Sutlej River in northern India and considering support for the Omkareshwar dam on the Narmada River, with the potential to displace another 50,000 people.³² Despite complaints by affected communities, the World Bank and the government of India are pursuing these plans, “distan[cing] themselves from the recommendations of the WCD.”³³ The fidelity of the institutional and collective memory of the participants in the Narmada movement will determine if this experience is a lesson remembered or, failing this, a condemnation of other communities to repeat their struggle.

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29. Need for Sardar Sarovar Project, <http://www.sardarsarovardam.org> (follow Need for Sardar Sarovar Project hyperlink) (last visited Jan. 25, 2006).

30. Phillippe Cullet, *Narmada Dams and Human Rights*, FRONTLINE, July 8, 2000, at 95, available at <http://www.ielrc.org/content/n0003.htm>.

31. See Alternatives to the Narmada Valley Project, <http://www.narmada.org/ALTERNATIVES> (last visited Jan. 25, 2006).

32. PETER BOSSHARD, INTERNATIONAL RIVERS NETWORK, *THE WORLD BANK AT 60: A CASE OF INSTITUTIONAL AMNESIA?* (2004), http://www.irn.org/programs/finance/pdf/wb_at_60.pdf; Ann Kathrin Schneider, International Rivers Network, *The World Bank's Legacy of Funding Hydropower Projects in India: Nathpa Jhakri* (2004), <http://www.irn.org/programs/india/NathpaJhakriReport.pdf>.

33. *Id.*

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