

Dams, “development” and International Law

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1. Introduction

Two events of significance for freshwater resources in the “Third World” occurred in 1997. One was the setting up of the World Commission on Dams (WCD) by the World Bank in March 1997. The other was the adoption by the UN General Assembly of the Convention on Non-navigational Uses of International Watercourses in May 1997 (UN-IWC). The first development was the culmination of a sustained critique of large dams by environmental and social justice movements in the “Third” and “First” worlds alike (The World Conservation Union and The World Bank 1997; World Commission on Dams 2000). The critique of large dams occurred in the context of the rise of neo-liberal transformations within international organisations. The second was the culmination of sustained efforts to create a legal framework to resolve transboundary conflicts over freshwater that would pave the way for transboundary institutions for water projects and dispute resolution. Development of the UN -IWC spanned nearly all of the post-World Wars period of economic “development” and concluded against the context of rising concerns about “water wars” and security (Starr 1991; Uitto and Duda 2002).

Both events were about dams and development, yet the discourses around the two events ran parallel without convergence or contestation, intra-discourse. Ex-facie, the two events were viewed at best as a coincidence. There is nothing in the events per se

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that suggest the possibility that there might be something more to the absence of connections in the discourses on the two events. This paper argues that the insular yet related discourses on dams, development, water conflicts, and international water law render opaque a political programme for restructuring the international regime for regulating freshwater resources along neo-liberal principles. The opacity is sustained by disciplinary exclusions, especially the mutual exclusion of critical and sociological legal theories in the critique of development and critical development theory in discourses on international law. Thus the *absence* of discourse on the interconnections between the two events constitutes a problematic in its own right.

2. The World Commission on Dams

Throughout the post-World Wars era, large dams have been the foci of bilateral and multilateral development assistance under the aegis of UN organisations and “Third World” developmental states.² This is because in the post-World Wars international political economy, dams became inextricably tied to industrialisation and a new international division of labour based on cheap agricultural production, cheap labour, consumerism and transferring environmental costs to the “Third World”. By mid nineteen nineties there developed a widespread critique of large dams within the academe and outside. There were a number of strands to the critique. Popular movements of displaced people in “developing” countries challenged developmental models promoted by international organisations most prominently, the World Bank (WB) (Baviskar 1995; Fisher 1995; Imhof 1997; Sklar and McCully 1994; Thukral 1992). The environmental critique was the other (McCully 1994; Worster 1983). Systems for accountability of international development agencies (Clark, Fox, and

² The United Nations publication series from 1949 to the present, first as ‘Flood Control Series’, later continued as ‘Water Resources Series’ is useful to trace the changes in the priorities and approaches of bilateral and multilateral organisations to water resources and river basin development.

Treacle 2003) and internal reviews of lending policies (Morse and Berger 1992; The World Conservation Union and The World Bank 1997) followed the critique of development models (Escobar 1995; Leys 1996; Moore and Schmitz 1995; Sachs 1992). In this context the WCD was a significant event in that it rallied different “stakeholders” in water and attempted to arrive at a lowest common denominator on standards and processes that was acceptable to all the “stakeholders” (Dubash et al. 2001). The WCD was necessitated by the widespread critique of large dams. The critique of large dams was not the *only* factor that necessitated the WCD however. Without minimising the importance of the critique of large dams based on development models in the post World War II period of state-centred development, it is necessary to interrogate the structural transformations that were underway which provided the context for the WCD.

The most significant structural transformations were the end of the Cold War in global politics with the dissolution of the Warsaw Pact and the Union of Soviet Socialist Republics in 1991; and the formation of the World Trade Organisation (WTO) in December 1994 in the global economy. Briefly recapping the institutional arrangements for regulating the global economy at the end of World War II, the Bretton Woods agreements envisioned the creation of three institutions, the International Bank for Development and Reconstruction, (IBRD) later World Bank (WB), to regulate banking, lending and finance; the International Monetary Fund (IMF) to regulate fiscal matters, exchange rate mechanisms and balance of payments matters between states; and the International Trade Organisation (ITO) to regulate global trade. Of the three functions, international trade did not acquire an independent institutional framework and legal persona in international law. The Economic and Social Council of the UN convened an international Conference on Trade and Employment and through the Havana Charter resolved to set up the ITO. The resolution was never effectuated and the ITO never set up. Nevertheless the interim arrangements to regulate trade through the Interim Committee of the International Trade Organisation (ICITO) continued.

The ICITO operated organisation alongside WB and IMF, but as an interim arrangement without a clearly defined legal persona. The status of the ICITO and GATT agreements within the UN were affirmed through exchange of letters and notes between the ICITO and the Secretary General of the UN from time to time. The

exchange of letters gave the ICITO *de facto* status of a specialised agency with all the privileges, administrative authority and involvement in the international economy due to a specialised agency of the UN, but without the legal persona. A note by the Secretariat of the UN by the Ad Hoc Committee on the Restructuring of the Economic and Social Sectors of the United National System, on Relations of the General Agreement on Tariffs and Trade with the United Nations states:

The 1952 letters also confirmed that the existence of the above arrangement [the ICITO as an interim arrangement], coupled with the close de facto working arrangements which existed between the United Nations Secretariat and the secretariat of the Interim Commission, rendered it unnecessary to make separate or formal agreements between the CONTRACTING PARTIES and the Economic and Social Council relating to the work of the General Agreement. This formal exchange of letters defined, and continues to define, the relationship between the CONTRACTING PARTIES and the United Nations, under which GATT *is treated as a specialized agency on a de facto basis*. As a result arrangements of a practical nature have developed in the course of years covering inter alia the following areas [the note expands on a number of areas] [Italics added].(United Nations 1976).

This is not the place to engage the question of the nebulous status of international trade in the post-World War II world order and the reasons why it became the site from where global neo-liberal restructuring of relations between states, between International Organisations and between states and International Organisations occurred at the end of the Cold War. It is sufficient to note that: (a) such restructuring was underway when the WCD was set up; (b) of all international organisations the ICITO was most ad hoc and the least developed institutionally; and (c) therefore a site most amenable to lead the regime changes in the post Cold War world.

The Marrakesh agreement decided to set up the WTO in December 1994. The decision ended the ad hoc status of the ICITO and transformed it into a new International Organisation with a constitution and independent legal personality. In other words, the WTO became an independent institutional player in its own right. Unlike other International Organisations set up in the context of the World Wars, the WTO became a global regulator unconstrained by the post-World War role for states in the economy, domestic and international. That the functions of the WTO was to *restructure* institutional relationships between states, between international organisations and between states and international organisations is borne out by a

ministerial declaration signed in December 1993 towards the end of the Uruguay Round, the last round of GATT negotiations under the ICITO. The Declaration spells out the brief for the WTO which was to be set up the following year. It may be useful to quote the Declaration at some length.

2. [...] Ministers note the role of the World Bank and the IMF in supporting adjustment to trade liberalization, including support to net food-importing developing countries facing short-term costs arising from agricultural trade reforms.

3. [...]

4. Ministers recognize, however, that difficulties the origins of which lie outside the trade field *cannot be redressed through measures taken in the trade field alone*. This underscores the importance of efforts *to improve other elements of global economic policymaking to complement the effective implementation of the results achieved in the Uruguay Round*.

5. The interlinkages between the different aspects of economic policy require that the international institutions with responsibilities in each of these areas follow consistent and mutually supportive policies. The World Trade Organization should therefore pursue and develop cooperation with the international organizations responsible for monetary and financial matters, while respecting the mandate, the confidentiality requirements and the necessary autonomy in decision-making procedures of each institution, and avoiding the imposition on governments of cross-conditionality or additional conditions. Ministers further invite the Director-General of the WTO to review with the Managing Director of the International Monetary Fund and the President of the World Bank, the implications of the WTO's responsibilities for its cooperation with the Bretton Woods institutions, as well as the forms such cooperation might take, with a view to achieving greater coherence in global economic policymaking. (Italics added) (Ministerial Declaration: Trade Negotiations Committee 1993).

What is important is this. Once global restructuring of institutional relationships from state to market regulation entailed in neo-liberal transformations had begun, there was no way a sector as important as water could remain outside the transformative

processes underway.³ Comprehending the role of agency in the “social whole” *that is in the making* requires understanding how different social actors responded to the initiatives to restructure the regulatory regime for water and why.

A meeting of different “stakeholders” including representatives from dam industry, governments, academia, NGOs and civil society groups involved in anti-dam movements, convened by the WB and the World Conservation Union (IUCN) on March 1997, resolved to set up the WCD, a body representative of the “stakeholders”, with two objectives: (a) to review the effectiveness of large dams and assess alternatives for water resources and energy development; and (b) to develop internationally acceptable criteria, guidelines and standards for planning, design, appraisal, construction, operation, monitoring and decommissioning of dams (World Commission on Dams 2000: p.2).

Methodologically, the work programme of the WCD was comprehensive in that it was based on a *WCD Knowledge Base* drawn from eleven case studies, seventeen thematic reviews, surveys of one hundred and twenty-five dams in fifty-six countries, four regional consultations in Africa, Middle East, East and Southeast Asia, Latin America and South Asia, nine-hundred and fifty submissions from seventy-nine countries and input from WCD Forum at which seventy organizations were represented. The thematic reviews were under grouped under five categories: (i) social and distributional issues, (ii) environmental issues, (iii) economic and financial issues, (iv) options assessment, and (v) governance and institutional processes, and supported by over a hundred commissioned papers. The *WCD Knowledge Base*, thus, encapsulates a spectrum of diverse, conflicting and contradictory views and policy

³ Again this is not the place to engage with the rise of neo-liberal restructuring within the important centres of capital signified by Reganomics, Thatcherism and such, and the restructuring of the relations between the centres and international organisations in the UN system. It is sufficient to note that such an engagement is possible.

debates on dams and water resources at this point in time. The synthesis of divergent views of the “stakeholders”, the thesis and antithesis entailed in their discourses, finds a point of convergence in the way all “stakeholders” conceptualise the law. This convergence in the way law is conceptualised is significant for “manufacturing consent” for the regimes changes in the regulation of water. We return to regime transformations for the water sector below, but before that it is useful to examine the other important strand in the regime change for water, the UN-IWC.

3. The UN Convention On Non-navigational Uses of International Watercourses (UN-IWC)

The UN-IWC was the culmination of a number of parallel strands of developments relating to regulation of water resources in the post war era. The development of international law on transboundary waters parallels the emergence of large dams and spans the length of the post-World Wars era (Teclaff 1967; Teclaff 1991). The 1923 Geneva Convention on the development of hydraulic power affecting more than one nation developed by the League of Nations was limited and its further development thwarted by the events of the Depression and World War II. After the end of World War II, the constitutive strands that led to the UN-IWC include: (a) the need for a legal framework for transboundary waters felt by private international lawyers who were required to provide legal services for the expanding dam industry; (b) Article 13(1)(a) of the UN Charter that gave the mandate to codify international law; and to ensure peaceful settlement of disputes and promote cooperation under Articles 1 and 2; (c) the involvement of UN International Organisations, economic, developmental and scientific (IO), in water resources development which created harmonisation of principles and practices and laid the basis for a UN convention; (d) the emergence of environmental law and the duties of states to prevent transboundary pollution and to promote environmental practices developed by International Organisations; and (e) concerns about environmental security and water as a possible source of security threats especially since the 1990s, that provided the rationale for international law on transboundary waters.

From 1945 a growing number of river water disputes and an expanding dam industry provided the impetus for legal initiatives from private organisations of law professionals and experts most notably the Rivers Committee of the International Law

Association (ILA), a professional body of lawyers in the United States (US). The ILA set up a Rivers Committee in 1954 to develop the law on utilisation of river waters (Bagdanovic 2001; Bourne 1996). The ILA developed the Helsinki Rules on the Uses of Waters of International Rivers 1966 (Helsinki Rules) that provided a conceptual framework for regulation of rivers and utilisation of freshwaters and conflict resolution arising from water projects. It became, *de facto*, the international law on transboundary water for nearly three decades. Not surprisingly the orientation of the Helsinki Rules was to facilitate global water industry and transboundary projects.

Although the UN General Assembly adopted a resolution in 1959 to study the problems relating to the utilisation of international rivers in order to determine if codification of the law by the International Law Commission (ILC) was required, the resolution appointing the ILC to codify the law was adopted only in 1970.

“Developing” countries had had limited influence or role in the development of Helsinki Rules. When Finland (a country with little interest in dams or development or international rivers) moved a resolution to adopt the Helsinki Rules as UN law, i.e. as public international law, the objections from “developing” countries forced the UN to adopt the resolution for codification of the law on watercourses in 1970 (Tanzi and Arcari 2001). The context of the 1970s was important.

The 1970s saw the emergence of “North” “South” tensions with the rise of “dependency theories” within the Economic and Social Council of the UN, calls for a New International Economic Order and the UNCTAD as institutional vehicle to address the perception of failure of “development” and unequal economic relations the post-World Wars era. During the three UN Development Decades, states and international organisations were the principal actors on transboundary water resource development. “Private” interests, including industry, agriculture, electricity producers and other consumers and users depended heavily on states and International Organisations to safeguard their interests. Governance over water during this period was largely through administrative mechanisms and state bureaucracies on the one hand and International Organisations and UN bureaucracies on the other. In other words, both IOs and States followed “rule by men”. The codification mandate complemented the “development” mandate in the UN Charter. The codification mandate also prepared the ground for “rule by markets” on a global scale.

The rise of the environmental movements, especially after the 1972 UN Conference on Environment and Development's Stockholm Declaration, the 1987 World Commission on Environment and Development's Brundtland report and the rise to prominence of environmental policies in the IOs eroded the state sovereignty principle in law and developed new ways of conceptualising international law wherein the sanctity of state sovereignty was watered down by the sanctity of the "whole earth". The end of the Cold War also saw the rise of new security concerns and new ways framing military and defence issues. Environmental security concerns rose to prominence as a result and "water wars" became a topic for public debate. In turn both these strands of development contributed to the finalisation of the UN-IWC. The contentious nature of the proceedings of the ILC in codifying international law on transboundary waters which prolonged the finalisation of the UN-IWC, and later its ratification by states, suggests real contradictions in relations over water internationally between states.⁴ After nearly thirty years of deliberations the UN General Assembly adopted the UN-IWC in 1997. The UN-IWC does not yet have the required number of signatories to bring it into effect. Like the WCD report, the UN-IWC too fructified against the backdrop of the global rise of neo-liberalism. A sociological analysis of the nature of the differences and the contradictions between states in the ILC's work eludes water resources studies.

The Helsinki Rules had profound influence on the framing of the UN-IWC and on interstate and intrastate water regimes (McCaffrey 1991). In turn, although technically a framework convention, the normative ramifications of the convention are significant (Tanzi and Arcari 2001: p.24-32). The influence of the UN-IWC is profoundly ideological and conceptual in that it conceptualises the legal and institutional framework for dam projects, promotes regional and economic integration, defines

⁴ For voting patterns on the UN-IWC see (Wouters 2003)

“equitable” and “reasonable” utilisation, and most importantly, provides the legal basis for transnational institutions, mechanisms for dispute resolution, management of water conflicts and water security. In other words it defines legal relations over water between different global actors.

The conceptualisation of relations over water in the UN-IWC informs the work of international organisations such as the World Bank, the UNEP and other agencies on sustainable development policies and lending for dams. The convention creates a space for third party interventions by IOs such as the World Bank and the GEF (Duda and Roche 1997). The principles provide the legal basis for resolution of intrastate water conflicts within domestic jurisdictions in a federal state. It is therefore significant that in the WCD proceedings, the UN IWC, a framework convention, went largely unchallenged and accepted by all “stakeholders” as a matter of course (Millington 2000). The *equitable utilisation* principle, the cornerstone of the UN-IWC, is controversial as it raises questions about social values, values in selection of technologies, conceptualising corporations-state-citizen relations and what constitutes “human development” and “sustainable development” (D’Souza 2006: p.464-467, 467), in other words the very issues at the heart of the WCD proceedings. The critique of large dams in social sciences and by social movements stops within national boundaries. They do not extend to international law and the global legal regime that underpins large dams and sustains commodified relations over water between users, appropriators and “stakeholders”.

Instrumentalist conceptualisation of *development* grounded in empirical approaches of the WCD and the positivist approaches of the ILC do not suggest anything suspect in the absence of any apparent connections between the two events that are so closely tied to dams and *development*. Both approaches decontextualise the legal and institutional developments from the overarching backdrop of the global rise of neo-liberalism. The problem of two parallel yet apparently unconnected developments in relation to water resources arises only if the problematic is re-framed as: is it possible that two major developments relating to dams and development, both of major significance to regulation of rivers, both having their genesis in post-war developments, both emerging against the backdrop of neo-liberal reforms globally, are unconnected? Reframing the question in that way opens up conceptual spaces to draw out the common grounds between the two proceedings and to bridge the gaps in

the discourses over large dams in social sciences and international law on development of water resources.

4. State v Market Regulation in Law

To assert any connection between the two events, it is necessary to begin by acknowledging that both events undertake to transform the legal regimes for water in different spheres. The WCD develops rules, principles, guidelines and policies to regulate appropriation and use of water within national jurisdictions. The UN Convention develops rules, principles, guidelines and policies to guide appropriation and use of transboundary water between states internationally. Acknowledging that law is involved in both the events makes it possible to begin by interrogating the law as a point of departure to understand the hiatus in the discourses about the two events and the political programme that underpins them.

It is widely accepted that neo-liberal transformations involve rolling back the state, and is associated with liberalisation and privatisation in economics. Differences in the characteristics of “the law” under state regulation and market regulation may be less apparent. In essence the difference lies in the institutional framework for “the law” seen as a set of rules and principles. Markets undertake “enactment” and “enforcement” of law in very different ways from states. An extended period of state regulation of economic regimes has familiarised us with certain legal *forms* that are now seen as essential features of the law by many, especially social scientists. These features include: (a) conflating law with statute law; (b) an instrumentalist view of law that sees state agencies achieving certain outcomes mandated through statutes, rules, regulation and policies; (c) law as a set of imperatives for different social actors to abide by; (d) law as comprising two distinct domains, the “public” the “private” domains; (e) regulation through the institution of the civil service, the executive and in the final analysis the legislature, all operating under public law principles.

Market regulation, the characteristic feature of law under neo-liberalism, involves regulation through market institutions. Market institutions involve setting up authorities/agencies/organisations that operate under a distinct set of institutional rules autonomous from the state. Rolling back the state thus entails autonomy from conventional rules that govern state institutions comprising the civil service, the executive and rules of parliamentary procedures. Legal instruments under market

regulation routinely take the form of setting up regulatory authorities to regulate a specified field in market relationships: e.g. competition, inflation and currencies. The regulatory authorities set up norms for the actors within that field and take steps to ensure actors conform to the norms for that field. The type of instruments used to regulate the market may include voluntary codes, industry standards, dispute resolution mechanisms amongst others, all operating on private law principles. Social policies too are brought under market instruments. Hence the emphasis in more recent times on “corporate social responsibility”, labour market regulation through inflation policies and new institutional models for tertiary education funding.

State regulation rationalises economic regulation on the basis of “public” good in the name of society. Thus state regulation retains the distinction between the economic sphere and the social sphere, the public and the private domains in law. Market regulation rationalises economic regulation on the basis of “public” good but assumes economic policy *is* social policy and therefore benefits all of society. Market regulation therefore conflates the economic and social spheres, the public and private domains in law. Thus it is the *institutional* context of the law, and the *type* of legal instruments used in law, that marks the point of departure for law under state and market regulation.

Both, state and market regulation share common attributes of law under capitalism, however. The common attributes include: (a) privileging of economic relationships over all other social relationships; (b) sanctifying private property rights; (c) creating and refining legal regimes, principles and instruments for appropriation of labour and environment; (d) legal policies and instruments for alienation of people from land, water, minerals and other nature resources by turning them into commodities for exchange in the market-place; (e) positive law underpinned by empiricism and positivism in social and physical sciences. The differences in the institutional frameworks for the law encompass different modes of enactment, enforcement and legitimation of the law; and different philosophies, theories and rationalisations of principles and rules. It is important to emphasise the convergences in the characteristics of “the law” under state and market regulation. All too often the differences understood without the convergences create gaps in knowledge that allow insular developments in different dimensions of the same social phenomenon. The absence of apparent connections between the WCD processes on the one hand and the

UN-IWC proceedings on the other in the discourses on dams and development exemplify the insular processes and conceptual gaps in the transition from state to market regulation of water resources law and development.

5. Regime Changes and Neo-liberalism

The rise of neo-liberalism since the end of the Cold War has triggered pervasive transformations in regulatory regimes in a wide range of social sectors (Braithwaite and Drahos 2000). Water is no exception. Regime changes have occurred historically during certain periods either as a result of revolutionary social transformations, or far reaching changes in the institutional mechanisms within the same constitutional order. Whatever the means, changes in regulatory regimes entail wide ranging institutional transformations and relationships between institutions in a social system.

One conceptual challenge posed by the emergence of neo-liberalism globally is the problem of human agency in regime changes. Regime theories have been criticised, and rightly, for their tendency to subsume human agency and to construct regimes premised on empirical conjunction of events and facts within narrow positivist frameworks. Regimes *need not* however be understood as a conjunction of facts and events and human agency does *not have to be* excluded in accounts of regimes (Lloyd 2002). Regimes involve relatively enduring interrelationships between institutions. The stability is achieved through “manufacturing consent” achieved through reconciling conflicting interests where necessary and establishing decisive hegemony by one or more interests in society where required.

The other conceptual challenge relates to transitions from one regime to another as with the transition from the post World War II world order to the post Cold War world order. Regime transitions, the period when one regime has broken down and another in construction, are periods when the “social whole” appears blurred and ideological debates by major social actors emphasise some strands in the structural changes underway over others. The processes of change are rationalised or resisted by different social actors using different *types* of arguments, usually economic arguments, political arguments or moral/ethical arguments (Darby 1987). These arguments emanate from the position of different social actors within the previous social order and the ways in which the changes impact upon them.

The dominance of positivism in law and empiricism in social sciences means, the arguments appear disaggregated and disconnected. The “social whole” is rendered opaque as a result {Buck-Morss, 1995 #35}. The fluidity during periods of transition means the nature of the “social whole” can be grasped only after the regime has achieved some degree of stability. The systemic coherence of regimes thus becomes visible only retrospectively. Regime theories therefore often lapse into retrospective analysis of the institutional relationships within a social order that appear to discount the social agents that brought about the transformation. The challenge therefore is to be able to envision the structural and systemic ramifications of the arguments, economic, political and moral/ethical that social agents put forward in support of or opposition to social and legal changes *during* periods of transition. The simultaneous insularity and complementarity in the WCD and UN-IWC processes provide a useful vantage point to investigate the ways in which political arguments, economic arguments and moral/ethical arguments by different social actors on questions affecting water resources development, especially the controversies on large dams, made from their positions within social structures, contribute to our understanding of the way regime changes occur.

Two most significant concerns for law under capitalism remains managing competition between economic actors and managing social conflicts following from economic developments. In relation to water resources development the concerns have been about managing the apportionment of water to different riparian users and regions; and providing mechanisms for dispute resolution arising from water appropriation and use. Neo-liberal regime changes entail transferring both functions from the institution of the state to market institutions. In classical liberal theory, the rule of markets was ensured by “rule of law”, wherein the role of the state was, in Adam Smith's words, akin to that of a “night watchman”. Henry Maine the legal theorist who extended classical liberalism to the colonies rationalised colonial law by arguing all societies evolved from status based social relations to contractual social relations (Maine 1909). In developing law for the colonies, Maine blended social Darwinism and liberal theory, to create the basis of “progress” as the rationale for colonialism.

In the post World War II world order, international development organisations notably the World Bank, fostered state regulation in the water sector through state

economic planning, state bureaucracies and bilateral and multilateral development assistance in the post-World War II period to facilitate regimes of appropriation of labour and environment through industrial development, mechanised agriculture and infrastructure development. The transition from state to market regulation has seen the World Bank in recent times, foster market regulation in the water sector through water users' associations based on private property regimes, market instruments using user pay principles, to facilitate appropriation of labour and environment through development of industrial, agricultural and infrastructure. The policies aim to take developing countries further up the ladder of "progress" seen as movement from "status" to "contract" based social relations through law reforms in line with what Sir Henry Maine envisioned for the colonies.

Under early capitalism before the World Wars, more and more relations and transactions in society assumed the form of a contract between individual(s) and/or group(s) within the umbrella of the nation-state (Tigar and Levy 1977). The legal *form* of contractual relations provides (a) the conceptual framework for social transactions; (b) the value framework for social transactions and (c) the sanctions framework (i.e. mechanisms for dispute resolution and penalties for non-compliance). In the post World War II world order, contractual social relations were *extended* to the international arena. The extension occurred by transforming economic relations between states and between states and international organisations to (semi)/contractual legal forms. During this period the institution of the state developed a "split personality". The functions of the state as an institutional player in the economy, through public enterprises, manufacturing and trade was akin to "private" institutions with monopoly status, and the political functions were cast in the mould of traditional "public" law.⁵

⁵ For theoretical viewpoints on the "public"/ "private" divide in law see University of Pennsylvania Law Review 1982 vol. 130: Special Issue on Public Private Divide with discussion and debate.

The constitutional status of the International Economic Organisations (IEO) within the UN system notably the World Bank and the International Monetary Fund was legalised through the specialised agency agreements with the UN (D'Souza 2006, at p. 294). The IEOs with independent legal personality could develop contractual relations between the IEOs and states and between states inter se using instruments such as bilateral and multilateral aid agreements, contracts and memorandums using private law principles and dispute resolution mechanisms. Neo-liberalism takes the contract form of social relations to new heights by restructuring the relations between corporations, states and social groups, *qua collective/corporate entities* as contracting parties. In other words law under neo-liberalism creates new institutions with their own sets of rules and goals; and regulates the relationship between the institutions. Legal innovations under neo-liberalism involves developing new forms of enacting and enforcing law, new discourses for legitimating law and new institutions that will regulate relations between different types of collective entities and institutions, in the new language of neo-liberal legalism the “stakeholders”.

Viewed in this way the WCD and the UN-IWC reconstitute different strands in the regime-changes for water along neo-liberal lines: the first restructures relations between social agents *within* nation states internally; and the other *between* states and transnational organisations and corporate entities externally.

6. Creating New Regimes: What the WCD and the UN-IWC Do.

The WCD process and the new water regime

The main rationale for the WCD was, as the title of the report suggests, developing a “new framework for decision making”. It proposes three broad criteria to promote five core values - equity, sustainability, efficiency, participatory decision-making and accountability - all core components of “democratic development”. The criteria are:

A rights-and-risks approach as a practical and principled basis for identifying all legitimate stakeholders in negotiating development choices and agreements;

Seven strategic priorities and corresponding policy principles for water and energy resources development - gaining public acceptance, comprehensive options assessment, addressing existing dams, sustaining rivers and livelihoods, recognising entitlements and sharing benefits, ensuring compliance, and sharing rivers for peace, development and security; and

Criteria and guidelines for good practices related to the strategic priorities,

ranging from life-cycle and environmental flow assessments to impoverishment risk analysis and integrity pacts (World Commission on Dams 2000: p.5).

The WCD reaffirms the view that dams have made important contributions to human development; that the social and environmental costs of dams have been considerable; that technological alternatives to sustainable development of water resources need more attention; that efficiency of projects need improving and 'inefficient' projects need to be dealt with; that financial viability of projects need to be closer monitoring and lastly and most significantly for the law, the WCD Report finds that:

By bringing to the table all those whose rights are involved and who bear the risks associated with different options for water and energy resources development, the conditions for a positive resolution of competing interests and conflicts are created (World Commission on Dams 2000: p.7).

Summarising the work of the WCD it can be said that there were two different but related “stakes” involved in the WCD process. One was the “stakes” that different “stakeholders” had in water appropriation and use. It included the interests of the urban and rural poor in the “Third World” evicted from land and deprived of means of subsistence, as well as environmental concerns in the “First” and “Third” Worlds. The other was the “stakes” that International Organisations and “First World” states had in ensuring a smooth transition from a state to market regime for regulation of relations over water. This involved removing water from the “citizen-state” framework of regulation and inserting it into “stakeholders-markets” framework of regulation.

Not surprisingly the WCD framed the debate as “pro vs. anti large dams” and invited all “stakeholders” to participate in the proceedings. By participating in the proceedings the “stakeholders” ceased to claim water as citizens with ties to a place, a location, a nation and instead claimed water as “non-state actors” with “stakes” in the water markets. For the purposes of the regime transformation it did not matter what positions the “stakeholders” took on the pro vs. anti large dam controversy. Indeed many “stakeholders” including states and non-state actors criticised the WCD report from different standpoints (Bandyopadhyay 2002; Bird 2002; Fujikura and Nakayama 2002; Iyer 2003; Navalawala 2001; Scudder 2001; Thatte 2001). Regulatory regimes create a *field* for non-state actors to “stake” their claims. Within that field, how effectively “stakeholders” defend their “stakes” depends on their ability for

institutional innovation, alliances with other “stakeholders” and above all common interests in the appropriation and use of water.

The WCD process was subjected to a “social audit” soon after it was completed. The “non-state actors”, the World Research Institute, Lokayan and Lawyers’ Environmental Action Team, all non-governmental “epistemic communities”, carried out the audit. Their work was supported by the Ford Foundation, the Royal Dutch Ministry of Foreign Affairs, the Swedish International Development Co-operation Agency, the US AID and MacArthur Foundation, who were states, quasi government organisations, industry foundations and trusts with “stakes” in regulatory mechanisms for water markets. The “social auditors” reported:

In this report, we look at the efforts of the WCD and its initiators to create political space for diverse access to the process through

- full representation of relevant stakeholder groups on the Commission,
- independence from external influence,
- transparency to ensure the Commission’s accountability to stakeholders’ concerns, and
- inclusiveness of a range of views in compiling the knowledge base.

We assess how the WCD put these principles into practice and *the effect of this experience on stakeholder perceptions of the WCD’s legitimacy* as the process unfolded. This approach was made possible by the time frame of our assessment, which was concurrent with the WCD.

We pay close attention to the political and practical trade-offs that the WCD faced in its efforts to create *a representative, independent, transparent, and inclusive process*. (Dubash et al. 2001: p.3.)(Italics added).

The “social auditors” were not inquiring into whether the recommendations of the WCD were consistent with the interests of the poor in the “Third World” and the global environment in whose name the “anti-large dams” campaigners spoke. Instead they were concerned primarily with was “*stakeholder perceptions of WCD legitimacy*” and in “*a representative, independent, transparent and inclusive process*”. What was really at stake here was *the legitimacy of new types of law-making entailed in market regulation* in a sector of economy that had become especially disillusioned with the inequitable use and appropriation of water.

Likewise, for the World Bank too the substance of the issues in the pro vs. anti large dam controversy was less important than the processes for decision making. What

was important was the willingness of the “stakeholders” to recognise and participate in the new water regime. Assessing the work of the WCD the WB states:

The focus of much controversy regarding the WCD Report has centered on the twenty-six "guidelines," which have been interpreted by some proponents and critics of the Report as a proposed new set of binding standards. The World Bank's conclusion on the guidelines is best summarized by the Chair of the WCD, who has explained that "our guidelines offer guidance - not a regulatory framework. They are not laws to be obeyed rigidly. They are guidelines with a small 'g'." Individual governments and/or private sector developers may wish to test the application of some of the WCD guidelines in the context of specific projects. In such cases, the World Bank will work with the government and developer on applying the relevant guidelines in a practical, efficient and timely manner (World Bank 2002).

In clarifying that the WCD guidelines were *"not a regulatory framework. They are not laws to be obeyed rigidly. They are guidelines with a small 'g'."*, what is clarified is that the WCD guidelines should not be seen as state regulation; they are not to be seen as “state law” enforced through public law instruments of rights and sanctions within a citizen-state framework. Rather the guidelines are principles that will inform institutional players in the water markets; and the flexibility of the principles will allow institutional players to “stake” their claims in the marketplace. In other words the state will be “rolled back” to allow the market to regulate; and the neo-liberal legal *form* of “flexible principles” will guide transactions over water. The WB developed an Action Plan comprising six complementary areas based on the WCD report, amongst them:

[...]

* Continuing to emphasize institutional reform for more efficient use of water and energy;

[...]

[...]

* Practicing a proactive and development-oriented approach to international waters; and

[...] (World Bank 2002).

What is important is that the WCD processes would be replicated by the WB for all projects hereafter. The WB states:

The World Bank remains committed to implementation of its operational

policies to ensure that: key stakeholders are systematically identified and involved in project planning and implementation; upstream meaningful consultations are held with affected groups to guide project decision making, and their views and preferences are reflected in the plans developed as an integral part of the project (World Bank 2002).

Not surprisingly since the WCD process was completed water privatisations, river privatisations and corporate players in the water markets regime have increased greatly (Earle 2001; Public Citizen 2004). The “stakeholders” who spoke for the “Third World” poor and the global environment now voice concerns about water privatisation and the expansion of corporate interests in the water sector (Barlow and Clarke 2002; Shiva 2002). The WB’s earlier shift of emphasis to legal and institutional issues to develop markets instruments in the water sector (Kirmani and moigne 1997; Olem and Duda 1995; Rose 1998; Salman and Uprety 2002) is reaffirmed and given a green signal by the WCD. There is a proliferation of different industry, scientific and other water organisations all seeking to play in the market field of “stakeholders”. All of these developments are consistent with principles of market regulation and neo-liberalism (Blatter and Ingram 2000; D'Souza 2005). The developments suggest the convergence achieved through the WCD process was about law-making and “manufacturing consent” for market regulation. It was never about resolving the conflicts of interests between “stakeholders”. Under market regulation it is the markets that do “justice” between “stakeholders” acting through their institutions. In the final analysis law and regulation are about processes, procedures and practices that regulate conduct/transactions between different individuals/groups and institutions in society.

Undoubtedly the “stakeholders” who spoke for the poor and the environment, did so because of their frustrations with the “citizen-state” model of state regulation where the state *did not* do justice to the poor and the environments. They took their chances in the “stakeholder-market” model of regulation in the hope that they might be able to play a better role in the water markets to bring justice to those on whose behalf they spoke. In so far as both models of regulation are designed to facilitate appropriation of water for industry, for profit-maximisation, for increased rate of return on investments, the “stakes” of the poor and the environment invite attention to the *substance* of water regimes: for whom and for what and how appropriation occurs.

The substance of water appropriation transcends questions about the legal forms and processes for appropriation and use.

The UN-IWC and the new water regime

The UN-IWC, a framework convention, undertakes to codify the law on international watercourses. The mandate to codify international law derives from Articles 1(4) on “harmonizing the actions of nations” and 13(1)(a) on “encouraging the progressive development of international law and its codification” in the UN Charter. The UN-IWC acknowledges the special needs of developing countries. It reaffirms the need for sustainable utilisation of waters and rivers to ensure development, conservation, management and protection of international watercourses, the need for international co-operation, the Rio Declaration of 1992 and Agenda 21, and existing bilateral and multilateral agreements (*Convention on the Law of the Non-navigational Uses of International Watercourses 1997* 1997).

Typical of statutes, the UN-IWC defines terms and concepts. Article 2 (d) defines *Regional economic integration organisation*:

'Regional economic integration organisation' means an organisation constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention and which has been duly authorised in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it (*Convention on the Law of the Non-navigational Uses of International Watercourses 1997* 1997: Art.2 (d)). (Italics added).

Thus, Article 2(d) provides for creation of supranational organisations for regulation and management of rivers. Once formed, these supranational organisations will further roll back the states which would have “transferred competence” on certain aspects of management of water resources to the global institution. The transnational organisation would have removed more aspects of water resources management outside the framework of citizen-state relations based on rights and sanctions. The new global institutions, with their own internal rules, objectives, procedures and practices with a legal personality will become institutional players in the water markets in their own right independent of the states that formed the transboundary regional organisation. It may be noted here in passing that the Mekong Agreement in 1995 set up the Mekong River Commission. It gave renewed impetus to

transboundary dam projects on the Mekong River which had commenced in the nineteen fifties and came under cloud during the Cold War(Sneddon and Fox 2006).⁶

Part II of the UN-IWC sets out the general principles governing use of river waters and covers the substantive rights and obligation of states. Articles 5, 6 and 10 are the most significant and controversial principles. Article 5(1) develops the principle of “equitable and reasonable utilisation” and requires that:

[...] international watercourses shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilisation thereof and benefits therefrom.

The legal concept of “equitable utilisation” is problematic (D'Souza 2006). The concept involves assessing the role and competing interests of different “stakeholders”. Under the UN-IWC processes the “stakeholders” are global players are states, intergovernmental organisations and IOs acting as economic actors at a time when the role of the states within national jurisdictions has been rolled back to varying degrees. The status of other global “stakeholders”: the dam industry, power generation industry, epistemic communities, and water trading industries are privileged because their place is secured by the way equity in water appropriation and use is conceptualised. To determine “equitable utilisation” the preamble provides the guidelines. The meaning must be derived from the United Nations Conference on Environment and Development of 1992, the Rio Declaration and Agenda 21. It follows that the meaning and application of the principle of “equitable utilisation” must be derived from further developments of those global policies by development agencies and IOs, restructured pursuant to the interagency cooperation initiatives after the WTO was formed as discussed above. In doing this the WCD principles and

⁶ To the contrary, on the Indus River, during the Cold War the peace was kept through the interventions of IOs and states and the end of the Cold War has renewed tensions. See (D'Souza 2007, forthcoming).

guidelines will undoubtedly provide “objective” and authoritative basis for determining what is or is not “equitable utilisation”.

Article 6 enumerates the factors relevant to equitable and reasonable utilisation. The factors to be considered include the social and economic needs of the states, the populations dependent on watercourses, the effects of developments, amongst others. Article 6 does not create a weighting mechanism for the relative importance of the factors, or a hierarchy of priorities. In fact Article 10 explicitly states that “no use of international watercourse enjoys inherent priority over other uses”. The key point here is that the global water regime that the UN-IWC formalises as international law *predetermines* the conditions for water appropriation and use within nation-states and within national law. The global water regime that predetermines the appropriation and use of water within natural boundaries went unchallenged because “epistemic communities” speaking on behalf of the environment and the global poor were unable to make the connections between the UN-IWC processes and the WCD processes. Those connections could only be made by anchoring both the developments to the wider context of developments in capitalism and imperialism and the ways in which the wider processes expropriate the poor and the environment.

At the global level, legal theory hangs on to the principle that states represent their populations. If their populations comprise diverse and competing interests the states must sort out those differences within domestic jurisdictions. This is a circular argument because states have been rolled back, global institutions have emerged as major players, neo-liberalism has changed the rules of the game, and states have limited leeway to manage competing domestic interests. For the less economically powerful water users like subsistence farmers or the urban poor who must rely on their political power within a constitutional framework of national law, the willing participation of their spokespersons in rewriting the rules of the game and their willing repositioning as “stakeholders” in the global market, is not exactly empowering.

Part III of the UN-IWC sets out the obligations on the part of States when planning water projects. Part IV provides for protection, preservation and management of rivers, Part V for emergency situations and Part VI for dispute resolution during armed conflict and project related disputes and provides for arbitration and/or submitting the dispute to the International Court of Justice. Article 33 of the UN-IWC

includes the conventional mechanisms for dispute resolution mechanisms based on consensual decisions by states. Article 33 extends the conventional principles for invoking dispute resolution mechanism in international law in significant ways (Tanzi and Arcari 2001: ch. 6). Article 33(3) provides that the state parties are unable to settle their disputes within six months, then one of the state parties may request a fact finding commission to be appointed unilaterally. Article 33 also provides for a range of non-judicial third-party settlement procedures including mediation, arbitration and negotiations. The WB is imminently placed in a position to play the role of mediator. A number of UN organisations like the Global Environmental Facility (GEF) a financial body supports the idea the WB's role as mediator in transboundary water disputes (Duda and Roche 1997). These developments dovetail the WB's thinking on a greater role of the WB in mediation and dispute resolution. A mediation and conciliation role for the WB will invest it with a quasi-regulatory role between "stakeholders".

Conclusion

To sum up, the UN IWC creates a framework for decision making and conflict resolution *between* states on transboundary waters. It creates the legal framework for supranational organisations that facilitates dam construction (Beaumont 2000; Nakayama 1997), in other words create new institutional players in the water markets with powerful interests in sustaining large dams. The WCD recommendations create a framework for decision making and conflict resolution between "stakeholders" *within* the state by addressing questions of social equity and environmental sustainability within the framework of neo-liberal economic development. Both are informed by the same core values, concepts, ideas; both are committed to developing processes with legitimacy, for use and appropriation of water on the one hand and conflict resolution mechanisms on the other, between states and between "stakeholders". Both processes are directed at building institutions capable of engaging and facilitating market transactions in the appropriation and use of water. Taken together, the WCD and the UN-IWC are complementary processes that seek to redefine new public and private spheres, create new roles for states and "stakeholders" in relations to waters and rivers. Together the two frameworks seek to create a new regime by:

- Providing for supranational organisations for utilisation and management of water based on core concept of the river basin as a “natural” unit of regulation.⁷
- Creating a framework to take the regulation of waters and rivers to the next stage of legal and institutional development: from a bureaucratic administrative form of governance typical of the post World War II period to regulation by market institutions, mechanisms and principles; in other words from take water from “rule of men” to “rule of law”, from State to Market mechanisms of governance.
- Creating communities of “stakeholders” in water based on market principles, institutions and instruments.
- Redefining the relations between States, International Organisations, corporations and supranational organisation within a rights-based framework in the public sphere.
- Providing for international interstate institutions by requiring the states to cede some of their powers in relation to rivers to international organisations committed to facilitating water resources development for industrialisation, agriculture and power generation through private actors.
- Redefining the relations between citizens *interse* within a rights-based framework in the private sphere.

⁷ For a critique of what is entailed in this concept see (D'Souza 2006).

A legal regime is a much broader concept in that it includes a variety of statutes, policies, concepts, values, goals, instruments and mechanisms of governance that taken together define social relations over water (or any other relations) in society and prescribes the ways in and the extent to which different segments of society will participate in the regime. Law *is* about relations (Hunt 1993). Law casts different social actors into normative roles and thereby facilitates behavioural expectations that facilitate repeated transactions required for social relationships to work. Law under neo-liberalism casts different *institutional actors* into a normative framework that regulates institutional responses, behaviour and repeated transactions. In this law under neo-liberalism enables a classical liberal world view to operate on enlarged scales, with enlarged ramifications for inequality, dispossession, and social and environmental conflicts.

Taken together, the WCD and the UN-IWC appear complementary processes that seek to redefine public and private spheres in waters and rivers in the “Third World” and between the “First” and “Third Worlds” along neo-liberal principles; and create a framework for institutional developments within market regulated regimes for water resources. The social actors engaged in the regime changes do not however make the connections between the two events. Disciplinary orientations, immediate sectoral interests, and minimising the importance of theory and philosophy in discourses on law and social policy, especially in the “Third World” and in international law, prevent envisioning of the “social whole” *that is in the making*.

The tragedy lies not in the fact that the regime changes occurred but that the “epistemic communities” speaking for the dispossessed, the environment, for distributive justice and human values, participated willingly and contributed to a regime change that could produce results that are the very opposite of the reasons that prompted their involvement and interventions. Decontextualised analysis unconstrained by history or geography disengages the analysis of water resources from the wider processes of transformations in capitalism, forms of colonialism and ways in which structuring and restructuring of social orders occurs (D'Souza 2003). Narrow empiricist approaches to social and natural phenomena, narrow positivist approaches to law, reductionist methodologies and disciplinary closures cast a veil over social relations over water. The veil conceals the politics of water as the WCD/UN-IWC processes show. There is by now an extensive critique in social

theory and philosophy on all of the approaches. Why the philosophical and theoretical critique eludes critical engagement on water issues by “epistemic communities” speaking on behalf of the dispossessed and the environment must be left to another inquiry.

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