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What Happens Next Is Up to You: Human Rights at Risk in Dams and Development

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INTRODUCTION

The Executive Summary prefacing the World Commission on Dams (“WCD”) Report (“Report”)\(^1\) concludes elegantly by saying: “We have told you the story. What happens next is up to you.”\(^2\) The Report tells a story about the inevitable justification of developing large dams.\(^3\) Underlying issues of the dams debate involve “equity, governance, justice and power—issues that underlie the many intractable problems faced by humanity.”\(^4\) This implicit division of

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\(^1\) See generally WORLD COMMISSION ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING xxxvii (Earthscan 2000) [hereinafter WCD REPORT].

\(^2\) Id. at xxxvii.

\(^3\) See id. at xxvii (highlighting the importance and benefits of dams for human use).

\(^4\) See id. (remarking on the issues encompassed by the dams debate).
labor does not seem fair, even when the WCD’s insight that “global commitment to human rights, development and sustainability” provides “a number of basic and easily understood principles” readily applied in the context of dams and development.\(^5\)

In introducing the monumental study of the WCD, Chairperson Professor Kader Asmal proclaims “if politics is the art of the possible, this document is a work of art.”\(^6\) The aesthetics of this Report exist in the imagination of the art of the possible—an imagination that does little to flaw or flay the dominant paradigms of development. The Report endorses globalization from below, the art of listening to people’s stories, and speaks to future generations “because hundreds of diverse men and women were directly involved” in creating it.\(^7\)

Each denunciation of developmental theology, each voluminous act of protest against the masters and managers of globalization, enabled the Commission to measure the purpose and urgency of the WCD Report. “As Seattle, Toronto, Washington, London, and Berlin, came unravelling by turbulent protests against globalisation, we quietly continued to apply stitch after stitch to sew a stronger, more resilient and colourful tapestry.”\(^8\)

That aesthetic is marked by “the desire to link all things together,” the desire for “complete seamless explanation” aiming at a “unifying inclination” towards “complete knowledge.”\(^9\) The WCD seeks to provide us with an order of complete knowledge concerning dams and development. The order of imperious knowledge seeks to combine the complexity of techno-scientific knowledge with the simplicity of truths concerning human development and rights. “The dams debate is simple because behind the array of facts and figures of economic statements and engineering calculations, lie a number of basic and easily understood principles . . . the same principles that

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5. Id.
6. Id. at i.
7. WCD REPORT, supra note 1, at iii.
8. Id.
emerge from the global commitments to human rights, development, and sustainability.\textsuperscript{10}

On one hand, the WCD asserts the simplicity of the dams debate. On the other hand, it asks us to believe that today's "demands are too complex, our technology too advanced, our constituency too diverse, and our options too numerous to allow just one solution."\textsuperscript{11}

The Report rules out the singular notion of activist truths, which condemn all large dams as inherent violations of human rights, development, and sustainability. It installs an order of multiplicity of truths concerning large dams. However, the Report is animated by the belief that large dams are, and remain, a necessary evil, and that the task is to lessen that evil through the pragmatic politics of the possible. The Report deserves close reading not only by both policy makers and activists, but also by all those concerned with the theory and practice of human rights. It holds diverse and constructive messages. The activists will find a wealth of facts and features to further legitimize their struggle. Policy makers, too, may find the facts sobering, and, in the end, enthusiasm for large dams will be seen as inhumane. Both constituencies have been provided with high stakes in evolving a new policy framework. Human rights theorists will no doubt remain engaged in the complexity of rights at risk and negotiating rights concerns. Human rights communities, in particular the NGO sector, will find the Report an embarrassment of riches in terms of improvising a whole range of new rights, tactics, and strategies.

The range of facts highlighted by the Report is indeed critical. The twentieth century emerges as a century not only of nuclear power or space exploration, but also of a never-ending story of contestation and conflict over large dams. Forty-five thousand large dams constructed in about one hundred forty countries by the year 2000 have resulted in massive uprooting and displacement of people. An average of three hundred large dams constructed each year yield an estimated displacement of four million people annually.\textsuperscript{12} In China,

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  \item \textsuperscript{10} WCD REPORT, supra note 1, at xxvii.
  \item \textsuperscript{11} Id. at iv.
  \item \textsuperscript{12} See id. at 17 (detailing the problem of displacement caused by large dam
which has constructed 22,000 large dams, the official number of
displaced peoples is around 10.2 million. In India with over 4,000
large dams, the varying estimates of displaced peoples reach around
16 to 38 million.\footnote{See id. (discussing the social impacts of
large dams in China and India).}

The cycle of misery begins when a dam site is located and
constructed. At the early stages of the development process, forced
evictions and similar human rights violations begin.\footnote{See WCD
REPORT, supra note 1, at 99 (mentioning that dam projects can
result in communities living “for decades starved of welfare and
development investments.”). This misery is not confined to large
 dams, but is a feature of all major public projects (at least in the
South) where the mere formation of executive intention to locate
these in certain areas entails suspension of all developmental
activities. In the case of dams, the mere blueprinting of submergence
areas marks a cessation of government expenditure, including
expenditures for schools, hospitals, roads, transportation, and other
policy initiatives targeting basic needs. Bureaucratic “rationality”
thus creates by a regime of “planning blight” whole classes of condemned
citizens, even when the actual construction activities begin
years or decades later. The Report contains minimal reference to this
suffering. \textit{id.} at 106-08 (remarking on the minimal input people
affected, have had in their resettlement).} The ecological
and public health costs of large dam development are acknowledged
to be both massive and often irreversible.\footnote{See id. at
20-21 (acknowledging the significant services provided by dams,
while recognizing the increasing costs of dams).} If dams have generally
provided “an indispensable range of water and energy services,”
there is a considerable “mismatch of benefits and costs.”\footnote{See WCD
REPORT, supra note 1, at ch. 3 (detailing the impact that large
dams have on ecosystems).} The Report analyzes the reasons for this
mismatch and seeks to provide a policy framework for improved
decision-making processes that will service the key goals of equity,
efficiency, participation, sustainability, and accountability.

In this essay, I focus primarily on the WCD Report’s episteme. I
first review the regimes of representation; second, I address the
specificity of human rights conceptions that animate the Report;
third, I assess the ways in which the Report fails to address
human rights at risk with the development of large irrigation and power

projects; finally, I discuss future tasks and struggles ahead.

I. REGIMES OF REPRESENTATION

Representation may signify an image, a narrative, or an ideological product of "that vast scheme for showing forth the world and justifying its dealings." The WCD represents the relationship between large dams and development.

The Report complicates the narrative of that relationship with an immense reflexivity; the already complex and contradictory relationship is heightened by the Report's emphasis on "real development," which "must be people-centred." with states at best having mediatory and representational roles. The Report's authorial intent further aggravates the narrative and the ideological production itself. It seeks to give a global voice to peoples' struggles against large dams. At the same time, the Report articulates concepts of good governance by supporting policy-making frameworks. It also seeks to attain a rapprochement between "dam officials with an obligation to govern" and "dam affected peoples with stories to tell." The rapprochement is to be achieved by the WCD, elevating itself to Olympian heights by inaugural scientific evaluation, as well as by a conscious therapeutic role.


18. See WCD REPORT, supra note 1, at iii (supporting a people-focused approach to a global water policy and development).

19. See id. (noting the different perspectives that are reflected in the Report). Note the striking contrast that distributes truth-saying functions. The dam officials make policy and the affected peoples tell stories. The officials stand invested with fiduciary obligations to govern. The affected peoples may then speak only as those governed, as peoples owing allegiance to a code of duties to be governed. Id.

20. See id. at ii (remarking that dams have not been scrutinized at detailed levels). "Unlike every other aspect of our lives, large dams have escaped deep and clear impartial scrutiny into the processes by which they emerge and are valued." Id. (emphasis added).

21. See WCD REPORT, supra note 1, at iii (asserting the various roles played by the WCD). "We are a Commission to heal the deep and self-inflicted wounds torn open wherever and whenever far too few determine for far too many how best to
Accordingly, the Report presents dams as discursive objects in the development dialogue. The dam discourse is constructed as a key aspect of governance and international public policy discourse. It addresses worst-case scenarios of global water and energy resource scarcity and human deprivation. The important decisions are those surrounding options for water and energy development. The primary challenge for the twenty-first century is about how to "rethink the management of freshwater resources." The two objectives of the WCD were to assess both the developmental effectiveness of large dams, as well as their alternatives, and to develop appropriate international standards for dam development. The languages and logics of development and normative human rights are to be harnessed in order to fashion the discursive criteria for legitimating governance decisions. Dams, even large ones, stand justified if, and when, they mark a "significant advance[ment] of human development on a basis that is economically viable, socially equitable, and environmentally sustainable." Dams serve as metaphors of human and social development.

In constructing a global discourse on dams and development, the WCD Report is both a post-modern and post-foundationalist creation. The Report’s post-modern aspect creates the notion that there is not a singular solution to address one problem. The post-foundationalist aspect of the Report holds that no typical dams exist. Thus each dam is a contingent moment in the distinctive histories of national, global, and developmental discourse. This mode of de-privileging opens up divergent ranges of subaltern struggles against a dominant discourse on development. If there is no universal narrative about dams and development, "[w]hat happens next is up to

22. See id. at xxix (stressing the importance of focusing not on dams, but on energy and water development).
23. Id. (addressing freshwater resource management as a significant challenge).
24. See WCD REPORT, supra note 1, at xxx (presenting the objectives of the WCD).
25. Id. at 2 (discussing the end result to be achieved by dams).
26. See id.
you" is a necessary, even integral message to the policymakers and activists worldwide.27 There is no activist or policy recipe that may negotiate the complexity and contradiction in the dams and development discourse.

Yet, in its essentialist moment, the WCD shrinks from this grand finale. In that moment, the Report suggests that all large dams raise typical problems28 and create large inequities by enforcing typical modes of violent social exclusion of impoverished peoples.29 The WCD’s response urging authentic, democratic control over project decisions assumes the possibility of an unchanging democratic essentialism. Participation, accountability, sustainability, and transparency provide a range of public virtues informing every citizen of the world, having the potency of rolling back the unilateralism of governance, and placing human rights at risk with the construction of large dams. The art of the possible assumes an abundant proliferation of these public virtues among those who govern and those that stand governed. The WCD Report constitutes a secular faith culture.

This indeterminacy of collective authorial intent results in an ineluctable mystification. As Medha Patkar, in her mini-dissent comments: “the value-framework the Commission propagates—equity, sustainability, participatory decision-making and efficiency—[has] not helped attain, but rather [has] hindered, human development.”30 She maintains that “[e]ven with rights recognized, risks assessed, and stakeholders identified, existing iniquitous power relations would too easily allow developers to dominate and distort

27. Id. at xxxvii; see supra text accompanying notes 1-2.

28. See WCD REPORT, supra note 1, at xxviii (reiterating schedule and cost overruns, environmental hazards, inequitable distribution of water and power resources generated by dams, inadequate rehabilitation, issues of dam safety and decommissioning, and non-participation by the project affected peoples).

29. See id. at xxxi (discussing the inequities involved in large dams). “Perhaps of most significance is the fact that social groups bearing the social and environmental costs and risks of large dams, especially the poor, vulnerable and future generations, are often not the same groups that receive water and electricity services, nor the social and economic benefits from these.” Id.

30. WCD REPORT, supra note 1, at 321 (concurring in part with the Report, and partially dissenting).
such processes."  

This dissent captures the ambivalence of the moral pragmatism of the WCD Report. It points to the existence of sovereign orders of special interest formations already installed at the heart of developmental governance. The dam officials are, in truth, not savants of the public interest, but savants of private interests. The dam bureaucracy (national, regional, and global) constructs good governance to fulfill private interests. Medha Patkar presents the dam discourse as an order of captured governance sites. This discourse masks human suffering brought about because of dam displacement.

The WCD Report concedes the critique of large dams at a descriptive level by abundantly highlighting violations of the rights of project-affected peoples, but ultimately suggests ways of making large dams socially acceptable. Its Talismanic solution is to somehow bring back the people in governance processes through a policy-making framework whereby policy makers will be constrained to modify their pursuit of governmental monopolies over the definition of the public interest. In this mission, the Report then straddles pre-globalizing languages of development discourse in ways congenial to the post Cold War globalized development discourse. In sum, the Report blueprints designs of good governance

31. See id. at 321-22 (citing the leadership role of the World Bank and related financial institutions).

32. See UPENDRA BAXI, INHUMAN WRONGS AND HUMAN RIGHTS 1-9 (1994) (presenting aspects of the "rights to be, and remain human").

33. See id. (discussing a "basic needs" policy approach, which advocates a participatory decision-making process). At first glance, an unwary or a hyper-activist reader stands moved to condemn this regime of representation of dams as highly technocratic. The discursive site concerning public policy decisions on dams is already heavily vested and invested by techno-scientific discourse. This is undoubtedly so, but not wholly worthy of condemnation, for the simple reason that the activist discourse would remain unauthentic were it not to engage with techno-scientific issues concerning planning, design, project appraisal, construction, and decommissioning of dams. Anti-dam activism represents the politics for human rights most effectively when it empowers itself with the technique of engaging, in demystifying terms, the technocratic languages of power. See UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (2001) (distinguishing between politics of, and politics for, human rights).
as signposts to our common and better future for the twenty-first century. The problem is not so much defined by large dams, huge displacements, and mercantilist approaches to public power, but by the aspiration to transform these into non-revolutionary modes. After all, in a gestalt defined by the agencies and processes of contemporary economic globalisation, how may one proceed to transform governmental responses to human suffering, save through a piecemeal social re-engineering of the processes of public decision making?

II. HUMAN RIGHTS IN THE WCD REPORT

The Report, in its aspiration to redesign powers and practices of governance, exploits the full potential of rhetorical human rights resources, sustainability, and governance. These resources provide moral vocabularies for human redemption. Prescriptions emanating from these values stand situated in remarkable diagnostic analysis in Part I of the Report, furnishing the best human, and humane, development. It is not my intention to discuss Part I’s discourse. Rather, I focus on Part II of the Report, and specifically its distinctive approach towards the normativity of human rights.

The WCD adopts as its normative developmental framework three salient human rights doctrines: the Universal Declaration of Human Rights, the United Nations Declaration on the Right to Development, and the Rio Declaration on Environment and Development. The latter conception is billed as a new approach to bringing new voices, perspectives, and hopeful consensus into the decision-making process. The Report’s understanding of human rights is multifaceted and complex. It respects individuals’ humanity as a basis of human rights, and acknowledges that civil, political, social, economic, and cultural rights are indivisible—proclaiming “fulfilling development needs requires respect for fundamental rights and not any trade between them.”

34. See WCD REPORT, supra note 1, at 197-212 (outlining the specific instruments that make up the global framework for sustainable human development).

35. See id. at 197 (discussing the Rio Declaration).

36. See id. at 200-04 (discussing a rights-based approach to decision-making).
At the threshold, then, respect for human rights provides constraints on governmental decisions—decisions to build dams "must not, at the outset, sacrifice the rights of any citizen or a group of affected peoples." The caveat in the italicized phrase puts human rights at grave risk.

At the same time, the Report takes an instrumentalist approach to human rights. Its rights based approach is presented as providing "an improved tool for decision-making" (along with risk analysis). The approach that the WCD recommends is based on rights recognition and risk assessment. The rights based approach is advocated as providing "the basis for negotiated decisions on dams and their alternatives." If human rights are not to be sacrificed at the outset, or if human rights stand possessed of the Dworkinian trumping feature, such that policy goals may never be allowed to override rights, what may the negotiation consist of?

It is in this light that the full complexity of the WCD rights-based approach emerges. Both the notions of rights and risks need to be clarified by an overarching framework of global, national, and local policies that favor "greater transparency, participation in decision-making and accountability for compliance." "Equity, efficiency, participatory decision-making, sustainability and accountability are the foundational values of the Commission's rights-based approach." These core values will help clarify rights and ensure accommodation among conflicting rights. The WCD rights-based

37. See id. at 204 (emphasis added)(stating that an equitable approach requires that citizens' rights not be sacrificed).
38. Id. at 206.
39. See id. (explaining the Commission's proposal of the recognition of rights and assessment of risks approach as the preferred method for improved decision-making).
40. See WCD REPORT, supra note 1, at 198 (presenting the foundational components of the Commission's findings).
41. WCD REPORT, supra note 1, at 204.
42. Id. at 206.
43. See id. (considering the diversity of rights recognized as a result of the foundational value of a rights-based approach).
approach is proceduralist. What human rights may mean in developmental contexts becomes known only when institutional processes and structures, informed by the core values, are put in place. Thus, integrity of interpretative structures is the only assurance concerning the knowledge about the rights one has, and the “range and complexity of relevant rights and responsibilities.”

In the absence of commitment to evolve, expand, and entrench such structures, substantive human rights standards only constitute, in the famous Holmesian epigram, the “brooding omnipresence in the sky.”

The Report deserves applause for its imaginative expansion of risk categories. It castigates a narrow conception of entrepreneurial risk taking—where risks are assessed merely in terms of the corporate investor incentives and profits. These voluntary risk takers remain possessed of the capacity “to define the level and the type of risk they wish to take and explicitly to define its boundaries and acceptability.”

In contrast, “a far larger group has often had risks managed and imposed on them involuntarily. Typically, they have no say in the overall water and energy policy, the choice of specific projects, or in their design and implementation. The risks they face directly affect their individual well-being, livelihoods, quality of life, spiritual worldview, and very survival.”

Such an involuntary imposition of risks inevitably puts human rights in jeopardy—manifesting unequal power relationships and the absence of “processes for good faith adjudication among conflicting interests,” which eventually leads to less privileged

44. See id. (evaluating the assessment and recognition of the range of relevant human rights as a step toward adjudication).
45. See id. (arguing that the awareness of human rights is fostered when bodies of arbitration, negotiation, and resolution are founded upon a system of values).
46. See id. (discussing the importance of interpretive bodies in the awareness and range of basic human rights).
47. WCD REPORT, supra note 1, at 207.
48. Id. (emphasis added.)
49. See id. at 207 (discussing the risk of displacement, loss of resource access, and sustainable livelihood for people living near dam development).
groups being further displaced.50

This germinal risk approach analysis is further reinforced in the Report by recourse to the "precautionary approach" as a "structured approach to risk analysis."51 Indeed, normative human rights provide twenty-six substantive criteria and standards for this principle.52 They offer constructive potential for the United Nations agenda.53 The WCD Report tries to put human rights to work in the context of water and energy resources, and can be understood as addressing all other areas of Human Rights concerns.

III. TOWARDS A CRITIQUE

The range of the law, policy, human rights, and sustainable development framework inaugurated by the Report is indeed constructive, but the place for the normativity of human rights does not necessarily translate into a space for human rights. The Report does not explain what human rights people actually have with relation to large dam development, though it lays the groundwork for future expectations of human rights that ought to emerge through participation, transparency, and accountability in governance.

It is true that the precise content of rights and responsibilities emerge sharply and clearly through the labours of authoritative interpretative communities, and what rights people actually have (in a concrete context) will remain somewhat indeterminable. However, it is equally true that human rights proclamations seek to provide a specific range of content that ought to guide, even control, interpretative reach and renovation. The notion that human rights need to be clarified by a constant process of negotiation obscures the question of human rights content.

50. Id. at 208.

51. See id. at 207 (articulating the precautionary approach as an integral part of risk analysis and management, by providing input for project assessment, planning, and developing safeguards).

52. See id. at 214-57 (applying the criteria necessary for equitable and sustainable development for dam operation management).

53. See WCD REPORT, supra note 1, at 207 (discussing the outline of equitable criteria employed within the decision-making process during dam operation and management).
The question of content relates to large dams affecting peoples in three distinct, though related, ways. First, do the human rights standards and norms generally applicable to all human beings everywhere substantially address their plight? Second, is there a need to construct regimes of specific human rights standards for project-affected peoples? If so, how best should one proceed? Third, what institutional design of good faith adjudicatory or mediating institutions processes may we involve to achieve these rights? The WCD does not clearly formulate either the first or the second issue, though I suspect that its response to both these questions may turn out to be affirmative—given its emphasis on clarifying rights.

A. HUMAN RIGHTS REGIMES AND THE DAM DISPLACED PEOPLES

The WCD, as noted, does not explicitly indicate ways in which governmental decisions relating to dam construction may violate human rights. Its reliance upon "an increasingly robust foundation of international covenants, charters, declarations and conventions" does indeed suggest a "sharpening focus on equity" but remains insensitive to human rights obligations upon nation states. It is unfortunate but true that jurists, as well as state managers, continue to draw distinctions between soft and hard bodies of international human rights law. Even the Golden Jubilee of the Universal Declaration of Human Rights, provided scope for interrogation of the customary binding nature of some of its human rights proclamations.

There is no doubt that a robust body of human rights norms and standards exists under the International Bill of Rights (Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights) that may be said to constitute the general human rights regime. This regime prohibits and regulates certain forms of state action. Thus, basic human rights under the International Covenant of Civil and Political Rights ("ICCPR") may be invoked to furnish important rights limits on state power. Further, state repression of assertions against the construction of a dam may violate many of the important

54. See id. at 204 (focusing on legislative bodies in increasing human rights awareness).
provisions of the Covenant. However, as anti-dam protestors, especially in the South know, even these rights remain unavailable, and infringed upon, without effective redress. Furthermore, the substantive range of human rights articulated in the ICCPR does not extend to specific human rights costs entailed in dam development decisions. For example, it is unlikely that any constitutional court or human rights commission will entertain a challenge to dam construction on the basis that it violates the right to life. Article 6 of the ICCPR, no matter how expansively construed, does not enable adjudicators to rule that construction of a dam violates the right to life. This right is expressly directed only to state action infringing upon human life. The specific content of the right to life does not extend to a right to life-styles, which large dams necessarily affect.

Human rights enshrined in the International Covenant on Economic, Social, and Cultural Rights ("ICESCR") provide forensic and public policy space for arguments that dam decisions fail to comply their progressive realization mandate. Uprooting and unsettling millions of people from their habitats, without adequate programs of rehabilitation and reparation, violates various human rights. In any event, official and activist truths concerning the constituent elements of rehabilitation remain a contested issue.

The WCD Report, by the data it marshals so impressively, reinforces this debate—especially concerning the right to livelihood, housing, and meaningful employment. While this is undoubtedly important, national courts remain bound by the practices of translation of these rights in national constitutions and laws. Constitutional prescriptions mandating that courts take into account international human rights norms are rare. Furthermore, comparative human rights law does not provide us with accounts of an active judicial body curbing state human rights violations. All the courts have done is provided injunctive relief for human rights violations.56

55. Among such provisions are the rights to freedom of speech and expression, association and movement, bodily integrity, and denial of due process under Draconian security legislation. See generally id. at 18.

56. From my own activist decade and a half long engagement against Narmada and Tehri dams in India, I am able to say that the Indian appellate courts, especially the Supreme Court of India, by taking jurisdiction over human rights issues raised by the construction of these dams, have provided valuable dialogical
This is simply not protective enough.

To be sure, by an imaginative harnessing of human rights provisions in the constitutions and international bill of rights, justices may be able to design more human rights based protections for those displaced through dam development. For example, it has been gradually recognized that the legal and administrative policy of providing land for land as compensation for displacement is flawed for two reasons: (1) it ignores vast numbers of displaced people who have no land in the first place and (2) even those who are given land do not always get arable land in locations of their choice. In situations of monetary compensation, questions arise concerning the date from which the market value of the land is to be determined; usually it is determined, with detriment, as the value obtained at the time of notification of the project, not the value during the land acquisition, years or decades, following the initial notification. No reparations, at least in terms of accelerated developmental public expenditure in the areas of relocation, are available as a matter of human rights to communities for the planning blight referred to earlier. The very category named as displaced or project-affected peoples, that the policy and law constructs, almost ensures their existence and future as mere statistical categories or units, without gender, age, identities, or histories. Given hostile law and policy formations, it is unlikely that justices and courts can fashion and implement rights oriented rehabilitation measures.

Without denying the relevance of the extent of human rights standards, and the potential for activist recourse, it has to be said that the general regime of human rights does not fully address the problems and the plight of peoples affected by large dams and major spaces for years. By issuing interim stay orders, the judicial decisions have expanded the staying power, against all odds, of anti-dam movements. The interim orders in both situations have resulted in judicially-ordered negotiations between policy-makers and active citizens. Of course, in neither situation has the Supreme Court of India finally prevented the construction of the dams. As far as I know, no apex court in the world has done so. But it would be a tragic mistake for activists to ignore the limited partnership between human rights and adjudicatory communities. At the same time, I share the activists' outrage towards adjudicatory failures at protecting these rights.

57. See WCD REPORT, supra note 1, at 99 (discussing expenditures and basic needs regarding dam project development in the South).
public projects. The Report would have advanced the future of human rights a great deal by an acknowledgement of this truth, and proposals for renovation of the general regime of human rights.

B. TOWARDS A SPECIFIC REGIME OF HUMAN RIGHTS?

In this section I refer to clusters of normative human rights that address the needs of individuals and human collectives, which are socially vulnerable because of past or present discrimination. Prominent among this framework are conventions concerning the rights of women, those subject to racial discrimination, indigenous peoples, migrant workers, and children. A detailed review of these instruments will yield a conclusion similar to the one we have reached in the context of the general human rights regime, subject to one major caveat. There is an increasing trend in these instruments to identify private individual actors, and not just the state, as violators of human rights. Insofar as the planning and construction of large dams discriminates and violates human rights, the fact that such activities are conducted by private enterprises, beyond the state, provides no defense against human rights violations. One wishes that the Report would have relied on the specific legal and jurisdictional reach of these instruments, instead of urging maxim policy and governance sensibilities towards these values.

The distinction between general and specific human rights regimes will become even more contentious when I say that the Report’s invocation of the United Nations Declaration on the Right to Development and the Rio Declaration Principles appeals to specific regimes of human rights. These specific regimes primarily address

58. The Convention for Elimination of All Forms of Discrimination Against Women (CEDAW) extends human rights obligations not only to state agencies, but to other social institutions, entities, and enterprises.

59. See id. at 200-02 (considering the Declaration on the Right to Development (“DRD”) and The Rio Declaration Principles (“RDP”) framework that conceptuallize human rights, clarify the role of the state, and address water and resource management). For the purposes of this essay, I leave myself mercilessly open to the criticism that I wholly misunderstand human rights law and jurisprudence. I run this narrative risk, if only to reinforce the point that the Report furnishes a superb example of the advantages that flow in harnessing this normativity in the specific contexts of dams and development.
human rights responsibilities of policy makers and state governmental officials. Rather than human rights declarations, these instruments are better thought of as specific governance responsibility charters.\textsuperscript{60} This perspective enables us to move beyond the usual problems of these instruments.\textsuperscript{61} In any event, it is fascinating to observe how the WCD invokes new normative human rights concerns—in the first instance, dams and development.

Let us briefly attend to this venture through its creation. The WCD deploys the Declaration on the Right to Development and the Rio Principles to distill operative principles for negotiated settlements of risks and rights in the context of large dams.\textsuperscript{62} These principles, forming the substantive content of Part II of the Report, risk the following summation.

First, the rights-and-risks approach entails participatory decision-making.\textsuperscript{63} An order of unity marks those whose rights are most threatened and those who “face the greatest risk from the development” process; such people must have a pride of place at the negotiating table.\textsuperscript{64} Second, the stakeholders thus identified ought to be fully empowered by the negotiating process through adequate participation reflecting the fullness of voice of the violated, abundant good faith manifest in transparency, and expeditious, as well as readily understandable, terms of dialogue and decision-making.\textsuperscript{65} Third, the final outcome should strive to represent “the broadest

\textsuperscript{60} See \textit{id.} (discussing the DRD and the RDP as the reinforced framework for the environment, human rights, development, and economic cooperation).

\textsuperscript{61} See BAXI, \textit{supra} note 33 (mentioning the difficulties realized with these types of governance charters). These typically concern the questions regarding the binding nature of these instruments. In the case of the Declaration on the Right to Development, serious questions have been raised concerning their legitimization within the United Nations system. \textit{Id.}

\textsuperscript{62} See \textit{WCD Report, supra} note 1, at 202 (addressing the purpose of DRD and RDR as the framework governing the development and management of dams).

\textsuperscript{63} See \textit{id.} at 206 (arguing that participatory decision-making is a value that forms the foundation of a rights-based approach).

\textsuperscript{64} See \textit{id.} at 209, 216 (identifying the parties whose rights are threatened and face the greatest risks in the negotiating process).

\textsuperscript{65} See \textit{WCD Report, supra} note 1, at 209, 216 (arguing that the rights-and-risks approach employs an inclusive negotiating process).
reasonable consensus." Fourth, independent review, mediation, and, if necessary, judicial review, should be available to foster negotiated outcomes. Fifth, the WCD puts in place some objective criteria for evaluating successful compliance with the process, to which women’s participation, gender equality, and “free, prior and informed consent of the indigenous and the tribal peoples” remain central. Sixth, the process should be open to an options assessment—a process that accords the social principles the same importance as the technical principles. If the development of a dam is the most desirable option, then “social and environmental principles . . . [should be applied] throughout the detailed planning, design, construction, and operation phases.” Seventh, the requirement of a compliance plan outlining the specific technical, social, and environmental commitments, as well as performance related incentives and sanctions for compliance, is thought to create both equity and efficiency in pursuit of consensual decisions. Eighth, adoption by all states of a “common and consistent anti-corruption plan.” Ninth, the comprehensive participatory process thus envisioned extends to all levels of decisional processes: identifying needs, selecting alternatives, project preparation, and project operations. Paramount to all this remains an equity assessment of social and environmental dam projects at all levels of conception and implementation, including the instrumentality of a

66. See id. at 209 (discussing the rights-and-risks approach as one that seeks public acceptance).

67. See id. at 210 (concluding that fairness, stability, efficiency, and availability of knowledge are objective criteria used to ensure a successful decision-making process).

68. See id. at 217 (discussing further, the core principles used to define the decision-making process).

69. See id. at 221-57 (discussing the option-assessment process, which addresses policy management, and social and environmental considerations).

70. See id. at 244-50 (addressing the compliance plan, which provides for flexibility and equitable commitments during dam operations).

71. See WCD REPORT, supra note 1, at 249 (arguing that the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions seeks to prevent corruptive legislation).

72. See id. at 260-307 (providing guidelines that address management, implementation, compliance, and needs assessment for water and energy services).
mitigation, resettlement and development action plan ("MRDAP").

All this marks a considerable advancement from the piecemeal approaches toward legitimate decision-making concerning dams and development, especially the insistence on specific dam-related anti-corruption regimes of law. Peoples’ participation provides the cornerstone of the WCD policy framework—all other requirements flow from this cardinal value. This raises, however, a few awkward questions. The first is anticipated by the Report. The WCD remains aware that such elaborate participatory processes and structures entail substantial use of public revenues. Its response is that the international communities have assistance duties. However, the legal and ethical bases for such assistance duties remain inarticulate in the Report. The normative bases providing justification for such obligations remain deeply contested. The WCD’s casual approach to how its proposed policy framework may be resourced is its Achilles’ heel.

Second, participation by affected interests in decisions concerning the location, design, schedules, social and environmental costs of dam construction, maintenance, safety, operation, and eventual decommissioning of dams, envisaged by the Report as a program of renaissance of governance, assumes the ability to share techno-scientific information. Not only is this coded in techno-scientific governance languages, but also its social translation requires further socio-linguistic adaptation. The situation is formidable. For example, in one estimate, eighteen constitutionally recognized languages, one hundred fifty spoken ones, and about thirty-five hundred dialects, characterize India as a confederate linguistic nation. The WCD does

73. See id. at 288-89, 296-300 (explaining the distribution analysis for dam projects).

74. “It must, however, be stressed that not all countries possess the full range of legal and institutional structures, nor sometimes the human and financial resources, to implement such a participatory approach effectively. It becomes therefore a high priority to assist these countries and communities to put necessary structures in place.” Id. at 208.

not factor this diversity into its public policy design.

Third, the Report, in its identification of stakeholders, almost eliminates power asymmetries between dialogical constituencies. It presupposes an even spread of social movements in all regions of the world in its wearisome references to civil society. The diversity of the post-Cold War developmental contexts, replete with late post-colonial societies, the transitional societies of central Europe, the severely divided societies marked with escalating ethnic conflict, and the heavily and endlessly structurally adjusted societies remain conspicuously absent from the text of the Report. If the commissioned expert studies brought these to the forefront, the Report fails to foreground these cataclysmic contexts in its articulation of participatory framework. Its recipe for participatory process, then, emerges to be an exercise in what has come to be known as the democratization of disempowerment.76

Fourth, and related, the WCD does not recognize radically different epistemologies. The ways in which indigenous communities conceptualize a human-nature nexus is, for example, scarcely addressed by the abstract norm of informed consent to dam construction decisions. The incommensurability between the orders of organic and erudite knowledge, complicates and aggravates power asymmetries in all positivist policy prescriptions concerning dams and development. Practitioners of erudite techno-science dismiss as junk science1 the traditions of knowledge they regard as inherently pre-scientific. They refuse, almost as a matter of principle,78 any

76. See Claude Ake, Democracy and Development in Africa 1-17 (1996) (addressing the impact democratization has upon power and development).

77. See generally Peter Huber, Galileo’s Revenge: Junk Science in the Courtroom 24-35 (1991) (discussing the origins, tradition, and viewpoints of an infusion of technological concepts into the legal context).

78. This is a common experience of activists or public citizens opposing large dams. “Do you know enough?”, is a continual question asked by experts toward concerned citizens. At a public meeting in New Delhi debating the Tehri Dam in the Himalayan regions of India—the world’s largest rock-filled dam, being constructed not just in a seismic area but on the fault line—I was brazenly asked: “What do you know scientifically concerning the levels of probability of reservoir induced seismicity or landslides causation?” While I was able to respond appropriately, having studied relevant scientific literature for well over a year, I still lacked credibility because I was a not a scientist according to my curriculum
insistence on programs of periodic human rights education for policymakers and scientific specialists, which, one hopes, may partly redress the arrogance of power characteristic of the techno-scientific state.

CONCLUSION: THE TASKS AHEAD

At the end of the day, the WCD summons the global activist communities to assume leadership in re-articulating the integral relationship between dams and development, and governance and rights. In addressing the future tasks we ought to recall that a global “us” is scarcely attained by impositions of governmental bodies, which codify a bureaucratic “otherness”. The prose of governance, and its reformation, cannot conceptualize the radical “us,” who question the very assumption that governance can ever be altruistic.

The first task ahead is to situate the Report within the radical critiques of the old and new paradigms of development, and to ask how far it travels in the direction of disempowering those who question, foundationally, the developmental wisdom of large dams. It is simply not good enough to scatter the alternative wisdoms of conscientious objectors to large dams into a dissemination of principles that inform policy-making. Those who keep saying “No more large dams” ought to be taken more seriously—for they too bring a wealth of understanding to our conclusion. Let the text of Medha Patkar’s dissent speak to us as insistently as does the pro-dam discourse of the WCD Report. “Add dissent and stir it” is the WCD recipe to produce the soup of consensus on a new policy framework on dams and development—this is a disturbingly unfortunate approach because it does not accord a just measure of discursive dignity to the voice of the “other”.

The second task that arises is to consider a call for an international moratorium on the construction of large dams until there is an installation of participatory policy-making processes. Human rights communities have every reason to urge this course, since the Report highlights the unconscionable and irreparable human rights, and

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vita. The rhetorical strategy I adopted was by asking what did the scientific experts know about international or constitutional human rights law.
related social costs of large dams. Declaring a moratorium is a pledge to participatory governance. The moratorium lasts only so long as the agenda of governance reform is in the process of implementation. Once implemented, dam projects would be subject to participation and review, and human rights would have, as far as humanly possible, been fully respected. There is no reason why a special session of the General Assembly of the United Nations should not be convened to facilitate a decision, based on a cost benefit analysis of such a moratorium. Equally, unilateral declarations of a moratorium from concerned governments would pave way to a more sustained global effort.

Third, there is scope for meaningful invigilation of current dam projects by the human rights treaty bodies. These bodies need to consider issuing a general comment expanding the scope of monitoring treaty obligations, so as to include the manifest human rights violations in the planning, construction, operation, maintenance, and decommissioning of large dams. It is also time that the United Nations Human Rights Commission find ways to foster greater interstate dialogue on the anti-human rights dimensions to dam development.

Fourth, this same prescription extends to human rights agencies at national and regional levels. The scope for human rights oriented oversight and scrutiny of national Human Rights Commissions, Women's Commissions, Legal Aid and Service Commissions, and Law Reform Commissions should expand to redressing human rights violations because of dam development. This same trend extends readily to regional human rights organizations.

Fifth, there is a pressing need for a review of existing general and specific human rights instruments from the perspectives of the displaced peoples. Where these normative regimes combat against anti-human rights violations, they need to be clearly and comprehensively identified, in ways that guide conscientious policy makers and human rights communities everywhere. Where gaps exist, innovative proclamations ought to provide a response. 79

79. See generally The Peoples Decade of Human Rights Education, available at www.phbre.org (discussing the impact that community involvement, governmental activities, and economic injustices have upon human rights).
I conclude by reiterating the famous dictum of Antonio Gramsci, who spoke of the need for pessimism of intellect and optimism of will. Human rights violations urge us to, however, profess pessimism of will and the optimism of intellect. We need to hunt and haunt all erudite discourses that seek to over-rationalize development. We need to defend and protect people suffering everywhere who refuse to accept that the power of a few should become the destiny of millions.

If we are prepared to read the WCD Report, contrary to collective authorial intention,80 "what happens next" is an archive, grasping the ways in which the extent of human rights discourse has passed by the rights and plight of certain displaced people. "We" stand summoned to a new order of reflexivity that only voices of suffering may bring to us.

Immunity from corruption in high places has yet to be affirmed as a basic human right. The Report marks a welcome beginning on this count. See supra note 71. Yet large dam construction, rife with corruption in high places, may not be redeemed without such an enunciation of people's most basic democratic right.

80. See generally MARK TAYLOR, ALTARITY 1 (1987) (considering the realities of divergence and distinctions).

81. See WCD REPORT, supra note 1, at xxxvii.