

Inter-State River Water Disputes: A study in the light of the federal principle in India

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ABSTRACT : *Fresh water resources are essential for the survival of mankind. The domestic, agricultural and industrial uses of water are multiplying day by day and the pressure of the ever-increasing population, scarcity and unequal distribution of water have surrounded it in an area of continued conflict and debate. This conflict becomes even more highlighted in federal systems like India and the United States of America because in both these countries majority of the rivers are inter-state and the states have substantial power over the water resources, frequently resulting in inter-state disputes. Considering the importance of inter-state water sharing, it becomes an area of great concern in maintaining the federal spirit and better Union-State and inter-State relations. Constructing efficient and equitable mechanisms for sharing inter-state river waters has long been an important legal and constitutional issue in federal countries. We shall look, in detail, in this paper various constitutional and legal provisions, history of inter-state water disputes and case studies of each country and doctrines that have been devised to resolve inter-state water disputes and their short comings and suggest improvement, wherever possible. Our endeavor is to evolve most efficient and fair mechanisms for sharing inter-state river waters.*

KEYWORDS – Art. 262, Inter-state, India, River water disputes, federal relations

I. INTRODUCTION

The Importance of Water

There is no denying that even in modern day, water is becoming an important factor in the economic development of the states and since economic development affects the social development also, this factor gains still higher significance. The domestic, agricultural and industrial uses of water are multiplying day by day and this phenomenal increase in demand for water in diverse fields has resulted in its scarcity. The pressure of the ever-increasing population and the threat of scarcity and unequal distribution of water – a finite, pre-eminent natural resource – have surrounded it in an area of continued conflict and debate. This conflict becomes even more highlighted in federal systems like India and the United States of America because in both these countries majority of the rivers are inter-state and the states (units constituting the federation) have substantial power over the water resources, frequently resulting in inter-state disputes. Considering the importance of inter-state water sharing, it becomes an area of great concern in maintaining the federal spirit and better Union-State and inter-State relations. Constructing efficient and equitable mechanisms for sharing inter-state river waters has long been an important legal and constitutional issue in all federal countries. We shall look, in detail, in this paper various constitutional and legal provisions, history of inter-state water disputes and case studies of India and doctrines that have been devised to resolve inter-state water disputes and their short comings and suggest improvement, wherever possible. Our endeavor is to evolve most efficient and fair mechanisms for sharing inter-state river waters.

II. LEGAL THEORIES AND INSTITUTIONS

Initial claims to water in negotiations are often justified in terms of one of several simple legal doctrines. We may identify six such "theories" or legal doctrines:

1. **Doctrine of Riparian Rights:** Etymologically the term “**ripa**” means, “*the bank of stream*” or “*the bank of a river*”. Thus, the land to be riparian must have the stream flowing over it and along its borders. The doctrine of riparian rights emphasizes the recognition of equal rights to the use of water by all owners of land abutting a river, as long as there is no resulting interference with the rights of other riparian owners [1]. The doctrine is not of much use in the context of inter-state river water disputes. The Krishna Water Disputes Tribunal observed that, “*the doctrine of riparian rights governs the rights of the private parties, but does not offer a satisfactory basis for settling the inter-state water disputes.*”[2]

2. **Theory of absolute territorial sovereignty or the Harmon Doctrine.** Under this doctrine, a riparian state can do what it pleases with its waters without regard to its effect on other co-riparian state and no riparian state has a right to demand the continued flow of water from other states [3]. This doctrine was evolved by Attorney General Harmon, of the US in 1896, to justify the action of the United States in reducing the flow of the river Rio Grande into Mexico. This theory represents one sided extreme view and is not of much use in the context of inter-state river water disputes.

3.. **Theory of prior appropriation.** This theory says that the first user who puts the water to beneficial use establishes a prior right and subsequent users can only appropriate what is left by the first user. This doctrine allocates property rights to water on the basis of historical use. This theory was developed in the arid and semi-arid parts of USA, where severe shortage of water was faced from the beginning of the settlement [4]. This doctrine is also not treated as the acceptable law in India.

4. **Theory of Community of Interest.** According to the theory of community of interest, a river passing through several States is one unit and should be treated, as such, for securing the maximum utilization of its waters. Its smooth implementation would seem to require mutual agreement. The Kosi project (India and Nepal) is often cited as an example of the adoption of this approach.

5. **Doctrine of equitable apportionment.** The doctrine of equitable apportionment seems to have originated in the United States, as is illustrated by the decision of the US Supreme Court in the case of Connecticut Vs. Massachusetts [5], wherein it was held that “*inter-state water disputes should be settled on the basis of equality of rights*”. Similar stand was also reiterated in the cases of New Jersey Vs. New York [6], and Nebraska Vs. Wyoming [7]. The theory of equitable apportionment conceptually embodies the following elements:

1. Firstly, the equality of rights does not mean the right to equal division of water literally. On the other hand it means the right of each co-basin or co-riparian state to share in the said basin or inter-state waters on the basis of various factors including, inter alia, its social and economic needs consistent with the corresponding rights of other co-basin or co-riparian or concerned states etc.
2. Secondly, this concept is a utilitarian one.
3. Thirdly, equitable apportionment is concerned with the beneficial use of concerned waters.

Equitable apportionment in India

The theory of equitable apportionment has been recognised in India also – though, at the same time, its vagueness has also been taken note of. Here are few examples:

- (a) *The Indus Commission* (1943) [8] recorded its views as under:
 - a. The most satisfactory settlement of such disputes is by agreement.
 - b. Failing agreement, the rights of the parties must be determined by applying the rules of equitable apportionment, each unit getting a fair share of the water of the common river.
 - c. However, equitable sharing, once made, may cease to be equitable, in the face of new circumstances.
- (b) *The Krishna Water Disputes Tribunal Report* [9] took note of the position, as under:

“*In India also, the rights of States in an inter-State water dispute are determined by applying the rule of equitable apportionment, each unit getting a fair share of the waters of the common river.*”

But the Krishna Tribunal also noted that the concept does not lend itself to precise formulations and its meaning cannot be written into a code that can be applied to all situations and at the all times.
- (c) The Narmada Water Disputes Tribunal [10] did accept the doctrine of equitable apportionment as applicable. In fact, it acknowledged that the diversion of water of an inter-State river outside the river basin was legal and the need for diversion of water to another basin may be a relevant factor on the question of equitable apportionment, in the circumstances of a particular case.

6. Theory of equitable utilization of Inter-State river waters: This theory stresses that each basin state should be entitled to “a reasonable and equitable share in the beneficial uses of water of a river basin.

It may be fruitful to point out here that the Helsinki Rules, adopted by the International Law Association in 1966 at Helsinki have provided a status and authenticity to this theory. According to Article 4, “*each basin state is entitled, within its territory, to a reasonable and equitable share in the beneficial use of the water of an international drainage basin.*” Article 5 sets out 11 factors which will determine “*a reasonable and equitable share*”, such as the geography of the basin, the hydrology of the basin, including the contribution of water by each basin state, the climate affecting the basin, population, economic and social needs of each basin state etc.

III. Inter-State River Water Disputes in India

There are more than twenty major river systems in India. Speaking in terms of Indian federalism, most of the rivers in India are inter-state rivers as they flow through the territories of more than one state within India. The inter-state character of the Indian rivers has given rise to a number of disputes between the federal units at inter-state level.

3.1 Legislative Mechanisms

3.1.1. System under the Indian Constitution of 1950

Under the Indian Constitution of 1950, States have power to legislate (State list, entry 17), with respect to the following subject:

“17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power, subject to the provisions of Entry 56 of List 1.”

Union list, entry 56, reads as under:

“56. Regulation and development of inter-State rivers and river valleys, to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.”

Article 262

Article 262 of the Constitution reads as under:

“262. Adjudication of disputes relating to waters of inter-State rivers or river valleys:

(1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, in any inter-State river or river valley.

(2) Notwithstanding anything in this Constitution, Parliament may, by law, provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1)”

The first provision makes water a state subject, but qualified by Entry 56 in the Union List. Article 262 explicitly grants parliament the right to legislate over the matters in Entry 56, and also gives it primacy over the Supreme Court. However, the parliament has not made much use of Entry 56. Various River Authorities have been proposed, but not legislated or established as bodies vested with powers of management. Instead, river boards with only advisory powers have been created [11]. Hence, the state governments dominate the allocation of river waters. Since rivers cross state boundaries, disputes are inevitable in this institutional setting. The Inter-State Water Disputes Act of 1956 was legislated to deal with conflicts, and included provisions for the establishment of tribunals to adjudicate where direct negotiations have failed. However, states have sometimes refused to accept the decisions of tribunals. Therefore, arbitration is not binding. Significantly, the courts have also been ignored on occasion. Finally, the center has sometimes intervened directly as well, but in the most

intractable cases, such as the sharing of the Ravi-Beas waters among Haryana, Jammu and Kashmir, Rajasthan, and Punjab, central intervention, too, has been unsuccessful. An unambiguous institutional mechanism for settling inter-state water disputes does not exist [12].

3.1.2. The Inter-State Water Disputes Act, 1956

Pursuant to the power conferred by the Constitution (article 262), Parliament has enacted the Inter-State Water Disputes Act, 1956. Its main features can be thus summarised:

- i. A State Government which has a water dispute with another State Government may request the Central Government to refer the dispute to a tribunal for adjudication.
- ii. The Central Government, if it is of opinion that the dispute cannot be settled by negotiation, shall refer the dispute to a Tribunal.
- iii. The Tribunal's composition is laid down in the Act. It consists of a Chairman and two other members, nominated by the Chief Justice of India from among persons who, at the time of such nomination, are Judges of the Supreme Court.
- iv. The Tribunal investigates the matter and makes its report, embodying its decision. The decision is to be published and is to be final and binding on the parties.
- v. Jurisdiction of the Supreme Court and other courts in respect of the dispute referred to the Tribunal is barred.

3.1.3. The River Boards Act of 1956

The River Boards Act, 1956, provides for the establishment of River Boards, for the regulation and development of inter-State rivers and river valleys. Briefly the procedure under the Act can be summarized as follows:

- i. On a request received from a State Government or otherwise, the Central Government may establish a Board for "*advising the Government interested*" in relation to such matters concerning the regulation or development of an inter-State river or river valley (or any specified part) as may be notified by the Central Government.
- ii. Different Boards may be established for different inter-State rivers or river valleys.
- iii. Functions of the Board are very wide, covering conservation of the water resources of the inter-State river, schemes for irrigation and drainage, development of hydro-electric power, schemes for flood control, promotion of navigation, control of soil erosion and prevention of pollution. But the functions of the Board are advisory and not adjudicatory.

3.2. Case studies from India

In India several costly disputes have arisen over the sharing of river water. Two cases of compacts in India over the rivers Narmada and Ravi-Beas are briefly described below, the objective being to see to what extent the conflicts have actually been resolved. In each case, tribunals were constituted to resolve the disputes but this proved to be a time-consuming process, often requiring many years to achieve real conflict resolution.

The Narmada River

A second important dispute, also the most publicized of all the water disputes in India, is the Narmada water dispute among the states of Madhya Pradesh, Maharashtra and Gujarat. The project has been controversial because of the large population displaced by the reservoir and the failure to adequately compensate this population. The Narmada Water Disputes Tribunal was constituted as early as 1969 but the tribunal issued its findings in December 1979. The tribunal determined the utilizable quantum of waters of the Narmada at the Sardar Sarovar dam site on the basis of 75% dependability and allocated the available water to the three states on the basis of equitable apportionment after protecting the existing demand for irrigation.

The tribunal also addressed the proportionate sharing of water in surplus and deficit years, construction of the Sardar Sarovar dam, sharing of power benefits from the proposed dam and the sharing of capital, operation and maintenance costs of the dam among the states in proportion to the power benefits allocated to each. The resettlement and rehabilitation of the people living in the dam submergence area was addressed, and required

payment by Gujarat (the major beneficiary) to Madhya Pradesh and Maharashtra of all costs incurred in acquiring the land to be submerged. The order also established the Narmada Control Authority for the purpose of securing compliance with the tribunal award (NWDT 1979) [13].

Summarizing the Narmada case, the tribunal's judgment was quite complete, covering water and power allocation, resettlement of displaced populations (though with inadequate compensation) and the distribution of project costs on the basis of benefits received. However, failure of the planners and the tribunal to consider alternatives (tributary dams, conjunctive groundwater-surface water use, and conservation in agriculture) led to high costs and inequitable treatment of the affected populations. Revision of the judgment is not allowed until 45 years have passed.

The Ravi-Beas dispute

The dispute between Punjab and Haryana about Ravi-Beas water started with the reorganization of Punjab in November 1966, when Punjab and Haryana were carved out as successor states of erstwhile Punjab. The four perennial rivers, Ravi, Beas, Sutlej and Yamuna flow through both these states, which are heavily dependent on irrigated agriculture in this arid area.

An agreement was accepted in 1981 between these states. This agreement however became a source of continued protest by the political opposition. These events led to the constitution of a tribunal to examine the Ravi-Beas issue in 1986. The award has not been notified, and does not have the status yet of a final, binding decision. Meanwhile the state of Haryana took the dispute to the Supreme Court in *State of Haryana v State of Punjab* [14] also known as *the First SYL* [15] *Canal case*. After hearing the case the Supreme Court gave three months' time to both the parties to reach an agreement. Then, on 15 January 2002, the Supreme Court ordered Punjab to complete the SYL within six months, failing which the central government had to finish the task. The Punjab government filed an appeal for review, which was rejected by the Court on 4 June 2004 with directions to the central government to assign this work to the central agency. Accordingly, the central government entrusted the CPWD the task to complete the SYL canal. On 2 July 2004, the Punjab government again filed a special leave petition for review of its June 4, verdict. The Punjab state also contended that this issue was not within the jurisdiction of the Supreme Court, as it was a water dispute in the ambit of article 262 of the constitution. Ultimately, the Punjab was forced to unilaterally abrogate all previous accords by passing an Act "Punjab Termination of Agreement Act-2004" in Punjab Legislative Assembly, on 12 July 2004. On June 4, 2004 [16] the apex Court announced its final verdict on the SYL issue, the highlights of which are as follows:-

1. Since the Punjab Government had failed to complete the canal within the one year deadline imposed by the January 15, 2002 verdict, so the Court directed the Centre to construct the unfinished portion of the SYL canal.
2. The Punjab Government was also ordered to provide adequate security to the officials of the executing agency and to the construction workers engaged by it.
3. The executing agency was directed to prepare a new map of the canal on the basis of a fresh survey by keeping in mind that no damage was caused to the green belt falling in the way.

However, there has been no progress in the matter since then and the Centre has not even started the construction of the unfinished Canal. Thus the future of the Ravi-Beas dispute hangs in uncertainty.

IV. Conclusion and Recommendations

With this background in mind, let us now discuss how efficient the present system is in resolving inter-state river water disputes. Initially the conflict-resolution mechanism provided by Article 262 and the Inter-State Water Disputes Act, 1956 seemed to be working well: The Krishna, Godavari and Narmada Tribunals' Award can be regarded as successful instances of operation of this conflict-resolution machinery. However, this system later ran into trouble[17]. In the Ravi-Beas case, political difficulties in implementing the award led to further reference being made to the Tribunal (as provided for in the Act) in 1987 and in 2008 the matter is still before the Tribunal. Meanwhile, Punjab enacted legislation terminating all water accords; this gave rise to some legal and constitutional issues; on these the Central Government made a Presidential reference under Article 143 to the Supreme Court, to which the Supreme Court has not yet given its opinion.

The history of operation of the Inter-State Water Disputes Act, 1956, has led to serious dissatisfaction with **adjudication** as a means of resolving Inter-State water disputes. Broadly speaking, there are four main criticisms of the prevailing adjudication process under the Inter-State Water Disputes Act, 1956:

- a) Adjudication is not the appropriate means of settling such disputes, a negotiated agreement would be much better. It is to be noted that Article 262 and the Inter-State Water Disputes Act, 1956 do not force adjudication on the disputing parties, nor do they preclude recourse to negotiation, conciliation or mediation; but when all these efforts fail, disputes still have to be resolved, a last resort mechanism is needed for the purpose. This is what Article 262 and the Inter-State Water Disputes Act, 1956 provide.
- b) There are no water sharing principles at the national level to guide the adjudication process.
- c) The adjudication system under the Article 262 and the Inter-State Water Disputes Act, 1956 is very dilatory and cumbersome. Delays at every stage certainly presented a serious problem in the past. The Sarkaria Commission made some recommendations in this regard, and after prolonged consideration, they have been implemented through the amendments of 2002 [18]. Now the Central Government has to establish a tribunal within a year after a State Government asks for one. The tribunal has to deliver its award in three years, but can seek an extension of two years, making a total of five years in all. However, it seems probable that after the amendments of 2002, the problem of delays at the various stages is likely to be substantially diminished.
- d) There are no effective means of ensuring compliance with the final decision. Although the Award of an Inter-State Water Disputes tribunal is said to be final and binding, there are no means of ensuring compliance with it. If a State Government refuses to obey the Order of such a Tribunal, there are not many courses open to the other parties to the dispute or even to the Central Government. The Centre can give directions, but if these too are not complied with, what sanctions are available? Article 356 (Central rule) is an extreme measure and cannot be lightly used, and in any case, what will happen when a popular government returns? The Sarkaria Commission had recommended the words 'final and binding' in the Act should be buttressed by conferring upon the Tribunal's Order the status of an Order or Decree of the Supreme Court, and this has been done through the 2002 amendment. However, this seems to have had no perceptible effect.

Recommendations

Under the present scheme, if it is felt that a certain inter-State river, is a river of national importance warranting Central planning or control or management, one of the two things can be done: Parliament can pass a specific legislation under Entry 56 bringing that river within the purview of Central action, or the Centre can set up a River Board for the river under the River Boards Act, 1956. However, the practical reality is that the River Boards Act, 1956 has remained a dead letter, with no board having been set up under it. Further, the Parliament has not yet passed any specific Act under Entry 56 bringing any river within the purview of the Centre. It is submitted that the reason behind this inaction is not legal or constitutional but political: the states are unenthusiastic about River Basin Organizations or about allowing Centre to play a larger role. Thus the Centre must usefully explore the political possibilities of legislation under Entry 56, and of re-activating the River Boards Act.

It is important to point out that the disputing parties under the Inter-State Water Disputes Act, 1956 are the state governments concerned and not the people. The Tribunal does not hear the farmers and the other water users in the basin. It seems very desirable that any reform of the present system of resolution of Inter-State water disputes should bring in the people as the interested parties [19]. It is submitted that the tribunals under the Inter-State Water Disputes Act, 1956 need not follow court-like procedures. Instead they could adopt a constructive, consultative, participatory, committee-style of functioning, something which the negotiated inter-state compacts of the US have been able to achieve. While retaining the power of judicial decision at the end, they could also function as conciliation agency.

Another recommendation being advanced is that in place of a complete bar of jurisdiction of the Supreme Court (as provided in Article 262), a partial modification of the bar should be worked out. The Inter-State Water Disputes Act, 1956 should be amended to provide for an appeal to the Supreme Court against the Tribunal's Order. Such a modification might improve the prospects of compliance to some extent. It is submitted that this suggestion combines the advantages of our system of tribunals with those of the US system of a final decision by the Supreme Court [20].

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