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Resolving conflicts over transboundary watercourses: an Indian perspective

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Abstract

Over 85% of the Indian territory lies within its major and medium interstate rivers. Known worldwide as a ‘federation sui generis’, India has the unique distinction of having a federal form of government with a strong unitary bias. This study analyses the sufficiency of the Indian Constitutional provisions and the parliamentary legislations in providing a comprehensive and lasting solution to the problems of interstate rivers in India. The basic philosophies behind the international water sharing laws have been analysed with a view to resolving the interstate water disputes in India. The Constitutional provisions relating to the Centre-state relations are discussed with special emphasis on the provisions relating to the water disputes. The relevant parliamentary legislations have been critically examined. Finally, an action plan has been suggested to resolve the conflicts pertaining to the interstate rivers in India.

Introduction

Over 85 percent of the Indian territory lies within its major and medium interstate rivers. Due to the presence of such a large extent of transboundary watercourses, there is an urgent need to analyse the Indian Constitutional provisions and the relevant parliamentary legislations for their conformance with the international water laws as well as their effectiveness in resolving interstate water disputes in India.

All the laws pertaining to the conflict resolution among the riparian States have a certain underlying philosophy which, in most of the cases, falls under one of five paradigms:

Principle of Absolute Territorial Sovereignty (or Harmon Doctrine)

This theory propounds that each State is a sovereign entity in itself and hence is entitled to utilise the rivers and other natural resources falling within its territories in whatever way it desires, irrespective of the consequences of such use on neighbouring States. This principle is also known as the Harmon Doctrine as it was applied for the first time in 1895 by US Attorney General Harmon to the dispute over pollution of the Rio Grande river between the US and Mexico.

Harmon argued that being a sovereign entity, the US had no obligation under the international law of ensuring pollution-free water supply to the river in Mexico. Most of the upstream riparian States favour this doctrine as it enables them to utilise the watercourses in the manner and to the extent that they desire and places no responsibility for ensuring either quality or quantity of flow in the downstream States. But this is a very parochial and myopic view of looking at things and can never bring reconciliation between riparian States. At the very best, it illustrates only the belligerent stand of the upstream riparian States in providing plenary powers of watercourse development without ensuring any accountability or responsibility on their part. Hence, this doctrine is not a favoured one and is no longer in use.

Principle of Absolute Territorial Integrity

In stark contrast to the Harmon doctrine, this principle states that downstream riparians have an absolute right to an uninterrupted flow of water from the river, no matter what the ground conditions may be. Hence, it prohibits upstream riparians to develop any part of the shared watercourse if it causes any harm to downstream States. Like the Harmon

doctrine, this theory also is very restrictive in its approach and considers only the interest of the downstream riparians. Hence, generally speaking, this doctrine has been rejected on the ground that it only talks about the rights of lower riparians without any reference to their responsibilities and obligations. Also, this may prove to be detrimental for the comprehensive development of the upstream riparians as they cannot undertake any developmental works on the shared watercourse without the permission of the downstream riparians.

Principle of Prior Appropriation

This principle favours neither the upstream nor the downstream riparian States. It states that the status quo should be maintained, i.e. it favours the State that puts the water to use first, thereby protecting the uses which exist prior in time. Hence, each State along a watercourse may be able to establish prior rights to use a certain amount of water depending on the date upon which that water use began. However, this doctrine of “the sooner the State starts utilising the water resources, the better it is” does not favour developing and underdeveloped countries. This is because they lack the technical expertise and economic resources to utilise watercourses and therefore this principle has not found many takers amidst the international watercourse-sharing nations. However, for nations or parts of a nation which are equal in terms of technical knowhow and have equitable resources, this principle can be applied in determining the resource-sharing of trans-boundary watercourses and is primarily the reason why it is the legal basis for the allocation of water resources in the western part of USA.

Principle of No Significant Harm

This is also commonly referred to as the ‘sic utere’ principle as it is based upon the traditional common law maxim of “Sic utere tuo ut alienum non laedas” i.e. one can put his property to any use subject to the condition that any such use is not detrimental to others. As used in the sharing of international waters, this principle gives each and every watercourse State a free hand to utilise the watercourse in whatever way it wants, provided that any such use does not cause any harm to the interests of other watercourse States. This doctrine has been recognised internationally and in the *Spain vs. France (Lake Lanoux Arbitration, 1957)* the court ruled “the sovereignty in its own territory of a state desirous of carrying out hydroelectric developments” along with “the correlative duty not to injure the interest of a neighbouring state”. Hence it can be inferred that this principle favours ‘restricted territorial sovereignty and restricted territorial integrity’ over absolute ones. However, the main criticism of this principle lies in the fact that, more often than not, it turns out to be merely a disguised version of the principle of prior appropriation. This is because of the very narrow interpretation that is accorded to this principle. Consider a case where a state A has been utilising exclusively an international watercourse owing to lack of technological advancement of other states sharing the watercourse. Now if a state B is desirous of utilising the watercourse for meeting its water demands, then state A would invoke this principle and argue that if it was earlier utilising (say) 100 units of water, now it would get only 75 units. Hence significant harm would be caused to its interests. Now is this not the principle of prior appropriation, which tends to

eternalise the water use of the earliest user. The way out is to give a broader meaning to the term ‘significant harm’ by including not only the harm that would be caused to a pre-existing user if a new user enters the stage but also by considering the harm that would be caused to the new user if it is deprived of the water use. In the previous example the principle should include not only the significant harm (of 25 units of water) which would be caused to state A owing to entry of state B but should also the significant harm which would be caused to state B if it is not permitted to utilise those 25 units of water. Only then can a reasonable resolution be brought about.

Principle of Equitable Apportionment

This is a highly progressive principle and its uniqueness lies in the fact that it can take care of the requirements of economists, environmentalists, hydrologists and other scientists at the same time. It is an all encompassing principle and includes all the previously discussed principles within its realm. It states that the waters of an international watercourse should be shared by all the member States in a reasonable and equitable manner. To determine the reasonable and equitable share of each watercourse state, a list of relevant factors may be taken from the UN Convention on the Law of Non Navigational Uses of International Watercourses (1997) (Article-6):

- Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
- The social and economic needs of the watercourse States concerned;
- The population dependent on the watercourse in each watercourse State;
- The effects of the use or uses of the watercourses in one watercourse State on other watercourse states;
- Existing and potential uses of the watercourse;
- Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
- The availability of alternatives, of comparable value, to a particular planned or existing use.

A look at the list of factors makes it abundantly clear as to why this principle is referred to as an “all encompassing principle”. When it considers one of the factors as “existing uses of watercourse State concerned” this is nothing but “principle of prior appropriation”. Furthermore, another factor is “effects of use of watercourse by one State on other watercourse States” which is nothing but “principle of no significant harm” in practice. Hence this principle is very broad in its outlook that it takes care of all other water sharing principles. This is primarily the reason why both the Helsinki Rules (1966) as well as the UN Convention on the Law of Non Navigational Uses of International Watercourses (1997) have adopted this principle as the most significant means of resolving the conflicts pertaining to transboundary watercourses.

Nature of the Indian Constitution

A federation is a group of regions or States united with a Central or a Federal Government. A federation has a well established dual polity or dual form of Government i.e. the

field of Government is divided between the Federal and the State Governments which are not subordinate to one another, but co-ordinate and are independent within their allotted spheres. Therefore, the existence of co-ordinate authorities independent of each other is the gist of the federal principle. Though the members of the Drafting Committee of the Constituent Assembly called the Indian Constitution federal (although nowhere mentioned in the Constitution itself), some jurists dispute this title. Western scholars generally take the US Constitution as a role model of federal Constitution and exclude those Constitutions which do not conform to it from the nomenclature of 'federation'. But now, it is realised increasingly that any assumption of such a typology is fallacious, and it is generally agreed that the question whether a state is unitary or federal is one of degree and whether it is a federation or not depends upon the number of federal features it possesses.

A perusal of the provisions of the Indian Constitution reveals that the political system introduced by it possesses all the essentials of a federal policy. The Indian Constitution establishes a dual polity with the Union at the Centre and the States at the periphery, each enjoying powers clearly demarcated by the Constitution. The Constitution is written and supreme, with enough power to declare enactments in excess of the powers of the Union or State Legislatures as *ultra vires*. Moreover, no new amendment making any change in the status or powers of the Centre and the States is possible without the participation of the States (Art.368). Finally, the Supreme Court is the apex authority to interpret the Constitution of India as well as to decide upon disputes arising out of Centre-State relations. Even though all the essential characteristics are present in the Indian Constitution, in certain circumstances, the Constitution empowers the Centre to interfere in the matters of the States, which places the States in a subordinate position. This violates the federal principle.

Provisions in the Indian Constitution which are not strictly federal in character

The question of the extent of federalism is a different matter and in this regard the Constitution of India has certain distinctive features having a bias towards the Centre. The political system of a country is, by and large, the outcome of circumstances which certainly differ from one country to another. The following are the provisions in the Indian Constitution which are not strictly federal in character:

- In the USA and Australia, the States have their own Constitutions which are equally as powerful as the federal Constitution but in India, there are no separate Constitutions for the member States.
- India follows the principle of uniform and single citizenship, but in the USA and Australia, double citizenship is followed.
- In the USA, it is not possible for the Federal Government to change the territorial extent of a State unilaterally but in India, the Parliament can do so even without the consent of the State concerned (Article-3). Thus, the States in India do not enjoy the right to territorial integrity.
- If the President declares a national emergency for the whole or part of India under Art.352, the Parliament can make laws on subjects, which are otherwise exclusively under the State List. The Parliament can give directions to the States on the manner in which to exercise their

executive authority in matters within their charge. The financial provisions can also be suspended. Thus in one stroke, the Indian federation acquires a unitary character. However, such a situation is not possible in other federal Constitutions.

- The VII Schedule of the Indian Constitution distributes the legislative subjects on which the Parliament and the State Legislatures can enact laws under three lists: Union, State and Concurrent. The Union List contains 99 subjects over which the Parliament has exclusive control, while the State List contains only 61 subjects over which the State Legislatures have control. Moreover, the most important subjects, except State tax, are under the Union List. Further, in the event of a conflict between the Union and State laws on Concurrent subjects, the latter must give way to the former to the extent of such contradiction. Furthermore, the Residual power, i.e. power to enact laws on subjects not failing under any of the three Lists, lies with the Centre (Canadian model) and not with the States, as is the case in the USA and Australia.
- The Parliament has the exclusive authority to make laws on the 99 subjects of the Union List (Schedule VII), but the States do not have such exclusive rights over the State List. Under certain circumstances and situations, the Parliament can legislate on subjects of State List. There are five such situations.

Under Article 249, if the Rajya Sabha passes a resolution with not less than two-thirds majority, authorising Parliament to make laws on any State subject on the grounds that it is expedient or necessary in the national interest, Parliament can legislate over that subject. Such laws shall be in force for one year only and can be extended continuously any number of times but for not more than one year at a time.

Under Article 250, if a national emergency is declared under Art. 352, Parliament has the right to make laws with respect to all the 61 State subjects automatically, i.e. the State List is transformed into the Concurrent List.

Under Article 252, if the Legislatures of two or more States request Parliament to legislate on a particular State subject, Parliament can do so. However, such legislation can be amended or repealed only by Parliament.

Under Article 253, Parliament can make laws even on the State List to comply with the international agreements to which India is a party. The States cannot oppose such a move.

Under Article 356, if the President's rule is imposed in a State, the powers of the Legislature of that State become exercisable by or under the authority of Parliament. This gives Parliament full powers to legislate on any matter included in the State List.

- Under Art. 155, the Governor of a State is appointed by the President and the former is not responsible to the State Legislature. Thus, indirectly, the Centre enjoys control over the State through the appointment of the Governor.
- If a financial emergency is declared by the President under Art.360, on the grounds that the financial stability of credibility of India or any of its units is threatened, all the money bills passed by the State Legislatures during the period of financial emergency are also subject to the control of the Centre.

- Under Art. 256, the Centre can give administrative directions to the States, which are binding on the latter. Along with the directions, the Constitution also provides measures to be adopted by the Centre to ensure such compliance.
- Under Art. 312, the All India Services officials – IAS, IPS and IFS (forest) – are appointed by the Centre but are paid and controlled by the State. However, in the case of any irregularities by the officer, States cannot initiate any disciplinary action except by suspending him/her.
- Judges of the High Courts are appointed by the President in consultation with the Governors under Article 217 and the States do not play any role in this.

Thus, apart from certain provisions based towards the Union, the Constitution of India, in normal times, is framed to work as a federal system. But in times of war and other emergencies, it is designed to work as though it were unitary. The federal Constitutions of the USA and Australia, which are placed in a tight mould of federalism, cannot change their form. They can never be unitary as per the provisions of the Constitution. But the Indian Constitution is a flexible form of federation—a federation of its own kind. That is why Indian federation is called *federation sui generis*.

Indian Constitutional provisions regarding interstate water disputes

In the seventh schedule to the Constitution of India there are three lists:

- List 1: Union List
- List 2: State List
- List 3: Concurrent List

Entry 17 of the State List puts water in the domain of the respective States and reads as follows:

“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”.

Entry 56 of the Union List provides for:

“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- Adjudication of disputes relating to waters of interstate rivers or river values:

(a) *Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the water of, or in, any interstate river or river valley.*

(b) *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).*

Parliamentary legislations pertaining to conflict resolution in interstate waters

The following are the enactments of the Indian Parliament

with regard to interstate river water disputes:

Interstate Water Disputes (ISWD) Act, 1956

The provisions of the Interstate Water Disputes Act, 1956 state that:

- 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. The Central Government, if it is of opinion that the dispute cannot be settled by negotiation, shall refer the dispute to a tribunal.
- The tribunal should consist 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.
- The tribunal can appoint assessors to advise it in the proceedings before it.
- On the reference being made by the Central Government, 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.
- Jurisdiction of the Supreme Court and other courts in respect of the dispute referred to the tribunal is barred.
- The Central Government may frame a scheme, providing for all matters necessary to give effect to the decision of the tribunal. The scheme may, *inter alia*, provide for establishing an authority for implementing the decisions of the tribunal

River Boards Act (1956)

- The Act provides for the establishment of River Boards for the regulation and development of interstate rivers and river valleys either on the request of a riparian state or even otherwise.
- Different boards may be established for different interstate rivers or river valleys.
- The board is to consist of the chairman and such other members as the Central Government deems fit to appoint. They must be persons having special knowledge and experience in irrigation, electrical engineering, flood control, navigation, water conservation, soil conservation, administration or finance.
- Functions of the board are set out in detail in section 13 of the Act. Subject-wise, they are very wide, covering conservation of the water resources of the interstate 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.

Though the River Boards Act was passed in 1956 after the ISWD Act, it came into force only in 1957. Being a later act on the same subject, it has a more validity than the ISWD Act. However, this act has remained a dead letter to date and no river boards have been established under this act so far. This is not to suggest that the act suffered from any serious limitations. The fact is that the various governments at the Central level in the country have resorted to adjudication directly in cases where the negotiations fail, without the intermediate step of arbitration as provided in the River Boards Act (RBA). The result has been an overuse of the ISWD act which has led to a lot of wastage of time as well as resources of the nation as a whole. Instead, if the Central government had set up a river board for each and

every interstate river in the country, the problems would have been resolved long ago.

Comparison and Discussion:

A detailed comparison of the ISWD Act and the River Boards Act reveals the following differences in their provisions:

- The ISWD Act falls under the purview of judicial functions of the government whereas the RBA is an expression of the welfare and developmental functions of the government.
- RBA provides for a *suo moto* action on the part of the Central government whereas the ISWD Act provides for the action of the Central government in only those cases in which it is approached by the State governments of the riparian states concerned.
- RBA is a comprehensive act that provides for the overall development of the river basin as a whole whereas the ISWD Act is limited to resolving disputes over the shared water resources (Bhavanishankar, 2004).
- Under section 8 of the RBA, any matter that can be referred to arbitration under the RBA cannot be brought before any Tribunal under the ISWD Act. This makes it clear that the intention of the framers of the two laws was to encourage the application of the RBA while the ISWD Act was to be used only sparingly and that too as a last resort.
- The Tribunal created under the ISWD Act ceases to function after its decision is made whereas the River Boards created under the RBA are permanent bodies which are involved in all the aspects of river basin planning, development and management.

Conclusions and Suggestions

The comparison of the philosophies behind the international water sharing laws makes it clear that the principle of reasonable and equitable utilisation is the most logical and preferred principle worldwide in determining water allocations of the riparian States. It has also been recognised by the International Court of Justice in the river Danube case between Hungary and Slovakia. However, the difficulty in using this principle arises mainly from the subjective element involved in assigning weights to the relevant factors and the difficulties associated with the quantification of social, economic and ecological factors within watercourse States.

In spite of these limitations, this principle occupies the centre stage in world politics because of its 'all-encompassing' nature. A detailed examination of the Indian Constitutional provisions shows that the Constitution has empowered Parliament to deal with the interstate water disputes. In this regard, the Indian Parliament enjoys much more power than other federal governments such as the US federal government. However, what is lacking is the willingness of central government to make all-out efforts to resolve disputes on a long-term basis without any regard for

the political compulsions. Even though there have been suggestions of water pricing and water trade, these can be used only in those cases where the initial allocation of water rights exists (Richards and Singh, 2002). In the case of interstate water disputes in India, there is no agreement between the riparian States as to the initial water rights. Hence the situation is one of pure conflict and there is a clear role for higher level authority. The need of the hour is the creation of an autonomous River Basin Commission for each interstate river basin along the lines of the River Boards Act that should be free from interferences by the basin States. The members of the Commissions can be drawn from eminent hydrologists, lawyers and retired Supreme Court and High Court Judges. However, to prevent biased decisions, about one-half of the members of a particular Commission should not be from any of the riparian States which are under the jurisdiction of that particular Commission. The remaining half can be drawn from the basin states, there being an equal representation of each of the basin states. Therefore, what is needed is not a new act, which would be almost impossible to pass in this era of coalition politics, but a proper implementation of the provisions of the RBA in letter as well as in spirit. Moreover, to encourage the local level participation in decision-making, permanent Water User Associations should be set up at the local level which should interact directly with the River Basin Commissions. Hence, what is desired is an amalgamation of the top-down and bottom-up approaches. Finally, in order to have an international acceptance, it should be made mandatory for all the Commissions to allocate water among the riparian States on the basis of the principle of reasonable and equitable utilisation.

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