

## **INTER-STATE RIVER WATER DISPUTES IN INDIA: LAW, GAPS & SOLUTIONS**

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### **ABSTRACT**

*This article covers the nature of India's long-running inter-state river water conflicts. This is accomplished by a presentation of the factors responsible for water disputes and a critical examination of the inherent gaps in the dispute resolution process. The relevance of inter-state river water sharing is a major issue in India for preserving the federal spirit and improving Union-State and State-State ties. As a result, this report contained suggestions and ideas for developing the most efficient and equitable process for sharing inter-state river water.*

**Keywords:** Federalism, Inter-state River Water Disputes, Art. 262, Inter-State River Water dispute Act.

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## **FEDERALISM AND INTER-STATE WATER DISPUTES : INDIAN PERSPECTIVE**

“Idea of India” and “Idea of Uniformity”: The co-existence of these two terms in perspective of social, political and geographical concept is not possible in case of India. This is because the fundamental thought of “Idea of India” is diversity and pluralism which is directly against notion of uniformity. Diversity is a natural concept which formulates the socio-cultural aspect of India whereas pluralism is an artificial concept which paints politics in India. From Pre-independence period, diversity and pluralism have been existing together. Post-Independence; the constituent makers were surrounded by following question- whether Indian Constitution and Indian Legal System should be inspired by legal pluralism or in other term liberal Constitution?

On behalf of legal pluralism, Indian legal system and Indian Constitution has provided various religions their fundamental principles based on their personal law, special provisions for certain special classes, reservation provisions for tribes, equipping special provision based on sex. Additionally at the indigenous level, the factor which has maintained the concept of legal pluralism in Indian Constitution is ‘Federalism’.

After long chain of debates and discussion, the members of Constituent assembly finally acknowledged that to make idea of India legally pluralist, it is obligatory that the opinion, and different modes of working, politics etc. which are diversified, should be honoured and synthesized. To make this come true the Constitution was made flexible and concept of Power distribution and separation was introduced. This led to the adoption of federalism in our Constitution ideologically as well as principally.

Fundamentally federalism is based on negotiation and agreements and its different component units favour co-operation among themselves.

Consequently, the motive with which federalism has been pitched into our Constitution includes:

1. The interest of the last individual of the society should be taken care of and nursed so that his/her voice must be represented.
2. The centralization of powers leads to Constitutional dictatorship, therefore, powers has to

be distributed between Centre and state as well as between the various organs i.e. legislative, executive and judiciary, which is an indicative of limited government and a liberal Constitution.

3. Natural Diversity and Pluralism (i.e. Political and Legal) concept has to be there for the existence of “Idea of India”.

Federal provisions in Indian Constitution have immensely contributed in Indian legal journey between Centre-state and state-state through various coordinative and co-operative machinery which has yielded in addition affirmative, to productively positive results.

Post-independence till date, still there are some disputes which has been a huge challenge for Indian Federalism, among them most prominent being River Water Dispute.

Due to overgrowing population and fixed source of water, the sustainable management of water bodies and their distribution is becoming a day by day challenging problem especially in case of River water distribution. River water dispute is immensely affecting the federal spirit because Maximum River passes through two or more states, which creates a panic between them in terms of their use and water distribution. Prominent Indian rivers like Cauvery, Krishna, Ravi-Beas, Sutlej, and Narmada are confronting with River-Water distribution. Therefore, the issue of Inter-state water sharing should be taken very seriously because it directly affects the relation between Centre-state as well as between state-state. Along with this it directly challenges the maintenance of federal spirit of the Constitution.

In India, the inter-state river water dispute genesis is a combination of various social, political, geographical and various technological – legal issues.<sup>1</sup> These are follows:

1. A riparian connection is fundamentally a regionally created unequal power relation. The capacity of upper riparian states to appropriate water early typically puts them at an advantage. Additionally, the states that are upstream construct dams to store water and utilise it via gravity flow after establishing the necessary height. The downstream states objected to this, especially since the river had a delta(Cauvery, Krishna, Godavari,

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<sup>1</sup> Shrinivas Chokkakula, *Interstate Water Disputes Perils and Prospects of Democratisation*, 49 (9) Economic & Political Weekly 75, 77 (2014).

Mahanadi), and Old users who assert historical rights like the right of appropriation, prescriptive rights, or natural flow rights are at odds with new users who assert territorial rights in this conflict.

2. Colonial-era agreements that have been passed down historically are often biased. River water conflicts between states are an example of the continuation of colonial and imperial power structures. In the case of Cauvery, the British Powers had their own imperial interests in Mysore, where they had an indirect authority via a Prince, and Madras, where they had a direct rule. The English inclination for resolution by agreement contributed to the creation of the 1892 and 1924 accords that were detrimental to Mysore. Further, tribunal awards given on the basis of these outdated laws and legal principals involved in it (Prior appropriation, Natural flow rights) are producing conflict with equity consideration and are prone to contestation and politicization.
3. Identical politics escalate the scale of dispute by involving cultural and ethnical pride. The Cauvery dispute escalated to a point where it change into a conflict between pro-Tamil and pro-Kannadiga identities and interests.
4. The limitation of technology to predict water availability and the uncertainties of the monsoon are a major source of contestation and politicization. There is no acceptable and entirely satisfactory legal principle to organize inequalities arising out of these limitations. It particularly gets challenging during distress years.

Inter-state river water disputes now divide every segment of our society into: political parties, states, regions and sub-regions. Water disputes seem to be draining faster to the grassroots level in India.

### **INTER-STATE RIVER WATER DISPUTES : LAW AND INSTITUTIONS**

Water resource are spreading over a large area covering often inter-state, rivers with varying socio-economic conditions and conflicting interests, requiring workable machinery keeping in view the overall interest of the country. Constitution maker realized that this could be achieved only by adopting an workable and equitable mechanism for sharing inter-state river water.

The legislative and functional authority of the Union, States, and municipal governments with regard to water is set down in the Constitution. The Constitution delegated to the states the overarching power to regulate water under the Division of powers. As agriculture was the mainstay of the economies of most states, this became necessary. Additionally, the peasants and agriculturalists were unwilling to cede their regulatory powers over water to a distant federal government after independence because they had already acquired those rights during British Rule through the reform of 1935. Keeping this in mind. Now, water is mostly a state responsibility, with the exception of interstate waterways. Entry 17 of List II of the Seventh Schedule, which deals with issues over which states have authority, reads: Water, that is, water supplies irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I; (Union list), which reads: Regulation and development of inter-state rivers and river valleys to the extent that such regulation and development under the control of the union is declared to be in the public interest by parliament by law. Dr. Ambedkar was assigned the responsibility of resolving the inter-state river water problem. “The task entrusted to the Ambedkar was difficult and complex as by the Act of 1935, irrigation had been brought under the jurisdiction of state government in British India and the central government’s role was confined to mediation in inter-state disputes. Dr. Ambedkar proposed an amendment for the necessity of setting up a permanent institution to deal with the disputes, the incidence of which was bound to increase with full utilization and generation of power in independent India.”<sup>2</sup> In the light of these consideration, the present Article 262 was introduced which deals with the adjudication of disputes relating to matters of inter-state rivers valleys; the article reads as follows

“Article 262 (1): Parliament may by law provide for the adjudication on any dispute or complaint with respect to the use, distribution or control of water of, or in any inter-state river or river valley.”<sup>3</sup>

“Article 262 (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).”<sup>4</sup>

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<sup>2</sup> P. Abraham, *Notes on Ambedkar’s Water Resources Policies*, 37(48) Economic & Political Weekly 4772, 4772 (2002).

<sup>3</sup> Art. 262(1), the Constitution of India.

The Inter-State River Water Dispute Act, 1956, was passed by parliament in accordance with the aforementioned clauses. The ISRWD Act of 1956 provided an exception by adding the concept of negotiation-based dispute settlement, departing from the mandatory adjudication system. If the central government believes that a water dispute cannot be resolved via discussions, Section 4(1) requires that a tribunal (ad hoc) be established. According to Section 11 of the Act, any water issue that may be brought to the tribunal under this Act is not subject to the Supreme Court's jurisdiction. However, the Supreme Court has the authority to issue temporary orders to maintain the status quo until the tribunal is established. The River Board Act of 1956 was also passed by Parliament with the intention of allowing the union government to establish boards that would provide guidance on the integrated development of inter-state basins after consulting with the state governments. By creating growth plans and figuring out the coast to each state, the River Boards were designed to avoid confrontations.

### **THE REAL “GAP’S” & “REMEDIES” : CRITICAL VIEW**

Despite of presence of a well-established demarcation of power sharing on water jurisdiction (Entry 17, List II, Entry 56, List I) and dispute settlement machinery (Art. 262, ISRWD Act 1956, River Water Board Act, 1956) long lasting inter-state river water disputes pose a challenge to existing settlement. These ‘ambiguities’ shows that there are critical gaps which are fundamental as well as procedural, and are responsible for genesis of dispute, longevity of dispute, non-implementation of justice of delivered.

Following section in a row will highlight these debates, “gaps” with possible remedial steps taken so far in case of river water disputes in India.

1. “Popular perception and debates in India pointed out that the ill-defined legislative power (Entry 17 of List II, Entry 56 of List I) gives a dominance to the Centre in respect of water management, as entry 17 is subject to the entry 56. In an extensive critique of this view, Iyer (1994a, 1994b, 2002) argues that the Centre has never exercised its powers under the Entry 56 and always allowed states to take the larger responsibility. These willful abdications by the Centre lead to an understanding that the states have exclusive power to

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<sup>4</sup> Art. 262(2), the Constitution of India.

manage water resources.”<sup>5</sup> “Iyer (2002) insists that there are other possible ways of extending Centre’s control over the use of water resources for eg. the provisions of the entry 20 in the concurrent list about economic and social planning requires the states to take clearance from the Centre for any project of water resources development. Further, there are several other acts that require clearance from the Centre to satisfy other consideration, for instance, Forest Conservation Act and Environment Protection Act. These various provisions allow the Centre to be responsible for water resource development and also provide powers to regulate and control them, Centre has not fully exploited these provisions so far. The point here is the pattern of power distribution regarding water under different list (state and union) cannot be a reason for emergence of interstate water disputes.”<sup>6</sup>

2. A demand of “Greater Role of Centre” in case of river water sharing is another curious case of debate. But this argument must be negate at a initial level because of the two prominent reason:
  - a) Any attempt to change/amendment in the power listed under 7th Schedule require Special majority with the consent of the more than half number of the state existed (Art. 368(2) r/w Proviso), which is very arduous task to be completed specially in the case where “power of the states” are being in the danger of shifting.
  - b) It will question the legal pluralism of Indian Constitution which is represented by federal principle.
3. Law provisions and institutions to deal with the water dispute and their resolution are facing lot of criticism in an academic and legal domain. Weightage of the criticism and subsequent suggestion at academic and policy level proven to be helpful in dispute resolution.

Firstly, River Board Act, 1956 enacted under entry 56 of List I. The Act's scope limits the boards to consultative duties when it comes to influencing states and their decisions, despite the fact that the Act's goal was for the federal government to regulate interstate rivers in the public interest. However, no water boards have yet been established under the RBA. Nariman provides a clear

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<sup>5</sup> Shrinivas Chokkakula, *Disputes, (de) Politicization and Democracy: Interstate Water Disputes in India*, RULNR Working Paper Series, 7, Working Paper Number RULNR/WP/2012/108, Centre for Economic and Social Studies, Hyderabad (2012).

<sup>6</sup> Ibid, at 8.

explanation for the RBA's advising character and inefficiency by arguing that the Indian state's intense centralization in 1950, with its powerful central government and submissive states, may have been a factor in the assumption of the boards' potential success. Following the advent of coalition politics in the 1990s, this unquestionably altered. The shift in power politics led to stronger states and amenable development and management. Efficacy of laws changes with the time, which makes a case for the periodical review. Further, the National Commission to Review the working of the Constitution (2002) turned RBA as a 'Dead letter' and recommended repealing of RBA and replacing it with a more comprehensive legislation.<sup>7</sup>

Secondly, dispute settlement system under the Article 262 and the ISRWD Act, 1956 is very dilatory and cumbersome. Procedural ineffectiveness i.e. delay at every stage from the establishment of tribunal to the giving of the award, and fundamental ineffectiveness, adhoc nature of tribunal, bindingness of award, problem of non-implementation of award presented a serious problem. Although courts are prohibited from reviewing tribunal verdicts, the Supreme Court nevertheless hears cases involving environmental considerations, population relocation, and human rights in the context of individual projects. Such referrals prolong the resolution of disputes and the completion of projects by years. To overcome with the irregularities in ISRWD Act, which was amended in 2002 and the following important changes were made on the recommendation of Sarkaria Commission Report on Centre-State relations.

- “Government of India to establish a tribunal within one year on a request by a state government.”<sup>8</sup>
- “The tribunal to investigate the matters referred to it and gives its report within a period of three years (Govt. of India may extend the period by another 2 years).”<sup>9</sup>
- “The decision of the tribunal, after its publication in the official gazette by the central government, shall have the same force as an order or decree of the Supreme Court. [Sub-section (2) of Section (6)].”<sup>10</sup>

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<sup>7</sup> Ibid, at 9.

<sup>8</sup> Report of the Sarkaria Commission | ISCS, <http://interstatecouncil.nic.in/report-of-the-sarkaria-commission/> (last visited Jan 8, 2023).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*



After the 2002 amendment of ISRWD Act, the problem of delays at the various stage is likely to be substantially diminished. But, forcibility of the tribunal decision and adhoc nature of ISRWD tribunal posing a challenge of non-implementation of the decision of the ISRWD tribunal. An ISRWD tribunal can only issue a verdict; it has no involvement in its execution. Aside from the fact that it will cease to exist after it has rendered its final judgment, it has no enforcement powers (of its interim award, if any) even while it is in existence. Again, would the ruling be more "final and binding" if it were a supreme court order? What would happen if a state disobeyed or refused to enforce a tribunal's decision? Does the new statute (amended ISRWD Act of 2002) allow for contempt of court charges? There is no simple solution to these issues.<sup>11</sup>

However, a new measure to alter the ISRWD Act of 2017 aims to resolve the unfair circumstance. A permanent tribunal is proposed under the bill; now, tribunals are only established when a river water issue occurs. A Disputes Resolution Committee (DRC) is established under the Bill to allow for negotiated agreements. This clause is intriguing since it seems to prevent disputes from moving on to the next round of legal review. The other well publicized clause for an information system and data bank. The present statute also has a similar provision for data banks and information systems, but it requires the center to establish such a repository.<sup>12</sup>

The success of the proposed bill will depend upon the factors namely implementation capacity of permanent tribunal, techno-legal efficiency of the dispute resolution committee and consent of state's over a piece of data etc.

Thirdly, a "prolonged issue of debate about inter-state river water dispute is the role of Supreme Court in water conflicts. Bar of SC jurisdiction in ISRWD matter did not prove an absolute bar on SC to deal with issue related to water conflicts. SC has assumed jurisdiction over all other matter including interpreting the awards of tribunal under the ISRWD Act (as it did in the Krishna cases and the Narmada cases) and inter-state water sharing agreements (as in the Ravi-Beas case).<sup>13</sup> Recently in dealing with Cauvery dispute the apex court has allowed a Special Leave Petition (SLP) challenging a tribunal's award, and also modified the award. Apex Court

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<sup>11</sup> Ramaswamy R. Iyer, *Interstate Water Dispute Act 1956 Difficulties and Solutions*, 37(28) Economic & Political Weekly 2907, 2908 (2002).

<sup>12</sup> Shrinivas Chokkakula, *A stronger river referee*, The Indian Express 15 (New Delhi, 22/07/2017).

<sup>13</sup> *Supra* 2, at 86.

itself justified the maintainability of SLPs appeals under Article 136 of the Constitution in view of Article 262 barring its jurisdiction over inter-state river water disputes. These changes over jurisdiction lead the debate to the point where it is being suggested that original jurisdiction of the water conflicts must shift from tribunal to the Supreme Court & ISRWD Act must be repealed. (NCRWC Recommendation 2002). It would be unfair to give the Supreme Court initial jurisdiction over river water disputes that are expected to last for years and entail a lot of complicated facts and economic issues in addition to (or instead of) legal questions. The NCRWC is correct to wish to reinstate Supreme Court jurisdiction, but it ought to be appellate jurisdiction.”<sup>14</sup>

4. Since long national consensus or general guideline for planning of water and dispute resolution is being demanded. In spite of the same views supported by stalwarts like by Dr. Ambedkar, it seems to be non-practicable. The reason for the above are following

Firstly, it is very arduous and time taking process to frame an national consensus on planning of water and dispute resolution mechanism, meanwhile the conflict-resolution mechanism cannot be suspended. Even National Water Resources Council has twice considered a set of draft principle but has not been able to reach any kind of consensus or even an approach to it.<sup>15</sup>

Secondly, tribunals and Supreme Court has almost take all available principle, (related to international law aspect, topography aspect, environmental aspect) while considering the water conflict. This inclusive approach neglect the essentiality of any general guidelines. Recently, on 16th Feb., 2018 verdict of Cauvery SC shows the same inclusive approach. The liability of Karnataka has been reduced from 192 TMC annually at the inter-state border of Biligundlu, for four reasons (para 396). “These are :

- (i) The change of legal position from prescriptive rights and natural flow theory to equitable apportionment.
- (ii) The non-development in Karnataka due to the restrictive agreement of 1892 and 1924 based on said outdated natural flow theory.

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<sup>14</sup> Supra 8, at 2910.

<sup>15</sup> Supra 8, at 2908.

(iii)The existence of large drought areas in 29 talukas in Cauvery basin in Karnataka.

(iv)The need for supplying drinking water to two-third of Bangalore (which is a tech hub) lying outside the Cauvery basin.”<sup>16</sup>

Though, Tamil Nadu’s share of surface water has been reduced by 14.75 TMC Act, Tamil Nadu would not suffer due to this reduction because it has been blessed with large ground water in the delta region.

## **RECOMMENDATIONS**

1. If negotiation fails, intermediate stages of conciliation and mediation must be put into the existing conflict resolution mechanism, before taking recourse directly to adjudication. These stages enhance the possibility of mutual agreement which is considered superior to adjudication. “It seems undesirable to prescribe various mandatory stages such as mediation, conciliation etc., through which the parties must pass in a sequence before recourse to adjudication: that would only introduce even greater delays. Instead the processes of negotiation, mediation and conciliation should be continued even after a tribunal is established (without suspending the adjudication proceedings) and if agreement is reached it could be reported to the tribunal and the tribunal could make that agreement its award.”<sup>17</sup>
2. To Existing dispute resolution procedures only allow for a single, non-appealable verdict in order to prevent the potential of extended litigation. One or more of the parties to the conflict may feel betrayed and wronged as a result of this. At least no state may legitimately harbor resentment if an appeal against the Award of the Tribunal established under the ISRWD Act is open to the Supreme Court. The issue of non-implementation will be resolved as long as the Supreme Court's rulings are still accepted and followed in this nation. It's possible that many worry that if an appeal is allowed, the Supreme Court will hear every case. Yes, it is possible, but it is already taking place due to matters unrelated to

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<sup>16</sup> The State of Karnataka vs. State of Tamil Nadu Civil Appeal No. 2453 of 2007 and State of Kerala vs. State of Tamil Nadu Civil Appeal No. 2454 of 2007 and State of Tamil Nadu vs. State of Karnataka Civil Appeal No. 2456 of 2007 (Supreme Court, 16/2/2018).

<sup>17</sup> Supra 8, at 2908.

the actual water conflict. The change is required before the appellate provision(s) are added. The Constitution's enabling provision is Article 262. The word "may" is used twice in this sentence: "Parliament may introduce legislation for the adjudication of the river water issue" and "Parliament may exclude the courts' jurisdiction." In other words, parliament is only permitted—not required—to approve laws establishing tribunals, and it is likewise permitted—not required—to forbid courts from exercising their authority. Therefore, a modification to the ISWD Act but not to the Constitution would be necessary to provide for an appeal to the Supreme Court.<sup>18</sup>

3. Centre can plan, control or manage the river of national importance through the legislation under Entry 56 and by setting up of River Board under river Boards Act. However, the practical reality is that neither the law nor any board not yet made.<sup>19</sup> Reason behind this inaction is vote-bank politics. Thus, adverse impact of politicizing inter-state water dispute can't be discounted, but politics might be helping in accentuating interstate interdependencies and deepening federalism in India. But to argument this, there is a need for creating institutional spaces to ensure the transparent exchange of information between states, defuse tensions, and facilitate negotiation and collaborations. The interstate council (Article 263 of the Indian Constitution) is a potential institutional space for channelizing the politics of inter-state water disputes towards stronger interstate relations.<sup>20</sup>
4. In its 1999 report, the National Commission for Integrated Water Resources Development advocated the formation of River Basin Organizations (RBOs), which would serve as a venue for mutual talks and agreements between state governments, local governments, and water consumers. The optimal system to use is river-basin planning and execution, as the experience of France, Australia, and China reveals. The system has been successful in other nations, and since Australia has a federal structure, its experience is important to us. In terms of complete administration, decentralization, and involvement, RBO's would be considerably unlike from River Boards.
5. The IRWDA 1956 does not recognize any non-state actor as a party. The farmers and the

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<sup>18</sup> Supra 8, at 2909.

<sup>19</sup> Taniya Malik, *Inter-state River Water Dispute: A Study in the light of the Federal Principle in India*, 4(10) International Journal of Humanities and Social Science Invention 1, 6 (2015).

<sup>20</sup> Supra 1, at 81.

other water users in the basin are not heard by the tribunal. Any reform of the current mechanism for resolving interstate water disputes should, in my opinion, include the public as interested parties. Further, a civil society dialogue or what is referred to as Track Two diplomacy (Multi-Stakeholders Dialogues) may help under such circumstances. MSD other a cordial climate where conflicts could be turned into opportunities for an effective and fruitful collaboration to achieve sustainable development. Dialogue workshops and Cauvery family are the initiative started by under MSD. It plays a key role in suppressing violence during all deficit years during the period 2003-12 when it was active.<sup>21</sup>

6. International riparian law principles and international transboundary water regulations are often used by interstate water dispute courts and the Indian Supreme Court to resolve allocation and development conflicts. Because there is a vast, current collection of laws with a practical approach, it is advised that the significance and benefits of international legal principles be warmly accepted and implemented. The "Berlin rules of 2004" reflect the consolidated body of knowledge resulting from ongoing revisions to international commercial law that relies on conventions and accords. In addition to the concepts of fair and equitable use, the obligations of not causing major damage, cooperation, information sharing, collaborative consultation, and conflict resolution are also included in these guidelines.

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<sup>21</sup> S. Janakarajan, *The Cauvery Water Dispute Need for a Rethink*, 51(41) Economic and Political Weekly 10, 13 (2016).