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Water Law and Policy: An Indian Case Study

Amardeep Singh[1], Shahid Noor[2], R. Chitra[3], M. Gupta[4]
[1]Corresponding Author and Scientist 'D', [2] Scientist 'C', [3,4] Scientist 'E'
Central Soil and Materials Research Station, Ministry of Water Resources, RD & GR, Government of India, Olof Palme Marg, Hauz Khas, New Delhi-110016

***Abstract*— About 82 percent of the Indian territory lies within its major and medium interstate rivers. Known worldwide as a "federation sui generis", India has a unique distinction of having a federal form of government with a strong unitary bias. This study attempts to analyse 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 their application in resolving the interstate water disputes in India. The Constitutional provisions relating to the Centre-state relations are discussed with a 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.*

***Keywords*— Federation, interstate rivers, water disputes, action plan.*

***Disclaimer*— The views expressed in this paper are strictly individual views of the author and do not, in any way, represent the views of the department/organization where they are presently working.*

I. INTRODUCTION

About 82 percent of the Indian territory lies within its major and medium interstate rivers (Hassan, 2008). 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.

II. PHILOSOPHIES BEHIND INTERNATIONAL WATER SHARING LAWS

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 the five paradigms enunciated below (Embid, 2002; Gosain and Singh, 2002; Salman and Uprety, 2002):

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 utilize the rivers and other natural resources falling within its territories in whatever way it desires irrespective of the consequences of such use on the neighbouring States. This principle is also known as the Harmon Doctrine as it was applied for the first time in 1895 by the US Attorney General Harmon to the dispute of the pollution of Rio Grande River between the US and Mexico. At the very best, it only illustrates the belligerent stand of the upstream riparian States providing plenary powers of watercourse development to them 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

This principle states that the downstream riparians have an absolute right to have an uninterrupted flow of water from the river, no matter what the ground conditions may be. Hence it prohibits the upstream riparians to develop any part of the shared watercourse if it causes any harm to the 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 works on the shared watercourse without the permission of the downstream riparians.

Principle of Prior Appropriation

This principle favours neither the upstream riparian States nor the downstream ones. It states that the status quo should be maintained i.e. it favours the State which puts the water to use first, thereby it protects 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 utilizing the water resources, the better it is" does not favour the developing and underdeveloped countries. This is because they lack the technical expertise and economic resources to utilize the watercourses. This principle ensures that the countries which lag behind in technological advancement are never able to utilize and develop any part of the watercourse, which seems to be absurd, and hence this principle has not found many takers amidst the international watercourses sharing nations. However, for the nations or parts of a nation which are placed equally in terms of technical knowhow and have equitable resources, this principle can be applied in determining the resource sharing of transboundary watercourses. This is primarily the reason why this principle is the legal basis for the allocation of water resources in western part of USA.

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Principle of No Significant Harm

As used in the sharing of international waters, this principle gives each and every watercourse state a free hand to utilize the watercourse in whatever way it wants, provided that any such use does not cause any harm to the interests of other watercourse states. 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 a mere 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 exclusively utilizing an international watercourse owing to lack of technological advancement of other states sharing the watercourse. Now if a state B is desirous of utilizing the watercourse for meeting its water demands, then state A would invoke this principle and argue that if it was earlier utilizing (say) 100 units of water, now it would get only 75 units. Hence a significant harm would be caused to its interests. Now is this not the principle of prior appropriation, which tends to eternalize 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 not only include the significant harm (of 25 units of water) which would be caused to state A owing to entry of state B but should also include the significant harm which would be caused to state B if it is not permitted to utilize those 25 units of water. Only then can a reasonable resolution be brought about.

Principle of Equitable Apportionment

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 Transboundary 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.

III. UN CONVENTION ON THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES (1997)

The UN Convention is a *framework convention* that aims at ensuring the utilization, development, conservation, management and protection of international watercourses and promoting optimal and sustainable utilization thereof for present and future generations (Salman and Uprety, 2002). One of the most significant features of the UN convention is the balance between Articles 5 and 7 of the convention or the balance between principles of equitable utilization and no significant harm principle. Article 7 clause 2 makes this distinction very clear as it says 'where significant harm nevertheless is caused to another watercourse state, the states whose use cause such harm shall, in the absence of agreement to such use take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected state, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation'. Why the distinction between principle of equitable utilization and principle of no significant harm is so important and why almost all the international conventions have favoured the former over the latter would be clear from this illustration. Consider Nile river, a classic case of 10 riparian states with the most downstream state (Egypt) being the traditional controller of the river. Now if an upstream state, like Ethiopia, wants to utilize waters of Nile river, then Egypt can claim its exclusive rights by asserting that significant harm would be caused to its traditional interests if Ethiopia enters the scene. However if principle of equitable utilization is applied then all the factors would be considered in the light of each basin state being entitled to a reasonable and equitable use of waters of an international river and hence Ethiopia as well as other upstream states would be given a due chance to utilize the waters of shared river basin and would not be penalized eternally for being late starters in technology.

Hence, it can be rightly inferred that the equitable utilization principle is by far the most logical and the most reasonable means of determining shares of international waters and that is why intellectuals and scientists round the world have given preference to this principle over all other principles of water sharing.

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IV. NATURE OF THE INDIAN CONSTITUTION

A federation is a group of regions or states united with a Central Government 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. The 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 increasingly realized 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 degrees and whether it is a federation or not depends upon the number of federal features it possesses (Bakshi, 2003). 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 (Bakshi, 2003). Even though all the essential characteristics of federalism 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. Thus, apart from certain provisions biased 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.*

Comparison with the US Scenario

Even though both India and US have federal form of governance, the extent of federalism is different in both the countries. In India, plenary powers are provided to the Union Parliament and hence in case of emergencies, it can act as a unitary form of government whereas in US, individual states have much more power than the federal government. The reasons are not far to seek. At the time of framing of the Indian Constitution, the country had already gone through one partition and there were demands of other breakaway nations. So the Constitution framers had the unity of the country uppermost in their minds and hence they decided to give away most of the powers to the Central or the Federal government. In the case of US, the states had just got independence and at the time of framing of the Constitution, they wanted to give minimum powers to the Federal government and retained the maximum powers for themselves. Such Constitutional differences can be seen in the way the interstate river disputes are resolved in both the countries. In India, for example, the Cauvery River Authority, which had been created for resolution of the Cauvery river dispute had the Prime Minister of the country as the Chairperson, and the Chief Ministers of all the riparian states as the members. As has been seen in the past many incidents, there has been a stalemate many a times and the decision of the Prime Minister is final in such cases. In US, on the contrary, in almost all the interstate fresh water compacts, the conflict resolution authority consists of 1 or 2 members from each of the riparian states and generally 1 representative of the Federal government. But the voting rights are enjoyed only by the state representatives and the Federal representative is more of a facilitator. Hence, it can be inferred that the Indian Constitution has empowered the Parliament to deal with the interstate water disputes and in this regard, the Indian Parliament enjoys much more power than the other federal governments, say the US federal government.

Provisions regarding interstate water disputes in the Indian Constitution

In the seventh schedule to the Constitution of India, there are three lists, Union, State and Concurrent List (Bakshi, 2003). Entry 17 of the State List puts water in the domain of the respective states and reads as under:
"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 (a).*

Parliamentary Legislations Pertaining to Conflict Resolution in Interstate Waters

The enactments of the Indian Parliament with regard to interstate river water disputes (Bakshi, 2003), are:
1. Interstate Water Disputes Act (1956)
2. River Boards Act (1956)

Comparison and Discussion

A detailed comparison of the ISWD Act and the River Boards Act (RBA) 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

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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.
- Under section 8 of the ISWD Act, 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 aspects of river basin planning, development and management.

Though the River Boards Act was passed in 1956 after ISWD Act, it came into force only in 1957, much later than ISWD. Being a later act on the same subject, it has a better validity than the ISWD Act. But not much activity has taken place under this act. This is not to suggest that the act suffered from any serious limitations. The fact is that the various governments which have come at the Central level in the country have directly resorted to adjudication in case the negotiations fail, without going in for the intermediate step of arbitration as provided in the River Boards Act (RBA). The result has been great use of the ISWD act.

V. 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 is mainly due to the subjective element involved in assignment of weights to the relevant factors and the difficulties associated with the quantification of some of the factors like social and economic needs of the concerned watercourse States, ecological factors etc. However, in spite of these limitations, this principle occupies the centre stage in world politics due to its "all encompassing" nature. An examination of the Indian constitutional provisions shows that the constitution has empowered the Parliament to deal with the interstate water disputes. In this regard the Indian Parliament enjoys much more power than the other federal governments, say the US federal government. 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 of a higher level authority. Finally, to have an international acceptance it should be made mandatory to allocate water among the riparian States on the basis of the principle of reasonable and equitable utilization.

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