INTERSTATE WATERS OF INDIA: COLLISION OR CO-OPERATION

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Abstract : *The history of trans-boundary water sharing has been replete with struggles. India is not an exception and many interstate river basins have become difficult to handle as Indian water-dispute settlement mechanisms for sharing interstate river basins are ambiguous and opaque. Water conflicts as a product of this situation have now gone to the extent of becoming a challenge against the solidarity of the nation which is of prime importance and also a prerequisite for a prosperous India especially when the global systems, before they could prove their worth, have started crumbling. The paper enumerates shortcomings of the present legal system and references some specific historical events, global deliberations and underlines the need of immediate corrections. In absence of sound legal framework, how alternative dispute redressal mechanism could come to the succor is cited. Because India is an ancient civilization having a treasure of social value system which if properly tapped, can show the way to a better dispute redressal mechanism. The objective of the paper is to address the present crisis of water for diagnostic purpose and to show some way to appropriate and effective governance and management in the water sector in India. The coming year i.e 2013 is being celebrated as the International Year for Water Co-operation and therefore this aspect takes greater significance.*

Key Words : *Water Sharing, Water Conflicts, Dispute Redressal, Legal Frame*

INTERSTATE BASINS: ACCOMPLISHMENTS AND ISSUES

Seven decades of India's post-independence period has witnessed spectacular profile in its water resources sector. During this planned development period, commensurate with the four fold increase in the global annual water withdrawal, India, too, has increased its water storage capacity from a meager 15 BCM to more than 200 BCM, by constructing over 4000 dams. Consequently irrigation potential has increased five folds and food grain production by almost four and half times. Many of them are in interstate basins. This has enabled Indian economy to survive in the time of crisis when the robust most economies have failed to sustain.

Despite praiseworthy accomplishments, the other side of the said projects on interstate river basins is worth considering. A sense of belongingness in the people has been only a dream, sharing of water of the same basin has become a bone of contention. Development myth has captured a special place in public life and level of consumption of resources has been perceived as a benchmark of development and therefore fight for resources at individual and political levels is obvious. Water being the most basic resource for life, it becomes a valid point for conflict on the political stage, and, therefore, in many interstate basins conflicts have erupted. Cauvery, Ravi-Bias-Satluj, Narmada, etc. are the disputes which have left the states confronting for many years. Disturbed law and order in the states has taken tall of many lives. The monetary cost to each party state is inestimable due to delayed implementation or part implementation of the projects, rehabilitation related issues, legal expense, etc. At the time of elections, social tension rises and it vitiates diplomatic relations with the neighboring states which has a long run impact and sectarianism replaces

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nationalism eventually and infightings amongst the people on linguistic ground and regional biases rule over the societies which finally penetrate to the lower working level like industrial labor and private entrepreneurship. State solidarity when overrides the national solidarity, regional chopping of the states starts. All these make a dent up on the functional oneness of the nation which is the basis of our Constitution and also of the existence of the nation as we have still many challenges to face at the international level.

GENESIS OF CONFLICTS – FLAWFUL LEGAL SCENARIO

Constitutional Provisions

Legal recognition of water as human right is missing in Indian constitution, unlike Mexico, South Africa, Switzerland, etc. However, in some judgments of the Indian courts, doctrine of right to life has been interpreted to have innately contained right to water. The Constitution of India is considered as the source of Indian laws. India being a federal (or a quasi-federal) State, division of responsibilities between the State and Centre (Union) is made in the form of: the Union List (List-I), the State List (List-II) and the Concurrent List (List-III). Article 246 of the Constitution deals with subject matter of laws to be made by the Central Parliament and by Legislature of the States.

Entry 56 under List I of the Seventh Schedule provides that "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". Entry 17 under List II of the Seventh Schedule provides that "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 I".

Article 262 provides that in case of disputes relating to waters -

(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, or 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).

According to Article 39, “The State shall …. direct its policy towards securing ….. that the ownership and control of material resources are so distributed as best to subserve the common good.” As per the Directive Principles of State Policy of the Constitution of India laid down under Clause 38(2), “the State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but amongst groups of people residing in different areas or engaged in different vocations”.

Article 368 is the general amending power of Parliament. Twenty Fourth Amendment made some changes in Article 368 viz. (i) It made it mandatory on the President to give his assent to an Amendment Bill passed by Parliament (ii) Article 13(2) which prohibited the State from

making any law which takes away or abridges the fundamental rights, shall not apply to any amendment of the Constitution under Article 368.

Special Acts

The Central Government is conferred with powers to regulate and develop inter-state rivers under Entry 56 of List I of Seventh Schedule to the extent declared by the Parliament by law to be expedient in the public interest. However, Parliament has not made effective use of Entry 56 to legislate except enacted two special acts, viz., Inter State Water Disputes Act of 1956 and the River Boards Act of 1956. Six Water Dispute Tribunals have been constituted in the country viz. Narmada, Cauvery, Krishna, Godavari, Ravi Beas and New Krishna Water Dispute Tribunals.

The River Boards Act made provisions for setting up of river boards or advisory bodies by the Central Government at the request of the interested parties. River Boards like Bhakra Beas Management Board, Brahmaputra Board, Damodar Valley Corporation, Tungabhadra Board, Betwa River Board, Bansagar Control Board, Upper Yamuna River Board (1994) are some examples.

Following catches and contradictions in the legal scenario are apparent.

(1) Article 262 of the Constitution not only empowers the Parliament to make laws for the adjudication of any dispute relating to waters of inter-state river or river valley but also dismembers the Supreme Court.
(2) Groundwater is considered an easement connected to land under land tenure laws and the 'dominant heritage' principle implicit in the Transfer of Property Act IV, 1882 and the Land Acquisition Act, 1894. Thus, groundwater is attached to land property and can not be transferred separately from the land to which it is attached.
(3) Water has not been considered as a single undivided subject in the Indian Legal System and hence while dealing with the fragments of the same subject, element of coherence to address larger interests of the community is really lacking. This shortcoming perhaps makes it extremely difficult for the State Governments and the Central Government to sort out water conflicts. Even the Supreme Court feels maimed while taking any stance in such disputes in want of appropriate legislation.

OVERVIEW OF FRESH CONCEPTS IN DISPUTE REDRESSAL AND THEIR APPLICATIONS

So far as sharing of water is concerned, following doctrines form the basis of sharing in international river waters and are also applicable to resolve interstate water conflicts.

Doctrine of absolute territorial sovereignty

The upstream states would be free to divert all the water from a shared watercourse without considering the need for downstream states. This theory is often known as Harmon Doctrine, after the US Attorney General (Mr. Judson Harmon) who declared the absolute right of the USA to divert the Rio-Grande in 1895. It has little support in practice and does not represent international law.

Theory of absolute territorial integrity

It regards an international river as the common property of its co-riparians, which means that no state is allowed to deprive the others of the benefits of the waters in question. Therefore, the lower riparian has the right to claim the continued and uninterrupted flow of water from the territory of the upper riparian, "no matter what the priority". Often downstream states support this theory as it guarantees them the use of an international river in an unaltered state. It is not much supported by modern commentators.

Theory of limited territorial sovereignty

It is based on the assertion that every state is free to use shared rivers flowing on its territory as long as such utilization does not prejudice the rights and interests of the co-riparians. The co-riparians have reciprocal rights and duties in the utilization of the waters of their international watercourse and each is entitled to an equitable share of its benefits. It is also known as *theory of sovereign equality and territorial integrity*. It has got wider acceptance in recent time e.g. agreement on the cooperation for the sustainable development of the Mekong river basin (1995), framework agreement on the Sava River basin (2002), and SADC protocol on shared watercourse systems (1995).

Doctrine of equitable and reasonable utilization

This use-oriented doctrine is a sub-set of the doctrine of limited territorial sovereignty. It entitles each basin state to a reasonable and equitable (not necessarily equal) share of water resources for the beneficial uses within its own territory (Article IV, Helsinki Rules 1966 and Article 5 of the UN Watercourses Convention 1997).

Obligation not to cause significant harm

No states in an international drainage basin are allowed to use the watercourses in their territory that cause significant harm to other basin states or to their environment, including harm to human health or safety, to the use of the waters for beneficial purposes or to the living organisms of the watercourse systems. The question remains on the definition or extent of the word "significant" and how to define harm as a "significant harm". In all modern international environmental and water treaties, conventions, agreements and declarations it is adopted.

Doctrine of Prior Appropriation

The prior appropriation concept basically advocates historical rights: "first in time, first in rights" meaning that the state that first utilizes the water of an international river acquires the right to continue to receive that quantity, thus restricting future development of upper riparians. Claims on the basis of convenient interpretation of this doctrine act as major source of tension in the Nile river basin (between Egypt and Ethiopia) and in the Ganges basin (between India and Nepal).

Theory of equal distribution of benefits

It advocates the sharing of benefits from water use - whether from hydropower, agriculture, flood control, navigation, trade, tourism and the preservations of healthy aquatic ecosystems - not the benefits from water itself. Sharing the benefits for water use allows for positive-sum agreements, whereas distribution of the water itself only allows for winners and losers. The 1909 Boundary Waters Agreement between USA and Canada and the 1964 Columbia treaty

(*Treaty between USA and Canada relating to the co-operative development of the Columbia River Basin)*, are based on this Doctrine. It is supported by Nepal - the most upstream riparian in the Ganges basin.

Principle of notification, consultation and negotiation
Every riparian state in an international watercourse is entitled to prior notice, consultation and negotiation in cases where the proposed use by another riparian of a share watercourse may cause serious harm to its rights or interest. This principle is generally accepted but opposed by the most upstream countries for obvious reasons.

Principle of cooperation and information exchange
It is an obligation for each riparian state of an international watercourse to cooperate and exchange data and information regarding the state of the watercourse as well as present and future planned use along the watercourse. The 1944 USA-Mexico Water Treaty, 1960 Indus Waters Treaty, the 1964 Agreement concerning the Niger River Commission and the navigation and transport on the River Niger, as well as the 1964 Columbia Treaty between USA and Canada incorporate this principle.

MEETING ANCIENT VALUES AND MODERN PRINCILES OF JURISPRUDENCE
So far has been the history of collision and competitiveness in sharing the resources between the states in India like other countries of the world. Therefore, a time has come to think in a different way to shape a better future for India. That laws fall short is well established, alternative approaches have become mandatory to be explored. Law is to meet the needs of the society; it is the society that evolves the law and it is the society to obey it. Therefore, when the law falls short, prudence of the society is tested and the societies that stand the test of the time can survive. Inaction of society in a state of lawlessness for a long leads to anarchy. Therefore, Swami Vivekananda said, "It is the society to pay homage to the values and not the vise versa. The societies that do not pay homage to the values perish in no time." Basically law is a product of value system of a particular society.

Latest developments in settlement of dispute instead of going through the process of adjudication are noteworthy. Recent years have seen the development of a range of approaches under the overall label of Alternative Dispute Resolution (ADR). Though relatively well-known within the study of conflict resolution generally, ADR approaches have only been applied to a limited extent within water-resource management specifically (the UNESCO/Green Cross 'Water for Peace' Program is a notable exception). Essentially, ADR approaches seek to develop nonjudicial procedures and modalities for arbitration, mediation and negotiation in dispute situations. They generally aim to shift negotiation procedures away from a focus on positions, rights and power-relations and towards a focus on interest based negotiation, where stakeholder interests are voiced and jointly analyzed and compared in an attempt to establish win-win situations. Institutionally, ADR approaches tend to place particular emphasis on the role of third-party actors as mediators and facilitators in the resolution process, with the associated development of human resources, methods and procedures in order to undertake such functions.
The ADR approach has obvious elements for application in water-resource management, given its emphasis on making interests explicit and its focus on water benefit sharing rather

than water sharing *per se*. That said, it also has some aspects that need to be carefully considered before the approach can be applied. Developed mainly in the United States, ADR approaches require stringent adaptation to the context of developing countries generally, and individual cultures and politics specifically. Moreover, while third-party actors may be an important element in conflict resolution, it is important to ensure that these are - (a) sufficiently autonomous from political structures, and (b) do not overshadow alternative options for conflict resolution where these already exist locally.

The same way, history of co-operative movement suggests how societies could stand in past the challenges of anarchy like situation. During Industrial revolution, the co-operative movement began in Europe in the 19th century, primarily in Britain and France, although The Shore Porters Society claims to be one of the world's first cooperatives, being established in Aberdeen in 1498 (although it has since demutualized to become a private partnership). The industrial revolution and the increasing mechanization of the economy transformed society and threatened the livelihoods of many workers. The concurrent labour and social movements and the issues they attempted to address describe the climate at the time. The first documented consumer cooperative was founded in 1769, in a barely furnished cottage in Fenwick, East Ayrshire, when local weavers manhandled a sack of oatmeal into John Walker's whitewashed front room and began selling the contents at a discount, forming the Fenwick Weavers' Society. In the decades that followed, several cooperatives or cooperative societies formed including Lennoxtown Friendly Victualling Society, founded in 1812. Recorded history of co-operative movement i.e. organized form of co-operatives in India shows that the first recorded activity began in 1904 when this movement was officially set up by the British Government. Before that in the year 1892, Derrick Nicholson, tried to find out ways and means to establish institutions so as to help the agricultural sector. He gave the suggestions for setting of co-operative societies. Within that decade, India faced a terrible famine in 1899. The Government appointed the Second Famine Commission 1901 to suggest measures for the victims. The most important recommendation was for organization of co-operative societies. In 1904 “co operative societies Act” were passed with the aim was to help the rural farmers and artisans by providing short term and long term loans. India as on today enjoys the frontier place in co-operative movement in various domains of economy like banking, milk production and distribution, micro-financing, grain distribution, seeds and fertilizer distribution, etc.

India being the oldest civilization has a remarkable treasure of values owing to which co-existence and sharing resources have been a very fabric of the social life. History shows that spirit of co-operation and sharing resources with mutual understanding without unwritten principles and legislations has been well ingrained in the masses to the extent that it has become a way of life. Therefore, the co-operative sector has developed so much in India.

The history of water management clearly indicates that the spirit of co-operation for sharing of water resources was prevalent in various parts of India much before the organized or formal co-operative movement and people had found informal means of collective governance of water. Systems like Eri of Tamilnadu, Kul of Himachal Pradesh, Apatani of Arunanchal, Zabo of Nagaland and Bengal’s Inundation Channel are a few examples to

count. Those roots are required to be resurrected again on a larger scale and the negotiation on the basis of the modern principles discussed above would become possible. Thus, there is a possibility of blending the ancient values and modern principles of jurisprudence and the things could be improved.

Moreover, some recent examples of large scale maturity exhibited by the people and leaders are handy in the form of treaties with neighboring countries. Mahakali (also known as Sarada in India) is the principal tributary of the Ganges and border river between Nepal and India. The Barcelona Convention played a very significant role in the earlier negotiations and communications for the multilateral management of the Ganges basin. In 1950s, Nepal suggested Government of India to declare the Ganges as an international river under the Barcelona Convention but India vetoed Nepal's suggestion made under this convention and denounced Barcelona Convention on 17th March 1956. The Mahakali Treaty was signed on 12 February 1996 (came into force 5/6/97) between Nepal and India concerning the integrated development of the Mahakali river including the Sarada barrage, Tanakpur Barrage and the Pancheshwar multipurpose Project. This treaty adopted the Sarada agreement 1920 (Article 1) and 1991 MoU and 1992 Joint communiqué for Tanakpur barrage (Article 2). This treaty endorsed the principles of information exchange and cooperation, of equitable allocation and obligation not to cause significant harm. Ultimately, it forbids the unilateral development of the river and approves the principles of cooperation, consultation and notification. Article 3 of this treaty indirectly acknowledges the principle of equal sharing of benefits from the Pancheshwar Multipurpose project acknowledging the principle of equal utilization of benefits. The Article 11 (paragraph 3) makes the decision of the arbitration tribunal as final, definitive and binding to both parties.

Like the neighboring countries have entered treaties successfully, the neighboring states can also enter such sensible agreements and ease out the complexities and collisions. When the courts are handicapped in want of law, this is a more effective and an easier and wiser way to be resorted to. The choices are limited – either to be wise or to wither away as a society. India has the potential to perform in the today's crisis and a time has come the public leadership and bureaucracy came forward to prove their efficacy and prudence. The same way social institutions also need to come forward with this agenda. So far, conflicts have been witnessed by the world for water but everyone should remember that if water related issues are handled sanely, water does contain potential to unite the people.

There exist many better and smaller societies with clearer and stronger legislations as compared to India and yet water related conflicts have not been so effectively sorted out by them by conventional conflict redressal mechanism only and hence the world is celebrating the coming year i.e. 2013 as the International Year for Water Co-operation. In this context, the spirit of co-operation and co-existence is needed to be unearthed from the deeper roots of ancient civilizations and therefore this aspect of the water management contains greater

significance for India and proactive involvement of all the stakeholders of the water sector is solicited.

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