

AN INSIGHT INTO SUB-NATIONAL WATER DISPUTES IN INDIA: DIAGNOSING WATER LAWS AND ISSUES OF GOVERNANCE

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1. INTRODUCTION

Most of the rivers in India are inter-state flowing. They flow from their natural course cutting across political boundaries of the states. As river water flow through many states it creates many stakeholders. Thereafter, when an upper riparian state starts any developmental activity on the flow of river it harms the water supply of lower riparian state that eventually becomes the catalyst of disputes between the concerned states. When the disputed states exert enough pressure on the government, it undertakes various conflict resolving mechanisms like court proceedings, tribunals and so on

There are certain reasons that these disputes still occur and reoccur in India because we do not have established norms of upstream-downstream riparian relations, where there is joint planning, prior notification and construction is carried out on basis of scientific evidence. Dams' construction happens haphazardly, water is withdrawn or released without the consent of concerned states, and ground waters are unregulated and so on. (Modak, 2020) The lower riparian state often feels short-changed and remains distrustful; therefore, there is a constant political mobilization related to these disputes. Conversely, for the upstream riparian, key groups feel short-changed after an award is given, leading to frequent political mobilizations on their side. Mobilizations with both upper and lower riparian are tied to identity, which gives these conflicts an emotional character and allows them to burn for longer than might otherwise be possible.

Many scholars believe that water is a shared resource; therefore disputes are bound to occur. Mildwater disputes turn into violent conflict if they are not resolved on time. Furthermore, these disputes get complex by the increasing scarcity of water, rapid rise of population, water intensive farming, and contentious political dynamics further exacerbate this problem. (Fernandes, 2018: 7-9) Furthermore, there are two fundamental grounds which are the causes of water dispute; first the building of large dams by upstream states without the consent of downstream states, second the allocation of water quota among states who share the same river. (Khalid, 2020:2) There are many other factors too like

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excessive withdrawals by a state, prejudicial compensation to the affected state, unequal distribution of water, misinterpretation of dispute resolving agreements, and lack of coordination between the concerned states.(Central Water Commission)

After the independence, plenty of efforts have been made for the peaceful management and resolution of interstate water disputes in India. Various enactments and water policies were framed by the successive governments for the optimum utilization and sharing of water. National Water Commission of India (NWC) proposed interlinking of Indian rivers. Its main objective was to transfer the surplus water from the water sufficient states to water deficient states. Largely, the interlinking of river project remained unsuccessful because of the reluctant attitude of states. Furthermore, it can only be performed on economical, environmental, and social cost.(Pawanjeet, 2020: 2-7)

In the recent times, several efforts have been made by the Union government like River Basin Management Bill, 2018, Interstate River Water Disputes (Amendment) Bill, 2019, Dam Safety Bill, 2019 for the resolution of interstate water disputes. Scholars believe that these bills threaten the federalism of India. They argue, if these three bills get enacted they would upset the balance of power between the Centre and states.(Acharyulu, 2020)Despite these efforts, the institutional set up that governs the interstate water disputes in India does not inspire much confidence. The adjudication process incurs long delay followed by adversarial litigation, antagonistic politics, and defying judicial directives by the states make it difficult for the government to peacefully manage water disputes. (Chokkakula, 2017)

It is argued that a coordinated approach between the states, with adequate involvement of the Centre, is necessary for the preservation, equitable distribution and sustainable use of water.(Ghosh, 2021)Proactive cooperation between local communities and state is necessary for the resolution of water disputes.(Goswami, 2018)Legal approaches to resolve the water disputes have been inadequate, and experience so far reveal its limitation in addressing the problem.(Chokkakula, 2016)The strategy has to multi-pronged, legal approaches must be supplemented with coordinated and non-adjudicatory approaches. For the better governance of water multi-pronged approach is necessary because there are certain other factors which affect the water governance.

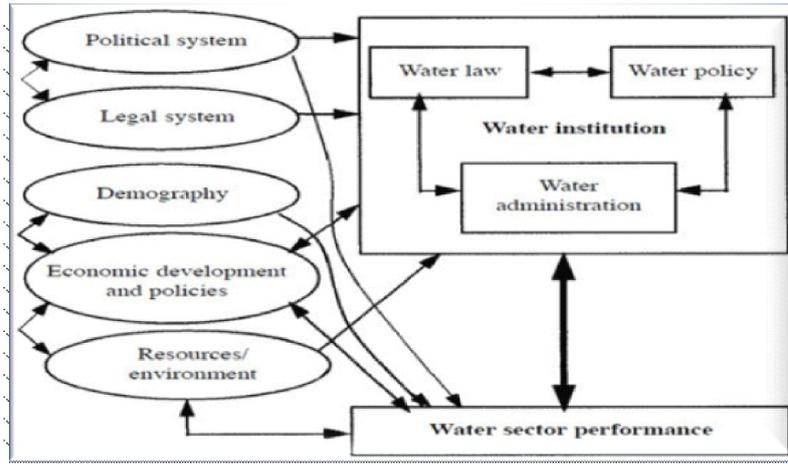


Figure 1. Water governance and water performance Source: (Araral, 2019: 5-6)

In Figure 1 the big square represents water law, water policy, and water administration rectangle represents water governance. The figure shows that the governance of water gets affected by the other factors such as political system, legal system, demography, level of economic policy and development, and resource/environment. All these factors play determining role in governance of water. Therefore, while framing any water policy or water law; these intervening factors need to be considered.

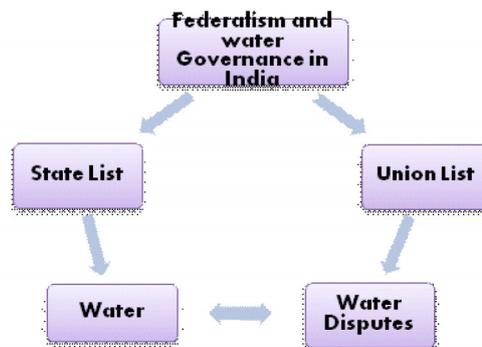


Figure. 2 Federalim and Water Governance

With the help of Figure 2 it has been illustrated that there is a clash between Centre and State over the management of water. Issues related to water supplies, drainage and embankments, irrigation and canals, water storage and powers are mentioned in the State List. Whereas, the regulation and development of inter-state rivers valley, and resolution of inter-state water disputes rests with Union List. The ambiguity in the laws related to water governance not only affects the inter-state water disputes resolution process but it also

threatens the cooperative federalism of India.

1.2 Evolution of Water Governance Related Laws and Institutions in India

Water governance has not been given much attention during British India because disputes related to water would hardly arise. After the independence states were created and separated on the basis of languages. Therefore, river water got divided among multiple states that created many stakeholders. Consequently, many complex water disputes emerged in India. For the resolution of these disputes many laws were framed and many institutions were established after the independence of India. In this section, pre-independence water laws post-independence water laws and institutions functioning have been discussed.

1.2.1 Laws before the Adaptation of the Constitution

From 1915 to 1919, India's governmental structure was unitary in nature. Hence, no question of water resource sharing and power contestation arose between the central and provincial legislature. However, item No. 7 of part 2nd of the schedule rules 3 of the devolution rules were made under scheme 45-A of the GOI Act, 1915-1919. They became the forerunner of Entry 19 of List 2nd (Provincial List) and Entry 17 of List 2nd (State list) of the seventh schedule respectively of GOI Act, 1935 and the Constitution of India 1950. They included the subject 'Water' except interprovincial concern in the provincial list.

Sections 130 to 134 in the GOI 1935, dealt with the problem of "Interference with the water supplies". Under Section 130 any Province or Princely state could complain before Governor-General if its water resource had been affected prejudicially by the action of other province or princely state. Under Section 131, if the Governor-General considered that the issue has sufficient significance than he used to appoint a commission for enquiry of the issue and the commission had to present its report before him. After the evaluation of the report, Governor-General had to give his decision about whatever he deemed suitable.

Section 133 of the Government of India Act, 1935 barred the jurisdiction of any court including Federal court to entertain any suit in respect of any matter referred to Section 131, such as the Acts of the Government of the province, the ruler of the states and Governor-General. In this way, the whole was arrangement provided for the binding arbitration; in the end, Governor-General could impose his decision. Besides, the GOI Act 1935 drew attention overtly to river water disputes between the two provinces or between the province and a Federated Indian state. The Provincial Legislative List which later became Entry 17 of the State List of the Constitution 1950 included 'Water' per se water supplies, drainage, irrigation and canals, water storage, hydro-electricity, and embankment. These were merely

falling within the competence of the Provincial List. (Nirivikar, 1996: 6-7)

In the scheme of the Government of India Act, 1935 all the powers of the provinces and princely states regarding the management of water had been clearly defined. (Kumar, 2000)

1.2.2 Constitutional Provisions in the Post-Constitution Period

In the post-constitution period, certain new articles and sections were inserted in the Indian constitution for the settlement of interstate water disputes. In this period the original Articles on the said subject such as Articles 239 to 242 were worded in the same Sections 130 to 134 of the Government of India Act, 1935. Subsequently, Article 242 (a) which was proposed by Dr B. R Ambedkar was added to the constitution by an Amendment Act on 9th September 1949.

In the draft of the constitution, the current Article 262 was added as Article 242 (a) which reads as

1. *"Parliament may by law provide for the adjudication of any dispute or complaint with respect to use, distribution or control of the waters of, or in any inter-state or river valley;*
2. *Notwithstanding anything contained 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 of this Article". (Ramana, 1992: 39-40)*

Article 262 must be read with the Entry 56, List, Schedule 7 and Entry 18 List 2:

1. List 1, Union List (Entry 56): "Regulation and development of inter-state rivers and river valleys to the extent to which such regulation and development under the control of the union are declared by Parliament by law to be expedient in the public interest."

2. List, 2, State List (Entry 17): "Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56, List 1." (Jain, 2007)

1.3 Legal Enactments and Water Policies in the Post Constitutional Period

This section discusses some significant legal enactments and water policies which were adopted for the better management and distribution of water in India. Author throws light upon the points that why the Water Policy of 1987 was amended multiple times and why it was deemed necessary to amend the Interstate Water Disputes Act, 1956 in 2019.

Table 1. Legal Enactments and Water Policies in the Post Constitutional Period

Legal Enactments & Water Policies	Objectives	Results
River Boards Act, 1956	The Act provides that River Boards will be established for the regulation and development of an inter-state river or river valley	No river board was established
Inter-State Water Disputes Act of 1956	This act states that if a water dispute arises between states then any of the concerned state can request the Central government to refer the dispute to the Tribunal for its adjudication	This Act could not achieved the desired results
National Water Policy 1987	The main focus of this policy was on the preservation and protection of both surface and underground water	This water policy could not achieve desired objectives.
National Water Policy, 2002	In this policy special focus was laid on optimal, economical, and equitable use of water resources	The recommendations of this policy like early water policies were not implemented
National Water Policy, 2012	This policy aimed to investigate the existing condition of water dispute resolving mechanisms and to propose a framework for the formation of certain laws and institutions	The recommendations of this policy like early water policies were not implemented
River Basin Management Bill, 2018	The main objective of this Bill is to constitute a single Tribunal for the resolution of all water disputes	With the implementation of this act, the River Boards Act, 1956 stands repealed
Inter-State Water Dispute Amendment Bill, 2019	The main objective of this Bill is to constitute a single Tribunal for the resolution of all water disputes	Provisions of this bill are yet to be implemented
Dam Safety Bill, 2019	It will empower the dam safety institutional set-ups in both the Centre and States.	On December 02, 2021, finally Rajya Sabha gave nod to the bill. Provisions are yet to be implemented.

Source: Various Newspapers and official websites

After independence, several acts and policies were adopted for the effective utilization and management of water. These water policies gave significant recommendations but majority of their recommendation had not been implemented. Keeping in view, lacunas of previous acts and water policies an amendment has been done in the Interstate Water Disputes Act, 1956 in 2019 for the effective utilization, distribution, and sharing of water. Furthermore, River Basin Management Bill, 2018 and Dam Safety Bill, 2019 were also introduced for the peaceful utilization, sharing, and management of water resources. The most considerable problem which India has been facing since decades is unnecessary

delay incurred by the tribunal in the resolution of water disputes. This amendment act supplemented by River Basin Management Bill and Dam Safety Bill would bring a substantial change in the water governance mechanism of India.

1.4 Evolution of Water Governing Institutions in India

In India, for the peaceful settlement of interstate water disputes participation of various bodies, institutions, and committees was required. Over time, various boards, bodies, and agencies have been constituted either by the statutory direction or by the act of the parliament. Few statutory boards were constituted such as Zonal Councils, Beas Construction Board, Bhakra Management Board, and Cauvery Management Board. Similarly, the non-statutory boards were constituted such as the Central Water Commission (1945) National Water Resource Council (1983), National Water Development Agency (1982), and Central Board of Irrigation and Power (1987). These boards and agencies have been working cooperatively for decades for the peaceful resolution of inter-state water disputes.

The performance of these institutions and agencies has been unsatisfactory. The inter-governmental pull along with the pressure of upper and lower riparian states, bigger and smaller states have hampered the performance of these institutions and bodies. The non-statutory bodies have been facing different problems; they lack infrastructure and coordination which is deemed necessary for the successful functioning of anybody or agency. These bodies were established by the resolution of the Central Government therefore, they lack statutory backing. However, non-adjudicatory methods have been effective in the resolution of interstate water disputes. But these methods have not been given importance in this regard. It has also been observed that different types of agencies and bodies either directly or indirectly have helped in the peaceful resolution of inter-state water. In nutshell, it can be said that these institutions could not attained the objectives for which these they were established. The attitude of the successive Central governments has also been reluctant in giving the powers to these institutions for the peaceful governance and management of water.

1.5 Issues of Water Governance in India

Issues related to water governance are complex in India. Water is not just like other natural resources in India, it is considered as an identity and symbol of civilization. Water being an emotive issue is difficult to manage when it is linked with problems like, politicization, legal and historical ambiguities, and non-conformity of affected states. In this sections, all these issues have adequately been discussed and analysed.

1.5.1 Non-Conformity of Concerned States

The dominant legal discourse somehow avoids contestation between states regarding the sharing of inter-state water. The deep and long-lasting legal centric discourse accompanies a visceral rejection of politics and politicization of inter-state water disputes in India. The political dimension of the debate is inevitable which is why it is acknowledged, yet the debate is critically and constructively is puzzling. Fali Nariman says that

"My experience is that none of the political parties in any of the complainant or contesting states (in inter-state water disputes) is ever willing to concede a single point to the other states. ... (Nariman, 2009: 32-34)

The unbending and reluctant attitude of states in India has made these disputes even more complex. While discussing the Ravi-Beas dispute soon after Punjab's unilateral decision to terminate water-sharing agreements, Ramaswamy Iyer observes that "It has been clear from the start that what we are witnessing in Punjab is as much as a political game as a water of disputes." (R.Iyer, 2004: 36-37) Inter-state water disputes in India are primarily political in nature; the attitude of ruling elites has been reluctant regarding the resolution of inter-state water disputes because these disputes help them to win vote banks and political constituencies.

Increasing competition instead of cooperation makes these disputes even more complicated. Sometimes, the ruling party in the state is different from the ruling party in the Centre, therefore, due to different political configurations; it becomes difficult to resolve interstate water disputes peacefully. The politicization of interstate water disputes often leads to constitutional and governance crisis as it happened in the Cauvery river dispute between the Karnataka and Tamil Nadu in 1990 and in the Ravi-Beas dispute between Punjab and Haryana in 2004. Such political contestations and roughness of states eventually affect the outcomes of the interstate water dispute resolution process.

1.5.2 Legal and Historical Ambiguities

In the changing scenario of interstate water dispute, states entirely rely upon the legal remedies such as the Tribunal, Water Management Boards, and Orders of the Supreme Court etc, have proved ineffective. It has extended litigations and politics of competitiveness between the states. Political theorist Chantal Mouffe suggested that vibrant democracy needs the right kind of practices for channelizing politics into a productive democratic design. (Chokkakula, 2013) There are some legal ambiguities that have become the reasons for the emergence of water disputes in India. These reasons are discussed as under:

First, there is a problem of apportionment regarding the allocation of the water resource.

Upper riparian states always have the advantage of first use of water and lower riparian state always remain dependent on the upper riparian state, this asymmetrical power relations between the disputed states is the core issue which has made interstate water disputes more intractable.

Second, the majority of the colonial agreements and institutions have now become obsolete and out-dated. Subsidiary political relations between the provinces and princely state have influenced the dispute resolution process of India. In the Krishna water dispute two agreements, 1892 and 1933 were incorporated between the erstwhile states of Hyderabad (princely state) and Madras (British presidency) for the resolution of a dispute. Similarly, in the Cauvery dispute, we followed these agreements and tried to resolve the dispute by adhering to the provisions of these agreements. The CWDT award says that it found the historical agreements, 1892 and 1924 out-dated but both cannot be held invalid in the resolution of other inter-state water disputes.

Third, the colonial legacy of reconfiguration and redrawing the borders of the new states also paved the way for the rise of more intractable inter-state water disputes. Indian diverse states have been extremely heterogeneous which include provinces that were directly ruled by the Britishers as well as princely states which were semi-sovereign. Therefore, in the hastily decided terms princely states were merged with the Indian Dominion. By the fear of national disunity and the pressure of creating linguistics majority states; the exercise of merging and bifurcation of states remains continued. This exercise also remains continued because the identity of states and the largest interest of national unity was the priority of the constitution-makers. Such political and geographical redrawing of the provincial units greatly undermined the natural historical heterogeneous nature of these states. (Modak, 2020)

The redrawing of territorial borders of these heterogeneous states fractured the aspirations of many constituencies. Interestingly, the Constitutional Assembly Debates reveal that the issue of inter-state water disputes got limited space in the priority list of the Constitution makers. Therefore, the slightest attention was paid to water and water disputes. In the backdrop of violence of partition, the priority of the Constituent Assembly was national unity. Therefore, the issue of river water-sharing between the states appeared to be a relatively less contentious issue. Thereafter, the boundaries of the states in India have continued to alter on the basis of cultural and political factors without considering the geographical and historical dynamics of the regions.

These changes complicated the jurisdictional and resources sharing agreements, including the one related to interstate water disputes. Recreation of states also generated

contestation among the states over the sharing of water. Furthermore, it created a sense of property and users rights among the states over river water. For instance, In the Cauvery dispute, the contestation was predominantly related to the conflictual understanding of property rights over the water. Consequently, a normal water dispute turned into a violent conflict between the Tamils and Kannadigas. People destroy public properties in the name of these disputes as happened in the Cauvery water dispute. Supreme Court alleged both Karnataka and Tamil Nadu of their populist politics for gaining political mileage by invoking these disputes. All the above-mentioned problems related to water sharing and water disputes enable political parties and other interest groups to politicise interstate water disputes for their vested interests.

1.5.3 Politicisation of Water Dispute Resolution Process

The politicization of water disputes does not imply that politics is totally devoid of real concerns about water rights. The politics of water disputes always round up by asymmetries and inequities. Water disputes not only in India but also at the international level entrapped with inequities and asymmetries that offer substantive and appealing grounds for political mobilization. For instance, in the Krishna water dispute, Tribunal took a long time in the adjudication process when KWDT-2 delivered its Final award then the people of downstream states (Karnataka & Andhra Pradesh) refused to accept the award. Governments of both states led all-party delegations to make a representation before the Central government. The AP (before bifurcation) claimed that injustice had been done with it. The state had challenged the rationale of surplus water allocation. It argued that "...the decision resulted in inequity in the allocation and unsettled many of the settled issues." (Chokkakula, 2017: 22) The state decided to challenge the award in the Apex Court. Subsequently, on November 30 it filed a Special Leave Petition (SLP) before the Apex Court on 23 of January 2014. In Karnataka, soon after the award was given in November 2013, political leaders refused to accept it. Leaders of the opposition party in Karnataka also wanted to challenge the award through an SPL. This dispute further deteriorated and complicated the relations between AP and Karnataka.

In the Cauvery water dispute, concerned states have been showing their political postures at different stages for political gains. The latest 2016 escalation between two states exemplifies such a politics of antagonism and posturing. The dispute escalated to a point of constitutional crisis where the state assembly of Karnataka decided to deny orders of the Supreme Court. (Outlook, 2022)

1.5.6 Role of Union Government in the Management of Interstate Water Disputes

The role of the Central government in the resolution of inter-state water disputes has

been partial. First, since river water is a state subject and its governance lies within the ambit of the state. Therefore, if a national political party or coalition finds it has a less political stake in the states involved then it shows unwillingness in the resolution of these disputes. Consequently, the Union government does not make any concrete efforts for the resolution of inter-state water disputes unless it does not have any immediate electoral benefits. This is one of the reasons that the Centre has always been reluctant in ensuring cooperation between the concerned states and in resolving the disputes. Otherwise, it has been routinely interfering in the political, administrative, and financial domains of states.

Second, even if the Union government finds direct political stake in inter-state water dispute, it has historically preferred to support the state from where it could get political mileage, instead of taking a bipartisan stand. It has used the emotive issue of sub-regional identity which is inherent in interstate water disputes at the state level to facilitate the identity-based mobilization. It has invoked these disputes to polarize the masses of concerned states where it has maximum political stakes. For instance, in the case of the Ravi-Beas river dispute, Congress (I) was in power at the Centre. The political considerations made by the Centre, in this case, hints at the larger question of sub-regional identity and ethnic polarization, which determined both State and Centre's approaches towards political negotiation in the late 1970s and early 1980s. (R.Iyer, 2004:34-35) Therefore, it can be argued that the Centre has tried to resolve the disputes only in a situation where it has found high political stakes or electoral benefits. It has preferred to take the side of the state where it has maximum political benefits rather than taking a bipartisan stand to resolve the disputes between concerned states.

Results and Discussion

With the rapid increase of pollution and excessive demands of food will lead to water scarcity. With the rise of strong regional voices and claim of greater state autonomy resolving interstate water disputes have become difficult task. Meanwhile, any reformative measure of the Union government is deemed threat to the autonomy of the states. Legal, historical, and constitutional ambiguities supplemented by reluctant attitudes of states, and reductionist approach further complicate the problem. The roots of all interstate water disputes in India lie in water use efficiency and pattern by the different entities. While resolving interstate water disputes coordinated efforts of all the concerned states are needed. Recently, Union government has proposed some significant legislation for reforming and restructuring the water governance mechanism in India. But it is necessary to understand that no concrete effort would yield better results until the basic lacunas in the present water governance mechanism are not rooted out. Our present water governance structure creates more conflicts

than resolving them. In a federal democracy like India, mutual consensus needs to be ensured between the states and Centre. Mutual distrust between the states and Centre makes any dispute resolving measure ineffective. For keeping Indian federal structure unharmed and making water governance institutions more effective, proactive participation of states in water governance is prerequisite.

In the recent years, a paradigm shift in the water governance has been witnessed all over the world. An Integrated River Basin Governance, supplemented by holistic approach has been following in the resolution of interstate water disputes. The new paradigm focuses upon that the resolution of interstate water disputes should not be seen independently rather than their comprehensive solution should be found in the whole mechanism of water governance. While resolving these disputes, their environmental, economical, and social impacts should also be given due consideration. In this context, the idea of "Integrated System Water Governance" (ISWG) is gaining traction. It lays stress upon four important constituents that flow in the rivers and whose dynamic interconnectivity creates equilibrium: Water, Energy, Biodiversity, and Sediments (WEBS). To avoid the monopolisation of power, Ghosh and Bandyopdhyya have recommended that two key elements:

F Ecological restoration and conservation of aquatic and conservation of aquatic biodiversity, in addition to the balancing of water supply and demand for human use in the management objectives and outcomes of the basin plan

F The identification of key issues and risks to river basins and strategies needed to address them in both the short and long term. (Ghosh, 2021)

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