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Critical Analysis of Article 262 in Light of Major Water Disputes

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ABSTRACT

Water is very crucial for all of us. In India, developing effective and equitable systems for sharing interstate river flows has long been a legal and constitutional challenge. These disputes pose a major challenge to the existing federal framework of the Constitution and hence we need to consider the issue of water of supreme importance.

The Indian Constitution limits the authority of courts and sometimes the function of Parliament and the Union government, as defined by the Constitution and laws, was deemed to be ineffective in resolving inter-state disputes. The constraints of courts and tribunals in exercising jurisdiction, as well as the capacity of the central government to decide on the implementation of tribunal awards, make this area of centre-state interactions extremely complicated.

The ability of states to use their legislative power to overturn tribunal or court decisions creates a constitutional concern because there is frequently a direct clash between state laws and tribunal orders. Article 262 of the Indian Constitution, as well as the provisions of the Inter-State Water Disputes Act, 1956, need to be reviewed and it is time that a new framework should be enacted to deal with the present-day problems of water sharing in India.

Keywords: *Interstate rivers, water disputes, government control, tribunals, and constitution.*

I. INTRODUCTION

Among Each state tries to use as much water as it can and as a result, achieving a fair and effective allocation of river water has long been a legal and constitutional concern for a great period of time. Many times, states have collaborated on the building of multipurpose projects, aiming for the most efficient use of water resources. However, in many situations, progress has been delayed by tensions between riparian governments over the use of water. When the rivers are interstate, it cannot be inferred that only a single state has ownership of that river water.³

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³ M.P. Jain, Indian Constitutional water Law, 739 (7th Edn., LexisNexis, 2015).

The constitutional challenge is resolving inter-state water disputes. In the present world, the provisions in place are not enough to solve the contemporary problems pertaining to water disputes. Some of India's largest inter-state water conflicts include the Krishna-Godavari, Narmada, and Cauvery River disputes, as well as the Sutlej-Yamuna Linking Canal.

Inter-state water conflicts have a peculiar position under the Constitution of India because they do not fall under the jurisdiction of any Court. The establishment of tribunals to adjudicate interstate water issues aims to resolve conflicts in a comprehensive manner while also allowing the Central Government to supervise and manage these disputes directly.

This research article is an attempt to understand various facets of Article 262 while highlighting some of the major river disputes in India. Apart from this, the author has tried to study the Indian river disputes and has critically analysed Article 262 in this regard.

Importance of Water

Water is an essential component of life in every way. It is predicted that the main reason for the third world war might be related to ongoing water disputes. Water is extensively used for carrying out a diverse range of activities from domestic to industrial sphere, however, this extensive usage of water has somehow led to scarcity as even though most of our planet is covered with water, we still do not have enough resources of freshwater available. The conflicts pertaining to are not something new under the sun and have increased due to the pressures of an ever-increasing population and the prospect of shortage and unfair distribution.⁴

This issue of water scarcity has gained importance at an international level and the United Nation have raised its concern regarding the problem in various international meetings and convections⁵. These include the following:

- **Non-Navigational Watercourses Convection, 1997:** It was the first agreement to lay down the guidelines for sharing water at an international level, it also aimed to prevent harm from scarcity of water.
- **UN Resolution on Law of Transboundary Aquifers, 2008:** It aimed to strengthen internal agreement for water sharing in order to promote equitable distribution.

⁴ Taniya Malik, Inter-State River Water Disputes: A study in the light of the federal principle in India, Volume 4 Issue 10, Intl. Jour. of Humanities and Social Science Invention, 1, 2, (2015), [http://www.ijhssi.org/papers/v4\(10\)/A041010107.pdf](http://www.ijhssi.org/papers/v4(10)/A041010107.pdf).

⁵ UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, https://www.un.org/waterforlifedecade/transboundary_waters.shtml (last visited Sept, 28, 2020)

Legal doctrines pertaining to water disputes:

- **Doctrine of Riparian Rights:** Riparian rights denote sole rights of the local people to use the given water resource. This doctrine is not widely used as it doesn't offer much scope for resolving disputes. The same has been upheld by Krishna Water Dispute Tribunal.⁶
- **Theory of absolute territorial sovereignty:** This doctrine was developed by Attorney General Harmon and says that a state has full control over its water resources.⁷
- **Theory of prior appropriation:** This doctrine says that the first person who uses water automatically gets a property right to water. This doctrine allocates property rights to water on the basis of historical use. This doctrine was promoted by the US Supreme Court in the case of *Wyoming v. Colorado*.⁸
- **theory of Community of Interest:** As per this, the interest of the community matters and it is assumed that interstate rivers should promote the interest of community as a whole.
- **Doctrine of equitable apportionment:** This doctrine was evolved by the US Supreme Court in the case of *Connecticut v. Massachusetts*,⁹ here, it was held by the court that the sole basis for settling water disputes should be equality of rights as water is a crucial for human existence. This doctrine has also been applied in the cases of *New Jersey v. New York*,¹⁰ and *Nebraska v. Wyoming*.¹¹ In India, this theory has been accepted by various tribunals for resolving disputes such as Narmada River dispute.
- **Theory of equitable utilization of Interstate River waters:** According to this theory, every river must provide equitable and reasonable share for uses of water.

History of Regulatory Mechanism of Water Disputes in India:

During British rule, inter-state water disputes were resolved by the Central government under the supervision of the Secretary of State and it was imperative to take his permission for building water projects whenever the interests of the society was affected.¹²

⁶ Report of the Krishna Water Disputes Tribunal, with Decision, Vol. 1, 1973, at p.93.

⁵ Jacob, Austin, *Canadian-United States Practice and Theory Respecting the International Law of International Rivers: A Study of the History and Influence of the Harmon Doctrine*, Canadian Bar Review No.3 (Sept 1959) at Pp. 405-411 (1959).

⁸ *Wyoming v. Colorado* 259 U.S. 419 (1922).

⁹ *Connecticut v. Massachusetts* 282 US 670 (1931).

¹⁰ *New Jersey v. New York*, 283 US 336 (1931).

¹¹ *Nebraska v. Wyoming*, 332 US 54 (1945).

¹² Indian Law Institute. & Jain, S. N. & Jacob, Alice. & Jain, Subhash C. & India. Ministry of Irrigation and

As per Government of India Act, 1935, water was a subject of federal list which meant that the central government exercised control over it. Here, there was an exception that the provincial government can manage water in their own territories. Section 130 and 131 of GOI Act, 1935 talked about resolving water disputes in India during British Rule.

- **Section 130 of GOI Act, 1935 states that:** “If it seems to the government that any province is affected from the issue of supply of water due to any law passed or any competent authority unduly exercising its power, then in such a case, the province may appear before the Governor-General.”
- **Section 131 of GOI Act, 1935:** “The Governor-General can appoint a Commission to inquire into the matter of water dispute, this commission is required to submit a report and if the Governor-General is satisfied, he may impose the recommendation in that report to resolve the issue.”

Further, it was felt by the constituent assembly that having a provision related to interstate water disputes is imperative as water is vital for humanity and this is the main reason, we have article 262 in place. Article 262 bars the Supreme Court’s jurisdiction as if the matter is resolved by court, then there are high chances that one party loses and the other wins, so by virtue of Article 262, the tribunals are created for resolving water disputes.¹³

Constitutional provisions related to water disputes:

- **Entry 17 of States List states that:** “Water and all its related sources are subject to the provisions of Entry 56 of List 1.”
- **Entry 56 of Union List states that:** “Parliament has the authority to develop and regulate interstate rivers for public interest.”
- **Article 262 of Indian Constitution states that:** “The Parliament can provide judication for resolving water disputes and no court in India have the jurisdiction to resolve such disputes.”

The first provision declares water to be a state subject, however it is limited by Union List Entry 56. Article 262 expressly allows parliament the power to legislate on the topics listed in Entry 56, as well as authority over the Supreme Court. The reason for including interstate rivers in the union's competence is that rivers flow from different territories and no state have

Power. 1971, *Interstate water disputes in India; suggestions for reform in law*. Prepared by S. N. Jain, Alice Jacob, and Subash C. Jain, under the auspices of the Indian Law Institute, New Delhi N. M. Tripathi Bombay.

¹³ RAJHYA SABHA, https://rajyasabha.nic.in/rsnew/constituent_assembly/constituent_assembly_mem.asp (last visited Sept 28, 2021).

exclusive right to solely use the water as per its choice. It might happen that the advantageous state may discriminate the lower by not providing water and hence, parliament's involvement in this matter is imperative to maintain overall principles of equality.

In order to resolve water disputes, parliament have enacted two major acts, we shall discuss them further.

Laws enacted by the parliament for resolving water disputes:

In the present context, there are two acts for resolving water disputes, these are as follows:

Inter-State River Water Disputes Act of 1956:

- The Inter-State River Water Disputes Act of 1956 was enacted in compliance with Article 262 of the Indian Constitution to settle water disputes arising from the ownership, administration, and allocation of an interstate river or river valley. The Act defines what constitutes a water dispute and sets out procedures for resolving such.
- When the Central Government believes that interstate water and river conflicts cannot be resolved through discussions, the Act provides for the establishment of tribunals to resolve them. If any state complains about any existing or potential water disputes, the Central Government is empowered to form a tribunal under Section 3. Section 4 of the act establishes the composition of the Tribunal, and the Tribunal's verdict is final and binding on the parties. The Court's jurisdiction is restricted from regulating activities related to rivers flowing through a state under Section 11 of the Act.
- The tribunal has also been given the authority to investigate topics of public concern, such as water pollution, flood control, river basin productivity sustainability, climate change effects, and so on. The Union Government is required by section 6 to publish the tribunal's decision in the Official Gazette for better implementation. As a result, the execution of the tribunal award is subject to Union's decision. The Union has discretion over the implementation of the tribunal's ruling under Section 6.

River Board Act of 1956:

- The Rivers Act was passed in 1956, however it did not result in the creation of any river basins. The Centre, according to Section 2 of the Act, is responsible for overseeing the development of transnational rivers and river valleys. The Centre may form a river council at the request of a regional authority.
- The board has two key responsibilities: first, to oversee proper and optimal use of interstate river water resources, and second, to monitor various irrigation, water supply,

and hydroelectricity power generation programmes. Section 4 of the Act states that the Board's role is advisory, and it can only make recommendations and offer advice. As a result, this act isn't very useful in the long run and hasn't been applied much.

Major River Disputes in India:

1. Cauvery River Water Dispute:

- The conflict is between the states of Karnataka and Tamil Nadu over the Cauvery River's resources. Tamil Nadu has been adamant in its opposition to modifying the existing pattern of usage, claiming that any change will result in the loss of livelihood for many people. The Supreme Court ordered the tribunal to be established in 1990.
- In 1991, the Cauvery Water Disputes Tribunal issued an interim decision requiring the State of Karnataka to release water from its reservoirs. However, the Karnataka administration refused to comply. The Tribunal issued its final order distributing equal distribution of water in 2007 after 16 years of hearings and an interim order.

2. Issue of Satluj-Yamuna Canal:

- The problem stems from a conflict that arose between Punjab and Haryana following the creation of Haryana in 1966. Haryana built the Satluj Canal in 1982 to share its water. Punjab protested, and a tribunal was established to investigate the matter. Punjab was not content with its share of water, and the award was passed.
- The Punjab Assembly approved the Punjab Termination of Agreements Act in 2004, putting an end to water-sharing agreements with other states and jeopardizing the canal's development. The Supreme Court permitted the states to settle the dispute peacefully.

3. Narmada Water Dispute:

- The Narmada Water Disputes Tribunal was established to decide on the sharing of Narmada River waters. The tribunal's decision set aside a certain amount of usable water for the four states of Gujarat, Rajasthan, Madhya Pradesh, and Maharashtra to share.
- The height of the Sardar Sarovar Dam was also determined by the tribunal, which stated that the height should be fixed for Full Reservoir Level.

- As a result, the tribunal ordered the Gujarat government to complete the dam building as soon as possible. This tribunal decision resolved a state-by-state water dispute, demonstrating that Article 262's conditions were met.¹⁴

4. Krishna Water Dispute:

- Maharashtra, Karnataka, Andhra Pradesh, Madhya Pradesh, and Orissa are the parties involved in the Krishna water conflict.
- The main point of contention was the interstate use of untapped surplus water. The Krishna Water Disputes Tribunal decided the case on three issues, but the parties concerned petitioned the Supreme Court for a review.

Case Laws Related to Water Disputes:

Some landmarks case laws related to water disputes are as follows:

- In the case of *T.N. Cauvery Neerppasana Vilaiporulgal Vivasayigal Nala Urimai Padhugappu Sangam v. Union of India*,¹⁵ the issue of Cauvery water dispute came up for promoting equal distribution of water. Here, SC ordered the central government to directly look into this issue because there is bar on SC's jurisdiction for hearing water disputes, a tribunal was formed and the Tamil Nadu Government filed an interlocutory application for distribution of water before the tribunal, here the State of State of Karnataka contended that Tamil Nadu has no right to file such an application before tribunal and hence it was dismissed.
- Tamil Nadu did not accept the above decision approached SC under article 136 of the Constitution in the case of State of *T.N. v. State of Karnataka*,¹⁶ for allowing tribunals to accept interlocutory applications. Here SC held that the tribunals have the right to decide on interlocutory matters as well because in India, only tribunals are the competent authority as per article 262 in matter related to water dispute. On similar lines, then the tribunal decided to order Karnataka for realising water but it refused to follow and passed an ordinance to overcome the order of the tribunal.
- This matter was then heard in the case of *Cauvery Water Disputes Tribunal, In re*¹⁷,

¹⁴ MINISTRY OF WATER RESOURCES, RIVER DEVELOPMENT AND GANGA REJUVENATION, NARMADA WATERDISPUTES TRIBUNAL (1969), <http://jalshakti-dowr.gov.in/acts-tribunals/awards-of-existing-tribunal/narmada-water-disputes-tribunal-october-1969> (Last visited on Sept. 28, 2021).

¹⁵ T.N. Cauvery Neerppasana Vilaiporulgal Vivasayigal Nala Urimai Padhugappu Sangam v. Union of India, (1990) 3 SCC 440.

¹⁶ T.N. v. State of Karnataka, 1991 Supp (1) SCC 240.

¹⁷ Cauvery Water Disputes Tribunal, In re, AIR 1992 SC 522.

here, SC overruled the ordinance and directed Karnataka to release water as directed by tribunal and the Cauvery matter was at last resolved.

- In the case of *State of Karnataka v. State of TN*,¹⁸ the Supreme Court of India, in considering the scope of its jurisdiction, decided that, despite the bar of jurisdiction imposed by Article 262(2) read with Section 11 of the Inter-State Water Disputes Act, 1956, Act, the Supreme Court can exercise its authority to carry out the Tribunal Award.
- Again, in the case of *State of A.P. v. State of Karnataka*,¹⁹ the SC has again held that it has the power to look for validity of the award granted by the tribunal and can also interpret the decision of tribunal but it doesn't have the right to adjudicate on water matters. Similar view has also been held in the case of *State of Haryana v. State of Punjab* for checking the validity of the tribunal award for the Satluj Yamuna canal dispute.
- In the case of *Atma Linga Reddy v. Union of India*,²⁰ SC clearly excluded the jurisdiction of article 32 and 131 with respect to water disputes and stated that these issues will solely be dealt by tribunals.
- In the case of *Gandhi Sahitya Sangh v. Union of India*²¹, SC has held that no individual will have any standing to challenge the validity of award, it also stated that only State government can do so under article 131 of the Constitution.
- In the case of *State of Tamil Nadu v. State of Kerala*,²² it has been held that if the matter is not related to water dispute solely then the SC has the jurisdiction to decide on the same.

II. CRITICAL ANALYSIS

The Inter-State Water Disputes Act of 1956, which was enacted under Article 262 of the Indian Constitution, gave the Union control over the resolution of water disputes between two or more states. Many tribunal awards have been made in resolving water conflicts on the Krishna, Narmada, and Godavari rivers as a result of this legislation. This system of dispute resolution is no longer relevant as India has become more complex since 1947. This is demonstrated by

¹⁸ State of Karnataka v. State of TN., (2017) 3 SCC 362.

¹⁹ State of A.P. v. State of Karnataka, (2000) 9 SCC 572.

²⁰ Atma Linga Reddy v. Union of India, (2008) 7 SCC 788.

²¹ Gandhi Sahitya Sangh v. Union of India, (2003) 3 SCC 356.

²² State of Tamil Nadu v. State of Kerala, (2014) 12 SCC 696.

the exorbitantly long time it takes to resolve disputes, widespread discontent with outcomes, and a variety of other factors. These circumstances have combined to create a sense of dissatisfaction with the laws, both statutory and constitutional. On analysis the constitutional provisions, article 262 can be majorly criticized in the sense that it doesn't provide any time limit for resolving the disputes, moreover, there are no standards to ensure that the tribunals work in an efficient manner. There is no provision in the constitution to ensure the proper implementation is the main reason for pending water disputes currently. Further, the technical difficulties are always there when it comes to resolving water disputes as the members of the tribunal are not well versed with water law and this sometimes leads to wrong decision which affects the community as a whole.

The major problematic issue is that there are no effective remedies in place to deal with the possibility of a Tribunal's ruling not being implemented. The award is final and binding, according to the Act, and there is no right of appeal, even to the Supreme Court. An award can only be made by a tribunal, it has no role in its implementation. It has no enforcement powers even when it is in existence, except from the fact that it will cease to exist after it has made its final award.

Failure to hear the problems of the community has also been a major issue while settling water disputes, as often the needs and demands of the community are overlooked and the award is then not able to prosper in the long run.

III. RECOMMENDATION

In light of topic, the author would like to recommend the following:

- At the most general level, the central government must take note of Sakaria Commission and should allot the tribunal's award the same position as Sc's decree, this will help in accepting the award and the number of disputes will eventually decrease.
- The parliament must take examples from western countries like USA and Canada for resolving water disputes and then can eventually amend the existing laws related to resolving water disputes. The need of the hour is to amend the laws in such a way that the award is rapidly implemented and there is no delay in any process of legislation. The Supreme Court must lay down proper guidelines for both- central government and tribunals to resolve water disputes.
- The Parliament can also establish a special permanent body to supervise tribunals in resolving disputes, this body can also be in charge of ensuring transparency and

separation of power in the system.

- The various process of ADR can be fostered even when the tribunals is working to resolve the issue and once if there is any effective solution, tribunal can be made aware for better implementation of the award, the central government should also have a deadline to publish these awards so that justice can be served in an efficient manner.
- Since the community does not receive justice immediately after filing a complaint with a tribunal, an alternate method of contacting courts to resolve the matter at the local level should be available. In light of same point, community engagement must be promoted and their needs must be made aware to tribunal because then only the tribunals might come up with awards that will benefit the society.
- At last, Linking all the rivers in India can also be an effective solution because then all the states will have water to meet their daily requirements and the disputes will take a U-turn eventually.

IV. CONCLUSION

The Inter-state River Water Disputes are a complicated subject involving a number of court rulings and statutes. Nothing has succeeded in resolving this very sensitive and political problem. An examination of the Inter-state River Water Disputes Act of 1956 reveals that it is legislative framework for settling inter-state water conflicts. The constitutional position of the Supreme Court's jurisdiction being excluded created a situation in which a tribunal was legally required to be created for settling disputes.

Further, if we analyse the major water disputes, it can be seen that the process of adjudication has its own pros and cons and sometimes leave the community unattended. Because of a number of existing complex issues, the Inter-state River Water Disputes Act of 1956 is ineffective. There is an obvious need to modify the mechanism for resolving interstate water disputes.

The interconnection of river waters in India has been offered as one solution to India's water concerns. Water conflicts may only be resolved or balanced by establishing a permanent tribunal with Supreme Court appeal authority over the tribunal's decisions. The parliament's first concern should be to amend Article 262 and the Inter-State Water Disputes Act.
