

# THE PLACE OF THE TRIBUNAL IN INTER-STATE WATER DISPUTES

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## Abstract

*The enthusiasm in official circles for Tribunals to settle inter-state river water disputes has not been matched by that of the states involved in the disputes. There is some doubt about whether the awards of the Tribunals dealing with the more difficult tasks will be accepted by the states. This throws up a rather fundamental question: What role, if any, can Tribunals play in resolving inter-state river water disputes in India? In order to answer this question, we first seek an appropriate concept of institutions that would help us understand Tribunals. Based on this concept, we would look at the abstract case for Tribunals. We would then go on to look at the issues that emerge in practice, before finally going on to argue that while the Tribunals have an essential role to play in addressing the technical and judicial aspects of inter-state river water disputes, there are other dimensions to these disputes that are equally important to address. Unfortunately, these fall well beyond the capabilities of even the best equipped Tribunal. Thus the effectiveness of a Tribunal depends not just on what it does, but also on what is done to address factors beyond its control.*

## Keywords

Tribunals, rivers, disputes, India, institutions

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National governments in India have tended to rely quite heavily on Tribunals to determine the sharing of river waters between states of the Union. Disputes concerning the waters of Narmada, Godavari, Krishna, Cauvery, Ravi and Beas rivers have all been referred to Tribunals.<sup>2</sup> The response of state governments to the awards of these Tribunals has however been rather uneven. In some cases, the verdicts of the Tribunals were accepted without too much resistance by the states concerned. In the case of the Godavari, the affected states even worked out a series of agreements leaving the Godavari Water Disputes Tribunal with the less onerous task of incorporating these results into its final report. On the other hand, in some other river basins, the contending parties have proved more difficult to please. Not only have they been far less capable of settling the disputes themselves but also they were not entirely willing to accept the awards of the relevant Tribunals. Indeed, Karnataka's rejection of the interim order of the Cauvery Water Disputes Tribunal in 1991 was accompanied by violent protests (Sebastian, 1992). There is thus a disparity between the enthusiasm in some official circles for Tribunals between the institutions with the knowledge and authority to resolve inter-state water disputes and the doubts sometimes expressed by states over the validity of a Tribunal's orders. This divergence brings to the fore a rather basic question: What role, if any, can Tribunals play in resolving inter-state river water disputes in India?

In order to answer this question we first seek an appropriate concept of institutions that would help us understand Tribunals. Based on this concept, we would look at the abstract case for Tribunals. We would then go on to look at the issues that emerge in practice, before finally identifying some of the essential features of an effective mechanism to address river water disputes and the role of Tribunals in that mechanism.

### **Institutions and River Water Dispute Tribunals**

In choosing a concept of institutions to understand the nature and functioning of River Water Dispute Tribunals, we run the risk of our choice being equipped to deal with only a part of the many dimensions of this issue. Too often, we take a rather narrow view of an institution as one that sets the rules that must then be unquestioningly followed. While the fairness of these rules may be debated in an academic, even abstract sense, the possibility of a rule that is believed to be fair in terms of accepted academic criteria not being considered fair by people in the contending states is not given too much importance. It is implicitly, and sometimes even

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<sup>2</sup> Brief accounts of the various Tribunals are available at the website of the Ministry of Water Resources, Government of India, <http://wrmin.nic.in/> accessed on 10 July 2009.

explicitly, assumed in academic discussions that once a Tribunal has considered all the facts and come up with an award, the state must quite simply use all the resources at its command to implement it. Any attempt to take into account emotional reactions on the ground would be seen as a sign of weakness.

This tendency is reflected in some academic responses to Karnataka's rejection of interim order of the Cauvery River Water Disputes Tribunal in 1991. Confronted by Karnataka's actions, Tamil Nadu had asked for a direction from the Supreme Court that the order be implemented. But wary of the possibility that the Supreme Court's order too could be difficult to implement in the emotionally charged environment at the time, the concerned states reached a short-term compromise which involved Tamil Nadu withdrawing its petition. The politicians' recognition of the need to keep down the temperatures of the debate was not shared by at least one administrator/academic commentator who believed "an opportunity for an authoritative pronouncement by the Supreme Court on the question whether compliance with the award of an ISWD Tribunal is mandatory or not was missed" (Iyer, 2002).

This approach has the advantage of logical clarity, as it does not have to take into account the often inconsistent and apparently unrelated claims that political reactions tend to bring into the picture. But the extent to which the politicians reflect perceptions of the dispute among the affected people keeping their reactions out, amounts to going by what is officially considered fair rather than what is *seen to be* fair. And if disputes and their intensity are determined by what is *seen to be* unfair, leaving out perceptions of unfairness will not help. Since disputes only disappear when the affected parties accept a proposed solution, we could argue that the success of a Tribunal should be measured not just in terms of its award being just, but also on it being seen to be just. A concept of institutions that would help us understand the nature and functioning of river water dispute Tribunals in India must then recognise that there could sometimes be a substantial divergence between what a Tribunal genuinely believes to be fair and what people in the contending states consider fair.

One concept of institutions that meets this requirement is that used by John Rawls in *A Theory of Justice*. Rawls makes a distinction between two ways of perceiving an institution: "first as an abstract object, that is, as a possible form of conduct expressed by a system of rules; and second, as the realization in the thought and conduct of certain persons at a certain time and place of the actions specified by these rules. . . The institution as an abstract object is just or unjust in the sense that any realization of it would be just or unjust" (Rawls, 2000). Clearly, the academic and legal debate on water Tribunals tends to focus almost exclusively on the first way of looking at institutions, that is, the creation of a set of rules for water sharing. The focus of the politicians, on the other hand, is almost entirely on the second way of looking at

institutions, that is, the consequences of implementing the rules of water sharing laid down by the Tribunals. And, as this concept makes clear, it is the realization in practice of an institution that determines whether it is just or unjust, we cannot afford to leave out the responses to the actions of a Tribunal.

To get a more inclusive picture of the role water Tribunals can play, we would need to go beyond looking at this institution as one that makes the rules of water sharing, in trying to understand the determinants of the reactions to its actions.

### **The Rule Maker**

In a purely legal sense, water Tribunals owe their existence to the decision of the framers of the Indian constitution to make water the responsibility of state governments. When distributing subjects according to whether they should be dealt with by the states, the union or concurrently by both, water was placed on the state list. This created a need for a mechanism that would deal with disputes between states. The scope to create such a mechanism was provided by Article 262 of the Indian Constitution which states:

“Adjudication of disputes relating to waters of inter-state rivers or river-valleys:

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.” (Bakshi, 2005)

Based on this Article, the Indian Parliament enacted the Inter-State River Water Disputes Act, 1956.<sup>3</sup> Three aspects of this Act stood out in its approach to river water disputes. First, it was true to the spirit of the Constitution, in that it upheld the view that water was a state subject. As such, it saw a role for Tribunals only at the request of an affected state. Second, it sought to merge the skills and reputation of the judiciary with the detailed investigation required to appreciate the intricacies of inter-state river water disputes. Thus its chairman and members had to be judges of the Supreme Court or a High Court at the time of their nomination, even as they were given sufficient time to investigate the matters referred to it. And third, there was no room for doubts about the stature of the Tribunal and its awards as the Act reiterated the

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<sup>3</sup> Downloaded from <http://wrmin.nic.in/index3.asp?subsublinkid=377&langid=1&sslid=385> accessed on 10 July 2009.

provision of Section 262 that neither the Supreme Court nor any other court would have any jurisdiction over any water dispute referred to the Tribunal under this Act.<sup>4</sup>

The Act seemed to work well enough in the first three and a half decades of its existence. The Narmada Tribunal submitted its report in December 1979 and the Godavari Tribunal in July 1980 and both found the required degree of acceptance by the affected states (Iyer, 1994). Since the 1980s however, there have been signs of the water disputes becoming much more politicised, with the dispute between Karnataka and Tamil Nadu over Cauvery waters being a prime example. This tends to make states less accommodating towards Tribunals. The public perception of the Tribunals in individual states is that of central institutions which do not necessarily have that state's interests at heart. And in this charged atmosphere, there are bound to be doubts about whether the verdicts of the Tribunals would be accepted by the state governments.

The official response to this challenge has largely been in terms of trying to improve the efficiency of the Tribunals. The problems were seen as one of long delays before a Tribunal's verdict was available and then the difficulties in enforcing that verdict. The Sarkaria Commission on Centre / State relations addressed both these concerns.<sup>5</sup> It recommended deadlines at various stages in the entire process. It sought a one-year limit for the Union government to constitute a Tribunal once it received an application from a state. It also wanted the award to become effective within five years from the date of constitution of the Tribunal, though it was realistic enough to allow for the government to accede to the request of the Tribunal for an extension. And, in order to speed up the entire process of investigation, it made a case for a Data Bank and information system at the national level. To help make the award binding, it demanded that the awards of the Tribunal be given the same force and sanction as an order or decree of the Supreme Court. It was also inclined to curb the power of the states by allowing the Union government to appoint a Tribunal suo moto, without waiting for one of the affected states to approach it.

Not surprisingly, when the recommendations were considered by a sub-committee of the inter-state council, the attempt to give the Union government suo moto powers was struck down. But for the basic approach of setting deadlines and providing the Tribunal's award, a greater legal tooth was endorsed. The deadline on the Union government to set up the Tribunal within

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<sup>4</sup> It must be remembered that, in practice, a distinction is made between the settlement of a water dispute and the enforcement of the decision of the Tribunal. The Supreme Court has ruled that it can go into cases relating to the enforcement of the decisions of a Tribunal (Jain, 2005).

<sup>5</sup> The Commission under Justice RS Sarkaria was set up in June 1983 to review the working of the relations between the Centre and the States. It submitted its report in January 1988. It devoted a chapter (Chapter XVII) of the final report to inter-state water disputes.

a year of the complaint was accepted as was the recommendation that the Tribunal's award be given the same force as an order or decree of the Supreme Court. Deadlines were also set for the Tribunal to give its report and for the report to be implemented, but enough flexibility was built into the clauses to allow for political and other contingencies.<sup>6</sup>

Since the enactment of the relevant law in 1956, the Tribunals have emerged as institutions that can play an important technical and judicial role in inter-state river water disputes. They have demonstrated the technical expertise required to evaluate the contributions of the catchment areas of individual states to the river. They have also shown the judicial skill required to determine how the water should then be shared. But the acceptance of their verdict is an issue that they evidently believe is well beyond their purview.

### **'Externalities' and Water Disputes**

While looking at popular responses to an inter-state water dispute it is important to recognize that the public perception of the issues involved need not tally directly with the legal issues involved. River water disputes do not occur in isolation but, within a larger social, economic and political context. In a purely legal sense, we could treat many of these issues as external to the dispute, or what economists would call 'externalities'. But that does not necessarily diminish their importance. Indeed, in the popular perception, what is typically being debated is the entire set of issues that can be directly or indirectly related to the specific water dispute and not just the technical aspects that is the focus of the Tribunals. And this broader debate could be influenced by a variety of factors.

The intensity of water disputes tend to be very sensitive to popular perceptions of shortages. The disputes can, and often do, arise well before a shortage actually emerges. The moment conditions arise that raise the possibility of change in the demand for water, states tend to make their claims. The dispute over Cauvery waters first arose in the late nineteenth century when a significant proportion of the water was flowing into the sea. But, as the states move towards utilising a greater proportion of the water, there is the possibility of canals going dry in a bad monsoon year. It is the fear of such extreme shortages that adds to the intensity of public reactions to the dispute in a poor monsoon year.

This sensitivity to the monsoons is also heightened by the pressures to build irrigation infrastructure based on excessively optimistic estimates of rainfall. Given the often vast differences between conditions in wet land and dry land villages, it could make economic sense to construct irrigation infrastructure even if it is expected to go dry, say, once in every four

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<sup>6</sup> These changes were incorporated into the Inter-State River Water Disputes Act in 2002.

years. But in the dry year, there will be a tendency to look suspiciously at other users of the river water, especially if they are in another part of the country.

The frequency of such dry years would depend not just on the monsoons but also on the efficiency of the irrigation network. The wastage involved in extremely low levels of efficiency could lead to canals going dry even in years of only a limited decline in rainfall. And there are several factors that contribute to this wastage. The demands of rural politics ensure that the pricing of irrigation water is such that it is difficult to even cover maintenance costs. There is then little possibility of charging anywhere near the scarcity prices needed to prevent the wastage of irrigation water. The challenge of putting in place a pricing system in the urban areas that prevents wastage is also largely unaddressed. In addition, cities are also marked by grossly inadequate attention being paid to the need to differentiate water quality for different uses. More often than not, drinking water is used for gardens.

The effect of the rising probability of the canals going dry has been accentuated by larger macro economic trends. The rapid growth in the Indian economy since liberalization in the 1990s has been marked by a sharp decline in the share of agriculture from well over 40 percent of Gross National Product to well below 20 percent of GDP. At the same time, there is little to suggest a corresponding shift in the workforce from agriculture to non-agriculture. While the census noted a fairly sharp decline in the proportion of agricultural labourers and cultivators to total workers in a few states like Kerala, this trend was far less pronounced in most other parts of the country.<sup>7</sup> If we take into account the overall growth in population, the number of people dependent on agriculture has, in fact, grown very substantially. Indian agriculture thus presents a picture of a larger number of people dependent on a lower share of GDP. Efforts to ease this pressure are constrained by the fact that the net sown area in India has not grown significantly since the 1960s (Bhalla and Singh, 1997). The entire emphasis then is on cropping the same piece of land more frequently. And irrigation forms an essential part of this dream.

To make matters worse, there are indications of an increasing dependence on river waters. Other more local sources of water are already under intense pressure. The centuries-old tank irrigation network is, in most parts of India, in a state of extreme disrepair, leading to a massive decline in the area irrigated by tanks.<sup>8</sup> In urban areas, there is an economic incentive to hasten the decline of this water source, as tank beds can be converted into expensive real estates. The

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<sup>7</sup> For a comparison across states, see Pani and Jafar (2008).

<sup>8</sup> Noting that the decline in tank irrigated area is a common feature across the country, the *Jala Samvardhane Yojana Sangha* of the Department of Water Resources (Minor Irrigation), Government of Karnataka, records that "The actual area irrigated by [Karnataka's] tanks have shown a consistently declining trend with the current irrigation at 2,40,000 ha. This is only 35% of the total potential." <http://www.jsysindia.org/TIK.asp> accessed on 10 July 2009.

unregulated use of groundwater has also resulted in the gross over-utilization of this source (Singh and Singh, 2002). Not surprisingly, the dependence of cities on river waters has also increased. Chennai has had the benefit of an agreement between neighbouring states, giving it additional water from the Krishna. Bangalore's dependence on the Cauvery for its water has also grown quite rapidly.

These water-related pressures have been given an additional dimension by national political trends. The 1980s can be seen as one of the turning points in the emergence of regional identities in Indian politics. It was marked by the rise of a variety of regional movements across the country from Punjab to Assam and down to the southern states. The nature and intensity of these movements did vary quite substantially – from secessionist terrorism in Punjab to greater assertiveness within the Indian union in states like Karnataka and Andhra Pradesh. It was perhaps only to be expected that this trend would have its effects on river water disputes as well. It may not be entirely coincidental that the decades after 1980 have seen states being less willing to accept the verdict of Tribunals. The challenges of sharing the water of individual rivers too have tended to be increasingly articulated in inter-state terms. In rivers like the Cauvery, disputes over water sharing could occur just as easily within as well as between states. One of the major disputes over sharing the waters of this river in the 1970s was over the Varuna canal, which saw a clash of interests between farmers of two districts in Karnataka.<sup>9</sup> But since the 1980s, the focus has been entirely on the sharing of waters between states. And disputes between linguistically defined states provide a prominent place for language and linguistic identities. The response in Karnataka to issues related to the sharing of Cauvery waters is not confined just to the basin but extends to Bangalore. And in Bangalore, the agitations are typically dominated by the same groups that lead language and identity based politics in the state.<sup>10</sup>

It is important to note that the impact of such external factors on water disputes and the Tribunals set up to address them need be uniform. The factors involved would themselves vary from situation to situation. Language, for instance, would tend to play a far more potent role in disputes between states that have a history of language tensions than in conflicts between states where such tensions do not exist. Much would also depend on the response to public discontent. One of the reasons why tempers on the Cauvery dispute did not reach the levels they had in 1991, in the following years, was the fact that the governments, both in Delhi as well as in Karnataka and Tamil Nadu, chose not to take a purely legalistic approach to the issue

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<sup>9</sup> In 1978, farmers in Mandya had protested against the construction of the Varuna canal that was meant to irrigate Mysore district (Jayaram, 2002).

<sup>10</sup> Organisations like the *Karnataka Rakshana Vedike* have been leading agitations in both, on issues like the Cauvery water dispute as well as demanding the primacy of Kannada language in Karnataka.



and force the awards on an unwilling population. Indeed, even the Supreme Court has been wary of insisting on an immediate implementation of the Cauvery Tribunal's final order, regardless of the social tensions on the ground. The nature and impact of external factors on the functioning of a Tribunal would then need to be understood on a case by case basis.

### **Putting the Tribunal in Context**

The divergence between the two dimensions of the Rawlsian concept of institutions is clearly quite substantial in the case of Water Dispute Tribunals in India. The technical aspects of the disputes, such as the rights of individual states to the water and the principles to be used in apportionment, are complex enough. But when we enter the realm of reactions to the dispute, a number of other equally complex, and frequently much more intangible, elements enter the picture. The links to identity politics in particular have sometimes led to situations that are very volatile. The considerable distance between the technicalities of water sharing and the aggressive postures on the street of identity politics makes it rather difficult for practitioners in one to relate to the other. It is tempting for the technical experts to simply hope that the central government will demonstrate the strength to make the pressures of identity politics irrelevant. Such expectations are however based on a gross underestimation of the very real link between an essential requirement like water and identity politics.

In order to understand this link, we need to make explicit the distinction between the river basin and the territory covered by the users of the river water. The boundaries of the river basin are determined by the catchments of the river. The usage of the water from the river can extend beyond the basin. In a relatively backward agrarian economy that does not have the ability to divert river waters for irrigation, the two territories may be broadly the same. But technology can substantially change this situation. Large storage dams and irrigation networks can take the water to fields outside the basin. Large scale urbanisation outside the basin can also add to the demand for river water. Rapid industrialisation outside the basin too can create a fresh source of demand for the water. To the extent that we consider urbanization and the development of non-agrarian economies as essential features of development, we can expect that over time, the divergence between the boundaries of the river basin and that of the territories that use the river water will only grow.

The non-basin users of the water, in turn, represent very diverse interests, which can generate their own conflicts over water. The demands of water-intensive industries would have to be balanced against the drinking water needs of the population. The need to provide free drinking water to the poor can lead to higher prices for water being paid by the non-poor. The political mobilization of these groups requires them to be brought under a common umbrella. Language

and regional identities provide large umbrellas. Thus, as long as there are diverse groups outside the basin that share a common interest in water, there will be a temptation to link the politics of water to that of identity.

Inter-state river water disputes are thus a reflection of a larger set of tensions thrown up by changing relationships in a number of areas. A meaningful effort to resolve the conflict would then require a multi-dimensional approach. Such an inclusive approach would address at least three important aspects of the issue.

First, it would recognize the divergence between a river basin and the areas utilizing the waters of that river. It would be prepared for the possibility that economic development will shift an increasing portion of the water from the basin to areas outside the basin. This shift need not be confined to what is made possible by large irrigation projects. It could also be the result of increasing non-agrarian uses of river waters. This shift will have to be managed in a way that is consistent with the availability of water. A crucial element in such a management strategy would be water pricing that reflects the scarcity of this resource as well as other priorities such as the provision of drinking water to all and the need to ensure sufficient water for the production of food crops.

Second, an effort would have to be made to ease the existing pressures on water. A variety of steps would be needed to improve the efficiency of water usage, ranging from the prevention of wastage to ensuring that scarce drinking water is not used where reusable water would suffice. The problem of a greater number of people than required being dependent on a unit of land, and irrigation water, would also have to be addressed. The availability of alternative occupations will help reduce the dependence on irrigated agriculture for a livelihood.

Third, it must be recognized that, notwithstanding the fact that there are a large number of dimensions to water issues, Tribunals have a critical role to play in the resolution of inter-state disputes. Much as we have emphasized the need to be comprehensive in the approach to water issues, it does not, in any way, diminish the importance of at least two roles that the Tribunals play.

First, a significant degree of legal knowledge is required when determining the principles to be used when apportioning river waters. This knowledge is unlikely to be available outside the judiciary. Since a Tribunal, by law, consists only of senior members of the judiciary, it is equipped to handle this task. There may still be the odd error in the functioning of a Tribunal. It could be argued that the failure of the Cauvery Water Disputes Tribunal to include a distress sharing formula in its interim order was a major error. It meant the upper riparian state had to bear the entire burden of a failure of a monsoon. But given the complexity of the issues

involved, it is only to be expected that the possibility of legal errors is less when the exercise is carried out by members of the judiciary.

Second, the Tribunal has the ability to investigate the specifics of each river basin with a degree of independence and detail that would be beyond the scope of other judicial institutions. It is unlikely that other institutions, including the Supreme Court, would have the time to go into a specific river water dispute with the same degree of detail as a Tribunal that has years to do so. The Tribunal is thus, in a unique position to merge technical knowledge with judicial experience.

The effectiveness of a Tribunal can also be enhanced if its structure can be modified in a way that allows it to address at least some of the factors that are currently considered to be outside its purview. In the current arrangement, there is no reason why a Tribunal, looking only at the technical and judicial aspects of a dispute, must come up with solutions that are acceptable to state governments that are sensitive to the political dimensions of that dispute. One way to bridge the gap between Tribunals and state governments would then be to allow place for a wider set of interests within the Tribunal. A Tribunal could first identify the major stakeholders in the dispute and then go on to co-opt representatives of each stakeholder. The solutions offered by such a broader Tribunal may not still be the same as those demanded by an elected state government. But to the extent that the Tribunal would now be looking beyond the technical and judicial aspects alone, the gap between its view and that of an elected government is likely to be narrower.

To answer the question we started out with, the Tribunals have an essential role to play in addressing the technical and judicial aspects of inter-state river water disputes. But there are other dimensions to these disputes that are equally important to address which fall well beyond the capabilities of even the best equipped Tribunal. The effectiveness of a Tribunal would then depend not just on what it does, but also on what is done to address factors beyond its control.

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