

“Managing Water in Federations”

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Notes for an Address to the World Water Forum
Theme Session on River Basin Management in
Federal Countries

Istanbul
17 March, 2009

Let me first congratulate Dr. Ben Brega for taking the initiative to have a theme session at the World Water Forum on managing water in federal systems. He and I first met in Saragossa, Spain, last summer where the Forum of Federations was co-sponsor of a conference on this subject. Over twenty countries were represented. The conference was put together under the academic leadership of our friend Professor Antonio Embid, who is here today. That meeting in Saragossa was, so far as I know, the first ever held on the management of water in federations—a subject that has had much less attention than the management of international waters. It was a stimulating event that has led to the recent publication of a major volume in Spanish edited by Antonio Embid. The English versions of the papers are on the Forum of Federations' website www.forumfed.org. I think it fair to say that this gathering is a direct lineal descendant of our meeting in Saragossa. Certainly, the subject is one that merits a good deal of further examination.

I am something of, if you'll excuse the expression, a fish out of water at this conference. Where most of you are water experts, I am a federalism expert. Thus, I thought it might be useful if my contribution put the issue of water management in the broader context of federal governance. I shall briefly review the very varied nature of federalism, sketch the particular challenge of dealing with water within a federal context, and outline how different federations have come at the allocation of powers relating to water. This will lead into a consideration of different approaches to dealing with waters that cross boundaries between two or more states or provinces. Finally, I shall suggest that a rounded view of the subject needs to pull together legal, administrative, policy and political perspectives.

The Nature and Variety of Federal Systems

There are an estimated 28 or so countries in the world that are usually considered to be federal or call themselves so. They are home to about 40 per cent of the world's people. The essence of federalism is a system of government where there are at least two orders of elected government—the central government and what are usually called the states or provinces (I shall use the term “states”)—that are established by the constitution and where each is endowed with some genuine autonomy from the other. In some federations local or municipal government is also constitutionally established as a third order of government. Most democracies with very large territories and populations are federal, as are a number of smaller countries with distinct religious and ethnic groups. Some non-federal

countries, such as Indonesia, are increasingly showing federal characteristics.

The classic view of federations is that each order of government has quite distinct powers—for example, the federal government is responsible for defence while the provincial or state governments are responsible for education. In fact, the extent of a clear division of powers differs greatly across federations. Some make extensive use of concurrent powers—where both orders can pass laws on the same subject, usually conditional on state laws not contradicting federal ones. Some federations, such as Germany and Spain, have an integrated approach whereby the states administer many federal laws. In most federations, there is also a good deal of overlap because certain federal powers effectively overlap with other state powers, meaning that both have legal authority to pass laws on essentially the same matter. Finally, federal governments often have a so-called spending power that enables them to make conditional financial transfers to the states and thus influence policy in areas where there may not be a federal legislative competence. So federalism typically involves a great deal of interpenetration and interaction between the two orders of government and sorting this out is a very political matter.

Federations can be centralized or quite decentralized. The form of interaction between the two orders of government varies greatly: in Germany, the state governments actually vote in the upper house on federal laws affecting them; by contrast, federal-state relations in the United States are quite unstructured and much is done through diffuse lobbying in Washington. A number of federations, such as Canada and India, have active “executive federalism” where Ministers and officials from the two orders of government meet frequently to work out problems.

Federalism and Water Management

Federations all divide their land mass into distinct territorial units. The physical boundaries of these units reflect various factors, including historical circumstances, some natural features, and the distribution of ethnic, linguistic and religious communities. These boundaries more often cut across than reflect natural water basins, so that the political geography of a federal map usually runs counter to the physical geography of ideal water management zones. Beyond that, water and population are typically distributed quite unevenly across federations, so that the demand for and

supply of water do not match political units: dry populous states can covet the water of their wetter, less populous neighbours.

The *importance of water* as an issue obviously varies greatly across federations. For those federations that have relatively abundant water across their land mass and no dramatic seasonal variations of drought or flooding, water is a second or third order political issue. Against that, in some other federations it is a first order concern. In arid Australia, for example, water has been at or near the top of the public agenda, and it is very important—at least regionally—in other federations, including the US, India, Pakistan, Brazil, Argentina, Mexico, and Ethiopia.

Water is quite *different from other natural resources*—such as petroleum and minerals—in how it affects the dynamics of a federation. Oil and gas or minerals can be a source of major tensions in federal systems that are richly endowed with such resources because of inter-state disputes over the sharing of revenues or the pace and form of development. These are usually systemic issues for the whole federation, with the federal government very much involved in trying to achieve a balance amongst competing interests at the national level.

Water is quite different. *Water disputes are often quite localized* between a few contiguous states which have differences over sharing water or water quality. Disputes seem most common in situations of relative scarcity, but they can also arise, as in Northeastern India or between Quebec and Newfoundland, over the development of abundant water resources. Of course, there can be disputes over the broader framework of water policy in federations, and these are arguably becoming more important as federal governments play a larger role in imposing national environmental and water quality standards.

In unitary countries, there can be conflicts over water issues, but typically the central government has clear authority. The conflicts can be more complicated in federal countries because the states may have legal levers of their own and because the state governments can enter the political fray—whatever their powers—to mobilize public opinion around a local interests. This can mean that the federal government hesitates or refrains from intervening where both sides are dug in because it may not want to alienate voters on one side or the other and conclude that resolving the issue is not worth the political cost.

The Allocation of Powers for Water Management

Federal constitutions allocate powers to the federal and state governments. Some federations, such as India, have very long lists setting out federal, state, and concurrent powers. Others, such as the United States, have relatively short lists of federal powers and then assign all other powers to the states.

Some federal constitutions make explicit and significant mention of water or bodies of water, while many others make no, or only very oblique, mention of the subject so that other “heads of power” become determinative.

Consider first, those constitutions that mention rivers. They can make all rivers a federal responsibility: this is the case for Ethiopia and South Africa. Or they can try to distinguish in some way between rivers under federal versus state jurisdiction: this is the case in Argentina, Brazil, India, and Spain, for example. You will realize that any attempt to define distinguish between rivers that are under federal versus state jurisdiction may run counter to an integrated approach to water basins.

Other constitutions may make some mention of water or natural resources, but the effective allocation of legislative responsibility for water may be a complex function of who has which of a whole series of powers such as internal commerce, criminal law, the environment, navigation, fisheries, agriculture, irrigation, property, treaty making and other powers. Take the treaty-making power, for example. In the United States and Australia, the federal power to make treaties has been interpreted as binding the states to respect the terms of those treaties and this has been an important source of federal legislative power over rivers. In Canada and Argentina, by contrast, the federal power to make treaties cannot encroach on provincial powers so it cannot provide the federal government with a legal lever to manage rivers. So in the Canadian case, federal authority over rivers comes from other powers—such as navigation, fisheries, and the criminal law—but the federal role is normally secondary because the provinces are responsible for natural resources.

Whatever the constitutional basis for allocating responsibilities for water, it appears that in most federations both orders of government have some significant responsibilities for water. Nigeria, South Africa and Ethiopia are

highly centralized for this purpose and are important exceptions, but even in these cases there are prospects for greater state or provincial involvement. In most federations, the states or provinces lead on such local issues water services and sanitation. They also usually lead on the allocation of water rights amongst private parties, at least from rivers and other water bodies deemed to be under their jurisdiction. This, in itself, can give a federal character to water policy in that the principles applied in different parts of the country may be different: thus in Canada and the United States the Western provinces and states have adopted the prior use principle of apportionment while equitable access prevails elsewhere. Customary law regarding water rights may also constrain both orders of government, as in Nigeria, and these rights may differ by region. Aboriginal rights may also impinge on both orders or create a federal fiduciary responsibility that overrides certain state rights—this has been important in the United States.

In most federations, however, it appears that the federal government has a range of legislative powers that permit it to play a significant role in relation to water if it so chooses. In many cases, the federal government may also use the spending power of the federal government to offer conditional grants to the states or provinces in exchange for their complying with federal policy.

Dealing with Trans-boundary Waters

Clearly, a—perhaps the—central issue for water management in federations is dealing with trans-boundary waters. This includes waters that cross the boundaries between the states and provinces, but also those that cross international boundaries where the contiguous states or provinces may have an interest and a role. There are essentially three ways in which such issues can be managed: through the courts, through federal legislation, or through cooperative relations between the concerned governments. Let me say a word about each of these alternatives.

The courts clearly have a role in clarifying the respective legal authorities of the federal versus the state governments. They can also be called upon to interpret legislation. However, the role of the courts in dealing with water conflicts varies considerably across federations. Governments make very different recourse to the courts for such matters, and the courts themselves can be quite deferential in inserting themselves into issues that are often as political as they are legal. Even where there are special tribunals to deal

with interstate water disputes, as in India, the process can be very slow and there can be problems with compliance, particularly by upstream states that object to rulings. Moreover, courts by their nature are constrained to decide issues on legal grounds, which may have little to do with good or coherent water policy.

Federal legislation can also play a significant role in settling water disputes and in establishing water policy frameworks. In some federations, the federal government has virtually all the constitutional authority needed to impose a water policy framework, while in others it has at least the possibility of significant interventions. A dramatic example of this is the recent Australian legislation on the Murray-Darling that imposes a very detailed set of obligations on the states regarding the management of this critical basin. However, it is striking how often federal governments in some countries have been reluctant to exercise fully their potential legal authority by legislating robust water management policies. For example, the US Congress has taken a very limited approach to water legislation, while the federal Parliament in Canada has passed legislation that has had only a very marginal impact: neither country has ever legislated a comprehensive federal water policy. Even where federal governments do pass major legislation, they usually avoid a complete usurpation of state powers and provide for some role by states in whatever water management processes they establish.

This brings me to the cooperative approach. A number of federations have established inter-governmental mechanisms for the joint management of waters. The United States, for example, has some 25 compacts between states; these are backed by federal law and include a federal representative as part of the decision-making. Brazil has developed an exceptionally elaborate structure to bring together the states and federal government: the process must include a significant cooperative element because the states have constitutional responsibility for certain rivers.

In some cases, cooperative mechanisms have involved a secondary role for the federal government. For example, the Governors of the relevant states in the US led in the creation of a Great Lakes Charter which has established an important policy framework for cooperative policy management; the Canadian provinces of Ontario and Quebec have joined in this and they all cooperate with the International Joint Commission established between Canada and the United States. It is striking that most major water policy

initiatives in the United States have been driven by state governors, not the federal government.

Cooperative mechanisms may involve the relevant jurisdictions agreeing to new decision-making arrangements which effectively bind the states or provinces. This has been the case with the US compacts, for example. Until recently, Australia had relied on consensus for decisions on the Murray-Darling basin, but it was recognized that this too often led to stalemate and the new rules do not require all states to agree. In Germany, cooperative mechanisms have been limited by the constitutional prohibition on the länder (states) from entering into joint decision-making arrangements that would constrain their constitutional powers; this has complicated attempts to coordinate even cooperative administrative arrangements amongst the länder. This subject of cooperative mechanisms for resolving water conflicts is potentially one of the most fruitful for further research into water management in federations. For example, the European Union's success with the Danube and Rhine arrangements could provide an example to various federations.

Politics, Policy, Administration and Law

Let me conclude this brief overview with a few comments on the need for an integrated view of the factors shaping how federations deal with water management. The legal view emphasizes the constitutional division of powers and who could do what. The administrative view looks at how federations deliver programs in key areas, such as environmental regulation, and where the bureaucratic authority and capacity resides for research, regulation enforcement and program delivery. The policy view is focused on the principles of good water management. And the political view looks at the political games around water: the objectives of stakeholders, the politics of the issue for state and federal governments and for political parties, the levers that the different actors have to influence the outcome.

Perhaps the best way to draw all of these factors into some sort of joint focus is to ask a few basic questions. In political terms, is water a highly salient issue nationally or in some regions? In policy terms, what is the nature of the key issues? Is there some measure of consensus on the way forward or are views highly divided?

It is clear that the nature of the issues evolve. In the United States, for example, it has been suggested that the focus of water policy has shifted over time from transportation, to water and public lands, to allocation, to major water infrastructure, to the environment. The environmental issues themselves have been changing in nature and will evolve further as climate change policy develops.

Whatever the focus of water policy, we have seen that in some cases, federal governments have shied away from making full use of their potential legal or moral powers to manage water or engage in water disputes amongst states or provinces. In some cases, such as Canada, this is probably because the issues have been viewed as relatively minor in terms of the national interest and therefore not meriting the federal government using up political capital by intruding into an area of strong state or provincial interest. In other cases, however, it may be that even if the federal government recognizes an important problem, it is politically not prepared to come down on one side or the other in an intractable regional conflict over water. Arguably this has been the case with the US government's relative lack of engagement in water issues affecting the southwest and with the Indian government's similar posture in some conflicts between upstream versus downstream states. Of course, sometimes the very scale of the problem forces a federal government to lead, however politically difficult that may be. The story of the Murray-Darling in Australia is one of the federal government being progressively drawn further and further into a deeply divisive issue, but one that absolutely had to be resolved given its exceptional importance for the country. The federal government's approach was not just to impose a solution, but to sugar the pill with over thirteen billion dollars in spending—including three billion for the purchase of water rights. Spending money may be the only way the federal government has to achieve the famous win-win that politicians so love and thus strictly limit the number of losers.

The question the conference organizers have put to this session is whether river basin management in federations is realistic. The answer, as we shall see in the case studies discussed at this session, is a mixed picture depending on the several factors I have outlined. I would argue that generally federations do a better job at coming to terms with these issues than is the case for international waters because federal governments can use legal and spending instruments to promote solutions. But this is by no means assured. Meetings such as this could help improve the federal success ratio,

particularly if they draw out those factors that have permitted some federations to develop consensus and cooperative processes.