

Subtheme

Anticipating and Managing Tension and Conflict

Work Session 7: How do Federations
Deal with Water Disputes?

Work Session 19: How do Federations
Coordinate Policing and Deal with
Public Security?

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1. Introduction

In the contemporary context of “global” becoming “local”, and “local” becoming “global”, the federal matrix of “self rule plus shared rule” is being fine-tuned in each federation to meet the challenges of “coordinated action” in the areas which have been traditionally marked with strict separation of powers and responsibilities. As the global federal experiences show, federalism begins with the neat division of powers and authorities, but soon converts into a shared action, or shared governance of the larger public issues, even though the realm of public is constitutionally delimited as local/regional and national. Shared governance of the “public” is made necessary as a result of several factors, including the need for rule harmonization and standardization, redistributive stress, common

resource management, fiscal needs, conflicting societal demands, ownership conflict and overlapping of jurisdictions, trans-regional and trans-boundary implications of actions and decisions, cross border movements of public goods and trafficking of crimes, criminals and terrors. The most crucial challenges for shared governance are seeking a balance between autonomy and integration on the one hand, and between centralization and non-centralization on the other, in addition to containing conflict and ensuring coordinated actions. Generally speaking, coordinated action involves: (i) regular interactions among the actors-in-situations, (ii) a formal mechanism of resolution of conflicts and shared governance, (iii) laying down the formal rules of games, and (iv) an independent judicial mechanism of conciliating differences and arbitrating competing claims of interests. There are no universally accepted principles of shared governance and coordinated action on the matters of common public concern. Thus, while the Australian approach emphasizes a combination of both formal and informal executive mechanisms of shared governance and common policy outlook, the Canadians favour a formal—legal approach of rule based cooperation and collaboration. India uniquely combines formal structural mechanisms (i.e. institutions of shared governance such as Inter-State Council, National Development Council, etc.) with political negotiations (especially in the process and through the good—offices of the Prime Minister’s Office), judicial resolution, and semi judicial arbitration by regulatory authorities.

In order to avoid conflict among the different actors and polities, federal methodology recommends an unbundling approach in which responsibilities and authorities are split up into many micro actions, which are then assigned to the actors on the basis of equity, subsidiarity and economies of scale. Such an approach of allocation of responsibilities and authorities is further fine tuned to critically blend the basics of autonomy and integration. In other words, a kind of even playing field is created for each level and each unit of the federation. This offers a tremendous opportunity for coordinated action and shared governance of such vexatious and complex issues of public security and water sharing. These two issues, in the contemporary context of techno-managerial perspectives of development and international regulation, pose a critical

challenge of redistributing competences, redefining and restatement of the problems, redrafting of laws, reinventing better methodology of public management, reinvigorating existing institutional mechanism, designing new institutions, revisiting the role of judiciary, redesigning the state-society relationship in a manner ensuring greater involvement of public at large both in decisions and actions. Given the multidimensionality of the issues, we find in practice no one stroke solution of the problem, but a variety of practices are emerging from the federations.

2. Resolving Water Disputes

One can hardly find any uniformity in resolving water disputes across federations. Interregional water flows produce conflicts between regions sharing the water source over its use. This raises the complex question of water rights, community ownership, national regulation and extension of federal control over the jurisdictions of the regions. The Canadian, Australian and US constitutions hardly elaborate and provide for any significant mechanisms for resolving water disputes. The recourse to judicial mechanism is the principal mode of resolution of conflicts in these federations. However, one can further classify the various modes of resolution of competing claims on water as the following: (a) Constitution of commissions and other national level regulatory institutions with due consent and partnership of federating units, particularly of the affected regions. (b) Nationalizations of contentious inter-state river waters for federal regulation. (c) Establishment of semi judicial institutions like water tribunals to arbitrate between contesting units. (d) Judicial resolutions. (e) Contesting states agreeing among themselves to institute a lateral authority to regulate the sharing of waters. (f) Striking consensus through executive interventions, particularly of the Prime Minister or President's office. (g) Behavioural regulation through adoption of national mission statement on water.

Indian federalism constitutes an interesting case of the relative successes and failures of multiple modes of resolution of water disputes. Constitution bestows upon the Union government/parliament to make necessary laws with regards to "regulation and development of inter-state rivers and river valleys in the larger

interests of the public". To the extent of conformity with this provision of the constitution, the states have vested rights and authorities over "water supplies, irrigation and canals, drainage and embankments, water storage and water power". But the federal government has an obligation under Article 262 of the constitution to adjudicate the river water dispute through tribunals, which, as provided under Inter-State River Water Dispute Act, 1956, "shall investigate the matters referred to it and forward to the central government a report setting out the facts as found by it and giving its decisions on the matters referred to it within a period of three years". The tribunals are required when "it appears to the government of any state that a water dispute with the government of another state has arisen or is likely to arise by reason of the fact that the interests of the state, or of any inhabitants thereof, in the waters of an inter-state river or river valley have been, or are likely to be, affected prejudicially by: (a) any executive action or legislation taken or passed, or proposed to be taken or passed, by the other state; (b) the failure of the other state or any authority therein to exercise any of their powers with respect to the use, distribution or control of such waters; (c) the failure of the other state to implement the terms of any agreement relating to the use, distribution or control of such waters; the state government may, in such form and manner as may be prescribed, request the central government to refer the water dispute to a tribunal for adjudication."

The primary responsibility for the execution of the tribunals' decision lies on the federal government. And to this end, the government can either create an independent authority to oversee the execution of the tribunals' award, or a high-level office of the central government, such as the Prime Minister's Office (PMO) to monitor the progress in the implementation of the tribunals' award.

In the matter of Cauvery Water Disputes Tribunal (1993), the Supreme Court of India rejected the fundamental theory of water rights as claimed by some of the southern states of India. It has held as under:

"Though the waters of an inter-state river pass through the territories of the riparian states such waters cannot be said to be located in any one state. They are in a state of flow and no state can claim exclusive ownership of such waters so as to deprive the

other states of their equitable share. Hence in respect of such waters, no state can effectively legislate for the use of such waters since its legislative power does not extend beyond its territories. It is further an acknowledged principle of distribution and allocation of waters between the riparian states that the same has to be done on the basis of the equitable share of each state.” Recent stress is on developing a common national perspective on the use and exploitation of water. In this regard National Water Policy 2002 was announced by the Government of India. The salient features of this mission statement inter alia include: (i) bringing water resources within the category of utilisable resources to the maximum possible extent; (ii) inter-basin transfer of waters in order to meet the need of water short area; (iii) planned development of hydrological unit such as drainage basin; (iv) establishment of river basin organization; (v) promotion of participatory approach to water resource management, a user and stakeholder’s perspective of water development; and (vi) “the water sharing/distribution amongst the states should be guided by a national perspective with due regard to water resources availability and needs within the river basin. Necessary guidelines, including for water short states even outside the basin, need to be evolved for facilitating future agreements amongst the basin states.”

Undoubtedly the growth of national outlook would harmoniously resolve the water disputes. However, nationalizing a water route may also cause undue centralization of powers, an encroachment on the autonomy of states. Neither the “Swiss cheese” approach to water management, as shown from the Australian experience with regards to Murray-Darling Basin, nor the executive-political route appears to be a fool-proof federal mechanism of resolving water disputes. This is perhaps one of the crucial areas of public policy to which federalism is yet to adequately address as an integrated discipline.

3. Coordinated Policing and Public Security

Generally, maintenance of law and order and public security falls within the core competence of the regional/local governments. And

the federal government has been generally responsible for the maintenance of national security. It has resources and competence to raise defence forces, paramilitary forces, highly specialized national security guards to perform specific and targeted functions, and to institute an investigating agency. In the realm of internal security management, it only has a secondary role to play. It at best can extend helping hands to local police in performance of certain specialized tasks. But given the transforming nature of public security, each federation now emphasizes upon collective management. The evolving approach emphasizes upon the following: (i) synthesizing or the systemization of a differentiated approach to public security management into one-integrated national policy framework to which each unit of a federation is party to decision and action. While doing so, large responsibilities lie on the federal government; (ii) vertical integration of intelligence agencies; (iii) lateral integration of departments involved in tackling different challenges posed to public security; (iv) bringing out a new regime of law in the areas where no regulatory system is at work; (v) greater involvement of local governments, because they being the first-line responders play a crucially important role in the management of public safety and emergency and disaster management; (v) greater involvement of people, a public-private partnership initiative in the management of public security.

An interesting document in this regards is the DPR 2004-5: Public Safety and Emergency Preparedness, Canada. It favours a holistic approach to public safety management with lateral integration and coordination of departments, portfolio agencies and review bodies engaged in public security. The passing of the Public Safety and Emergency Preparedness Act, 2005, is an important step in this direction. "The principles enshrined by the Act—national leadership, portfolio coordination, partnerships and information sharing—are fundamental to a progressive and comprehensive approach to public safety." Another important initiative is the Policy Statement of Federation of Canadian Municipalities, 2006-7. It strongly recommends for intergovernmental partnership and agreement, saying: "a strong responsible municipal government is key to building a safe and healthy community. Community based

holistic approaches to combating crime and victimization are most successful when developed and implemented through intergovernmental and community-based partnership. We must recognize municipal governments as critical partners in emergency management, disaster mitigation and pandemic planning.” As the “fifty-two per cent of all policing expenditures in Canada come from municipal budget”, the Federation of Canadian Municipalities strongly believes that “an integrated policy model would significantly improve communication and tactical coordination across jurisdictions, and better employ resources and well coordinated responses in the events of public emergencies”. In the aftermath of 9/11 the federal government of USA initiated a thorough revamping and reorganization of its homeland security. Twenty-two separate organizations were merged together to constitute the Department of Homeland Security, principally responsible for prevention and protection from terrorist attacks and violence. US defence departments act in close cooperation with homeland security, especially in the areas of intelligence-information exchange and humanitarian relief. As a matter of fact, the issues of illegal migration and cyber crime have blurred the traditional distinction between military and police forces.

In Switzerland, cantons and confederation have joint responsibility over national security and public safety. Article 57 of the Swiss Constitution deals with the forms and format of cooperation between federal government and cantons. Besides ministerial conference, meeting on internal security lays down the formal rules of game in striking coordination in the area of public safety. Public security is shared responsibility in Indian federalism. There is a basic uniformity in the Police Act and Criminal Justice System. States have authority to employ different forces to deal with crime and public security. Yet state forces largely depend on the deployment of paramilitary forces in dealing with trans-border or interstate crimes. For modernizing its police forces, states largely depend on central assistance. Primary intelligence input is provided by the intelligence agencies of the Union government. Coordinated actions are maintained through formal executive modes such as departmental meetings, etc. So far as the role of local government in policing

and public safety is concerned, it has yet to be mapped out by the government. Another grey area is quasi-policing. Over the years, the development of private security agencies and organizations has been increasing, but they are yet to be legally formalized and institutionalized. In recent decades, Australian federation is coping with the question of “hybrid policing”, redefining the roles of state police and private policing, and policing by regulatory institutions. What appears from above is the fact that federalism as a design of cooperative-collaborative governance has yet to prepare a blueprint for policing and public security. There appears to be greater dependence of states on the federal government in performing their primary constitutional mandate of providing security to the people.

4. Unresolved Dilemma

Inter-state issues like water and public security pose an interesting unresolved federal dilemma. This is possibly because none of the federal designs as mentioned above provide an adequate role model of resolving water disputes and effective management of public security. Yet one can critically learn from the others. Shared governance of water and public security require a redefinition of cooperative federalism, because integration of actions and decisions are bound to produce centralization of powers and authorities. This may countervail the essence of federalism—non centralization. However, the need of the hour is coordinated action and a partnership view of governance.