

# Waterway wrangles beset India's federalism



REUTERS/STRINGER/INDIA

People try to transport a car to the banks of a flooded river in northeastern India. Parts of India face severe water shortages, but not the Northeast. India's National Water Policy emphasizes the need for integrated basin-based master planning for flood control and water management, but agreements have been hard to reach.

BY ASH NARAIN ROY

**“T**HE EARTH HAS ENOUGH FOR MAN'S NEED BUT not for man's greed,” said Gandhi. He practiced what he preached.

Every day when Gandhi bathed himself in the freely flowing water of the Sabarmati River in 1920, he consciously used only the smallest quantity of water he needed for taking a bath.

Asked why he was using the river water so sparingly when it was available in abundance, Gandhi remarked that “all that is flowing in the river is not mine.” States and nations fighting over water have not taken Gandhian wisdom to heart.

Water is a prime national resource, a basic human need and a precious national asset that needs to be conserved and used sparingly. The wheel of progress can run from ox carts to nuclear power; but life will always run on water. That is why water, not oil, is the prime mover in human development.

India is a microcosm for the world's water crisis. For other federal countries, it is also a model of how or how not to deal with water and water disputes. Of India's 28 states, as many as 15 have had water disputes or are squabbling over 8 river water projects.

One of the main reasons for some of India's river water dis-

putes can be found in the “Harmon Doctrine,” which the states seem to have followed, that is, “what falls on our roof is ours to use, without regard to any potential harm to downstream parties.”

This doctrine was set out by U.S. Attorney General Judson Harmon in 1896 during a controversy between the United States and Mexico over the use of the waters of the Rio Grande river. One other trend is discernible: the more recent the water disputes, the more intractable they are to resolve.

India of course does not possess textbook federalism, but then again, many contend there is no such thing as textbook federalism. The Indian Constitution sets out the legislative domains of the central and state governments. This is both the strength and weakness of India's federalism. Water, for instance, is a state subject, or jurisdiction. The Seventh Schedule of the Constitution sets out all subjects under three lists—the union list, the state list and the concurrent list.

## Prejudicing states' interests

However, because of other clauses in the constitution, water is a shared responsibility. Entry 17 of the state list includes “water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power.”

But there is a caveat. Entry 17 is subject to the provisions of Entry 56 in the union list (central government list), which says: “Regulation and development of inter-state rivers and river valleys to the extent to which such regulation and development

**Ash Narain Roy** is the Associate Director, Institute of Social Sciences in New Delhi, India.



under the control of the central government is declared by parliament by law to be expedient in the public interest.”

In effect, water is as much a central government subject as it is a state subject.

Article 262 goes further. It says: “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.”

Interestingly, the law so enacted can even exclude the jurisdiction of the Supreme Court or other courts. However, on closer scrutiny, constitutional provisions with regard to water may give the appearance of clarity, but in actual practice they are far more opaque.

Nevertheless, one can hardly fault the constitution. The spirit behind these provisions was that a state would exercise its powers in a manner that would not prejudice the interests of other states. Some of the parties to the recent river water disputes have done precisely the opposite.

River water disputes have posed a major challenge for Indian federalism over the years. The Inter-State Water Disputes Act of 1956 was enacted to deal with existing and potential inter-state disputes. It provided for the establishment of a tribunal to adjudicate among various states.

But there is one problem here: the arbitration is not binding. States have even refused to accept the court's rulings. This has often led to a constitutional crisis. The reasons for the states' defiance are not hard to find. The growing population has imposed immense pressure on available natural resources.

According to some projections, even if every available river and river stream is harnessed to the full potential, by 2045, India's population will exceed the availability of water needed to support it. The future will therefore see more conflicts over water. The politicization of water disputes has made them intractable.

More significantly, mechanisms for settling water disputes were created at a time when India had a strong central government and largely non-assertive states. The advent of coalition governments has weakened the authority of the central government.

Prime Minister Manmohan Singh said, while addressing the Fourth International Conference on Federalism in Delhi in November 2007, that water sharing and water disparities are a major challenge to federalism in India.

“It is perhaps no exaggeration to say that we have found it easier to manage bilateral agreements with neighbours on river water sharing than domestic disputes between states” Mr. Singh said.

### Feds resolve Disputes

The federal government has managed to resolve several disputes with relative ease. These include the Palar water dispute between the states of Tamil Nadu and Karnataka in 1956, the Tungbhadra Canal dispute between Karnataka and the state of Andhra Pradesh in the same year, the sharing of Subarnrekha River water among the states of Bihar, Orissa and West Bengal in 1964 and the utilization of Ravi-Beas waters among the states of Punjab, Rajasthan and Jammu and Kashmir in 1966 among others.

However, some major disputes involving large river basins

could not be resolved and hence had to be referred to tribunals. The federal government has so far set up four tribunals—the Narmada Tribunal, the Krishna Tribunal, the Godavari Tribunal and the Cauvery Tribunal. The first three disputes have been largely resolved but the Cauvery is turning out to be a tough nut to crack.

The Krishna and Godavari dispute involved the states of Maharashtra, Karnataka, Andhra Pradesh, Madhya Pradesh and Orissa. This dispute was resolved by the tribunal using the rule of equitable apportionment, each party getting a fair share of the water of the common river. The Narmada water dispute involved the states of Gujarat, Maharashtra, Madhya Pradesh and Rajasthan. The tribunal, set up in 1969, rendered its ruling in 1978. The finding was respected by all parties. In 2000, the Supreme Court upheld the tribunal's award.

The Cauvery water dispute has eluded resolution because of politicization. Differences are not only about the quantity of water released into the Cauvery River by the state of Karnataka and the method of measurement, they are also about political brinkmanship.

### Defying tribunal rulings

The strident political postures of both the Tamil Nadu and Karnataka governments have made a negotiated settlement difficult. What is indeed disturbing for Indian federalism is the lack of respect for the tribunal shown by the two states. The tribunal had given an annual share of 419 trillion cubic feet of water to Tamil Nadu and 270 trillion cubic feet to Karnataka.

The Karnataka government sought to overturn the Tribunal's interim order through an ordinance, arguing that Tamil Nadu's irrigation expansion project needed to be stopped so Karnataka could appeal the ruling. The Supreme Court declared Karnataka's action unconstitutional but the Karnataka government has shown no inclination to abide by the Tribunal's decision.

This state of affairs underscores the degree to which states located upstream benefit disproportionately by refusing to comply with arbitration – as illustrated by the Karnataka government's stand on the Cauvery dispute with Tamil Nadu.

The government of the state of Punjab has done the same as Karnataka by rejecting the Ravi-Beas Water Tribunal's award. As per the Inter-State Water Disputes Act, 1956, no state is competent to legislate with respect to water disputes or water-sharing agreements. But in July 2004, the Punjab assembly unanimously tossed aside water sharing accords with the states of Haryana and Rajasthan and pledged to withhold its water resources for use by its residents only.

The disputes discussed above are largely the result of almost year-round water shortages in the affected states.

The situation in northeastern India is quite the opposite. Against the national per capita annual availability of water at 2,208 cubic metres, the average availability in the Northeast, because of the often swollen Brahmaputra and Barak rivers, is as high as 16,589 cubic metres per capita, or seven times the country average.

However, this vast water resource remains unutilized and raises different issues related to water management in the region.

CONTINUED ON PAGE 31

## INDIA [FROM PAGE 22]

In this region, heavy rains during the monsoon season cause considerable soil erosion in the rural areas upstream, mainly in the hills, and flash floods in the downstream in the plains, including major urban areas in the state of Assam. The winter months are marked by drought and subsequent lowering of ground water level, both upstream and downstream.

The violence of the monsoon and the winter calm both have negative consequences for cultivation in the Northeast. State governments have so far approached these problems individually and through their respective local governments. However, since the upstream and downstream are hydrologically related, integrated management practices have to be put in place.

The National Water Policy (2002) emphasizes the need for integrated basin-based master planning for flood control and water management; and increased implementation of non-structural measures such as flood forecasting and warning, zoning and flood-proofing to minimize losses.

This required bilateral arrangement is between Assam and its neighbors, especially with the state of Arunachal Pradesh, to manage water flow in individual river

basins. However, agreements have been hard to reach since participant states are reluctant for political reasons to displace rural or urban populations through a process of zoning or construction of flood control infrastructure.

Further complicating the situation is the fact that in several northeastern states, management of water resources is vested not with the states but is under the jurisdiction of traditional institutions (rural local councils).

### Empowering local government

After the 73<sup>rd</sup> and 74<sup>th</sup> constitutional amendments in 1992, a third tier of government has come into being. Under the Eleventh and Twelfth Schedules of the Constitution, over two dozen subjects have been devolved to the village panchayats or local councils, and municipalities. These include drinking water, water management, watershed development, minor irrigation, sanitation, culverts, bridges, ferries, waterways and other means of communication.

The empowerment of local government institutions has added a new dimension to Indian federalism. The advent of this new order of government, the *panchayati raj*, has further weakened the central government's powers. Governance is today a far more federal enterprise than hitherto. What form or shape the conflict dimensions will take

with respect to water and water resources is impossible to predict.

In view of the increasingly difficult-to-resolve water disputes, some experts have suggested that rivers should be joined by means of canals. The BJP government pushed the idea.

The nationalization of major interstate rivers to avoid water disputes is constitutionally permissible, but is likely to be avoided by any central government that wants peace with the states. A more viable option could be water conservation and demand management.

The Sarkaria Commission on Centre-State Relations of 1988 recommended that the central government set up a tribunal within one year of receiving a complaint. In this regard, the Inter-State Water Disputes Act should be amended to ensure that the award of a tribunal becomes effective within five years and the awards should have the same force and sanctions as an order of the Supreme Court.

All said, Indian federalism has learned to live with water disputes. For the smooth functioning of federalism there is need to find ways to ensure that states don't abuse their powers over rivers. Federalism should not be a ploy for states to function as independent republics. At the same time, the federal government must play the role of a trustee for all natural resources, including rivers. 