

## CHAPTER III

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### **LEGAL FRAMEWORK ON WATER SHARING IN INDIA: AN INTER-STATE AND TRANSBOUNDARY APPROACH**

This chapter attempts at studying the Indian legal framework that provides for transboundary water sharing between India and its neighbours and the inter-state regime. Further, the chapter attempts to answer the research question as to whether the existing legal framework is adequate in dealing with the transboundary water conflicts.

Rivers are reflected as the cradles of civilizations whose waters sustain human life, but in India and the Indian subcontinent, rivers are regarded to be a divine resource. River waters play a pivotal role in enabling the social, economic and political development of the country. The Indian rivers such as the Ganges, Narmada, Mahakali, Krishna, Cauvery etc. are hence of a crucial importance in this particular regard and are thus a major pillar and a contributor of the Indian development process.

Due to vast population that vests in the subcontinent, the sharing of river waters is both a central and a challenging aspect. Rivers such as the Ganges, Mahakali and the Indus are traditionally shared between India's ancient neighbours; Bangladesh, Nepal and Pakistan among the others. As discussed in the previous chapter, conflicts over shared water resources among various stakeholders arise particularly due to the depletion of water flow that is caused by factors such as:

- Quantum of the population
- The economic needs of the population.
- The need for social development
- The use of water by one stakeholder and its effect on the other.

Though sharing of water resources across political boundaries is a matter of concern, India in this context, experiences a major challenge, as it faces both trans-national and intra- state conflicts on common and pooled rivers. Almost all states in India face inter-state water disputes, and international water disputes with Pakistan, Nepal and China to name a few. The Indian experience of water conflicts differs in regard of water sharing from the global one , due to the sole reason , that India , being a country not only shares water resources with other countries, but water sharing occurs between the domestic states at large. Being a federal country, the states through which the river flows may have strong contentions and differences with respect to the sharing of water, as each state may want a fairly large allocation of the river water on its side. Further, most water disputes among countries and states occur predominantly due to the sole reason and lucidity that rivers do not follow any specific political limits which poses a problem among nations. Second, the uneven distribution of water resources affects the hydrological cycle and water availability, thereby directly affecting water quality. Third, the regionalization of national polity is another cause for the Indian experience of water conflicts among states. Therefore, it became pertinent to resolve such water conflicts through constitutional and legislative means. The existing water law regime in India is largely a product of principles, rules and policies that were adopted over many decades.

Various statutes came to be enacted under the British reign, wherein irrigation was a prime consideration. One of the legislations to standardize the aspect of navigation, irrigation and drainage, was the '*Northern India Canal and Drainage Act, 1873*'.<sup>98</sup> *The Madhya Pradesh Irrigation Act, 1935* further asserted state ownership over water.<sup>99</sup> In order to strengthen the said provision, '*The Government of India Act, 1935*', transferred

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<sup>98</sup> Madhya Pradesh Irrigation Act, 1931, Art. 26

<sup>99</sup> Phillipe Cullet, "Water Law in India", International Environment Law Research Centre.

the subject of irrigation from the control of the centre to the state, thus vesting the power to legislate on the said subject with the states.<sup>100</sup> Hence, deriving from the same, the Indian Constitution is what is known as ‘*supreme lex loci*’, and is termed as the ‘law of land’, lays down discrete provisions for water sharing and it seeks to achieve reasonable allocation by way of power-sharing arrangements between the Union and the States, and hence gives the power to states to legislate as water is largely state based. Hence, by virtue of the same, states have the power to regulate on matters such as fisheries, canals, drainage, irrigation, embankments and hydropower.<sup>101</sup> Article 262 of the *Constitution of India*, empowers the Union Parliament to adjudicate on matters which relate to the usage, distribution and the issue of control over waters or an transboundary river, these also include shipping and navigation on national waterways and the power to regulate the usage of territorial waters,<sup>102</sup> thus excluding the jurisdiction of the Supreme Court from entertainment of such disputes, which would ordinarily would vest with the apex court under Article 131.<sup>103</sup> Thus, the division of water across different heads between the legislature and the executive lays a clear demarcation of adjudication of water conflicts. Though the makers of the constitution attempted at dealing with the subject of water through clear allocation of powers amongst the Union and the States, yet the concern for sharing of water amongst states and countries still persisted. This was due to the year 1956, wherein the Parliament enacted the *States Reorganization Act*, through which the Union sought to realign the State territories to strengthen populations speaking similar language. Then, with the creation of these new boundaries, the central government was faced with a more peculiar problem of sharing of the inter-state rivers. This was because, states which became more uneven; newer states had river waters within their boundary and new laws that these states wished to implement which caused disarray among states and hence reaching a common consensus became difficult.

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<sup>100</sup> Entry 19 of the Provincial List.

<sup>101</sup> Schedule 7, List 2, Entry 17 and 21 of the Constitution of India, 1950.

<sup>102</sup> Schedule 7, List 1, Entry 24, 25 and 57 of the Constitution of India, 1950.

<sup>103</sup> Article 131 of the Constitution of India.

### **III.1. INDIAN FRAMEWORK ON INTER-STATE WATER SHARING**

In response to resolving this issue, the Parliament enacted two legislative instruments to adjudicate upon the inter-state water rights. These were:

#### **III.1.i. The River Boards Act, 1956**

Under the said legislation, the State Governments at their discretion may demand the creation of Inter State ‘River Boards’ from the central government to assist in developing inter-state rivers and adjudicate upon issues arising out of them, and help prepare versatile schemes for regulation of waterways. Further, potential activities include the control, conservation and optimum use of water resources, preparation of promotional schemes for irrigation, drainage, hydro-electric power, pollution and water supply etc.<sup>104</sup> Moreover, the Statute follows the ‘*Sub Basin Division*’ approach wherein the whole river basin is divided into sub-basins, with each party being allocated the rights and the command of the respective sub-division lying in their particular area. Further, in order to ensure water allocation in the sub-division the principle of ‘*Equal Apportionment*’ is followed on which the proportionate share of the parties are based upon factors such as investment, area of the basin and total volume of water.

#### **III.1.ii. The Inter-State River Water Disputes Act, 1956 (ISWD)**

This Act was enacted under the aegis of Article 262 of the Constitution of India. The Act defines water dispute as, “*any dispute or difference between two or more states in regard to the use, distribution or control of waters in an inter-state or the interpretation of any terms of an agreement with respect to the above matters.*”<sup>105</sup> The statute provides for the creation of a ‘*Water Disputes Tribunal*’ by the central government on receiving requests from the state governments, where water conflicts remain unsettled through negotiations.

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<sup>104</sup> River Boards Act, 1956, Sec. 13

<sup>105</sup> Inter-State Water Disputes Act, 1956, Sec. 2(c)

The responsibility of the tribunal is not limited to mere adjudication of disputes but also water quality deterioration, flood control, climate change effects and water productivity.<sup>106</sup> Further, under Section 4, the said Tribunal shall be constituted of “*three sitting judges of the Supreme or the High Court to be appointed by the Chief Justice of the India who are required to pronounce a decision within three years, unless so extended to two years.*”

Another landmark effort by the Union Parliament in allocation of water rights included:

### **III.1.iii. Creation of the Sarkaria Commission<sup>107</sup>**

The Commission was set up in 1988 to make recommendations and implementations so as to improve the functionality of the ISWD Act, 1956, which were then submitted as 2002 Amendments to the 1956 Act. The key recommendations included:

- Compulsory setting up of a tribunal within one year by the Union Government,
- Creation of a Data Bank and an information system at the national level,
- Enforcement of the arbitral award of the tribunal within five years,
- Statutory recognition of the tribunal award and according it a binding status as a decree of a Court.

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<sup>106</sup> Inter-State Water Disputes Act, 1956, Sec. 5

<sup>107</sup> Set up in 1983 by the Central Government.

### **III.1.iv. National Commission to Review the Working of the Constitution (NCRWC)<sup>108</sup>**

This Commission taking a divergent view suggested the repeal of the ISWD Act and suggested for the enactment of a new Act for shifting the jurisdiction of river water disputes from tribunals to the Supreme Court by virtue of its exclusive and original jurisdiction under Art. 131 by taking a cue from the US experience of adjudication of disputes.

### **III.1.v. Punchhi Commission on Inter-State River Water Disputes<sup>109</sup>**

Considering the issues surrounding inter- state and international water conflicts, and a review of the working of the ISWD Act, the Punchhi Commission in its 2010 report, suggested the linking of water tribunals with the River Boards as a solution to deal with the complex issue of water sharing and making River Boards more stronger and authoritative body. Also, the tribunal shall be a multi-disciplinary body to be presided over by a judge and shall follow a participatory and a conciliatory approach. Furthermore, it suggested that the statute shall prescribe a time limit for issuance of clarificatory and supplementary orders.

Beside the above statutory instruments, the Indian Legal Framework on water law is backed by the existence of common law principles such as the Doctrine of Public Trust in respect of the principle of inter-generational equity<sup>110</sup> whereby natural resources held for the public benefit as *res communis* such as water are to be under the control of the state, which holds it as a trustee for public use. Furthermore, the Indian experience places a high reliance on international theories such as the *Doctrine of Apportionment* and other theories as discussed in the previous chapter. Apart from the

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<sup>108</sup> Set up in 2002 by a Government Resolution. <http://lawmin.nic.in/ncrwc/final-report/vich-ii.htm>

<sup>109</sup> Set up in April 2007 by the former Chief Justice of India, M.M Punchhi. <http://interstatecouncil.nic.in/report-of-the-commission-on-centre-state-relations/>

<sup>110</sup> The Public Trust Doctrine, as first laid in the case of *MC Mehta v. Kamal Nath* (1997)1 SCC 388

above doctrine, Indian framework is based on the ‘*Community of Interest Theory*’ which is an extension of the ‘*Doctrine of Limited Territorial Sovereignty*’. According to this theory, river water belongs to the entire population and therefore should be shared equitably among member states so as to achieve the utmost benefit as river is one unit that defies all boundaries. The concept provides for equal use of water sources by all the riparian states in the entire course of the river and excluding all the preferential privileges of any riparian state thereby excluding others. The Indian approach is further complemented and backed by the human rights approach, wherein water is treated as a fundamental right, thereby making it a part of right to clean environment under Article 21 of the Constitution, whereby the right to equal access to water evolved not through legislative action but mere judicial interpretation. Interpreting Article 21, the Indian Supreme Court recognized right to life includes right to equal access to water to all in order to sustain life.<sup>111</sup> Water is a basic need so as to ensure survival of humans and thus essentially forms a part of right to life.<sup>112</sup> In the landmark decision of *M.C Mehta v. Union of India*,<sup>113</sup> the judiciary recognized river water to be a public asset which can be utilized in the same manner as air. An extension to this is the case of *Networking of River, Re*<sup>114</sup> wherein it was upheld that the central government had a duty to preserve natural resources by adoption of necessary measures to augment water resources.

Some of the notable instances of water sharing disputes in India in the domestic regard include:

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<sup>111</sup> Francis Coralie Mullin v. Admr. Union Territory of Delhi [(1981) 2 SCR 516]

<sup>112</sup> Narmada Bachao Andolan v. Union of India (AIR 2000 SC 375)

<sup>113</sup> R v Tessling [(2004) 3 SCR 128]

<sup>114</sup> *Networking of Rivers, In. Re.* [(2012) 4 SCC 51]

### **III.1.vi. The Narmada Water Sharing Dispute, 1961<sup>115</sup>**

The construction of the Sardar Sarovar Dam and other related projects in the Narmada valley spurred tensions between Gujarat, Maharashtra and Madhya Pradesh. The predominant issue being between these states was the proper allocation of water. Therefore, with the orders of the Supreme Court, the central government constituted the Narmada Water Dispute Tribunal so as to adjudicate water sharing between the states and accordingly each riparian state was allocated its water share, thereby reducing the height of the dam.

### **III.1.vii. The Cauvery Water Conflict, 1974<sup>116</sup>**

One of the most controverted disputes and decade long, the dispute between Karnataka and Tamil Nadu sparked up rigidities in the entire nation. The dispute heightened with the failure of the upper riparian state i.e. Karnataka to adhere to the water allocation verdict of the *Cauvery Water Tribunal* set up in 1990 and thereby breaching its orders. The dispute paved way for the intervention of the Supreme Court in 2002 with series of arguments among the two states arguing for a greater million cubic share's considering the lives of the farmers and needs of their people. The conflict ended with the Supreme Court, increasing Karnataka share of water and allocating 14.75 TMC to Karnataka thus deciding water allocation from the Cauvery in 2018.

### **III.1.viii. The Krishna Water Dispute, 1969<sup>117</sup>**

The Krishna case before the Supreme Court involved water sharing allocations between Andhra Pradesh, Maharashtra and Karnataka by the construction of the Alamatti Dam. Two Krishna Water Tribunals were set up to resolve the said conflict. But with the

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<sup>115</sup> Rakesh Kumar; R.D Singh.; K.D. Sharma. "Water Resources of India". Current Science. Bangalore: Current Science Association. 89 (5): 794–811.

<sup>116</sup> State of Karnataka v. State of Tamil Nadu [(1991) SCR (2) 502]

<sup>117</sup> State of Andhra Pradesh v. State of Karnataka (AIR 2001 SC 1560)

growing needs and with the bifurcation of Andhra Pradesh and Telengana the conflict remains unresolved.

### **III.1.ix. The Ravi-Beas Water Dispute, 1966<sup>118</sup>**

The case appeared before the Supreme Court with Haryana pleading to divest water from the Ravi- Beas Rivers over the Sutlej Yamuna Link Canal and the opposition to such water allocation by Punjab. The dispute is an important one, due to primary reason that Haryana being a non-riparian state claimed waters of the rivers and claimed it to be a 'national asset'. With the creation of the Punjab Water Tribunal by the central government, the Hon'ble Supreme Court denied the claim of Punjab to divest water to Haryana and other states and water allocation was done between the two claimants.

Another initiative by the Indian Government was the enactment of the National Water Policy, 2002 with a prospect to govern the management and arrangement of water resources and ensure their optimum utilization. An important feature of this scheme includes the arrangement for water allocation priorities. Therefore, in operation of every system, water allocation is done in the said arrangement:

- Hydro power
- Agro-industries
- Navigation
- Water Irrigation
- Drinking
- Ecology<sup>119</sup>

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<sup>118</sup> State of Haryana v. State of Punjab (AIR 2002 SC 685)

<sup>119</sup> New National Water Policy, 2000. <http://pib.nic.in/newsite/PrintRelease.aspx?relid=90775>

Further, as per the policy, water sharing among states should be done taking into consideration the national perspective with regard to the availability of water resources and the particular needs in the river basin so as to maintain and optimize the water use efficiency.

Thus, taking into account the above Domestic arrangement and framework on water sharing with specific reference to inter-state water disputes, the following observations can be made:

- The ISWD Act, 1956 is not a comprehensive mechanism to deal with water disputes occurring at the federal level. Though the 2002 Amendment, calls for the award of the water tribunal to be a final and a binding one, yet there still remain issues as either the states (under Art. 136 ) or private persons(under Art. 32) approach the judiciary claiming a violation of Art. 21.
- Secondly, the composition of the tribunal under Sec. 5 is not multi-disciplinary, thus consisting of persons only from the judiciary. In order to effectively consider water allocation claims, it is pertinent that the tribunal is composed of members from all walks of life and having experience in their relevant field. This will in turn effectually help in considering water sharing rights and help resolve conflicts.
- Also, due to non- availability of sufficient data, the work of the tribunals so constituted experiences an inordinate delay.
- Though the Centre has intervened directly, such as in the case of Ravi-Beas water dispute such an intervention has not been a fruitful one. The cases of water conflicts testify to the fact of a weak Union, which is ineffective and mobilized.

- States are vested with political powers and little economic powers and responsibilities, and little democratic spaces for maneuver, where even other constitutional schemes such as the Finance Commissions are marginalized for addressing such inter-state allocation of water rights .Furthermore, Inter-state Councils are underdeveloped.<sup>120</sup>
- In totality, there is no unambiguous instrument in existence to deal with water conflicts.
- Nevertheless, to correct the ambiguity and vagueness in provisions, The Inter-Sate Water Dispute Amendment Bill, 2017 introduced by the government seeks to provide for a speedy settlement of inter-state water disputes. In approach to this, the Union seeks to establish a Dispute Resolution Committee to settle disputes within a year. Apart from this, a Single Permanent Tribunal will be constituted so as to have multiple benches.

### **III.2. LEGAL FRAMEWORK ON TRANSBOUNDARY WATER SHARING**

Conflicts over waters can either be inter-state (as discussed in the previous Sec.) or between neighbouring countries sharing a transboundary river water basin.<sup>121</sup> Such transboundary water clashes have been dominant in the South Asian region. South Asia's water coverage is an enormous one. Rivers in South Asia, Indus, Brahmaputra, Meghana and Ganges and their sharing among Bangladesh, Nepal, Pakistan and India have generated tensions and apprehensions in the region. India is a lower riparian state, except in case of Bangladesh where it is an upper riparian. The allotment of water resources and their allocation amongst the countries of India, Nepal, Pakistan and Bangladesh has

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<sup>120</sup> Supra note 27.

<sup>121</sup> A transboundary water basin is one where the river crosses at least one political border, either within the nation or an international boundary.

always been a matter of contentious issue emanating from factors such as scarcity, bad governance and ill-faith. The primary reason for such transboundary water conflicts to stem is the increase in the demand which serves as a catalyst for such conflicts. Other reasons being decolonization, regionalization and politicization which creates division of the river water basin thereby creating conflicts between states. Moreover, what are of fundamental importance are the historic relationships shared by the two states or countries and the tremendous importance of the river which tends to create a strenuous situation in the basin. India has been a victim of such transboundary water conflicts that have arisen due to the river sharing both in the upstream and downstream areas specifically with the Ganges and Indus Rivers. Such transboundary water conflicts have been resolved through the legal framework which includes treaties entered into by the Indian Government with the neighbouring government so as to mutually arrive at a common consensus and work out efficient solutions for optimum water allocation among the parties sharing the river basin. Hence, such conflicts due to their nature are resolved on the basis of their mutuality, implying that river waters are to be utilized on the principle of evenhanded sharing. An individual examination of such water conflicts and the treaties entered into by the Indian government is fundamental to the study as constituting the legal framework for transboundary sharing.

### **III.2.i. The Indus Water Treaty, 1960 (IWT)<sup>122</sup>**

One of the landmark water conflicts in history concerning the controvertor India and Pakistan is of fundamental importance. Indus, originating in China and flows through Kashmir where it is joined by several of its tributaries (Jhelum, Chenab, Ravi etc.). The Indus river system is of particular importance for agriculture and irrigation. The 1947 partition of India created an independent India and West Pakistan resulting in the bifurcation of the canals and the water systems. This partition, however, did not take into consideration the ecology, topography and the infrastructure of the Indus River Basin.

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<sup>122</sup> Treaty between the Government of India and the Government of Pakistan concerning the most complete and satisfactory utilization of the waters of the Indus system of Rivers.

The expiration of the Standstill Agreement of 1948; saw India withholding water from canals that flowed in Pakistan. This aggravated tensions between the two governments. Water allocation in the initial years of partition was sought to be governed by the Inter Dominion Accord of 1948 as per which India was required to release sufficient amount of water to Pakistan in return of annual payments. However, this was of a temporary duration and failed to get the two states in negotiations. Further, waters from this system are of undeniable importance for both India and Pakistan.

While Pakistan was primarily interested in the agricultural and irrigational uses of the Indus Water, thereby needing the bulk of the water, India needed it for hydro-electric projects. The issue of water allocation witnessed three major armed conflicts, hostilities, repeated spikes and tensions.<sup>123</sup> Henceforth, to bring an end to the aggravating political circumstances, the heads of both the governments arrived at a peaceful solution through the signing of the '*Indus Water Treaty*' which was negotiated by the World Bank. This treaty was based on customary international legal practices and seeks at protecting the right of the downstream state to water use and administers on the manner of utilization of the Indus River System. Accordingly, Beas, Ravi and Sutlej are to be governed by India, while Indus, Jhelum and Chenab are to be taken care by Pakistan,<sup>124</sup> thus creating a geo-physical partition of the river. Though Pakistan has an 80% share of the water, yet since Indus flows from India, 20% of the water is allocated to India for the purposes of transport and irrigation. Also, it advocates for the creation of a bilateral '*Permanent Indus Commission*' to execute the water treaty and solve disputes pertaining to water sharing and sharing of data. In event of a disagreement, such disputes are taken to the *Permanent Court of Arbitration* for an amicable settlement.<sup>125</sup> Unlike treaties in alternative basins that divided rivers on the idea of their flow or quality, the aforesaid Indus Water Treaty wanted to separate the system into three Eastern Rivers whereby India has 'unrestricted use' and therefore the three Western Rivers to that Pakistan has 'unrestricted use'. More importantly, the agreed water allocations between the two states are not absolute and thus

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<sup>123</sup> Armin Rosencranz, Abhimanyu George Jain and Raessa Vakil, "Transboundary Waters on the Subcontinent" 40, EPL 331 (2010)

<sup>124</sup> The Indus Water Treaty, (IWT), 1960, Art. V

<sup>125</sup> Id, Art. IX

attract exceptions i.e. Pakistan agreed to a policy of non-interference with the Eastern Rivers and India too retained the right to construct dams on the Western Rivers. Looking at the IWT, one can say that the said treaty is not a purely functional and an operative one. This is because, one, the distribution of water under the two treaties fails to abide by the Helsinki Rules<sup>126</sup> or the UN Water Courses Convention<sup>127</sup> that lay down that sharing of water resources between states shall undoubtedly be in accordance with the '*principle of equitable utilization of water*', i.e., water allocation shall be equitable, sustainable and reasonable. By means of the IWT, Pakistan is allocated the lion's share (80%), while India managed to get only a 20% of the share, thereby clearly violating the Helsinki Rules or the UN Convention.

Nevertheless, the Indus Water Treaty is a unique one as it demonstrates a water partition treaty rather than being water sharing one. Even though it is in violation of established customary norms, yet it chalked out a unique solution to handle the needs of both the enemy countries and given the existent political hostilities, partition and the deep-rooted mistrust back then. Thus turning it into a chief strength of the Treaty, it illustrates a peaceful sharing of water resources, through a legal framework that has survived for a considerable time period despite the hostile relations between the two state parties. To avoid future conflicts given the constant friction that exists between the two parties, constant efforts should be hitched in order to draw up a more equitable and viable water sharing arrangement which respects the established customary norms of International water law.

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<sup>126</sup> The Helsinki Rules on the Uses of the Waters of International Rivers were adopted by the International Law Association in 1966.

<sup>127</sup>United Nations Convention on the law of the Non-navigational Uses of International Watercourses, 1997

### **III.2.ii. The Mahakali River Treaty, 1996:<sup>128</sup>**

Sharing the water of a transboundary river can be quite a challenging task especially when it is an open border as that between India and Nepal. The two states share certain common rivers, and Nepal, being an upper riparian state enjoys additional privileges with respect to the water flowing into India. The Mahakali River originates in Nepal and forms the boundary between Nepal and India. The main cause of tension between the two countries was the construction of hydro-electric projects over the water of the Mahakali River. The situation became worse by the mistrust of the Nepalese Government in the belief that India was trying to exploit the hydro- energy potential of Nepal for its own benefit. To spur it even more, was the prior experience of these countries with reference to the Kosi (1954) and the Gandak River (1959). The Mahakali Treaty entered into is a set of agreements. It enunciates for the development and use of a multi-purpose project, i.e. the Pancheswar Project on the Mahakali River, between Nepal and India.

Additionally, the water sharing arrangement entered into between the two government's aims at ensuring an developmental projects of the water resources including the Tanakpur Barrage, the Pancheswar Project and the Sarada Barrage,. Further, the Nepalese government has allowed India to construct a damn on the Nepalese territory so as to make the Tanakpur Plan operational and receive water. Moreover, the Pancheswar project was to be implemented with the joint execution of both Nepal and India, hence allowing for joint utilization. Another striking feature of the said treaty is the formation of the Mahakali River Commission<sup>129</sup> entrusted with the task of taking care of the construction of projects and water allocation per cubic meter. As per the Treaty, the costs both the parties shall bear the costs in proportion to the benefits that accrue to each of them.<sup>130</sup> Further, the treaty ensures a minimum flow of water maintained by India in the Sarada Barrage so that the ecosystem of the river can be preserved. It is also provided based on the Harmon Doctrine, that neither party causes obstruction of the waters of the

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<sup>128</sup> Entered into force in February 1996 between His Majesty's Government of Nepal and the Government of India concerning the Integrated Development of the Mahakali River.

<sup>129</sup> The Mahakali River Treaty, 1996, Art. IX

<sup>130</sup> Id, Article III

river of Mahakali for their own benefit. Thus, the provisions of the treaty call for joint partnership of both states in executing energy projects for harnessing water from this river. The treaty advocates for an equivalent use after the subtraction of the existing consumptive use by both the state parties.<sup>131</sup> Implying that, each state party to the treaty has a right to use the waters of the Mahakali Treaty so long as it does not preclude the co-riparian state and cause a prejudice to its interests. Importantly, this Treaty endorses the principle of equitable utilization of water, equal distribution of benefits and the duty not to inflict damage as supported by the Helsinki Rules and the UN Convention. The treaty further provides for a detailed dispute and arbitration mechanism i.e. the establishment of an arbitration tribunal, in case of disputes.<sup>132</sup>

Therefore, the treaty discourages unilateral development of the Mahakali River hence encouraging joint cooperation and mutual benefit, hence producing and allocating maximum total net benefit of the Mahakali River to both the claimant parties, i.e. Nepal and India. Hence, the treaty is an example of symbolic relationship and cooperation in sharing water resources of the transboundary.

### **III.2.iii. Mahakali River: The Indo-Bangladesh Water Treaty, 1996<sup>133</sup>**

For over 35 years, the allocation of the waters of river Ganges and the sharing of its waters have remained an issue of conflict. The Ganges, Meghana and the Brahmaputra River systems flow to the Bay of Bengal in Bangladesh. The political dynamics between the two states in the past have further heightened the estrangement over water sharing. The treaty entered into by the two nations India and Bangladesh in the year 1996 aiming at resolving the on-going conflict primarily centered on the allocation of the waters of River Ganges, that originated in 1951, because of the construction of the Farakka barrage and the allocation and use of the river Ganga, flowing from Northern India into Bangladesh.

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<sup>131</sup> Supra note 129, Article III

<sup>132</sup> Id, Article XI (2)

<sup>133</sup> Treaty between the Government of the Republic of India and the Government of the Republic of Bangladesh on the Sharing of the Ganges Waters at Farakka , 1996

### **III.3. A COMPARISON OF THE LEGAL FRAMEWORK ON WATER SHARING IN AUSTRALIA AND US WITH INDIA**

#### **III.3.i. India**

The Indian legal framework advocates water-sharing between neighbouring states to be regulated by the necessities of the Indian constitution that divides power with respect to adjudication on water between the Union and the States. This is supplemented by the *Inter-State Water Disputes Act, 1956* that calls for the formation of Water Tribunals to comprehend and resolve water disputes occurring between nation-states, posing a threat to the integrity and peace between nations. This water-sharing Indian legal framework is further strengthened by the customary norms and doctrines of International Water Law such as the Helsinki Rules.

In contrast to this Indian system, the legal framework with respect to water allocation differs in Australia and the United States which is discussed below.

#### **III.3.ii. Australia**

Water-sharing in Australia is controlled by state jurisdictions. Unlike the Indian context, there is no direct constitutional power over State power and hence the Commonwealth Constitution has the power to regulate state water. Section 98 and 100 of the Australian Constitution highlights the issues pertaining to river water and such water resources. The power of the Commonwealth to regulate the usage of water resources is restricted through Sec. 100. As the Constitution is silent on the issue of water management, water resources and their sharing is hence left to the States to manage water resources.<sup>134</sup> The power of the Commonwealth was asserted through the enactment of the Water Act, 2007, which paved way for the Commonwealth to decide on matters of water resources, which were in the exclusive domain of the States. This position was subsequently affirmed in

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<sup>134</sup> P. Ishwara Bhat, *Inter State & International Water Disputes*, 75 (Eastern Book Company, 2013).

the Tasmanian Dam Case<sup>135</sup> that upheld the power of the Commonwealth. The active role played by the federalism was strengthened by the ‘*Murray Darling Basin Ministerial Council*’ imposing a limit on water extractions from the river basin by states. Hence, this represents the role played by the federal government inter-state water disputes.

### **III.3.iii. The United States of America**

The Mississippi river in the United States is one of the largest river basins in the world. Water resources and the infrastructure on the Transboundary Rivers are dominantly in the hands of the government. The water rights, i.e. the allocation of water remain largely a State matter. Though the US Constitution makes no express mention of water sharing yet, the federal constitution addresses the role of the states and grants power to the Congress to regulate inter-state sharing of water and its allocation.

Further, the US Supreme Courts and the Inter-State Compacts i.e. agreements between concerned states to resolve their water disputes are generally binding and are important means to resolve the Inter-state water disputes between states.

Thus, in comparison to the water sharing arrangements existing in the United States and Australia, the Indian legal framework on water sharing is quite a flexible one and easy to comprehend. Unlike other countries, India has stringent power sharing between the federal and the Union that distributes power on water allocation matters.

To conclude, Transboundary River water conflicts are an important area which affects the livelihood of people and trespass upon the social, economic and political welfare of the nation. Water disputes are a global phenomenon and India is no exception to it. As water sharing and allocation of water rights is a critical challenge faced by the governments today, it thus becomes imperative for the Indian government to reconsider and revise its legal framework and mechanisms for dealing with such disputes in an efficient manner.

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<sup>135</sup> Commonwealth v. Tasmania [(1983) 158 CLR I]

The existing IWD Act, 1965 is assuredly an insufficient mechanism to deal with water conflicts as discussed previously. Further, the power sharing in the constitution needs to be worked at. It is essential that both the Centre and the states and the political class play a fruitful role in an amicable and speedy settlement of transboundary issues. To achieve this, it is suggested that:

- Alternative Dispute Resolution Mechanisms though employed need reconsideration and practical implementation. Further, state parties to the dispute can work out Inter-State Compacts based on the US model, which will be a legal and a binding document.
- An award delivered by the tribunals or Commission must necessarily consider the prescriptive rights of the parties.
- A National Water board or an authority can be constituted that has the sole authority to regulate and influence the usage of waters of a river basin. Further, such a body can issue guidelines with respect to water sharing between transboundary states. In order to ensure, the strict enforcement of these guidelines, water boards shall have the power to initiate penal action against offenders
- Further, the Centre and the States shall arrive at an understanding as to confer specific rights on the States with respect to water sharing and the Centre playing an impartial role.
- Most importantly, it is imperative for the neighbouring States to realize that water sharing need a planned usage and that water is a paramount asset.

Therefore, incorporation of the above will go a long way in strengthening India's legal framework with respect to transboundary water sharing that is in consonance with international norms and in conformity with environmental norms.