THE JURISDICTION OF THE SUPREME COURT & TRIBUNALISATION IN INTER-STATE RIVER WATER DISPUTES – A CRITICAL ANALYSIS

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Abstract

The House of the People has passed the Inter-State River Water Disputes (Amendment) Bill, 2019 with a mandatory Alternative Dispute Resolution process before adjudication along with technical support and transparent data collection system. The permanent single tribunal with no judicial review by Courts is the limelight of the Bill. The author has examined the Bill and identified that it undermines the pivotal role of the Supreme Court in inter-state water disputes (ISWD) as it encourages tribunalisation. The judicial review against the award of the Cauvery Water Disputes Tribunal and the interpretational acumen employed by the Supreme Court to do complete justice to the parties is examined and found that there is no technical, scientific or any other issues beyond the reach of the Supreme Court's wisdom. The author has proposed for the conferment of exclusive jurisdiction of the Supreme Court in ISWD after delving into the various reports and recommendations and doing a critical analysis of the same.

I. Introduction

WATER IS essential for survival of all living creatures and a livelihood issue for humans. 'Right to water' is not only a fundamental right but also a natural law right, wherein safeguards are available against the infringed either by an individual or by the government. The deficient or sub-standard supply of water is a legitimate social issue, and squarely, a political issue when it is

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exploited or misused for private gains.[1] Of late, the term 'water' has become a bone of contention in the sphere of global and national politics without effective resolution process. Inter-State River Water Disputes (hereinafter referred to as ISWD) in India is highly politicized[2] and political parties both at the Centre and the state level are giving a lot of prominence to these disputes to earn political mileage and garner support. It has also essentially become one of the prime highlights in every political party's election manifesto. Nevertheless, after assuming power, it is observed that the concerned political party fails to redress the issue through political discourse and subsequently the issue turns into a legal battle.

Unfortunately, the Constitution has ousted all the courts including the Supreme Court in the adjudication of ISWD and enabled the Parliament to enact a law for resolving it.[3] The Parliament in the year 1956 enacted the ISWD Act[4] that provided for a mechanism for resolving the ISWD through setting up of an *ad hoc* tribunal by ousting Courts' jurisdiction including the Supreme Court.[5] Furthermore, the ISWD (Amendment) Act, 2002[6] placed the decision of the tribunal as equal with the Order of the Supreme Court.[7] However, in the case of *State of Karnataka* v. *State of Tamil Nadu*[8] (hereinafter referred to as '2017 case'), the Supreme Court held that the appeal against the decision of the Cauvery Water Dispute Tribunal (hereinafter referred to as CWDT) under article 136 of the Constitution is maintainable. After deciding the jurisdictional issue, the Supreme Court exercised judicial review against the award of CWDT in the case of *State of Karnataka* v. *State of Tamil Nadu*[9] (*hereinafter* referred to as '2018 case'). The Supreme Court in this '2018 case' slightly modified the order passed by the CWDT with respect to the share of water between state of Karnataka and Tamil Nadu. Prior to the '2018 case', the Supreme Court provided interim and instant reliefs to the disputing states during the proceedings before the tribunal due to the inaction or tardy response from the Union government in complying with the

[1] Ramasamy R Iyer, *Towards Water Widom – Limits, Justice, Harmony* 31-33 (Sage Publications, New Delhi, 2007).
[2] The Cauvery, Vansadhara, Mahadayi, Ravi-Beas Disputes, Sutlej Yamuna Link Canal, Mullaperiyar and Parambikulam Aliyar Projects are the instances.
[3] The Constitution of India, art. 262(2).
[4] The Inter-State Water Disputes Act, 1956 (Act No. 33 of 1956).
[5] *Id.*, s. 11.
[6] Act No. 14 of 2002 (w.e.f. 28.03.2002).
[7] The Inter-State Water Disputes Act, 1956 (Act No. 33 of 1956), s. 6(2).
[8] (2017) 3 SCC 362.
[9] (2018) 4 SCC 1.

time bound processes prescribed for different stages under the ISWD Act.[10] Meanwhile, the union cabinet cleared the ISWD (Amendment) Bill, 2019 that provides for a single tribunal to hear all the ISWD at faster pace.[11] The present study revolves around the significance of the supreme court in ISWD and specifically focuses on the aspect of judicial review against the decision of CWDT. Furthermore, a critical analysis has been made over the ISWD (Amendment) Bill, 2019 and the author suggests that the Supreme Court should be conferred with exclusive jurisdiction to decide ISWD to avoid protracted litigation process in the tribunal.

II. Background

The inter-state river water disputes in India has different manifestations, as it includes construction of a new dam or canal, or increasing the level of water in a dam or increasing the level of the existing dam besides sharing of river waters between the upper and lower riparian states. The ousting of courts' jurisdiction in ISWD including the Apex Court and the alternative arrangement for the resolution of disputes had a colonial reflection. During the British regime, the jurisdiction of the Federal Court was ousted in ISWD under section 134 of the Government of India Act, 1935. The same provision was retained by our constitutional framers through bringing an amendment in the draft Constitution as article 242A.[12] It has been passed unanimously in the Constituent Assembly leading to the enactment of article 262 of the Constitution.[13] While moving the amendment, Dr. Ambedkar observed in the Constituent Assembly that water disputes may arise often and hence a special permanent body is required to deal with such disputes. Dr. Ambedkar opined that it would be better to leave it to the wisdom of Parliament to make laws for the settlement of those disputes.[14] The issues and concerns lingering on the minds of constitutional framers were relating to the corporations set up for the

[10] As per ISWD (Amendment) Act, 2002, the Union government has to set up a tribunal within one year from the receipt of complaint from any state in respect of inter-state water sharing. In 2002, the state of Goa had requested the union government to set up a tribunal to decide the dispute relating to Mahadayi/Mandovi River. The union government had acceded to the request only in 2010 after directed by the Supreme Court. However, it became effective only in 2013. The same happened in the Vansadhara River Water Dispute.

[11] Special Correspondent, "Cabinet clears Bill for single Tribunal to hear water disputes", *The Hindu (Madurai)*, July 10, 2019, *available at*: https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1578194 (last visited on March 23, 2020).

[12] Amendment No. 373.

[13] *Supra* note 4, art. 262.

[14] Constituent Assembly of India Vol. IX, 1188.

development of states through power and irrigation projects in inter-state rivers, such as Bhakra Nangal and Damodar Valley project. The Constitution drafters had foreseen the fact that the development of irrigation and power resources and the subsequent sharing of river water between the states might result in some ISWD. These disputes might create multiple complexities by touching upon different factors including social, economic, technical and geographical that would be beyond judicial wisdom in resolving it. Further, each river system is unique and the above-mentioned factors vary in accordance with time. Therefore, the constitution drafters decided to oust the jurisdiction of all Courts in ISWD.

The apathy of tribunals in resolving ISWD

Ironically, the tribunal system under the ISWD Act did not prove to be worth as expected. It is being criticized for causing enormous delay at every stage of the dispute, *viz.* establishment of a tribunal, proceedings in the tribunal including supplementary clarification, notification of the award, *etc.* These criticisms were analyzed by the Sarkaria Commission, and one of the main references was the time-limit for each stage in ISWD. The recommendations of the Sarkaria Commission were unattended for a long time. Nonetheless, it was finally considered after scrutinizing the report submitted by the sub-committee as well as the Standing Committee of the Inter-State Council. Consequent to the recommendations of the said committees, the Parliament brought certain amendments to the ISWD Act in early 2002. One of the major recommendations in this regard was "the decision of the tribunal shall have same force as the Supreme Court's Order."[15] There was a need to address whether the amended sub-section seemed to bar the appellate jurisdiction of the Supreme Court under article 136 or give more effect to the award passed by the tribunal that would be reckoned on par with the Supreme Court. The Supreme Court answered this question in the '2017 case' leading to exercise of judicial review against the decision of the CWDT. Thus, it is pertinent to analyze the ouster clause provided in the Constitution and the consequential legislation relating to inter-state water disputes *vis-à-vis* Supreme Court's original and appellate jurisdiction.

[15]ISWD (Amendment) Act, 2002, s. 6(2).

III. Ouster of jurisdiction of courts in ISWD

The express mention of ouster of courts' jurisdiction including the Supreme Court in a fresh water dispute between or among the states is evident under article 262(2) of the Indian Constitution coupled with section 11 of ISWD Act of 1956. Barring the ouster clause in the Constitution, the aggrieved states approach the Supreme Court in the matters connected either directly or indirectly with the water dispute as defined in section 2(c) of the ISWD Act, 1956. It is pertinent to note that certain states had approached the Supreme Court by filing an original suit under article 131 coupled with article 142 disregarding the bar under article 262(2) of the Constitution. One such instance was the case of *State of Karnataka* v. *State of Andhra Pradesh*[16], wherein the Court analyzed the scope and ambit of articles 131[17] and 142 to entertain cases relating to ISWD. The Court unanimously held that article 142 empowers the Supreme Court to pass any order or direction to render complete justice to the parties but such order or direction shall be confined within the scope of article 131, *viz.* it cannot interfere in the original suit between the states relating to water disputes.[18] Equally, suits were also filed under article 131 restraining a state from constructing a new dam or canal, or raising the level of an existing dam or raising the water level in a dam. These issues are not directly related to the water dispute as defined under the ISWD Act but the act of upper riparian states eventually cause prejudice to the interest of lower riparian states in sharing their due proportion of water.

In Mullaperiyar Environmental Protection Forum v. *Union of India*[19], the Supreme Court held that the case did not pertain to 'water dispute' between the state of Tamil Nadu and Kerala, however it is about the safety of dam when the water level is increased to 142 feet and observed that either article 262(2) of the Constitution or section 11 of the ISWD Act, 1956 have no applicability. Similarly, in *State of Haryana* v. *State of Punjab*[20], the state of Haryana filed a suit under article 131 of the Constitution to direct the state of Punjab to construct the Sutlej-Yamuna Link (SYL) Canal to carry the waters of River Sutlej to the state of Haryana as agreed between

[16] (2000) 9 SCC 572.
[17] *Supra* note 4, art.131.
[18] *Supra* note 16, at 648, para 60.
[19] (2006) 3 SCC 643.
[20] (2002) 2 SCC 507.

the two states when the state of Haryana is created from the erstwhile state of Punjab. The Supreme Court intervened by negating the argument that it lacks jurisdiction as it is a 'water dispute' under ISWD Act and reasoned that this case was related to the fulfillment of contractual obligation by one state towards another state on the basis of an agreement. Thus, the Supreme Court employs its interpretational acumen to resolve matters indirectly connected with water disputes and avoids greater friction between the states.

'Right to water' as a fundamental right and ISWD

The Court in the case of *Atma Linga Reddy* v. *Union of India*[21], categorically stated that a writ petition filed under article 32 of the Constitution with public interest was not maintainable due to the broadly worded section 3 of the ISWD Act, 1956[22]. The Court held that it cannot exercise jurisdiction on a fresh 'water dispute' albeit 'Right to water' is a fundamental right for drinking as well as livelihood of farmers. However, in *State of Orissa* v. *Government of India*[23], the Supreme Court observed that the constitutional and statutory bar on its jurisdiction would not operate until the central government constitutes a tribunal after the receipt of complaint from the affected state(s) relating to a "water dispute" as covered under the section 2(c)(i) of the ISWD Act of 1956. In this case, the state of Orissa approached the Supreme Court to seek interim relief for sharing the water of river Vansadhara with the state of Chhattisgarh. However, as the complaint preferred by the state of Orissa under section 2(c)(i) was not responded by the Central government within the stipulated statutory period, the Supreme Court provided remedy and observed that the bar of section 11 of ISWD would not operate till the time the tribunal is formed. Furthermore, the Court observed that the party should not be left devoid of any remedy for want of constitution of a tribunal or delay on the part of the central government. Therefore, it was held that by virtue of the Court having a wide jurisdiction under article 32[24], it has the power to pass interim orders to preserve the *status quo* in ISWD.

[21] (2008) 7 SCC 788.
[22] ISWD Act, 1956, s. 3 provides that the Central government is empowered to constitute a tribunal when it receives a complaint from any state or any of the inhabitants thereof when their rights are prejudicially affected or likely to be affected due to a dispute relating to sharing of inter-state waters.
[23] (2009) 5 SCC 492.
[24] *Supra* note 4, art. 32.

It is evident from the above cases that the Supreme Court initially employed strict interpretation of section 3 of ISWD Act and observed that it has no jurisdiction in ISWD with regard to a – 'fresh water dispute' even under article 142 of the Constitution. Later, it has changed its view and passed interim orders under article 32 till the tribunal is constituted by giving primacy to fundamental rights of the citizens. Thus, it is to be noted that the Supreme Court began to exercise jurisdiction under article 32 in ISWD to provide interim remedy for the violation of fundamental rights despite the provisions of the ouster clause.

IV. Judicial review and Section 6(2) of ISWD Act

The doctrine of judicial review is one of the basic features of the Indian Constitution.[25] The Supreme Court held in *L. Chandra Kumar* v. *Union of India*[26] that the jurisdiction conferred upon the High Courts under articles 226 and 227, and upon the Supreme Court under article 32 of the Constitution is part of the inviolable basic structure of the Constitution.[27] Nonetheless, it was not extended to the special leave jurisdiction under article 136 of the Constitution as it acts only as an extraordinary appellate jurisdiction and not to enforce the fundamental rights. The scope of article 136 against the decision of the ISWD *vis-à-vis* ouster of jurisdiction of the Supreme Court was one of the main questions when the state parties[28] in the CWDT challenged the award under different grounds by invoking article 136 of the Indian Constitution. The Court interpreted section 6(2) of the ISWD (Amendment) Act, 2002[29] as the deeming provision leading to a question 'whether they (the Parliament) intend to give binding effect to the award passed by the tribunal or provides finality to the award as against the power of judicial review by the Supreme Court under article 136?'

Maintainability of appeals against the decision of CWDT

[25] *Subhesh Sharma* v. *Union of India*, AIR 1991 SC 631 at 646.
[26] AIR 1997 SC 1125.
[27] *Id.*, at 1156.
[28] State of Karnataka, Kerala, Tamil Nadu and Union Territory of Puducherry.
[29] *Supra* note 8, at 405, para 72.

The maintainability of appeals against the decision of CWDT was raised by the union government as the Attorney-General submitted that the Supreme Court has no jurisdiction to exercise article 136 over the decision of CWDT on the ground that it still has the characteristics of a 'dispute', and the Supreme Court cannot sit in appeal over its own decree since the award of the ISWD Tribunal is reckoned at par with the decree of the Supreme Court as laid down under section 6(2) of the ISWD (Amendment) Act, 2002. Nonetheless, all the state parties before the tribunal have had agreed to the Court's jurisdiction in exercising judicial review against the decision of CWDT. Mr. Fali Nariman submitted that special leave jurisdiction was not affected due to the effect of section 6(2) of ISWD Act and only fresh water dispute shall stand excluded from the Court's jurisdiction under article 262(2) of the Constitution.[30] Mr. Naphade supported Mr. Nariman and contended that the legal fiction envisaged under section 6(2) is to be interpreted as a procedural power meant only for executing the award of the ISWD, and not to be construed with the substantive exercise of power to review the correctness of the decision of the tribunal, and if such an interpretation is made, the said provision would become unconstitutional.[31]

During the arguments, the then Chief Justice of India, Dipak Misra J., observed that oversimplification of law is a dangerous phenomenon and queried the Attorney General 'Does the award becomes final, when it violates any one of the principles of natural justice, or it was passed when a tribunal member was absent?' The Attorney General replied that law has to achieve finality at some level and the court cannot deal with this matter. Mr. Nariman intervened with sarcasm by saying that "if a parliamentary law can restrain the Supreme Court's jurisdiction, then imagine how Parliament can make laws saying every decision of High Court which choose their fancy can be deemed to be that of a Supreme Court."[32]

The Court also considered the report of the Sarkaria Commission and found the language used in section 6(2) is to make the tribunal's decision effective and binding on the states as a decree of

[30] *Id.*, at 374 para 7, 8.
[31] *Supra* note 8 at 376, 378, para 10,11,12.
[32] Krishnadas Rajagopal, "Decision of Cauvery Tribunal Final", *The Hindu (Chennai)*, Oct. 19, 2016.

the Supreme Court,[33] and clarified that there is a difference between having the same force as an order of this Court and passing of a decree by this Court after due adjudication.[34]

Precedents on finality and ouster clauses in Constitution

The Court after relying on plethora of cases found that no statute can cart off the power of judicial review under article 136 by providing a finality clause in a statute or even in a constitutional provision.[35] The case that the sound precedent relied was a case challenging the Constitution (52nd Amendment) Act, 1985. This amendment brought a new schedule (Tenth Schedule) in the Indian Constitution to deal with political defections of members in the legislative houses at the cost of national concern and democratic values. Para 6(1) of the amendment provides that the decision of the Speaker or Chairman is 'final' leaving no scope for judicial review. The said para was challenged in the case of *Kihoto Hollohan* v. *Zachilhu*[36] as it violates the basic structure of the Constitution, *i.e.* judicial review. The Supreme Court held that the word 'final' only limits the power of judicial review and does not totally exclude it.

Similarly, the construct of article 329[37] which begins with the words 'notwithstanding anything in this Constitution' and the sub clause (b) of article 329 that enables any law made by appropriate legislature[38] to oust the jurisdiction of all Courts is similar to article 262(2). Nevertheless, the Supreme Court held that the purpose of this article shall be not to entertain an original election petition by any Court and to only authorize the Supreme Court to entertain such petition under its special leave jurisdiction against the decision of the Election Tribunal.[39] Thus, it is understandable from judicial precedents that the Supreme Court cannot be barred from exercising judicial review under article 136 even though the Statute provides "finality clause",

[33] *Supra* note 8 at 406, para 74.
[34] *Id.*, at 408 para 81.
[35] *Laliteswar* v. *Beteswar*, AIR 1966 SC 580 at 595, *Dhakeswari Mills* v. *Commissioner of Income Tax*, (1955) 1 SCR 941 at 949.
[36] 1992 SCC Suppl. (2) 651.
[37] The Constitution of India, art. 329: Bar to interference by Courts in electoral matters.
[38] The Representation of People Act, 1951, s. 105: It provides that the decision of the Election Tribunals on Election Petitions are final and conclusive by ousting the jurisdiction of Courts including the Supreme Court. Nonetheless, it was repealed in 1956. Presently, the Supreme Court can entertain appeal in election matters under section 116A after triable by the High Court under section 80A of the Representation of People (Amendment) Act, 1966.
[39] *Durga Shankar Mehta* v. *Thakur Raghuraj Singh*, AIR 1954 SC 520; (1955) 1 SCR 267.

and the same was also ascertained in '2017' case as the remedy available to the aggrieved parties against the decision of ISWD Tribunal shall be only by invoking the extraordinary appellate jurisdiction of this Court.

The next pertinent question is, to what extent the Court is empowered to exercise judicial review over the decision of ISWD Tribunal, as it is difficult to articulate the circumstances under which the Supreme Court hear appeals from the tribunals. The Court has categorically held in many cases that special leave jurisdiction can be invoked when there is an injustice done to a party in lower forum, or there is a miscarriage of justice, or when a question of law of general public importance arises, or a decision shocks the conscience of the Court.[40] The author employed the term 'judicial review' rather 'appeal' because of the fact that article 136 is not an ordinary appellate jurisdiction, and the ISWD Act does not create any right of appeal to the Supreme Court. In this connection, it is imperative to analyze '2018 case', wherein the judicial review against the decision of CWDT opens Pandora's box, such as, to what extent the Supreme Court can exercise judicial review over the decision of ISWD Tribunal and how would this verdict affect other water disputes pending before many tribunals?

Judicial review against the award of CWDT

The CWDT passed the award on February 05, 2007 and it was challenged by all disputing state parties under article 136. In the meanwhile, the award was published on February 19, 2013 by the union government pursuant to the direction of the Supreme Court.[41] The maintainability issue was settled by the Supreme Court in '2017 case' and the appeal preferred by the state of Karnataka was partly allowed based on merits[42] by dismissing the appeals made by other states. Article 136(1) invests the Supreme Court with plenary appellate power. However, the propriety or correctness of the findings of the facts by a tribunal is not allowed to be challenged except in exceptional cases. In the instant case, the Supreme Court carefully scrutinized each and every findings of the CWDT to find its sustainability.

[40] *Kunhayammed* v. *State of Kerala*, (2000) 6 SCC 359.
[41] Venkatesan J., "Notify Cauvery final award before Feb. 20, SC tells Centre", *The Hindu*, Feb. 20, 2013.
[42] *Supra* note 9 at 3.

The Court justified the tribunal's approach in applying the Helsinki Rules, Campione Rules and Berlin Policies as the guiding factors and rejected Harmon doctrine in resolving the ISWD.[43] The Court acknowledged the tribunal's findings in arriving at the final determination of irrigated area and the required water for domestic and industrial purposes in the state of Tamil Nadu.[44] It did not entertain the claims of state of Kerala for 35 thousand million cubic feet (TMC) of water for transbasin diversion to generate hydropower and settled with the tribunal's finding of 30 TMC towards overall needs of the state. Similarly, it did not interfere in the allocation of 7 TMC to Union Territory of Puducherry and it convinced that the groundwater in Karaikal region was of no use both for drinking and irrigation due to close proximity to the sea.[45] Further, the Court did not interfere in tribunal's findings in allocating 10 TMC of water towards environmental protection and appreciated the tribunal's initiative in protecting the environment.[46]

Extent of judicial review against the award of CWDT

The Court disputed only two facts in the tribunal's findings. The first disputed fact was the availability of empirical data relating to groundwater and its usage in the Cauvery delta region of Tamil Nadu and Karnataka.[47] The Court rejected the tribunal's findings and took 10 TMC of groundwater out of 20 TMC as arrived by the tribunal in determining the final apportionment of the share of Cauvery waters. The Court also mentioned that there was no such empirical data in the realm of groundwater availability in the deltas of Karnataka.[48] Secondly, the Court questioned the tribunal's findings in allocation of water for domestic and industrial purposes of the state of Karnataka. The Court fixed 4.75 TMC in addition to 1.75 TMC awarded by the tribunal by rejecting the assumption of 50% groundwater for the requirement of drinking water and considered the entire city of Bengaluru with the projection of 2025 population census. Thus,

[43] *Id.*, at 216, para 446.7
[44] *Id.*, at 216, para 446.8, 446.9.
[45] *Id.*, at 204, para 425.
[46] *Id.*, at 210, para 437.
[47] *Id.*, at 205, para 426.
[48] *Id.*, at 206, para 428.

the Court placed the requirement of drinking water at the top priority to satisfy vital human needs as mandated by article 14 of the Berlin Rules and National Water Policies.[49]

Impact on other ISWD

The decision rendered by the Supreme Court in Cauvery Water Disputes has changed many principles with respect to water sharing that has been taken into stride by the tribunal. The Supreme Court considered drinking water issues as having paramount significance rather than water used for irrigation. The need for balancing the utilization and over-exploitation of ground water resources is a modern water-management technique adopted by the Supreme Court. This decision has influenced other ISWD matters, particularly the one pertaining to the sharing of the Ravi-Beas river system between the state of Punjab, Haryana and Rajasthan. In this regard, state of Haryana is more urbanized than Punjab and has greater need of drinking water. Conversely, Punjab has over-exploited the groundwater resources without recharge of required aquifers. Similarly, it can be gauged that the Mahanadi Tribunal may also be inclined to follow the same principles to devise the water sharing fraction between the state of Odisha and the state of Chhattisgarh.[50] The CWDT focused only on the rights of farmers' in the delta regions of the state of Karnataka and Tamil Nadu circumscribed within the facts and circumstances of the case in hand without any progressive outlook on other issues relating to ISWD, nevertheless, the role played by the Supreme Court in considering all aspects of ISWD and foreseeing the consequent impact of its verdict is highly commendable. It is evident that no ISWD Tribunal can perform the role of the Supreme Court in balancing the horizontal federalism in India. Unfortunately, the Parliament has undermined the role of the Supreme Court in ISWD by introducing a Bill in 2019 which insists on single permanent tribunal for adjudication of ISWD by ousting the original and appellate jurisdiction of the Supreme Court.

V. The Interstate Water Disputes (Amendment) Bill, 2019

[49] *Id.*, at 208, 209, para 433, 434.
[50] Editorial, "Cauvery Verdict May Impact Other Disputes", *The Hindu (Bengaluru)*, Feb. 25, 2018.

The Inter-State Water Disputes (Amendment) Bill, 2019[51] (hereinafter referred to as the 'Bill') was passed in Lok Sabha but not in Rajya Sabha. The major proposals under the Bill are three: (i) to set up a Dispute Resolution Committee (DRC) which will try to resolve the water dispute by negotiation; (ii) to set up a single water dispute tribunal with different Benches to adjudicate, if the negotiation fails; (iii) all processes should be completed in a fixed time period. The proposal to bring one tribunal for one nation to adjudicate ISWD was initiated in 2011. Later, the government introduced the Inter-State River Water Disputes (Amendment) Bill, 2017[52] but could not materialize due to the lapse of sixteenth Lok Sabha.

Salient features of the Bill

On July 31, 2019, the Inter-State River Water Disputes (Amendment) Bill, 2019 was introduced in the Lok Sabha with the reasons that the existing tribunals failed in resolving the ISWD in an effective and time-bound manner. It was further exemplified that the government had set up nine *ad-hoc* tribunals for resolving different ISWD in different regions out of which only four have given their awards, that too after taking long time ranging from 7 to 28 years. The CWDT took 28 years to pass the award, whereas, the dispute over the sharing of river Beas has not seen the light of the day even after 33 years of establishment of a tribunal.[53] The Bill provides Alternative Dispute Resolution (ADR) as a first step before adjudication by a tribunal. It prescribes maximum of one and a half year to resolve a dispute by negotiation through a Dispute Resolution Committee (DRC).[54] The Central government refers the dispute to a tribunal for adjudication within a period of three months after the receipt of the report from DRC stating the failure of negotiation. The tribunal has to decide a dispute not exceeding to the maximum of three years, however, the Centre or any state government can seek further explanation over the decision of the tribunal within three months of the decision. [55]

[51] Bill No. 187 of 2019.
[52] Bill No. 46 of 2017.
[53] Special Correspondent, "Plan for Single Water Disputes Tribunal", *The Hindu (Madurai)*, Aug. 1, 2019.
[54] *Supra* note 51, s. 4A.
[55] *Id.*, at s. 5(2A).

The tribunal may forward a further report within one year from the date of reference and it can be extended by the central government not exceeding six months,[56] in lieu of 'further period as the central government considers necessary' found in the existing Act. Thus, on all counts, the tribunal can take four and a half years to decide a dispute as against six and more years in the existing enactment. However, it is to be noted that the Bill was silent on the time period for notifying the award and setting up of a Board to implement the award of the tribunal. This is a prominent lacunae in the Bill and the same was evident from the past experience of notification of award of CWDT decision and subsequent formation of Cauvery Management Board and Cauvery Water Regulation Committee by the Central government. The CWDT passed the award on February 05, 2007, which was notified by the Central government on February 19, 2013, and then a scheme was prepared by the Central government in May 2018 to implement the decision of the tribunal subject to the modifications made by the Supreme Court. It took almost 14 years to implement the decision of the tribunal.

The other salient features of the Bill are: (i) it provides technical support to the members of the tribunal through assessors, who shall be working not below the rank of Chief Engineer in the Central Water Engineering Service and domiciled to any of the states which are not party to the dispute.[57] (ii) The Central government appoints or authorizes an agency to maintain information and data for each river basin at the national level. The authorized agency shall have all the powers to summon and verify any data or other information possessed by the state government.

Criticisms over the Bill

The Bill was welcomed by the majority of Lok Sabha members despite few criticisms. Members cutting across the party lines expressed their concerns over its implementation and politicization of water disputes. It was claimed by some members that ISWD should be politically resolved rather judicial adjudication and also suggested that Inter-State Water Council should be set up in the lines of GST Council to deal all water related disputes in the country.[58] Certain members had

[56] *Id.*, at proviso to s. 5(3)(ii).
[57] *Id.*, at s. 5A(1).
[58] PTI, "Lok Sabha passes Inter-State River Water Disputes (Amendment) Bill", *The Economic Times*, Jul. 31, 2019.

cautioned that the outsourcing of data collection to external agency would affect the credibility and reliability of the decision of the tribunal because the data forms the crux of the adjudication. However, the government dispelled the apprehension and said that a National Water Informatics Centre, which was already established to gather data from Central Water Commission, Indian Meteorological Department and other state agencies.[59] One of the members remarked that the tribunals had been toothless as their awards were not obliged by the states and recommended for nationalization of rivers.[60]

The establishment of DRC in the Bill appears to be a big question mark because of the failures of ADR mechanisms in ISWD. We have Inter-State Council[61], a constitutional body; Zonal Council[62], a statutory body and National Development Council (NDC)[63], an extra-constitutional authority to sort out the differences among the states amicably. However, no resolution or solution had reached between and among the states involved in ISWD by the efforts of these bodies. If any attempt was made, then whole meeting would be bogged down without any fruitful solution even in other inter-state problems. Therefore, even though the ISWD (Amendment) Bill, 2019 holds promising provisions for faster and effective redressal of water disputes through tribunal system, the ground level success is highly dubious.

VI. Supreme Court: The savior in ISWD

The government is always sticking to the tribunal system in the adjudication of ISWD for reasons known best to them. The ISWD (Amendment) Bill, 2019 did not bring any substantial changes in the adjudication process except setting up of a single permanent tribunal with multiple benches. Nonetheless, the time-bound mechanism for certain processes in the adjudication already existed in the ISWD (Amendment) Act, 2002 but the same was not given

[59] Srishti Choudhary, "Lok Sabha clears bill to speed up resolution of inter-state river water disputes", *Livemint*, Aug. 01, 2019, *available at:* https://www.livemint.com/news/india/lok-sabha-passes-inter-state-river-water-dispute-amendment-bill-2019-1564575414883.html (last visited on March 26, 2020).
[60] *Supra* note 58.
[61] *Supra* note 4, art. 263.
[62] The States Reorganisation Act, 1956 (Act No. 37 of 1956).
[63] The NDC was set up in August 1952 through a proposal of the Cabinet Secretariat of the Government of India.

due importance both by the Centre and the tribunal concerned.[64] The water disputes are highly politicized in India and the political parties both at the Centre and state are concerned only about electoral consideration rather than developmental politics. The tribunal orders were flouted now and then, and the only remedy available to the aggrieved states is to approach the Supreme Court. The Supreme Court acts as the savior and directs the government(s) to adhere to water law and equity principles depending on the facts and circumstances of each case of ISWD. The Cauvery Water Dispute is a best example where the Supreme Court played a crucial role from setting up of a tribunal in 1990 to the notification of the award of the tribunal in 2013. The immense contribution made by the Supreme Court in each and every process of the CWDT portrays that it not only effectively adjudicates the ISWD but also ensures that their orders are implemented in spirit unlike tribunals.

VII. Recommendations of Commissions and experts in resolving ISWD

The National Commission to review the working of the Constitution (NCRWC) headed by Justice Venkatachalliah approached the ISWD resolution mechanisms empirically and observed that in every case, the disputing parties are approaching the Supreme Court against the interim award as well as the final decision of the tribunal under special leave jurisdiction. Besides, they also invoke article 21 to enforce the fundamental right to access drinking water and other livelihood issues. This creates two forums to adjudicate one issue and the Commission also felt that the inordinate delay both in tribunal and the Supreme Court heightens bitterness between the states leading to underutilization of water and timely development of our nation. It recommended that ISWD should be covered within the exclusive jurisdiction of the Supreme Court and it is also not necessary to repeal article 262, since it is an enabling provision. It is sufficient to replace the ISWD Act with some other comprehensive legislation to deal effectively with ISWD.[65] The Punchhi Commission on Centre-State Relations had thoroughly analyzed the drawbacks in tribunal system and recommended that the tribunal should be a multi-member body with a judicial officer having an experience in Constitutional Court. The statute should prescribe time

[64] *Supra* note 10.

[65] Department of Legal Affairs, "The report of National Commission to review the working of the Constitution: Constitutional Mechanisms for settlement of inter-state Disputes", 8.11.1 – 8.11.9, (2002).

limit for every stage, provision for raising a statutory appeal to the Supreme Court and the procedure adopted by the tribunal should be conciliatory and participatory rather adjudicatory. The Commission also suggested that the river boards under the River Boards Act, 1956[66] should be charged with an integrated approach towards inter-state rivers in resolving disputes before submitting to tribunal.[67]

The Commission during its course of research obtained opinion from Shri. Ramaswamy R. Iyer, an authority in water issues and a member of Commission's Task Force, suggested providing an appeal to the Supreme Court against the decision of ISWD to have a better compliance. He has also advocated for the permanent ISWD Tribunal with multiple benches.[68] However, Shri. Fali S. Nariman, a doyen of Indian Constitutional Law and senior advocate of the Supreme Court opined that tribunals should be abolished and exclusive jurisdiction be provided to the Supreme Court which would make the Court's decision final and it may look at any issues having a direct or indirect bearing on river water disputes.[69] The Commission did not agree with the idea of Nariman on two counts, firstly, the Court is heavily burdened with cases and it is not possible to fix time limit for Supreme Court to decide an ISWD case. Secondly, enforcing awards against unwilling states would create compliance problem, and in turn undermine the authority of Supreme Court leading to constitutional breakdown. This was already witnessed from the stand taken by the state of Karnataka in Cauvery Water Dispute[70] and state of Punjab in Sutlej-Yamuna Link Canal[71]. Nonetheless, the Supreme Court never relents from exercising its jurisdiction and doing complete justice to the parties when warranted.

VIII. Conclusion

[66] Act No. 49 of 1956.
[67] Recommendations of the Commission on Centre-State Relations, Commission on Centre-State Relations Report, March 2010, Vol. IV, Environment, Natural Resources and Infrastructure, p.56, para 2.7.13(a), *available at*: http://interstatecouncil.nic.in/wp-content/uploads/2015/06/volume6.pdf (last visited on March 25, 2020).
[68] *Id.*, at 54:2.7.12(ii).
[69] *Id.*, at 54:2.7.12(iii).
[70] *In Re: Presidential Reference (Cauvery Water Disputes Tribunal),* 1993 (Supp) (1) SCC 96.
[71] *The Punjab Termination of Water Agreements Act, 2004, In re,* (2017) 1 SCC 121.

The role of the Supreme Court in ISWD is of vital importance and cannot be diminished even though its jurisdiction has been ousted through constitutional and statutory provisions. The technicality issues and politicization of water kept the Supreme Court away from the inter-state (fresh) water disputes. Lately, it has been observed that all kinds of disputes have knocked the door of the Supreme Court involving not only law but other technical, scientific and biological aspects in criminal cases, cyber issues, environmental matters, intellectual property law and many other kinds of such nature. However, the Supreme Court hears it with the help of *amicus curiae*, and probing through Special Investigation Team (SIT) to render considerable justice to the parties.

The judicial wisdom in ISWD could be perceived in '2018 case', wherein the Supreme Court exercised judicial review against the award of CWDT and analyzed each and every fact involving hydrology, geography, meteorology and other technical aspects. It ascertained certain new principles and considered it relevant to determine allocation of waters among the states. This clearly signifies that the Supreme Court not only reviewed the decision of ISWD but it actually reheard the full case to provide absolute justice to the parties without any prejudice.

The ISWD (Amendment) Bill, 2019 would just be like an old wine in a new bottle. The prescription of time-limit for each and every stage under the Bill is not unprecedented as it was brought through ISWD (Amendment) Act, 2002, nonetheless, it was not followed in spirit as analyzed above. The major highlights of the Bill are setting up of a permanent tribunal in lieu of *ad hoc* tribunal and a dispute resolution committee to resolve the dispute without adjudication. Concerning this, it is contended that the permanent tribunal will not make any difference because the states cannot approach the tribunal directly unless it is referred by the central government, and there are no instances that the central government acted promptly in setting up of the tribunals. The Dispute Resolution Committee is yet another blunder in the new Bill. It is apparent from the practice that either the activation of River Boards (as suggested by the Punchhi commission) or the Dispute Resolution Committee as contemplated in the Bill would be a futile exercise. Hence, trying for a negotiated settlement in ISWD is beyond belief and simply a waste of time.

The outcome of the '2017 case' provides another forum from the decision of the tribunal, *i.e.* Supreme Court. The aggrieved state(s) eventually exhaust the remedy finally available with the Supreme Court and the decision of a tribunal would not be final even though the letter of law provides for it. It is high time for the central government to ponder upon the effective implementation of the Supreme Court orders rather than citing needless reasons for the non-compliance of it.

As an apex constitutional court, the Supreme Court acts as a balancing wheel of federalism and it is a final arbiter to decide any disputes between Union and state(s) and states *inter se* in a federal democratic Constitution. It is the only authority, which can deal constitutional, legal, political, economic, social and other problems irrespective of the technicality involved in it. Thus, the government should think about implementing the recommendations of NCRWC and confer the exclusive jurisdiction to the Supreme Court to entertain ISWD for faster, effective and efficient dispute settlement.