Changing Notion of Sovereignty and Governance of Water in India: An Analysis of the Inter-State Water Disputes Tribunal

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ABSTRACT

The Constitution of India has distributed the powers to govern water resource and legislate between the centre and the federal states. Since the Constitution provides only a framework for sharing and management of water between such states and adjudication of disputes, a great deal of efforts has been made since the independence of India to flesh out the provisions of the Constitution and to implement its provisions. However, these endeavours have remained inadequate giving rise to disputes at the provincial level as well as between two and more than two federal units and consequent politicisation of disputes.

This article intends to look beyond the proportional distribution of water among various stakeholders or between riparian states, and therefore competence of the Inter-state Water Dispute Tribunal is investigated to point out its limitations in resolution of the inter-state water disputes. The assumptions being that jurisdiction of the tribunal is restricted and dose not possess the capacity to deal with the multidisciplinary concerns arising from the inter-state water dispute. The article examines the issue of governance through the lens of sovereignty, using the theory of 'the separation of powers' and the 'granting of internal sovereignty' by the federal state to its local units for the governance of the resource. It argues that the notion of sovereignty should be understood in two ways in relation to the governance of the water resource - first, as a *responsibility* of the state and second, as an *obligation* of the state, arising from the sovereign power of the state. Accordingly, it is suggested that for the efficient governance of the resource the means for the adjudication of the dispute and the governance need to rise to the challenge and must be competent to provide holistic solution.

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INTRODUCTION

The sharing of river water between the territory of two or more states and the conflict arising due to the sharing of river water has been high on the agenda of both central and federal states in India. The Constitution of India makes specific provisions to deal with the sharing of water between the states, as well as the establishment of a tribunal to adjudicate disputes arising from the sharing of river water.

The Constitution has distributed the powers to govern and legislate between the centre and the state governments based on a list of entries provided in the Seventh Schedule.[1] According to this Schedule, the provincial State/s are authorised to regulate the water resource within their territory.[2] However, the parliament is authorised to regulate the inter-state river water disputes.[3] For that purpose, a provision in Article 262 of the Constitution of India empowers parliament to resolve any inter-state river water dispute. As a result, parliament has enacted the - 'Inter-State River Water Dispute Tribunal Act',[4] which allows the central/federal government to constitute the tribunal for the adjudication of the dispute between the states; and expressly bars judicial intervention in the matter.[5] This arrangement was intended to resolve the dispute using political, diplomatic or the administrative means, without deliberately interfering with the sovereign power of the states to govern the water resource.

However, the situation in the present context is complicated, unsatisfactory and politically charged.[6] Changes in climatic conditions, increasing demand for the limited resource, and advances in understanding of the freshwater cycle are all pressing matters which are missing from the existing legal regime. It appears at present that neither the existing legal and political tools nor the legislative mechanism, or the institutional units can accommodate the rising challenge to the effective regulation of the water resource. This has led to increased politicisation of inter-state water disputes. Against this background, this article considers the matter of inter-state river water disputes in India within a broader national and international legal framework and critically analyses the ability of the existing constitutional and institutional units involved in the task. It analyses the existing mechanisms and extends its

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[1] Government of India, The Constitution of India, 1949: Seventh Schedule.
[2] Ibid., at Seventh Schedule, List II: Entry 17.
[3] Ibid., at Seventh Schedule, List I: Entry 56.
[4] Government of India, The Inter-State River Water Dispute Act, 1956 (Act No. 33 of 1956).
[5] Constitution of India, *supra* note 1 Art 262.
[6] Times of India, "Karnataka Election Insights: The Politics of the Cauvery Water Dispute" (9 May 2018), online: <https://timesofindia.indiatimes.com/india/karnataka-election-insights-the-politics-of-the-cauvery-water-dispute/articleshow/64095746.cms>.

investigation to the sharing of the freshwater resource, in general, providing a holistic picture of the current situation. In doing so, it will consider the main causes of disputes arising due to sharing of the freshwater between the states. Throughout this article the federal units of the country are referred to as the provincial state/s and the country (India) is referred as the federal state and the government at the national level is referred to as the central/union government. This article examines the competence of the tribunal as the adjudicating body using as a case study a well-known and long lasting inter-state water dispute in India – The Cauvery Water Dispute.[7]

The purpose of the discussion of inter-state water disputes in this article is to look beyond the proportional distribution of water among various stakeholders or between riparian states, and to better understand the underlying causes of such disputes. To do this, the article is organised in six sections. The first section will briefly describe the historical importance of water to the distribution of power between the central/federal government and the governments of the provincial states. Section Two provides a detailed analysis of the constitutional provisions for the regulation of the water resource, and the ability, scope and competence of these to deal with the water crises of the present century.

Section Three considers the regulation of water through the lens of sovereignty, using the theory of 'the separation of powers' and the 'granting of internal sovereignty', by the federal state to its units for the governance of the resource. The notion of sovereignty is discussed in two ways in relation to the governance of the water resource - first, as a *responsibility* of the state and second, as an *obligation* of the state, arising from the sovereign authority of the state. Since the duality of the sovereign power coexists with the central and provincial states, that is, the overall sovereign authority of the federal state, and the internal sovereignty of the provincial states as the countries federal units of governance in terms of separation of power. It further investigates the principle of sovereignty in international law and the shift experienced by the concept of statehood in the last century.[8] The aim is to examine the change in the relationship between the concept of sovereignty, and the governance of the water resource in the light of the development of international environmental law. It is hoped that this analysis will help in

[7] *The Report of the Cauvery Water Disputes Tribunal with the Decision in the Matter of Water Disputes Regarding the Inter-State River Cauvery and the River Valley* Inter-State River Water Tribunals Award, Online: <http://mowr.gov.in/acts-tribunals/current-inter-state-river-water-disputes-tribunals/cauvery-water-disputes> Ministry of Water Resources, River Development and Ganga Rejuvenation.

[8] JACKSON JH, "Sovereignty - Modern: A New Approach to an Outdated Concept" (2003) 97 American Journal of International Law 782.

strengthening the governance of the resource within the respective boundaries of the federal-state.

Section Four uses the Cauvery water dispute as a case study to investigate the issues from a practical perspective by analysing the tribunals award of 2007. The hope is that it will assist in understanding the causes of disputes, as well as highlight the shortcomings and contradictions regarding the law, competence of the tribunal and the means of governance, based on the general shortcomings observed in this article. Section Five will consider the recent judicial and legislative developments in the concerned matter. Finally, Section Six propose appropriate institutional, legislative and judicial reforms needed to strengthen the governance of water in India within a wider framework of international water/environmental law.

I. HISTORICALL BACKGROUND AND IMPORTANCE OF WATER TO THE SEPERATION OF POWERS IN INDIA

Soon after independence, at the time of the drafting of the Constitution of India, water played a key role in the negotiation of the distribution of power between the centre and the states.[9] The negotiation mainly focused on the issue of whether water, and other natural resources, should be managed locally by the provincial states or be subjected to supra-ordinate rule by the Union of India.[10] Consequently, the territory, after independence, was reorganised on a linguistic basis, resulting in the formation of states with particular linguistic and cultural affiliations and orientations.[11] At present India possesses twenty-nine states and seven union territories, with varying topography and geographical situations, and all territorial divisions are competent and empowered to make laws for the regulation and management of water resource.[12] However, during the process of negotiation, the central/federal government reserved some of the provisions in its favour, which gave it wider powers to legislate on national issues, and in relation to the sharing of river water among other things.[13] Notwithstanding the legislative arrangement, due to the natural course water moves freely across the territorial divisions, which makes sharing of the resource among the territorial divisions both involuntary and unavoidable. A further issue is that natural resources are not evenly distributed, and indeed, nature is unaware of, and indifferent to, human-made territorial

[9] V ASTHANA, *Water Policy Processes in India: Discourses of Power and Resistance* (Routledge, 2009) at 9.
[10] S CHOKKAKULA, "The Political Geographies of Interstate Water Disputes in India" 2015 A dissertation submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy, University of Washington at 102.
[11] Government of India, The States Reorganisation Act, 1956 (Act No. 37 of 1956).
[12] Constitution of India *supra* note 1 at Seventh Schedule, State List: Entry-17
[13] Ibid., at Art 248, 249 and 254.

divisions. As a consequence, in times of crisis or rising demand, disputes have broken out among riparian or non-riparian states over sharing of water.[14]

The legislative competence and jurisdictional authority of the union and the states for the regulation of the water resource are not rigid, and therefore overlap at times,[15] resulting in contradictory legal provisions. However, these legal contradictions *per se* are not addressed by the judiciary, which restricts itself to the question of the legal competence of the authority making that law, as per the constitutional guideline. Because maintaining harmony between the units of governance is important. In some cases, the conflict arises between the law made by the centre and the law made by the provincial state, on the same subject-matter, whilst both have the legal competence to make that law. To settle the dispute, the Supreme Court of India exercises its original jurisdiction.[16] In so doing, the Court broadly decides the legislative competence of the concerned parties, by interpreting the lists mentioned in Seventh Schedule, which indicate if the law-making body is authorised by the constitution to legislate on the matter at hand, or conversely, if the body involved has overstepped its limits making the act *ultra vires*. However, this interpretation is done keeping the object of distribution of power and the constitutional philosophy in mind.

If the issue remains unsettled, then the court will try to explore the possibility of coexistence for the laws by implying the *doctrine of severability.*[17] In which case, if the law made by the provincial state on the same subject matter is inconsistent with the law made by the centre, then the law made by the provincial state is repudiated by the legislature to the extent of such inconsistency.[18] However, if the omission of the part is substantial to the statute and without it, the statute loses its impact, then the existence of the statute is open for reconsideration.

The issue mentioned above is only a part of the problem. Perhaps, the legal question concerning the conflict of law/legal provisions among the applicable law itself rests unanswered, and possibly outside of the judicial mandate. This creates hindrance in the governance of the resource, or at times, reduces the impact of the law and policy created for

[14] MVV RAMANA, *Inter-State River Water Disputes in India* (Orient Blackswan Pvt Ltd., 2009) at 25.
[15] Constitution of India *supra* note 1 at Schedule Seven, State List.
[16] Ibid., Art 245; See also, JN PANDEY, *The Constitutional Law of India* 45th ed. (Central Law Agency, 2008) at 606-09.
[17] Ibid., Pandey at 68.
[18] Constitution of India *supra* note 1 Art 254.

the cause.[19] The resolution of both these issues is paramount to the success of the efficient water governance, and for resolution of inter-state water disputes within the country.

A definitive terminology which defines the principles, theories and doctrines acceptable within the territory of the federal-state of India, for the regulation of the freshwater resource does not exist.[20] Additionally, the manner territorial integrity is understood and applied within the domestic jurisdiction when exercised by the sovereign authority vested in the federal and the provincial states is not distinctly made clear. Therefore, strict implication of the theory in principle raises concerns, concerning the transboundary nature of the problems which arises from dealing with the natural resources within the limited territorial jurisdiction. A clear distinction of the attributes of the theory of territorial integrity is required to be made while dealing with sovereign rights of the state in environmental matters. This is despite the fact that the overall governance of the resource depends on such matters and their effective resolution. This too remains a foundational flaw in the resolution of the inter-state water disputes and these flaws are investigated in sections that follows. The investigation in the section below proceeds with the examination of the constitutional provisions which deal with the regulation of the water resource in India.

II. CONSTITUTIONAL LAYOUT

The federal structure of the Indian constitution has a strong centre similar to that of the Canadian federal constitution. The constitutional need to have a strong union also reflects something more than the provision of mere distributive power to legislate. It means that the states are self-sufficient and autonomous units of governance, but that they are not exclusively allowed to distort the common fabric of the constitution. Thus, the centre reserves some powers to regulate the activities of states, in case of need, and by reserving certain provisions it also ensures the effective separation of powers in line with the theory of checks and balances.[21]

As per the Indian Constitution, the delegation of the law-making powers to the union and the states is directed according to the Seventh Schedule. The constitution provides an elaborate list of subject matters for legislative competence in Schedule Seven, which comprises three lists.[22] The State List: where the provincial states are authorised to make law; the Union list:

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[19] MS VANI, "Community Engagement in Water Governance" in RR IYER, eds., *Water and the Laws in India* 2nd ed. (Sage Publication, 2012), 209.
[20] SR MARIA, "Strategic Analysis of Water Institutions in India: Application of a New Research Paradigm" (2004) 79 Research Report, International Water Management Institute (Sri Lanka), at 26.
[21] Constitution of India, *supra* note 1.
[22] Ibid., at Seventh Schedule.

where the union/centre is authorised to make law; and the Concurrent list: where the provincial and the federal state both are authorised to make law. According to the state list, the provincial states are exclusively and primarily authorised to formulate the laws for the subject matters concerned, within their own territories and within the constitutional framework. The union list empowers the union to make laws in the national interest. In practice however, the union can be seen to be very cautious in using its provisions, such as Entry 56 for the regulation of the water resource in national interest, out of concern that this might interfere with the exclusive legislative and sovereign rights of the provincial state. For matters enumerated in concurrent lists, both parties can make law, but the law made by the union prevails.[23]

The constitution provides a framework for distributing power among the units of governance, which directs them to conduct their businesses by being within the parameters of the constitution, and, in accordance with constitutional philosophy. However, it does not provide detailed guidelines on how to execute these tasks. It is beyond the competence of constitution to provide this type of descriptive guidelines to satisfy the aspirations for all the organs of the government in a dynamically changing world. Unfortunately, this has been a significant grey-area which does not certainly inspire the law-making bodies to push the limits of sophistication; given the change in climatic conditions, the nature and quantum of resource available, and the modern understanding of the resource.[24] Consequently, it not only creates the issue of a multiplicity of laws, but the existence of contradictory laws creates functional dead-locks which in turn are translated into political friction between the bodies involved.

As an example of contradiction - Entry 17 of the state list makes water the primary concern of the state, and Entry 56 of the union list makes it a subject matter of the union/centre. Whilst these entries are listed in different capacities, they might nonetheless induce interference a conflict between the jurisdictions of the state and the union. In a deliberate attempt to secure the interests of the legislature over the water resource, the constitutional provision enumerated in Article 262, expressly bars judicial intervention in the matter of the inter-state river water disputes.[25] The abovementioned provisions are the key provisions that deal with the water resource in India and are discussed further and in detail in the following section.

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[23] Ibid., Art 256.
[24] Vishwa MOHAN, "Centre, states not on same page when it comes to water rule book", The Times of India (16 June 2017), online: < https://timesofindia.indiatimes.com/india/centre-states-not-on-same-page-when-it-comes-to-water-rule-book/articleshow/59170265.cms>
Vishwa Mohan
[25] Ibid., Art 262.

A. Analysis of Article 262

Article 262 of the Indian Constitution is dedicated to the resolution of *'disputes relating to water'.* This article is inspired by the Government of India Act, 1935, which consisted of very elaborate procedures to preserve the discretion of the then Governor-General of India,[26] over the final judgement regarding the inter-state water dispute, by explicitly excluding the involvement of all other authorities. It again represents the intent of colonial laws, which were made mainly to strengthen and justify the administration's control over the resource and the territory, by an instrument of law drafted in its favour.[27] Therefore, while drafting the Indian Constitution, the then chairman of the drafting committee - Dr B. R. Ambedkar, proposed the amendment to this article because of the flaw in the existing provision.[28] The change so proposed, using an amendment, led to the creation of a permanent body to deal with the water disputes arising in future, while utilisation of the resource will be at its full strength due to the construction of dams and canals to further the states objectives.[29] The proposed amendment aims to ensure equitable distribution of the resource whilst preventing whichever body holds a dominant position in each case (geographically or politically) from exploiting this position.

The amendment influenced parliament to enact the Inter-State Water Dispute Act in 1956.[30] However, Article 262 principally advocates negotiation between the parties involved as the means to resolve inter-state water disputes. When negotiation fails, the central government is obliged to constitute the tribunal for that purpose, at the request of the state, based on the provisions of the statute. The central government must however be of the opinion that the tribunal is required, and that all efforts at negotiation have been exhausted.[31] In case the central government is not of the opinion that the tribunal is required, and the matter is brought before the judiciary, then the judiciary can order the constitution of such tribunal by issuing the Writ of Mandamus.[32]

The inter-state water sharing agreement at the time of these developments was made possible by means of the project's design, which was to harness water using technical or engineering advances such as the hydropower plants; construction of dams and reservoirs; and

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[26] Government of India by the Crown, Government of India Act, 1935 (26 Geo. 5. CH. 2) at Section 130 (3).
[27] Antony ANGHIE, *Imperialism, Sovereignty and International Law* (CUP, 2005) at 208.
[28] DD BASU, *Commentary of the Constitution of India* 8th rev ed. (LexisNexis Butterworths, Wadhwa Publications, 2012), at 9112.
[29] Ibid.
[30] Tribunal's Act *supra* note 4.
[31] Ibid., sec. 4 (1).
[32] Supreme Court of India, *T N Cauvery Sangam v UOI* AIR 1990 SC 1317.

the system of canals built for irrigation. As a result, all the tribunals created to date are somehow restricted to deal with disputes arising from such shared projects, and other means of sharing of the water resource is neither considered nor included. Thus, the scope of the article as understood in this act has been streamlined and narrow. In addition to the Inter-State Water Dispute Act, the parliament also enacted the River Board Act 1956, by applying the powers entrusted to it via Entry 56,[33] with the purpose to foster relationships and develop cooperative relationships among the parties involved.[34] This act has so far remained 'dead letter' as no river board has yet been appointed.[35] Both the acts have not lived up to their initial intention, one being restricted due to the object it was created for, and the other because it never came into existence.

> 262. Adjudication of disputes relating to waters of inter-state rivers or river valleys
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> 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
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> Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1) Co-ordination between States.

An intense reading of sub-clause (1) of this article suggests that it specifically restricts the jurisdictional authority to that of the inter-state rivers or river valley.[36] And the tribunals made for the purpose till date have restricted themselves to the technical/engineering structures designed to regulate the resource and not with overall governance of the resource. However, this article, along with the constitution itself, was drafted in 1949, when the understandings about the freshwater cycle and the connection of rivers with the other constituents of freshwater were undeveloped or even absent.[37] Ever since the article has not been upgraded to accommodate modern understandings of the hydrological cycle and therefore, it is neither competent to deal with the complex issues arising from the shared freshwater resources, nor it works in accordance with the environmental law principles.[38] Perhaps the practice of dealing with one of the components of nature in vacuum and within the strict statutory boundary has failed the human-kind in last century and is against the principles of international

[33] Government of India, River Boards Act, 1956 (ACT NO. 49 OF 1956).
[34] Basu, *supra* note 28, 9113.
[35] This institution never came into existence and the purpose for the creation of the statute remained unsatisfied.
[36] Valley: (Physical Geography) a long depression in the land surface, usually containing a river, formed by erosion or by movements in the earth's crust.
[37] Salman MA Salman, "Inter-states Water Disputes in India: An Analysis of the Settlement Process", 4 Water Policy (2002) at 223.
[38] Ibid.

environmental and watercourse law.[39] Therefore, the utility of the article and the Interstate River Water Dispute Act 1956 in contemporary times, is dubious.

Article 262 empowers parliament to adjudicate disputes about inter-state rivers or river valleys,[40] whereas Entry 56 of the list I,[41] and Entry 17 of list II,[42] classify the subject-matter for the legislative competence of the union and the state, respectively.

> Entry 56 of the Union List: Regulation and Development of inter-state rivers and river valleys to the extent to which such regulation and development under the control of the union are declared by the parliament by law to be expedient in public interest.
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> Entry 17 of the State List: Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provision of entry 56 of list 1.

Entry 56 again speaks of the regulation and development of the inter-state rivers and river valleys. The jurisdictional similarity and scope of Entry 56 is similar to that of Article 262. Although, article 262 initially reflects its determination to adjudicate the inter-state water disputes using a methodical approach to keep the governance of the resource un-interrupted by providing with an alternative means of judicial adjudication without judicial intervention. Whereas, the jurisdiction of Entry 17 of the state list is broader as it refers to waters in general, which includes surface and groundwater both, this could also mean freshwater in general. It also reflects what 'water' in this entry means: water in its natural form and all other forms used, regulated, harnessed or stored by the state. Thus, overall authority over the waters as per the provisions discussed above, lies with the state.[43] Although, the exclusive law-making authority given to states for that purpose is often compromised due to the transboundary environmental impacts, and the absence of basic legal standards to ensure coherence among such laws made by the adjoining states.[44] Nonetheless, their legislative competence is undeniable, but its utility in present times is questionable.

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[39] E Brown WEISS, "Environmental Equity and International Law" in S LIN and L KURIKULASURIYA eds., UNEP's New Way Forward: Environmental Law and Sustainable Development (1995) 7, 16-17.
[40] River Valley: An area of lower land between two lines of hills or mountains, usually with a river flowing through it.
[41] Constitution of India, *supra* note 1, Schedule Seven, at Entry 56 of the Union List.
[42] Ibid., at Schedule Seven, State List: Entry 17.
[43] Ibid.; Philippe CULLET and Sujith KOONAN, *Water Law in India: An Introduction to Legal Instruments* (OUP, 2011) at 51.
[44] Kishore UPERTY and Salman MA Salman, "Legal Aspects of Sharing and Management of Transboundary Waters in South Asia: Preventing Conflicts and Promoting Cooperation", (2011) 56 (4) Hydrological Sciences Journal 641 at 656.

The problem so arising seems to have its origin in the federal distribution of power itself. It is the possession of, and execution of this sovereign authority arising due to the separation of power to ensure the governance by the federal units of the state which is examined through the lens of governance in a subsequent section. However, the political benefits associated with the regulation and management of the resource is mainly rooted in the mechanism of the internal sovereign authority conferred on the states for governance.[45] Which is why, in the following section, the governance of water resource is explored, regarding sovereign powers granted to the federal -states and the provincial states within the nation, both individually and collectively.

III. IMPACT OF SOVEREIGN AUTHORITY ON GOVERNANCE OF WATER RESOURCE

Sovereignty plays a foundational and at times controversial role regarding the applicability of the international law on states. To an extent, the meaning of the notion of territoriality, absolute independence to regulate the natural resources, and the principle of non-intervention and self-determination associated with the sovereign power has lost its importance when applied in the context of global commons.[46] Moreover, strict and absolute implementation of such power by the state/s while dealing with the natural resources within its territory is contrary to the principles of modern international environmental law and the customary principles of international law.[47] Globalisation in the last century has made the interdependence and cooperation among the states inevitable and mandatory. It drove the change in global attitude, and the role played by the states in such a globalised world. Although the states are primary subjects of international law, humankind and the environment as such are the primary objects, rather than the subjects, of international law.[48] Therefore, the collective agreement between and among the states is often inspired by the shared objectives and common purpose which led to the creation of a collective sovereign will.[49] Is this then is an apt technique to tackle the issues that are of common concern to humankind/global commons?

Likewise, within the domestic federal set-up in a country like India, the strict implementation of the notions of territorial sovereignty when applied to natural resources

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[45] Ramaswamy R IYER, "Indian Federalism and Water Resources" 1994 10 (2) International Journal of Water Resources Development, 191.
[46] Commission on Global Governance, *Our Global Neighbourhood* (OUP, 1995).
[47] A Dan TERLOCK, "One River, Three Sovereigns: Indian and Interstate Water Rights",1987 22 (2) Land and Water Law Rev. at 631.
[48] N SHRIJVER, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (CUP, 1997) at 390.
[49] S BESSON, "Sovereignty in Conflict" in Colin WARBRICK and Stephen TIERNEY eds., *Towards an International Legal Community: The Sovereignty of States and the Sovereignty of International Law* (British Institute of International and Comparative Law, 2006) 131.

becomes problematic in the nationalistic federal set-up. However, the constitutional provisions apply equally on all the federal units of the country except for the state of Jammu and Kashmir.[50] But as discussed in section two of this article the issues of governance are based on separation of power directed by the schedule seven of the constitution of India, which gives autonomy and legitimacy to the provincial state governments to regulate and legislate for the concerned matters. So as is the case with the governance of water resource. And it is in this scope, the sovereign authority of the units of federal state will be investigated. It had been the conventional practice of the central government not to interfere with such a matter of day to day governance of the provincial units of the states. Additionally, in the absence of the higher legal authority or legal parameters which can ensure coherence and sustainability in the laws and policies promulgated by the provincial states, it is difficult to hold federal units of governance accountable for non-efficient or poor governance of the resource.[51] Therefore, the change in the concept of statehood, governance and responsibility of the state from international law is studied in context, to learn and improve the accountability mechanism of the domestic governance of the states as well as its federal units.

The concern in terms of accountability, governance and the implication of the principles which confers power to the state differs in a domestic set-up from that of the international domain. In domestic context all the units of federal state and the state itself is equally bound by the provisions of the Constitution of India. However, duality in the application of sovereign authority for governance of water resource in federal-state and its provincial units of governance is what has given rise to the tension between the centre and the provincial units of the state. Therefore, this study investigates the impact of responsibility of state in governance using the development of international law in this field with an aim to learn from and imply that learning for the betterment of governance in domestic context.[52]

A. Sovereignty as Responsibility in Governance

Concept of governance, or good governance, as the responsibility of the sovereign state, is discussed in international law but contested as to its extent.[53] States are expected to ensure good

[50] Constitution of India *supra* note 1, Art 370
[51] SC McCAFFERY and KJ NEVILLE, "The Politics of Sharing Water: International Law, Sovereignty and Transboundary Rivers and Aquifer", in K WEGERICH and J WARNER eds., The Politics of Water (Routledge 2010) 18, 37
[52] G FITZMAURICE, "The Future of Public International Law and of the International Legal System in the Circumstances of Today" (1973) 55 Annuaire de l'Institut de Droit International 197, at 249.
[53] G NOLTE, "Sovereignty as Responsibility" (2005) 99 American Society of International Law Proceeding 389, 392.

governance in their territory, so as to ensure the wellbeing of the state and the people in it, and it is this feature which brings the state legitimacy. Good governance is also defined as the states building process, which includes the parameters for the development of the state, and the establishment of its institutional and political power.[54] That said, the true extent of this responsibility is not precisely defined, and is therefore subject to interpretation in case by case basis.[55] In nationalistic set-up, the matter in hand deals with the concept of sovereignty between the provincial states and the union government mainly on two grounds. Firstly, due to the authority of provincial states to act as the independent unit to legislate for the matters delegated to it because of the internal sovereign authority. Secondly, due to strict adherence to its territory.[56] As discussed in the previous section, the provincial states possess the first claim over matters exclusively allotted to it, and the union holds a secondary claim on the same matters, so has the responsibility to govern the resource. Primary responsibility for the governance of water resource within the territory lies with the provincial state/s, but the overall primary responsibility for the efficient governance of the resource within the territory of the country, which is inclusive of all the provincial states and the Union Territories lies with the union. Thus, the union government and the states' together share this responsibility.[57]

To strengthen the means and mechanism of governance, the autonomy was guaranteed to the provincial states and backed with legislative powers. With power follows the responsibility which is classified into two categories: individual and collective.[58] Individual responsibilities are the ones understood as the primary obligation of the provincial states, such as the maintenance of law and order; allocation of basic public services for all, such as health, education, etc.; and the efficient governance of the resource within its territory.[59] Conversely, the collective responsibilities of provincial states are the ones which translate as their contribution to the accomplishment of national political goals. As the obligations arising from a national or international commitment by the federal-state, such as the obligation to fulfil the

[54] Jeremy ALLOUCHE, "The Multi-Level Governance of Water and State-building Processes: A Longue Duree Perspective" in Wegerich *supra* note 51, at 45.
[55] Demetrios ARGYRIADES, "Values for Public Service: Lessons Learned from Recent Trends and the Millennium Summit" 2003 69 (4) International Review of Administrative Sciences 521.
[56] Constitution of India, *supra* note 1, Schedule Seven, List II.
[57] UN, *A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change*, Doc A/59/565 (2005).
[58] Constitution of India *supra* note 1, at Part XI: Relations Between the Centre and the State.
[59] Yu KEPING, "Governance and Good Governance: A New Framework for Political Analysis", 2018 11 (1) Fudan Journal of the Humanities and Social Sciences 1.

economic, social and cultural rights arising from the Covenant,[60] and the obligation to work towards the fulfilment of sustainable development goals, etc.[61]

The shift in the concept of sovereignty has manifested sovereignty as a responsibility of state and not as the control exercised by the state.[62] Likewise, the individual and collective responsibilities of the states concerning the water resource is expressed as the primary responsibility of the state towards the resource, because it is obliged to manage and govern the resource in the best manner possible for the benefit of people, as well as for the state.[63] The primary collective responsibility of the provincial state arises from this individual responsibility. However, due to the transboundary impact of the act or omission by the state within its territory and its overall impact on the resource; it is beyond the competence of provincial units of state to fulfil their collective responsibility in absence of the legal parameters or guidelines which are equally applicable and binding on all the provincial states. Which is why, this is the responsibility and the primary duty of the union government. The constitution has entrusted the union with the power to regulate any matter in the national interest,[64] and in this case, fulfilment of this obligation by the union will also facilitate the states to fulfil their collective responsibilities in that regard.

The primary collective responsibility of the union in this regard is complex and demands positive efforts. The governance of water is a multi-disciplinary subject; it includes things such as framing the policy, and the task to harmonise laws and policies; it also requires the institutes to foster cooperation among them for better results, etc.[65] To ensure implementation and accountability, along with keeping a close eye on the states regarding the manner they exercise their responsibility of governance, an institute is of prime importance. Therefore, the legal framework required to accomplish the task of water governance is understood as the inter-woven web typology of governance, which functions at multiple levels.[66] All this constitutes the responsibility of the federal-state/union for efficient water governance, the implementation

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[60] *International Covenant on Economic, Social and Cultural Rights,* 16 December 1966, GA Res 2200A (XXI) (entered into force 3 January 1976) [ICESCR].
[61] UN, *Sustainable Development Goals: 17 Goals to Transform our World, 2030,* online: < http://www.un.org/sustainabledevelopment/>.
[62] Gareth EVANS and Others, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre, Ottawa, 2001) 17.
[63] Argyriades, *supra* note 55, at 6.
[64] Constitution of India *supra* note 1, Seventh Schedule, Union List: Entry 56, Art 254.
[65] J NEWTON, "A brief History of Global Water Governance" in A Rieu-CLARKE, A ALLAN and S HENDRY eds., *Routledge Handbook of Water Law and Policy* (Routledge, 2017) at 352.
[66] R JAMES, "The Governance of Fragmentation: Neither A World Republic nor A Global Interstate System" (2000) Studia Diplomatica LIII 5.

of which in federal set-up is conventional and effective.[67] And by doing so, the states gain legitimacy and commences the state-building process which revolves around the management of water resource, this is now up to the state to decide in which direction it wishes to lead the resource management. As a frame of reference, the global water governance prescribes four levels: international, regional, national and local.[68] The governance at the national and the local level are on a par with the sovereign power of the federal-state, and this is very important because it plays a critical role in the making of international law and policy.[69]

The responsibility of the state in this context equates with the state's accountability, due to the democratic nature of the decentralised government existing in the country. Alternatively, one can argue in favour of duplication of the articles of the law of responsibility of states, by one provincial state against another, concerning the manner of regulation of freshwater resource, within the country.[70] Irrespective of the manner in which we understand and acknowledge the existence of the responsibility, it is difficult to legally exercise it without creating the institution for the cause, which is competent to outline the responsibility of respective branch of governance, and to determine the object, principles, doctrines and all other foundational aspects associated with it. Alternatively, the transboundary cooperation and harm associated with the freshwater resource, along with its management and governance, are most likely to attack the sovereign rights of the states, which again raises the issue of state responsibility, thus creating a political crisis.[71] However, the basic difference in the concept of sovereignty in the nationalistic domain from that of the international domain lies in the fact, that both the states, as well as the union, are subjected to the constitutional limitations which are equally binding on them. The sovereign rights of the state in the contemporary world are understood to carry with it the obligation to work for the welfare of its populace, and further, to meet their obligations towards the international community.[72]

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[67] Pahl-Wostl and Others, "Governance and the Global Water System: A theoretical Exploration" (2008) Global Governance 14.
[68] A SCHULZ, 'Sustainable Development Goals and Water' in Rieu- Clarke *supra* note 65 at 373.
[69] Ibid.
[70] UN, *Responsibility of States for Internationally Wrongful Acts, 2001* (U.N. 2005: Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles appears in Yearbook of the International Law Commission (2001) Vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001 and corrected by document A/56/49(Vol. I)/Corr.4.).
[71] Anton EARLE and Marian J. NEAL, "Inclusive Transboundary Water Governance" in KARAR E eds., *Freshwater Governance for the 21st Century,* 6 Global Issues in Water Policy (Springer, 2016) at 145.
[72] A ETZIONI, "Defining Down Sovereignty: The Rights and Responsibilities of Nations" (Ethics International Affairs, 10 March 2016), online; <https://www.cambridge.org/core/journals/ethics-and-international-

B. Sovereignty as Obligation in Governance

The protection of fundamental rights for all is one of the primary obligation of the sovereign federal-state, and for its fulfilment, efficient governance of the resource plays a prominent role. The government at the union and provincial level in India are obliged to fulfil their duties to the best of their abilities.[73] The concept of sovereignty when understood as an obligation includes both the duty to protect and, to prevent.[74] For the protection of the right to water as a fundamental right, the protection is from the negative interference in the enjoyment of the rights, and the prevention is from the situations which can act as the hurdle in the enjoyment of the right. Additionally, ensuring efficient governance of the resource is to facilitate the progressive realisation of the right to water so guaranteed.[75] Therefore, this obligation primarily lies with the state within whose territory the resource physically resides, and the collective responsibility lies with both: the union and the states.

The emphasis on the shared/collective obligation is because of the nature of freshwater cycle, as well as the judicial assertion of the public trust doctrine: which states that the natural resources must be held in trust by the state.[76] It reassures the classification of freshwater as the natural resource within Indian territory, besides emphasising the application of the principle of stewardship by the state for their regulation, management and governance.[77] This counteracts the principle of absolute territorial integrity, which by the way is the unwritten rule and conventional state practice. Moreover, the assertion of the public trust doctrine and the principle of stewardship is the judicial pronouncement, therefore, act as the precedent and the law of the land. The acceptance of these norms suggests the consideration of the principle of inter-generational and intra-generational obligations arising from the state practice as well, which is very much in line with the international trend.[78] This possesses the potential to work

affairs/article/defining-down-sovereignty-the-rights-and-responsibilities-of-nations/79A09560168F9C3DFB425CFADE3A83C0>.

[73] Constitution of India, *supra* note 1, Part III.

[74] A ETZIONI, "Sovereignty as Responsibility" (2006) 50 (1) Orbis: Foreign Policy Research Institute 71, at 76.

[75] *Resolution on a Human Rights-Based Approach to Natural Resources Governance' (2012)* by African Commission on Human and Peoples' Rights, (African Commission accepted in its Resolution 224, at its 51st Ordinary Session held from 18 April to 2 May 2012 in Banjul, The Gambia).

[76] Supreme Court of India, *MC Mehta v Kama Nath* (1997) SSC 540.

[77] T BURROWES, "The Public Interest as Stewardship of Natural Resource" (1992) 1 (2) Maine Policy Review at 51.

[78] California Natural Resource Management, "The Future of Natural Resource Management: The White Paper and Action Plan" (2010) California Natural Resources Agency 1, 8.

wonders within the federal-state for the fulfilment of the collective obligations, especially when directed towards an object.[79]

The federal organs of the state execute political power within the common framework of the constitution of India, the existence of which assures that they are the component of the federation.[80] Sovereignty and territorial integrity are foundational ideologies for the existence of the state, but they are not exercised in the same way within the federal-state as in the context of international law. However, the clarification as to what these principles mean in a federal set-up, and what could be the plausible manner and extent of their implications needs re-evaluation, which need not be construed as the subjugation of their autonomy but regulation for better governance of natural resource in the light of the development of environmental law.[81] The sovereign authority is crucial for governance, but like every other authority, it is prone to certain limitations. In the domestic set up, the limitation imposed on the internal sovereignty of the states is through constitutional provisions and then by legal provisions. The constitutional limitation is in place although they require revision to keep up with the tone of the time, but the categorical limitation based on sound principles of watercourse law and the modern understanding of the freshwater cycle is not explicit at all, and at present, they remain fragmented and not in comprehensive or in concrete form.[82]

The lack of this kind of super-ordinate legal framework leaves room for the application of the internal sovereign authority in any form, without being oriented and limited to the set dimensions principally or otherwise: which frustrates state/s effort. All these complexities are discussed in the subsequent section using Cauvery water dispute as an example of a long-lasting inter-state water dispute.

IV. CAUVERY WATER DISPUTE

The Cauvery dispute started in 1892, and the sharing of Cauvery's water remains a prominent cause of dispute between the states that are involved.[83] Cauvery flows in the south-western part of the Indian sub-continent, originating from the state of Maharashtra, then travelling mainly through the state of Karnataka, Tamil Nadu, and it eventually empties into the Bay of Bengal.

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[79] Paul BABIE, "Sovereignty as Governance: An Organising Theme for Australian Property Law" (2013) 36 (3) UNSW Law Journal 1075, 1105.
[80] Malcolm N SHAW, *International Law* 7th ed. (CUP, 2014) at158.
[81] James CRAWFORD, *State Responsibility: The General Part* (CUP, 2013) at 66.
[82] Philippe CULLET, "Water Law in a Globalised World: the Need for a New Conceptual Framework", (2011) 23 (2) Journal of Environmental Law 233.
[83] Cauvery Dispute *supra* note 7.

Though the Cauvery dispute involves four states, this article mainly concerns the two principle contending parties: the state of Karnataka and Tamil Nadu. The dispute has become more intense with the change in climatic conditions and growing demand for the resource. However, the means for resolution of the disputes have not transformed much over this time. This section will highlight these issues, investigate the existing techniques and test their feasibility to tackle contemporary issues. While addressing the dispute and the relative concern the competence of the inter-state tribunal is subjected to investigation in the light of tribunals award of 2007.[84]

A. ISSUE 1: Demand, Distribution and Sharing

The genesis of the dispute lies in the Inter-state agreements signed between the states in 1892 and 1924,[85] before independence. At the time those agreements were concluded the prime concern for sharing the Inter-state river water was for irrigation and other domestic use. Also, the resource was not as scarce as it is nowadays. Although, the issues concerning the legality of the agreements signed between the parties of different capabilities: where the British enjoyed the position of dominance, was put to rest by the subsequent decisions of the tribunal.[86] As a consequence, this issue need not be discussed.

With a growing population and rapid economic development across India, the demand for the resource has increased many folds, and increasing pollution adds further to the burden. However, the primary concern in this dispute revolves around the physical availability of the resource, and the right of the states to proportionally distribute the resource for different purposes, such as irrigation, agricultural and domestic uses; along with the generation of hydro-electric power. The solution, therefore, can no longer just be inclined towards the distribution of the resource based on demand, rather it must be holistic, which balances the equation on both sides: demand and supply.[87]

During colonial rule in India, the territory which belongs to the state of Karnataka at present belonged to the Maharaja/king and was known as the princely kingdom of Mysore.[88] The territory belonging to the State of Tamil Nadu at present was under British precedency rule:

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[84] Government of India, *The Report of the Cauvery Water Disputes Tribunal with the Decision: Volume II-Agreements of 1892 and 1924* (Ministry of Water Resources, River Development and Ganga Rejuvenation, 2007)
[85] Ibid.
[86] Ibid.
[87] RR IYER, "Water Resource Planning: Large Dams and Development" (Association for India's Development, Chennai, 1999).
[88] Cauvery Dispute Tribunal's Award *supra* note 7, Volume I, Chapter 2: Background of Dispute and Framing of Issues: Agreement between the Mysore and Madras Governments, in regard to the Construction of a Dam and Reservoir at Krishna-Rajasagar, 18th Feb 1924, at 34.

popularly known as the Madras Presidency. The State of Karnataka at that time was forbidden to build reservoirs or to cause any obstruction to the Cauvery water, without prior consultation with the Madras Presidency as it might adversely affect their interests.[89] Soon after independence, the state of Karnataka wanted to harness the resource to the best of its abilities, to bring prosperity to the state. For that purpose, the construction of dams for power generation and the development of canals for irrigation was planned on the tributaries of Cauvery.[90] This later became the cause of dispute between the two riparian states. Karnataka maintained its position by challenging the validity of the agreements signed in 1892 and 1924. Conversely, Tamil Nadu insisted upon them and claimed their historical right to the waters of Cauvery. Karnataka wilfully violated the terms of the agreement and proceeded with the construction of the dams, without the prior consultation with the State of Tamil Nadu, as well as, in the absence of the Clarence which is required by the state of Karnataka to proceed with the project from the government of India.[91]

It is one of the classic problems when considering the issue of the shared natural resource among the states. The parties to the dispute often insist on the proportional distribution of the resource with reference to whichever available statute, theory, principle or legal agreement signed between the parties works in their favour. Consequently, each party demands a certain quantity of the resource or establish their authority over it based on the rights or claims favourable to them.

As of now, the tribunal's order and the judgement of the Supreme Court for the concerned matter mainly dealt with the amount of water to be released from the dam and reservoir by the State of Karnataka.[92] While deciding the amount of water for distribution among the riparian states, the authorities considered the overall availability of water in the river, and its tributaries, along with the other available water sources, in addition to the dynamics and extremes of the monsoon.[93] Regardless, neither the overall availability of the freshwater resource nor the impact on the ecosystem, which ensures the health and quantum of the resource, were taken into account. These factors are responsible for ensuring the availability of the resource and are the most competent to balance the supply side of the equation, but remain discredited in the

[89] Ibid., Madras-Mysore Agreement of 1892, at 29.
[90] Ibid., Chapter 1: Four reservoirs were formed by construction of dams across the tributaries of Cauvery namely: Harangi; Kabani; Hemavati; and Suvarnavathy at 7.
[91] Ibid., Violation of the Interstate Agreements of 1892 and 1924 by Karnataka at 7.
[92] Ibid., Volume V- Apportionment of the Waters of the interstate Cauvery: Final Order and Decision of the Cauvery Water Disputes Tribunal - Clause V, at 238.
[93] Ibid., Clause VII and XIV, 239, at 242.

analysis. Perhaps, the inclusive modelling of freshwater of the region by combining the surface and groundwater could have been the preferable solution, which would not only resolve the distribution of the resource among the riparian states but also foster the cooperative mechanism to enhance the freshwater cycle.

The demand-based insistence for adjudication of the Inter-state water dispute is not unique to this dispute in India but is the prevalent practice in almost all Inter-state water disputes,[94] nationally and internationally.[95] This might be the reason for the non-compliance of the order passed by the tribunal,[96] as it does contemplate the need of the states nor does it prioritise the distribution of the resource except for the necessities such as drinking, washing etc. This is done, rather than deciding which party is at fault, or deciding if there has been a violation of the legal obligations based on the facts and legal provisions. This position was taken and argued by the state of Karnataka at various stage of the order: interim order, final judgement, etc. The state of Karnataka argued that it does not have sufficient storage of water due to poorly developed irrigation canals and reservoirs for storage of Cauvery water. Thus, the state finds it inappropriate to be forced to share a certain amount of water with the state of Tamil Nadu, along with other states (Kerala and Pondicherry), especially when it does not have enough water to satisfy its own need.

The example above is precisely why water as subject-matter is deliberately excluded from the purview of the court's jurisdiction and intended to be dealt with using political or other means.[97] The technical concerns in the dispute were resolved with expertise because the matters primarily concern with the technical and infrastructural instruments such as the dams and canals. However, the manner of adjudication was similar to that of judicial adjudication mainly emphasising the legal issues raised.[98] Since it was intended for out of court settlement, the tribunal could have been empowered to resolve the dispute through initiatives which promote cooperation and the equitable sharing of the resource. The solution could have been

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[94] Government of India, *Ravi and Beas Waters Tribunal's Award* (Ministry of Water Resource, River Development and Ganga Rejuvenation), online: < http://www.wrmin.nic.in/forms/list.aspx?lid=368>.
[95] Government of India, *Indus Waters Treaty, 1960* (Treaty Between the Government of India and the Government of Pakistan Concerning the most Complete and Satisfactory Utilisation of the Waters of the Indus System of Rivers, Ministry of External Affairs), online: < http://mea.gov.in/bilater al-documents.htm?dtl/6439/Indus>.
[96] Priyanka MITTAL, "Cauvery dispute: Karnataka fails to fully comply with orders, Tamil Nadu tells SC" (LiveMint, E-Paper, 16th Sep 2017), online: < http://www.livemint.com/Politics/XykLQP4hQHYqTFQlw4AOIK/Cauvery-water-dispute-SC-allows-Tamil-Nadu-to-file-plea-aga.html>; See also, V SHIVSHANKAR, "Supreme Court Pulls up Karnataka for Disobeying Orders to Release Water to Tamil Nadu" (The Wire, 30th Nov 2017), online: < https://thewire.in/70183/sc-pulls-karnataka-disobeying-orders-release-water-tn/>.
[97] Constitution of India *supra* note 1, Art 262.
[98] Cauvery Tribunal's Award *supra* note 7.

more inclined towards efficient governance of the resource while prioritising the importance of the resource due to its inherent value, and its value for the states sharing the resource. Another weakness of the tribunal's approach was that they did not recognise other entities as a party to the dispute except for states.[99] Given the history of inter-state water disputes,' the sole purpose of segregating the inter-state water disputes from judicial intervention does not seem to have materialised appropriately. This occurred because of the narrow-sightedness about the possible prospects to arise from the sharing of river water by the states, and the limited knowledge about the multifaceted influence of the resource management in other sectors of life.

B. ISSUE 2: Legal Competency of the Adjudicating Institutions

The Tribunal for the Adjudication of the Inter-state Water Dispute was created to be the final authority for the disposal of all disputes arising from the sharing of water between two or more states. The general theme of discussion in this article, as well as the Cauvery case under investigation, suggest dissatisfaction and raises concerns regarding the legal competence of the tribunal. As evident by the Cauvery case, in which the states as parties to the dispute have been observed using other mechanisms such as the writ jurisdiction;[100] special leave petition,[101] or the advisory opinion available at the disposal of the higher judiciary for the resolution of the concerns arising from the dispute at different stages. The states have appealed to the Supreme Court of India as a last resort for the administration of justice, and at times for the clarification of the order passed by the tribunal.[102] These alternative paths discovered by the states to take the matter before the higher judiciary raises two prominent issues concerning the legal competence of both the bodies involved - the tribunal and the higher judiciary. 1) The criticism or scrutiny of the tribunal is mainly due to its limited ability for the resolution of the inter-state water disputes;[103] 2) The authority of the involvement of the higher judiciary is questioned due to the explicit prohibition mentioned in Article 262 of the Indian Constitution.[104] Both of these institutions are subject to scrutiny in this section, against this background.

The origin of the Tribunals Act has its genesis from Article 262 of the constitution thus, has the same jurisdictional problem as discussed in Section II of this article. Therefore, unless the

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[99] RR IYER, "Cauvery Dispute: A Lament and a Proposal" (2013) 48 (13) Economic and Political Weekly at 49.
[100] Constitution of India *supra* note 1, Art 32.
[101] Ibid., Art 136.
[102] Supreme Court of India, *State of Tamil Nadu. Etc. v State of Karnataka and Others* 1991; 1991 SCR (2) 501.
[103] Supreme Court of India, *In the Matter of: Cauvery Water v Unknown* 1991; AIR 1992 SC 522, at para 16.
[104] Constitution of India *supra* note 1 Art. 262 (2).

Article 262 and the Tribunals Act are amended to clarify their jurisdiction, and to embrace shared freshwater among the states as their area of competence and interest; their competence is dubious. The narrow interpretation of the constitutional provision has limited the possibilities for the tribunal in a way that it does not seem apt to deal with the complex problems of this century.

The disputes dealt with by the tribunal mainly revolve around the use and management of the resource due to the engineered infrastructure created to harness the resource: but is not confined to it. The issues of development; and the rights of the people affected by these joint projects, such as the problem of displacement, resettlement, relocation, loss of ecology etc., are inevitably connected, especially when these considerations are associated with the rights of an individual.[105] Moreover, the question arising from the sovereign rights and responsibility of the state(s) party to the dispute and other cross-cutting issues arising from the context, is beyond the mandate of the tribunal's competence. The concerns arising are multifaceted. Thus, their resolution must also not confine itself to the adjudication of the legal dispute and distribution of the resource, ignoring all other relative concerns. The disputes involving the sharing of water can no longer be confined to the physical characteristics of water, but rather, must be addressed through the lens of sustainability. Continuance of the former approach is no longer acceptable, but unfortunately, it remains in practice.[106]

The states in the past had approached the Supreme Court in most of the inter-state water disputes adjudicated by the tribunal. However, due to the bar restricting the direct intervention of the judiciary, the states have to find alternative means to approach the judiciary, which raises complexity and prolongs the administration of justice.[107] This additionally, leads to the contestation of the judicial order, in case the judiciary intervenes at the request of the disputed parties or the request made by the central government or President of India, which undermines the overall institutional authority and destabilises their credibility. Nevertheless, keeping the matter separate from a judicial intervention for the sake of separating the judicial and administrative functions is one thing, but obstructing the inherent power of the judiciary is

[105] Smita NARULA, "The Story of Narmada Bachao Andolan: Human Rights in the Global Economy and the Struggle Against the World Bank (2008)" in Deena R HUEWITZ and others, eds., *Human Rights Advocacy Stories* (Research Paper No. 08-62: Public Law, NYU School of Law, 2009).
[106] Supreme Court of India*, State of Tamil Nadu v State of Karnataka and others* I.A. No.12, 15, 16 and 18/2016 in Civil Appeal No(s). 2456/2007.
[107] Constitution of India *supra* note 1, Art 136.

another.[108] The tribunal in the consideration or any other institute except for the judiciary could never be able to deal with the concerns raised above.[109] It is the prerogative of the higher-judiciary and is the only body competent to tackle such issues. While exposed to these situations, both the institution, the tribunal and the judiciary suffer from the issue of competence in one way or the another.

The Supreme Court has the original jurisdiction to entertain all the inter-state disputes [110] and the resolution of the issues concerning the fundamental rights.[111] The inter-state water disputes fall within both the categories, especially after the judgement clarifying the *right to water* as arising from the fundamental right of *right to life.*[112] It is no longer considered wise to adjudicate the dispute concerning water in isolation while disregarding all other aspects such as social, economic, ecological and cultural; or without contemplating the positive obligations associated with the governance of the resource for the progressive realisation of the *right to water*. These issues provided the basis of the claim that the constitutional provision which obstructs justice, needs to be amended to provide legislative clarity. Nevertheless, the constitutional provision restricting the judicial intervention itself is not at fault. However, it is not keeping up with the tone and the complexity of the problem.

C. ISSUE 3: Politically Influenced Sovereign Authority

The sovereign federal-state and all its provincial units possess a degree of inherent sovereignty to execute the functions of governance. The sovereign authority symbolises control over the territory, and everything encompassed within the territory including the natural resources such as freshwater. However, as we have discussed in Section Three, the concept has changed and is now understood as the responsibility and obligation of governance by the state. Therefore, the investigation must continue in this direction.

In this case, the state of Karnataka has misused its legislative authority to legislate the ordinance while the dispute was ongoing before the tribunal;[113] to establish its supremacy over the resource and to refute as illegal the claims raised by the state of Tamil Nadu. Later, the

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[108] Ibid., Art 136 and 142; See also, Government of India, *Code of Civil Procedure, 1908* (Act No. V of 1908) Section 151.
[109] Ibid., Part - XIVA: Tribunals – Art 323 A and B.
[110] Ibid., Art 131.
[111] Ibid., Art 32.
[112] *MC Mehta v Kamal Nath, supra* note 76.
[113] State Government of Karnataka (India), *Karnataka Cauvery Basin Irrigation Protraction Ordinance, 1991* (the ordinance was passed by the then Governor of Karnataka, Mr. Khurshed Alam Khan, under the clause (1) of the Art 213 of the Constitution of India).

ordinance was replaced by the Act No. 27 of 1991. The legislation was challenged before the court, because of the *mala-fide* intention of the state behind promulgation of such a statute. To seek an advisory opinion, the President of India has referred the matter to the Supreme Court, to determine the constitutional validity and the competence of the state concerning the promulgation of such act/ordinance.[114] The court declared such act as *ultra vires* to the Constitution.[115] When the state uses the sovereign right in an abovementioned manner, it further complicates the matter and prolongs the administration of justice.

The politically induced sovereign rights exercised by the state, in this case, made this issue politically sensitive. These issues play a significant role in winning the election and making of government for the respective political parties in both the states of Karnataka and Tamil Nadu.[116] Due to this, the governments of the respective states do not wish to lose control of the water resource while considering the requirements of another state. Additionally, when it comes to the control of the natural resource, especially the river and water resource; the states represent a typically self-centered attitude which concerns itself with the taming or establishing the control over the resource as a showcase of their sovereign rights over the territory. This paradigm is evident from most of the irrigation projects started before, and after the independence, the overall attitude towards the resource has not changed much, and the same is apparent from India's National Water Policy of 1987 and the one in 2002.[117] However, one could argue that these political motives exist and benefit the state only because of the absence of legal procedures which could re-align these activities and question their authority or legality. Perhaps, if such legal parameters did exist, the same behaviour of states that brought them benefits, would instead be harmful to them, as it would project the state as an entity which does not respect the law.

Factual representation implies the execution of legislative authority by the state is coloured due to political motives which represent an abuse of sovereign legislative power. Therefore, the shortcomings observed reaffirm the claim that the existing legal and constitutional provisions are obsolete and unable to address, competently, the growing freshwater crisis, or to regulate the behaviour of the state. Alternatively, the change in legal practices and

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[114] Constitution of India *supra* note 1 Art 143 (1); See also, *Cauvery Water vs. Unknown, supra* note 103, Para 23 (5).
[115] Cauvery Award *supra* note 7, Para 30.
[116] PB ANAND, "Water and Identity: An Analysis of the Cauvery River Water Dispute" (2004b) 3 BCID Research Paper, University of Bradford UK.
[117] Government of India*, National Water Policy of 1987 and 2002* (Ministry of Water Resources).

reorientation of law as per the modern understanding of water law could peacefully obliterate such political tactics and reduce the probable scenario for politicisation over the resource.[118] Furthermore, the concern discussed in this segment of the article is outside of the jurisdictional competence of the tribunal and is broadly an issue of governance. In the following section, the politicisation of the inter-state water dispute is analysed from a different viewpoint.

D. ISSUE 4: Politicization of the Inter-state Water Dispute

In accordance with the existing constitutional provision for the resolution of inter-state water disputes, the relationship between the centre and the states has the potential to unduly prolong or influence the dispute. As per the provisions of the Inter-state Water Dispute Act, it is the responsibility of the central government to create a tribunal at the request of the state. For instance, in the Cauvery dispute, the State of Tamil Nadu made the formal request for the formation of the tribunal to the central government in the year of 1970.[119] However, the tribunal only came into existence in 1991, after the intervention of the Supreme Court.[120] In between, the central government facilitated the fact-finding commission, and the joint meetings of states, to negotiate the matter in hand.[121] Despite this, no reliable mechanism exists to hold them accountable for not constituting the tribunal for twenty years. Alternatively, the delay could also be the result of favouritism or a biased attitude of the central government towards the states, either due to political relations or otherwise. This delay could facilitate the completion of the projects undertaken by the state government, or it could also be understood as the undue advantage granted to the state by the centre. In either case, the stakes are high, and it is very likely that the dispute will be politicised; as evidenced by the public outrage and protests in the year 2016 after the courts' decision.[122] It surely is not a pleasant situation, for the states sharing the resource, or for the resource itself. It causes loss of public property and creates anarchy, which disrupts the life of the states, further damaging relations among the disputed parties.[123] These are viable possibilities behind the political decisions of the government, especially in the

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[118] PB ANAND, "Capability, Sustainability, and Collective Action: An Examination of a River Water Dispute" (2007) 8 (1) Journal of Human Development 109, 127.
[119] Cauvery Tribunal's Award *supra* note 85, Report Vol. 1 P 10 (letter No.79558/D/69 -36 dated 17-02-70).
[120] Ibid., at 121.
[121] Ibid., at 14.
[122] S POKHAREL, "Two dead in Water Riots in India's Silicon Valley" (CNN, 14 Sep 2016), online: <http://edition.cnn.com/2016/09/13/asia/india-water-dispute/index.html>.
[123] The Indian Express, "Cauvery dispute: After violent protests, Karnataka govt says ready to release water Siddharamaih, after coming out of the all-party meet, said that his government will abide by Supreme Court's order and water will be released to Tamil Nadu" (September 7 2016), online: <http://indianexpress.com/article/india/india-news-india/cauvery-water-dispute-all-party-meet-ends-karnataka-cm-says-will-abide-by-sc-order/>.

presence of the immunity granted from the judicial intervention which could have unravelled the sovereign veil.[124]

Another possibility, which might lead to politicisation over the shared water resource, is postulated by the doctrine of permanent sovereignty over a natural resource (PSNR).[125] Concerning the freshwater resource, or broadly with the environmental concerns, the states can no longer take the position to argue in favour of absolute territorial sovereignty; and this is also widely discredited by the scholars of international law and by Judges worldwide.[126] Nevertheless, in the absence of the contrary binding legal provisions, the territorial sovereignty is exercised as the default position by the state. The states adopted this position at a different time in this dispute, and in other disputes of the same nature.[127] That being said, the doctrine of limited territorial sovereignty or the state responsibility in that regard is difficult to execute in the absence of the viable legal instruments and institutions acting in their favour within the federal-state.

In the absence of strict norms to rely upon, the states, when in conflict, use different principles and theories to justify their acts.[128] For example, the state of Karnataka insisted on the theory of absolute territorial integrity over the resource within its jurisdiction and utilised its geographical position of being the upper riparian state to sabotage the interest of its lower riparian state (the Harmon doctrine). Conversely, the state of Tamil Nadu insisted on the historical rights to utilise the resource as it had the exclusive right over the resource. Ultimately, neither party was willing to share the resource equitably and was simply interested in securing maximum utilisation of the resource in their favour. However, the states could take those positions because the understanding about the resource in the political or the domain of governance is not updated as per the modern scientific or legal understanding of the resource.[129] The same stands true for the principles and theories governing them.

The kinds of problems discussed above result in a continuum of the practices even if they disregard the customary norms or the basic principles of the watercourse law, which must apply

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[124] Constitution of India *supra* note 1, Art 262 (2); See also, Edith Brown WEISS, *The International Law for the Water Scarce World* (The Monogram Published by The Hague Academy of International Law, 2013) at 126.
[125] UN, *Permanent Sovereignty over Natural Resources,* GA Res. 1803-XVII of 14 Dec 1962.
[126] S McCAFFREY, *The Law of International Watercourses,* 2nd ed., (OUP, 2007) at 76.
[127] Ravi and Beas Water Tribunal's Award *supra* note 94.
[128] IYER *supra* note 87, at 51.
[129] Nico KRISCH and Benedict KINGSBURY, "Introduction: Global Governance and Global Administrative Law in the International Legal Order", 2006 17 (1) European Journal of International Law 1.

to the states. Moreover, when the matter comes before the judiciary it gets further complicated and the decisions get prolonged. It is not because the judiciary is incompetent, but because a lot of time is wasted debating on the existence and legal validity of the acts or reasoning proposed and finding the appropriate place for such norms to fit within the applicable constitutional and legal framework.[130] Successive tribunals have also been engaged in such proceedings on record, and are akin to the discussions involving legal disputes.[131] Additionally, in water disputes, when they are resolved using political diplomacy or tribunals created for that purpose, and in the absence of the settled norms or well- established legal parameters, the similar claims are often approached by different means, and they reach different conclusions. This gives rise to multiple and often contradictory norms, making room for rampant politicisation over the resource. On that note, the developments relating to Cauvery dispute and the tribunal in the last two years are recorded below.

V. Recent developments in Cauvery Water Dispute

The issues discussed in the previous section were in accordance with the tribunal's award of 2007. However, the unsatisfied state parties had filed a civil appeal before the Supreme Court of India on different questions of fact and law. As a result, on 13th February 2018 Supreme Court of India passed an order curtailing the share of Cauvery water for the state of Tamil Nadu.[132] In this decision and the one that follows on 18th May 2018, the court seems to have departed from the conventional practice giving rise to an interesting turn of events. Likewise, the ministry had proposed a set of amendments to the existing tribunal with the hope to increase its efficiency. Both these developments are analysed below.

A. THE SUPREME COURT'S VERDICT

A special bench consisting the Chief Justice of India - Deepak Mishra upheld the tribunal's decision of 2007 while declaring Cauvery as a national asset. Further declaring that Karnataka will now supply 177.25 tmc instead of 192 tmc - a reduction of 14.75 tmc, from its Billigundlu site to Mettur dam in Tamil Nadu. The judgement was reasoned stating that the Karnataka was

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[130] Government of India, *Awards of the Tribunal: Godavari Water Disputes Tribunal (In April 1969); Narmada Water Disputes Tribunal (October 1969).* At various time have discussed the justiciability of different principles and theories while adjudicating the disputes (Ministry of Water Resources, River Development & Ganga Rejuvenation), online: <http://www.wrmin.nic.in/>.

[131] RR IYER, "Indian Federalism and Water Resources", (1994) 10 (2) Water Resources Development 191 at 196.

[132] Supreme Court of India, Civil Appellate Jurisdiction – *Civil Appeal No. 2453 OF 2007, The State of Karnataka by its Chief Secretary vs State of Tamil Nadu by its Chief Secretary & Ors.; Civil Appeal No. 2454 of 2007 State of Kerala through the Chief Secretary vs State of Tamil Nadu through the Chief Secretary to Government and others; Civil Appeal No. 2456 OF 2007 State of Tamil Nadu through the Secretary Public Works Department vs State of Karnataka by its Chief Secretary, Government of Karnataka & Ors.* (Judgement on 16 Feb 2018)

entitled to marginal relief because the demand for the drinking water has increased many folds in the expanding city of Bangaluru and the need for drinking water is topmost priority, while deciding the fair share of distribution of water resources among various stakeholders across competing uses.[133] In terms of allocation proposed by the tribunal the court was of the opinion that the tribunal did not consider the growing demand of Bangaluru and thought the availability of 60% groundwater is enough to satisfy the demand of the city, unfortunately, the resource had dried-up and is no longer sufficient to satisfy the growing need. The court also considered 20 tmc of groundwater in Tamil Nadu before readjusting the quantity of the resource to be shared among the riparian.[134] After careful analysis of all the alternative resource available in the vicinity of the states, the apex court has readjusted the quantity of water to be shared among the states using the principle of equitable utilisation.[135]

The court went on clarifying that, the constitution confers equal status to all the states and no state can claim full right on the part of river flowing through its territory. Thus, declaring the Cauvery a national asset and refuting the notion of absolute right over the resource within the territorial boundaries of the state. Moreover, the court upheld the tribunals scheme of distribution of water stating that it was based on equitable distribution and reasonableness.[136] In addition, the honourable court responded to the centre's claim refusing the jurisdiction of the SC in the said matter and in recognition of the tribunals award as final. Stating that article 136 is the constitutional remedy which cannot be abrogated by legislation much less by invoking the principle of election or estoppel (emphasis added).[137]

As per the judgement passed by the apex court on 16th February 2018, the court asked the Centre to formulate a Cauvery Management Scheme including the creation of the Cauvery Management Board, for release of water from Karnataka to Tamil Nadu, Kerala and Puducherry.[138] In pursuance of the order, the centre had submitted the draft scheme to the apex court for its opinion and received an approval for the same on Friday 18th May 2018 for distribution of water.[139] Section 6A of the tribunals act provides for the formulation of the

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[133] Ibid., Para 375 and 376.
[134] Ibid., Point X, Sub-head 2, 3 and 6.
[135] Aaron T WOLF, "Criteria for Equitable Allocations: The Heart of International Water Conflict", 23 (1) United Nations Sustainable Development Journal 3.
[136] *Supra* note 132, Point X 4.
[137] Ibid.
[138] Outlook, "SC Approves Centre's Amended Draft Cauvery Management Scheme: The court dismissed Tamil Nadu's plea seeking initiation of contempt against Centre for non-finalisation of Cauvery scheme until now", (18 May 2018), online: <https://www.outlookindia.com/website/story/sc-approves-centres-amended-draft-cauvery-management-scheme/311998>.
[139] Hindustan times, 'Supreme Court approves Centre's draft scheme for Cauvery water distribution

board for the implementation of the tribunals award. Therefore, the court's order and its jurisdiction to order the making of the board was again challenged by the states while interpreting article 6A of the tribunals act. To which the apex court came to the conclusion that the intent of this article was to ensure the implementation of the tribunals order by the states in good faith and therefore, the order of the court for creation of the scheme for the distribution of water directed to the centre government is in accordance with the norm so created.[140]

The judgement confirms some of the essential features of the international watercourses law and the customary principle of international law. It resembles art 10 of the watercourse convention while prioritising the need of distribution of water resource and it broadly confirms the principle of equitable utilisation (art 5 of the watercourse convention) for the management of the resource. The declaration of the Cauvery river as the national asset could be interpreted as a declaration of the river as the common resource for shared use and responsibilities and rejection of the idea of supremacy over the resource based on territorial authority of the states (emphasis added).[141] It represents the determination of the court to ease the governance of the resource despite the existing flaws in the legal set-up and the manner the powers are distributed between the centre and the state for the governance of the resource.[142] These developments and the refusal of the unrestricted application of the bar conferred on court's jurisdiction by the art 262 of the constitution is very much in line with the analysis and arguments conducted in this article. However, in the absence of the legislative input which could clarify such overlapping jurisdictional issues its remains a problem despite the enthusiastic judicial activism.

The following section analyses the competence and the utility of the tribunal in the light of the amendment bill proposed by the ministry of water resources for the improvement of the tribunal. The examination of the proposal is set against the shortcomings observed in this article regarding the tribunal's ability to adjudicate the inter-state water sharing disputes in India.

The Supreme Court also dismissed Tamil Nadu's plea seeking initiation of contempt against the Centre for non-finalisation of the Cauvery scheme' (18 May 2018), online: <https://www.hindustantimes.com/india-news/supreme-court-approves-centre-s-draft-scheme-for-cauvery-water-distribution/story-X3ebM7UlQoj6dul iuBLQgM.html>; See also: Cauvery Water Management Authority (CWMA), "Cauvery Water Management Scheme, 2018" (Ministry of Water Resources, River Development & Ganga Rejuvenation, India).

[140] Ibid., Cauvery Management Scheme.

[141] PK PARHI and RN SHUKLA, "Beyond the Transboundary River: Issues of Riparian Responsibilities" 94 (4) Journal of The Institution of Engineers (India): Series A (2013) 257.

[142] Manveena SURI, "Indian Water Dispute Settled After 200 Years" (CNN, 16 February 2018), online: <https://edition.cnn.com/2018/02/16/asia/india-river-dispute-intl/index.html>.

B. EVALUATION OF THE INTER-STATE RIVER WATER DISPUTE TRIBUNAL AMENDMENT BILL

The observation so far indicates that there is a scope for improvement in the tribunal using the constitutional amendment provision,[143] as well as through the provisions of the Inter-State Water Tribunal Act. Likewise, the Ministry of Water Resource had observed some of the deficiencies and proposed an amendment bill in the lower house of the parliament for the upgradation of the existing tribunal.[144] However this proposal might not contribute to the improvement of the tribunal immensely, due to the reasons outlined below.

Firstly, the proposal is silent regarding any change in the jurisdiction of the tribunal. This implies that the tribunal will again be limited to dealing only with the issue of shared river water among provincial states, and not the issue of shared freshwaters. This is problematic because river water constitutes the part of the freshwater cycle, therefore, limiting the jurisdiction to it implies the same substantial jurisdictional limitations to the tribunal as observed in previous sections of this article.

Secondly, the bill proposes in favour of the formation of the permanent tribunal for the resolution of the inter-state river water dispute.[145] This would obliterate the possibility of delay in the creation of the tribunal for the adjudication of the inter-state water disputes and its fate will no longer be reliant on the discretion of the central government, which has so far been the case.[146] Furthermore, this would reduce the extent of politicisation that occurs due to differences of opinion between the centre and the state, especially regarding the means by which to resolve the dispute, and the institution chosen to adjudicate it. The amendment also proposes a time-limit of three years for the adjudication of the dispute, which might help speed up the process of resolution of the dispute.[147] This is a sensible suggestion, which might make the tribunal more effective.

Thirdly, the bill insists on the status of the tribunal in the adjudication of the inter-state water dispute, as final and binding.[148] An alternative explanation implies that the scope of the tribunal remains unchanged and bound by the Article-262 of the Constitution, which makes the tribunal

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[143] Constitution of India *supra* note 1, Art 368.
[144] Government of India, *Inter-State River Water Disputes (Amendment) Bill, 2017* (Press Information Bureau, Ministry of Water Resources 14 March 2017), online: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=159201> (Proposal of the bill by the Ministry)
[145] *Ibid.,* online: < http://www.prsindia.org/billtrack/the-inter-state-river-water-disputes-amendment-bill-2017-4671/> (first draft of pending bill in parliament).
[146] Tribunal's Act *supra* note 4, Section 4.
[147] *Supra* note 145.
[148] Ibid.

the final authority in the concerned matter and prohibits judicial intervention of any kind. As previously discussed, there is currently only limited jurisdiction as far as the tribunal is concerned and no means to appeal against the order of the tribunal to the Supreme Court of India. Which means that the states have to continue exploring other mechanisms to approach the Supreme Court for matters concerning the rights-based discourse, or broadly to address the issues concerning social justice and equity. In turn, this will result in multiple litigations, and once again raises questions about the legal competence of the involvement of higher judiciary. Therefore, to increase transparency and credibility of the institution and to widen the horizons of issues, the tribunal could broaden its jurisdiction by allowing individuals, groups, public-spirited persons and civil society by providing them legal standing to bring the case to the tribunal. Along with this, the clarification as to the scope and legal competence of the institutions involved in the adjudication of the dispute is quintessentially important. And success of the imposed time limit for the adjudication of the dispute on the tribunal depends heavily on this clarification.

Fourthly, it is proposed that there be scope for the advancement of other means of negotiation and conciliation before or simultaneous to the judicial adjudication of the dispute by the tribunal.[149] At present, as intended by the primary Inter-State River Water Dispute Tribunal Act, 1956, it is preferred by the central government to resolve the inter-state dispute by mediation and other means of negotiation.[150] The proposed bill, however, would replace this provision and require the central government to set up a Disputes Resolution Committee (DRC) to resolve any inter-state water dispute amicably.[151] The means adopted by the committee would be the primary means, and in the event of failure of these means, the dispute would be referred to the tribunal. However, the amendment fails to specify what means of dispute resolution should be followed by the committee, but nonetheless encourages their development and channelisation as the full-fledged working options through the DRC. Despite there being scope for this under the current legislation, however, the central government has not actively encouraged the advancement of such means previously. Therefore, the additional push suggested by the proposed amendment is to be welcomed, although it is advisable that

[149] Ibid.
[150] Tribunal's Act *supra* note 4, Section 4 (1).
[151] *Supra* note 145.

while exploring the possibilities in this area, the prospects arising from the global techniques of water conflict management and hydro-diplomacy must also be considered.[152]

Finally, new legislation proposes the creation of a robust institutional architecture to enhance the tribunal's ability to achieve its objectives, although, it lacks any means to achieve that goal.[153] However, the present draft is very much appreciated and is a step in the right direction, although, it would require revision based on the concerns raised above. It is to be hoped that the collective impact of all these initiatives could set the optimal conditions for the efficient working of the tribunal and following are the suggestions.

VI. CONCLUSION

It has been evident from the discussion in this article that the existing constitutional provisions and the practices concerning inter-state water regulation, management and governance are outdated, and need to be revised to accommodate the change in circumstances.[154] The central government seems to have been in the back seat on this issue so far and is seems to be wilfully avoiding the requirement to intervene in inter-state water disputes. It is high time that the central government stop behaving in a politically correct manner and take a proactive interest realising its responsibility as a sovereign state in creating, or developing, a mechanism to resolve these ongoing disputes speedily and systematically.

Based on the analysis conducted in this article, it is recommended to the parliament that it must upgrade the constitutional understanding about the water resource in the light of new scientific information available and then to reassess and realign the power to govern the resource. The continuation of the practice of dealing with one of the components of the freshwater resource in isolation and without respecting its tendency to have an inevitable transboundary impact on the other components of freshwater and on the ecology, is against the spirit of the general principles and customary principles of international environmental law, as well as, the international watercourses law.[155] Therefore, the provisions of Schedule Seven (entry 56 of the union list and entry 17 of the state list) of the Constitution and the jurisdictional

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[152] UNDP, "Conflict Resolution and Negotiation Skills for Integrated Water Integrated Water Resources Management" (Cap-Net: International Network for Capacity Building in Integrated Water Resources Management, Training Manual, 2008).
[153] *Supra* note 145.
[154] Iyer *supra* note 87.
[155] UN, 'Convention on the Law of the Non-navigational Uses of International Watercourses, 1997', (Adopted by the General Assembly of the United Nations on 21 May 1997. Entered into force on 17 August 2014. See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49)).

ambit of the Article 262 of the Constitution of India requires revision in the light of the arguments made above. Thus, we advocate for the clarification of the term water resource and what it encompasses (the surface and the groundwater) with respect to the governance of the resource as per the constitutional framework in India. However, we do not argue in favour of shifting the entry related with water resource in concurrent list of Schedule Seven of the Constitution of India.

As far as the adjudication of inter-state water disputes from within the existing institution is concerned, the tribunal prefers the adjudication of a dispute using diplomatic or political tools, for which the prospects arising from hydro-diplomacy, negotiation and another non-judicial tool for water conflict management look promising, as a means of preliminary adjudication of the inter-state water dispute.[156] It is oriented towards creating a wider dialogue among the stakeholders on either side of the state.[157] In our view, this is the most sensible strategy.[158] Diplomacy being the political tool will be in line with the constitutional philosophy, which remains rightly determined to separate the issue of governance from that of judicial intervention.[159]

To improve the adjudication of the inter-state water dispute by the tribunal, it is important to clarify tribunal's jurisdiction by explicit mention that it is competent to deal with the sharing of freshwater among provincial states and not just the river water. Moreover, it must also be empowered to deal with the issue of water governance holistically, instead of confining itself to technical projects and distribution of river water among the states sharing the resource, as it has been the case. In addition to this, a clear mandate is desirable which allows the appeal against the tribunals' order to the Supreme Court of India for the matters concerning rights based discourse or broader issues of equity and social justice.[160] It will require amendment of both the Constitution and the Tribunals Ac. Moreover, the reassessment of Article 262 and Entry 56 of the union list will have an impact on the jurisdictional ambit and the existence of

[156] UNESCO, "Hydro-diplomacy, Legal and Institutional Aspects of Water Resource Governance: From the International to the Domestic perspective" (Training Manual by the International Hydrological Programme, UNESCO, 2016).
[157] Tribunal's Act *supra* note 4, Section 4 (1).
[158] AT WOLF, "Hydro-politics Along the Jorden River: Scarce Water and its Impact on the Arab-Israeli Conflict" (UN University Press, 1995) at 181.
[159] Constitution of India *supra* note 1 Art 262 (2).
[160] Rajiv K GUPTA, "Human Rights Dimension of Regional Water Transfer: Experience of the Sardar Sarovar Project", 17 (1) International Journal of Water Resources Development (2010) 125.

the tribunal as these provisions collectively forms the authority for the creation of the statute which gives rise to the tribunal in the first place.

The betterment of the tribunal only addresses the issue in part, unless an umbrella legal framework is put in place, which could harmonise the existing provisions regarding law and policies.[161] The umbrella legislation could be expected to align the activities of the governance of the resource in accordance with the advanced provisions of the watercourses and the environmental law. As it will be projected as the legal and legislative guideline for the authorities and limits their activities as per the prescribed and well-defined principles of law and should be applied to, and direct, the manner of sovereign legislative authority that is being exercised by units of the federal constitution, thus reducing the possibility of political misuse.[162] This, together with the changes proposed in this article, possess the capacity to reduce the possibilities of politicisation over the resource. However, given the alarming projections of future and significant water crises, a timely information and knowledge to address these issues is gaining in significance.[163] Thus, the efficient governance of the available resources is a must, and a better way of dealing with water, the most precious of resources, would be a significant step in the right direction.

[161] RR IYER, P CULLET, KJ JOY and others, *The Draft National Water Framework: An Explanatory Note,* (Prepared by the Sub-Group on a National Water Framework Law set up by the Planning Commission's Working Group on Water Governance for the Twelfth Plan).
[162] FM PLATJOUW, 'The Need to Recognize a Coherent Legal System as an Important Element of the Ecosystem Approach' in C VOGIT eds., *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (CUP, 2013), 158.
[163] FEW Resources, "Water Scarcity" online: <http://www.fewresources.org/water-scarcity-issues-were-running-out-of-water.html>.