

SAARC LAW CONCLAVE, 2018.

Date : 28th -29th April, 2018; Time: 03:25 p.m.

**Venue: Indian Institute of Legal Studies, UNB, Siliguri,
Darjeeling, West Bengal, India.**

Justice K. M. Kamrul Kader.
Supreme Court of Bangladesh.

Respected President of the Session, Mr. Justice Priyasata Dep, Hon'ble Chief Justice of the Supreme Court of Sri Lanka. Respected Chief Guest, Mr. Justice Jyotirmay Battacharya, Hon'ble Acting Chief Justice of the Calcutta High Court, Mr. Justice Pema Rinzin, Hon'ble Judge of the High Court of Bhutan, Dr. Justice Manjulla Chellur, Former Chief Justice Bombay High Court, Mr. Justice Arijit Banerjee, Hon'ble Judge of the Calcutta High Court. Shri Joyjit Choudhury, Hon'ble Chairman of the Indian Institute of Legal Studies. Distinguished Dignitaries, My beloved students of this Institute, Ladies and Gentlemen, Greetings....

I deem it a great honor and privilege for me to be here with you in this auspicious occasion. It is an immense pleasure for me to be part of this SAARC LAW CONCLAVE. At the outset, I express my thanks to the organizers for inviting me as special Guest of this Conclave.

Ladies and Gentlemen.

Transboundary water conflicts related to International water body or River, which means a river that flows through or between two or more countries. There are 263 transboundary river basins in the world; many of them lack an agreement among the riparian states about how to share or to jointly manage the water resources. On a global level, there is no binding international

agreement / convention on transboundary water in force. Even the most cordial and co-operative neighboring nations have found it difficult to achieve mutually acceptable arrangements to govern their transboundary surface waters, even in relatively humid regions where fresh water usually is found in sufficient abundance to satisfy most or all needs.

An international river raised two questions:

- a.** whether riparian state has full control of its own part of the river; or
- b.** whether control is limited because the river is useful or even necessary to other states.

First question is related to the "**Harmon Doctrine**", it is perhaps the most notorious theory in all of international natural resources law. Based upon an opinion of Attorney General Judson Harmon issued a hundred years ago, the doctrine holds that a country is absolutely sovereign over the portion of an international watercourse within its borders. Thus that country would be free to divert all of the water from an international watercourse, leaving none for downstream states. The 'Harmon Doctrine' of absolute territorial sovereignty, generally favoured by upstream countries.

Second question related to the **customary law and UN Convention**. Over the last century, a strong customary law has evolved.

Madrid Declaration, 1911.

In 1911, the Institute of International Law published *the Madrid Declaration on the International Regulation regarding the Use of International Watercourses for Purposes other than Navigation*. It recommended to abstain from unilateral alterations of river flow and to create joint water commissions.

The Helsinki Rules, 1966.

In 1966, the International Law Association, a highly regarded non-governmental organization of legal experts founded in 1873, has developed the *Helsinki Rules on the Uses of the Waters of International Rivers*. The *Helsinki Rules* treat international drainage basins (watersheds extending over two or more States) as indivisible hydrologic units to be managed as a single unit to assure the “maximum utilization and development of any portion of its waters” (ILA 1966, art. II). The *Helsinki Rules* first formulated the phrase “equitable utilization” to express the rule of restricted sovereignty as applied to fresh waters: “Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin” (ILA 1966, art. IV). The *Helsinki Rules* also had chapters on pollution, navigation, timber floating, and procedures for preventing and settling disputes. Their core principles are related to the “equitable utilization” of shared watercourses and the commitment not to cause “substantial injury” to co-riparian states.

The International Law Association thereafter drafted rules relating to water-centered activities not addressed directly or adequately by the Helsinki rules, including flood control (1972), pollution (1972, 1982), navigability (1974), the protection of water installations during armed conflicts (1976), joint administration (1976, 1986), flowage regulation (1980), general environmental management concerns (1980), groundwater (1986), cross-media pollution (1996), and remedies (1996).

The UN Convention.

These principles are also the core of the *UN Convention on the Law of the Non-Navigational Uses of International Watercourses*, which was adopted by the General Assembly in 1997. Besides the confirmation of the principles of “equitable and reasonable utilization” (**Article-5**) and the “obligation not to cause significant harm or the so-called no-harm rule” (**Article-7**), the convention also contains regulations for the exchange of data and information, the protection and preservation of shared water bodies, the creation of joint management mechanisms and the settlement of disputes.

Overall, the *UN Convention* contains 37 articles dealing with the obligations of riparian States to share the common resource, to consult with each other, to protect the environment, and to resolve disputes.

However, it is still not in force as the necessary quorum of 35 countries' ratification has not yet been reached. One reason for the reluctance of states to sign the convention is a certain

vagueness of the core principles, which can lead to contradictions. An upstream country might claim its right to a previously unused “equitable share” of the water resources, which could cause economic harm to a downstream country that has used these resources for a long time. Whose rights and which principle have priority? And what exactly is an equitable share? Where is the borderline between a harm that has to be accepted and a significant harm? These questions are not answered in detail by the conventions, which only provide for the general principles and criteria.

The Berlin Rules, 2004

In 2004, the Water Resources Law Committee of the International Law Association reviewed the *Helsinki Rules* of 1966 and approved the *Berlin Rules on Water Resources* (ILA 2004). The *Berlin Rules* take into account the development of important bodies of international environmental law, international human rights law, and the humanitarian law relating to the war and armed conflict, as well as the adoption by the General Assembly of the *UN Convention*.

After an initial chapter that sets forth the scope of the chapter and key definitions, **Chapter II** sets forth the general principles applicable to all waters: the right of public participation, the obligation to use best efforts to achieve both conjunctive and integrated management of waters, and duties to achieve sustainability and the minimization of environmental harm. **Chapter III** sets forth the basic principles applicable solely

to international waters. **Chapter IV** deals with the rights of persons (including, in articles 20 and 21, the rights of persons organized as communities). **Chapter V** deals in considerable detail with the protection of the environment, including the obligation to protect the ecological integrity of the aquatic environment (including, but not limited to, the duty to protect ecological flows and the prevention of the introduction of alien species), the obligation to apply the precautionary approach, and the duty to prevent, eliminate, reduce, or control pollution as appropriate (including a special rule on hazardous substances). **Chapter VI** addresses the obligation to undertake the assessment of environmental impacts of programs, projects, or activities relating to all waters—national and international. **Chapter VII** sets forth obligations for cooperative and separate responses to extreme situations, including highly polluting accidents, floods, and droughts). **Chapter VIII** dealing with groundwater. Certain other chapters relating to armed conflict (chapter X), state responsibility (chapter XII), private legal remedies (chapter XIII), and the settlement of international dispute (chapter XIV) also contain certain refinements without making any substantial departure from the *Helsinki Rules* and the *UN Convention*.

Bangladesh in South Asia.

Most of Bangladesh is covered by the Bengal delta, the largest delta on Earth. There are about 405 rivers in Bangladesh including three mighty Himalayan Rivers, namely the Ganges/Padma, the Brahmaputra/Jamuna and the Meghna, out of which 57 are transboundary rivers. Out of the 57

transboundary rivers, 54 are common with India and remaining 3 with Myanmar. The life and livelihood of the millions of people of Bangladesh have been revolving around waters of these rivers over the ages. The other upper co-riparian countries are India, Nepal, Bhutan and China. Bangladesh, where these transboundary rivers discharge into the Bay of Bengal, it also faces multiple threats including annual floods, climate change and raise of sea water level. Currently, there is no comprehensive water agreement which involves all five riparian states. The majority of these states prefer to develop the water resources of these Rivers on a unilateral basis, with a limited scope for bilateral cooperation primarily concerned with the exchange of hydrological information and the joint construction of hydropower stations.

The Ganges, the Brahmaputra and the Meghna river systems drain a total catchment area of about 1.72 million sq km through Bangladesh into the Bay of Bengal. Out of this large catchment area, only 7% lies in Bangladesh, which helps to make the Ganges–Brahmaputra Delta a highly productive agricultural area. Almost 67% of its annual water flow comes from upstream states and Bangladesh is heavily affected by tropical monsoons which result in floods in the rainy season as well as drought in the winter (FAO, 2011). Further, agriculture generates half of Bangladesh's employment and contributes 20% of its annual G.D.P (Asia Development Bank, 2011). However, during winter seasons, unilateral withdrawal of water by the upper co-riparian state namely India, Nepal, Bhutan and China caused serious

damage to Bangladesh's agriculture, environment, biodiversity and the peoples at large.

Access to Food, water and energy is the source of prosperity of every human being; climate change threatens all of them. Bangladesh is one of the worst affected countries in the world by climate change, although as an agro-based developing country and a lower riparian state, Bangladesh has no or very little role in the control over the trans-boundary water or to prevent any environment or natural disaster. However, in recognition of its urgency and importance 'the protection and improvement of environment and preservation of natural resources and biodiversity' have been incorporated in Article 18A of Part II of the Constitution of Bangladesh as one of the Fundamental Principles of State Policy by the Constitution (Fifteenth Amendment) Act, 2011.

As upper and lower riparian state, bonding between India and Bangladesh is necessary for better management of trans-boundary water: The peoples of Bangladesh and India have a unique and special bond of inseparable cultural ties. To snatch the crimson red sun of Independence in 1971 like many heroic freedom fighters, many Indian soldiers also laid down their lives. The friendship and bond between the two nations are preserved by that sacrifice. After the Independence, the Father of the Nation Bangabandhu Sheikh Mujibur Rahman and the then prime minister and Great leader of India, Srimati Indira Gandhi took a number of important steps including establishment of the Joint Rivers Commission for further strengthening the friendship and

co-operation between the two nations. The Joint Rivers Commission was established on a permanent basis through a joint declaration between the Prime Ministers of Bangladesh and India on 19 March, 1972 inter-alia to carry out a comprehensive survey of the river systems shared by the two countries, formulate projects concerning both the countries in the fields of flood control and to implement them, to formulate detailed proposals on advance flood warnings, flood forecasting, study on flood control and irrigation projects on the major river systems and examine the feasibility of linking the power grids of Bangladesh with the adjoining areas of India, so that the water resources of the regions can be utilized on an equitable basis for mutual benefit of the people of the two countries. The Statute of JRC was accordingly signed on 24 November, 1972 to maintain liaison between the participating countries in order to ensure the most effective joint efforts in maximising the benefits from common river systems to both the countries. India is the world's second most populous country and Bangladesh is the world's eighth most populous nation. They are common members of SAARC, BIMSTEC Commonwealth, and many other international organizations. The relationships between two nations are strengthening day by day. For the greater interest especially to manage trans-boundary water for agriculture, power generation, minimization of environmental harm and sustainable development Bangladesh and India have to work together.

I am confident that this conference will inspire us all to play the role for resolving trans-boundary water dispute and improving

the quality and bring excellence of environment, life and livelihood of our respective countries.

Before I conclude, I like to express sincere appreciation to the organisers of this conference for their noble efforts to arrange this gathering of the Judges, Lawyers and distinguished persons of the judiciary across the SAARC nations.

I wish every success of this session and thank you all for your presence and participation.